Non-refoulement?

Findings of the Court of Justice of the European Union

In reference to the **applicability of the Charter** – the answer would be yes, Article 4.

The Court held that Member States are granted a discretionary power by Article 3(2) thus forming an integral part of the Common European Asylum System. Thus, **the decision by a Member State on the basis of Article 3(2) of Regulation No 343/2003 whether to examine an asylum application which is not its responsibility according to the criteria laid down in Chapter III of that Regulation, implements European Union law within the meaning of Article 6 TEU and/or Article 51 of the Charter**.

As regards the rest of the questions the Court noted that the CEAS was conceived in a context making it possible to assume that all the participating States, whether Member States or third States, observe fundamental rights, including the rights based on the Geneva Convention and the 1967 Protocol, and on the ECHR, and that the Member States can have confidence in each other in that regard. However, the Court states that it is not inconceivable that that system may, in practice, experience major operational problems in a given Member State, meaning that there is a substantial risk that asylum seekers may, when transferred to that Member State, be treated in a manner incompatible with their fundamental rights. The CJEU held that it cannot be concluded that *any infringement of a fundamental right by the Member State responsible will affect the obligations of the other Member States to comply with the provisions of Regulation No 343/2003*. The Court notes that it would not be compatible with the aims of Regulation No 343/2003 were the slightest infringement of Directives 2003/9, 2004/83 or 2005/85 to be sufficient to prevent the transfer of an asylum seeker to the Member State primarily responsible. **Only if there are substantial grounds for believing that there are systemic flaws in the asylum procedure and reception conditions for asylum applicants in the Member State responsible, resulting in inhuman or degrading treatment, within the meaning of Article 4 of the Charter, of asylum seekers transferred to the territory of that Member State, the transfer would be incompatible with that provision.**

Member states may not transfer an asylum seeker to the 'Member State responsible' within the meaning of Regulation No 343/2003 **where they cannot be unaware that systemic deficiencies** in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter.

It follows an application of Regulation No 343/2003 on the basis of the conclusive presumption that the asylum seeker's fundamental rights will be observed in the Member State primarily responsible for his application is incompatible with the duty of the Member States to interpret and apply Regulation No 343/2003 in a manner consistent with fundamental rights.

Member States cannot work on the basis of a conclusive presumption of compliance with fundamental rights. The presumption must be rebuttable.

The Court took into account the M.S.S. v Belgium and Greece ECHR Grand Chamber ruling and noted that the extent of the infringement of fundamental rights described in that judgment shows that

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there existed in Greece, at the time of transfer, a systemic deficiency in the asylum procedure and reception conditions.

How can Member States evaluate whether another Member State is in compliance with the fundamental rights of asylum seekers under the CFR?

Para 90 of the judgment refer **to the information sources** cited by the EctHR in the case of *M.S.S. v Belgium & Greece* as a way of enabling Member States to assess the functioning of the asylum system in the Member State responsible. Therefore, Commission Reports and Dublin Recast Proposal, reports of international non-governmental organizations, documents prepared by UNHCR as well as correspondence on the implementation of the EU asylum acquis are all relevant for such an assessment. Reference was also made to Article 80 TFEU in stating that asylum policy and its implementation are to be governed by the principle of solidarity and fair sharing of responsibility.

The judgment clearly states that subject to the right to examine the asylum application under Article 3(2) the Member State which should carry out the transfer must continue to examine the criteria set out in Chapter III of the Regulation in other to establish whether one of the following criteria enables another Member State to be identified as responsible for the examination of the asylum application.

EU Member States must themselves examine that asylum claim in accordance with Article 3(2) where there is no Member State responsible other than the one primarily responsible (in accordance with the criteria set forth in the Dublin II Regulation) or where determining such alternative Member State would take an unreasonable length of time. Para 98 states that the Member State must not worsen a situation where the fundamental rights of that applicant have been infringed by using a procedure for determining the Member State responsible which takes an unreasonable length of time. In such a situation the sovereignty clause should be applied.

The Court states that Articles 1, 18 and 47 of the Charter do not lead to a different answer. Also with regard to the seventh question raised in the C-411/10 case the Court stated that since the rights referred to in the cases in the main proceedings do not form part of Title IV of the Charter, there is no need to rule on the interpretation of Article 1(2) of Protocol (No 30).

Follow-Up Question

- In your national context, how would you deal with such situations? How would you assess compliance of the Member State with fundamental rights? (what does “cannot be unaware” actually means)

For a critical assessment of the case you can check the following article:

  - Check the judgement in M.S.S. v Belgium and Greece (Application no. 30696/09) by ECtHR, in which Belgium returned an Afghan asylum seeker to Greece under the provisions of Dublin II. The ECtHR held that both Belgium and Greece had violated article 3 of the ECHR (and that Greece had violated article 13 of the ECHR).

See: *N. S. v Secretary of State for the Home Department and M. E., A. S. M., M. T., K. P., E. H.,* Cases C-411/10 and C-493/10, Judgment of 21.12.2011.