



## *Non-refoulement?*

### *Fact of the case*

N.S., the appellant in the main proceedings, is an Afghan national who came to the United Kingdom after travelling through, among other countries, Greece. He was arrested in Greece but did not make an asylum application. He was released from detention in Greece and ordered to leave the country and later was arrested by the police and expelled to Turkey where he was detained for 2 months in appalling conditions.

He escaped detention in Turkey and came to the UK where he claimed asylum the same day. He was subsequently placed in a Dublin procedure and the UK issued a transfer decision with respect to Greece. The applicant requested the Secretary of State to accept responsibility for examining his asylum claim under Art. 3(2) on the ground that there was a risk that his fundamental rights would be breached if he returned to Greece. This was refused and judicial review was sought whereby the Court of appeal then requested a preliminary reference to the CJEU.

Five appellants, all unconnected with each other, originating from Afghanistan, Iran and Algeria. Each of them travelled via Greece and was arrested there for illegal entry. They then travelled to Ireland, where they claimed asylum. The Eurodac system confirmed that all five appellants had previously entered Greece, but that none of them had claimed asylum there. Each of the appellants in the main proceedings resists return to Greece. The appellants in the main proceedings argued that the procedures and conditions for asylum seekers in Greece are inadequate and that Ireland is therefore required to exercise its power under Article 3(2) of Regulation No 343/2003 to accept responsibility for examining and deciding on their asylum claims.

### *Legal Framework*

#### **International law**

##### **the Geneva Convention**

Article 33(1)

‘No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.’

#### **Relevant European Law**

##### **Regulation No 343/2003**

Article 3(1) and (2)

‘1. Member States shall examine the application of any third-country national who applies at the border or in their territory to any one of them for asylum. The application shall be examined by a single Member State, which shall be the one which the criteria set out in Chapter III indicate is responsible.’



Co-funded by the Justice Programme  
of the European Union



Ludwig Boltzmann Institute  
Human Rights



CENTRE FOR  
EUROPEAN  
CONSTITUTIONAL  
LAW



INPRIS



ISGL  
Institute for International Legal Studies



REPUBLIC OF AUSTRIA  
FEDERAL MINISTRY OF JUSTICE



REPUBLIKA HRVATSKA  
Pučki pravobranitelj

2. By way of derogation from paragraph 1, each Member State may examine an application for asylum lodged with it by a third-country national, even if such examination is not its responsibility under the criteria laid down in this Regulation. In such an event, that Member State shall become the Member State responsible within the meaning of this Regulation and shall assume the obligations associated with that responsibility. Where appropriate, it shall inform the Member State previously responsible, the Member State conducting a procedure for determining the Member State responsible or the Member State which has been requested to take charge of or take back the applicant.'

In order to determine which is 'the Member State responsible' for the purposes of Article 3(1) of Regulation No 343/2003, Chapter III of that regulation lists objective and hierarchical criteria relating to unaccompanied minors, family unity, the issue of a residence document or visa, irregular entry into or residence in a Member State and applications made in an international transit area of an airport.

Article 13

Article 17

Article 18(7)

Article 19

'1. Where the requested Member State accepts that it should take charge of an applicant, the Member State in which the application for asylum was lodged shall notify the applicant of the decision not to examine the application, and of the obligation to transfer the applicant to the responsible Member State.

2. The decision referred to in paragraph 1 shall set out the grounds on which it is based. It shall contain details of the time limit for carrying out the transfer and shall, if necessary, contain information on the place and date at which the applicant should appear, if he is travelling to the Member State responsible by his own means. This decision may be subject to an appeal or a review. Appeal or review concerning this decision shall not suspend the implementation of the transfer unless the courts or competent bodies so decide on a case-by-case basis if national legislation allows for this.

...

4. Where the transfer does not take place within the six months' time limit, responsibility shall lie with the Member State in which the application for asylum was lodged. This time limit may be extended up to a maximum of one year if the transfer could not be carried out due to imprisonment of the asylum seeker or up to a maximum of eighteen months if the asylum seeker absconds.

...'

**Directive 2003/9**

**Directive 2004/83**

**Directive 2005/85**

Article 36(1)

'Member States may provide that no, or no full, examination of the asylum application and of the safety of the applicant in his/her particular circumstances as described in Chapter II, shall take place in cases where a competent authority has established, on the basis of the facts, that the applicant for asylum is seeking to enter or has entered illegally into its territory from a safe third country according to paragraph 2.'

Article 36(2) conditions include:

- ratification of and compliance with the provisions of the Geneva Convention;

- the existence of an asylum procedure prescribed by law;
- ratification of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 ('the ECHR'), and compliance with its provisions, including the standards relating to effective remedies.

Article 39

## *Questions*

1. Does the Charter of Fundamental Rights apply in this case, and if yes which Articles?
2. In your opinion, does the decision adopted by a Member State (on the basis of Article 3(2) of Regulation No 343/2003) to examine a claim for asylum which is not its responsibility under the criteria set out in Chapter III of that regulation falls within the scope of European Union law for the purposes of Article 6 TEU and/or Article 51 of the Charter.
3. In your view, does the Member State which should transfer the asylum seeker to the responsible Member State is obliged to assess the compliance, by that Member State, with the fundamental rights? If yes, how would you do it?