Reports of Cases

OPINION OF ADVOCATE GENERAL
TRSTENJAK
delivered on 12 January 2012 [1]

Case C-620/10

Migrationsverket
v
Nurije Kastrati,
Valdrina Kastrati,
Valdrin Kastrati
(Reference for a preliminary ruling

from the Kammarrätten i Stockholm, Migrationsöverdomstolen (Sweden))

(Right of asylum — Regulation (EC) No 343/2003 — Determination of the Member State responsible for examining an asylum application — Entry by means of a Schengen visa — Lodging of an asylum application in a Member State which did not issue the Schengen visa — Application for a residence permit in the State of residence — Withdrawal of the asylum application — Admission of the asylum seeker by the Member State responsible for examining the asylum application)

I – Introduction

1. The present reference for a preliminary ruling from the Swedish Kammarrätten i Stockholm, Migrationsöverdomstolen (Stockholm Administrative Court of Appeal, Chamber for matters relating to migration) concerns the interpretation of Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national. [2] The referring court essentially wishes to know in what way the withdrawal of the asylum application by an asylum seeker, who lodged an application for asylum in only one Member State, affects the applicability of Regulation No 343/2003.

II – Legal framework

A – *Regulation No 343/2003*

2. Article 1 of Regulation No 343/2003 provides:

'This Regulation lays down the criteria and mechanisms for determining the Member State responsible for examining an application for asylum lodged in one of the Member States by a third-country national.'

1 — Original language: Slovene.
Language of the case: Swedish.

2 — OJ 2003 L 50, p. 1.

3. Article 2(f) of Regulation No 343/2003 defines the withdrawal of the asylum application as the actions by which the applicant for asylum terminates the procedures initiated by the submission of his application for asylum, in accordance with national law, either explicitly or tacitly.

4. Article 3(1) of Regulation No 343/2003 states:

'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.'

5. Article 4 of Regulation No 343/2003 provides:

'1. The process of determining the Member State responsible under this Regulation shall start as soon as an application for asylum is first lodged with a Member State.

…

5. An asylum seeker who is present in another Member State and there lodges an application for asylum after withdrawing his application during the process of determining the Member State responsible shall be taken back, under the conditions laid down in Article 20, by the Member State with which that application for asylum was lodged, with a view to completing the process of determining the Member State responsible for examining the application for asylum.

This obligation shall cease if the asylum seeker has in the meantime left the territories of the Member States for a period of at least three months or has obtained a residence document from a Member State.'

6. Article 5 of Regulation No 343/2003 states:

'1. The criteria for determining the Member State responsible shall be applied in the order in which they are set out in this Chapter.

2. The Member State responsible in accordance with the criteria shall be determined on the basis of the situation obtaining when the asylum seeker first lodged his application with a Member State.'

7. Article 9 of Regulation No 343/2003 states:

'1. Where the asylum seeker is in possession of a valid residence document, the Member State which issued the document shall be responsible for examining the application for asylum.

2. Where the asylum seeker is in possession of a valid visa, the Member State which issued the visa shall be responsible for examining the application for asylum …

…'

8. Article 16 of Regulation No 343/2003 provides:

'1. The Member State responsible for examining an application for asylum under this Regulation shall be obliged to:

(a) take charge, under the conditions laid down in Articles 17 to 19, of an asylum seeker who has lodged an application in a different Member State;

(b) complete the examination of the application for asylum;

(c) take back, under the conditions laid down in Article 20, an applicant whose application is under examination and who is in the territory of another Member State without permission;

(d) take back, under the conditions laid down in Article 20, an applicant who has withdrawn the application under examination and made an application in another Member State;

(e) take back, under the conditions laid down in Article 20, a third-country national whose application it has rejected and who is in the territory of another Member State without permission.

2. Where a Member State issues a residence document to the applicant, the obligations specified in paragraph 1 shall be transferred to that Member State.

3. The obligations specified in paragraph 1 shall cease where the third-country national has left the territory of the Member States for at least three months, unless the third-country national is in possession of a valid residence document issued by the Member State responsible.

4. The obligations specified in paragraph 1(d) and (e) shall likewise cease once the Member State responsible for examining the application has adopted and actually implemented, following the withdrawal or rejection of the application, the provisions that are necessary before the third-country national can go to his country of origin or to another country to which he may lawfully travel.'

B – *Directive 2005/85/EC*

9. Article 19 of Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status [3] states as follows under the heading 'Procedure in case of withdrawal of the application':

'1. Insofar as Member States provide for the possibility of explicit withdrawal of the application under national law, when an applicant for asylum explicitly withdraws his/her application for asylum, Member States shall ensure that the determining authority takes a decision to either discontinue the examination or reject the application.

2. Member States may also decide that the determining authority can decide to discontinue the examination without taking a decision. In this case, Member States shall ensure that the determining authority enters a notice in the applicant's file.'

10. Article 20 of Directive 2005/85 provides as follows under the heading 'Procedure in the case of implicit withdrawal or abandonment of the application':

'1. When there is reasonable cause to consider that an applicant for asylum has implicitly withdrawn or abandoned his/her application for asylum, Member States shall ensure that the determining authority takes a decision to either discontinue the examination or reject the application on the basis that the applicant has not established an entitlement to refugee status in accordance with Directive 2004/83/EC.

…

2. Member States shall ensure that the applicant who reports again to the competent authority after a decision to discontinue as referred to in paragraph 1 of this Article is taken, is entitled to request that his/her case be reopened, unless the request is examined in accordance with Articles 32 and 34.

3 — OJ 2005 L 326, p. 13.

Member States may provide for a time-limit after which the applicant's case can no longer be re-opened.

Member States shall ensure that such a person is not removed contrary to the principle of non-refoulement.

Member States may allow the determining authority to take up the examination at the stage where it was discontinued.'

III – Facts, proceedings before the referring court and questions submitted

11. The applicants in the main proceedings, Mrs Kastrati and her two minor children, are third-country nationals who entered the Schengen area with a Schengen visa issued by the French authorities. After they had applied for asylum in Sweden on 30 April 2009, Migrationsverket (the Swedish Migration Board) requested on 4 June 2009, in accordance with Regulation No 343/2003, that France should take charge of the family for the purpose of examining the asylum applications. On 16 June 2009, the applicants in the main proceedings applied in Sweden for residence permits on the ground of a connection with a person residing in Sweden and withdrew their asylum applications on 22 June 2009. After the French authorities had agreed on 23 July 2009 to take charge of the applicants in the main proceedings, Migrationsverket decided on 30 July 2009 to reject the asylum applications and the applications for residence permits, on the ground that France was the responsible Member State, and ordered the transfer of the applicants in the main proceedings to France pursuant to Article 19(1) and (3) of Regulation No 343/2003.

12. The action brought against that decision before Länsrätten i Skåne län, Migrationsdomstolen (Skåne Regional Administrative Court, ruling on immigration matters) resulted in the setting-aside of the decision and the referral of the case back to Migrationsverket for the purpose of examining the conditions governing the issuance of a residence permit, with an indication that Regulation No 343/2003 was no longer applicable following the withdrawal of the asylum applications. Migrationsverket appealed to the referring court against that ruling of the Skåne court ruling on immigration matters and argued that Regulation No 343/2003 remained applicable even after the asylum applications had been withdrawn.

13. As the referring court has doubts concerning the applicability of Regulation No 343/2004 in a case such as that in the main proceedings, it has stayed the proceedings and referred the following questions to the Court for a preliminary ruling:

'(1) In the light of, inter alia, the stipulations of Article 5(2) of Regulation No 343/2003 and/or the absence of provisions in the regulation on the cessation of a Member State's responsibility to examine an asylum application other than those contained in the second subparagraph of Article 4(5) and Article 16(3) and (4), is Regulation No 343/2003 to be interpreted as meaning that the withdrawal of an asylum application does not affect the possibility of applying the regulation?

(2) Is the stage in the process at which the asylum application is withdrawn relevant in answering the question set out above?'

IV – Procedure before the Court

14. The order for reference of 16 December 2010 was received at the Registry of the Court on 27 December 2010. The applicants in the main proceedings, the Hellenic Republic, the Federal Republic of Germany, the United Kingdom of Great Britain and Northern Ireland, the Italian Republic, the Kingdom of the Netherlands and the European Commission submitted written observations. The applicants in the main proceedings, Migrationsverket, the Hellenic Republic, the Kingdom of the Netherlands and the Commission took part in the hearing on 30 November 2011.

V – The submissions of the parties

15. The Netherlands, British and German Governments are of the view that Regulation No 343/2003 is also applicable in the case, which is not expressly dealt with in that regulation, of the withdrawal of a single asylum application. In so far as Regulation No 343/2003 deals with the withdrawal of one of several asylum applications, it follows from it that a withdrawal has no effect on the responsibility of a Member State which has been established on one occasion. In addition, one of the objectives of the regulation is to deprive the asylum seeker of the opportunity to determine the responsible Member State by withdrawing constantly changing applications and to maintain the responsibility of a Member State which was once responsible until the definitive conclusion of the procedure. If, therefore, an asylum application is lodged once, that asylum application is the trigger for the further applicability of Regulation No 343/2003.

16. By contrast, the Greek and Italian Governments, as well as the Commission, are of the view that the withdrawal of a single lodged asylum application renders Regulation No 343/2003 inapplicable. The cases in which the regulation remains applicable notwithstanding the withdrawal of an asylum application are, they argue, exhaustively regulated in that regulation. By withdrawing a single asylum application which was lodged in the European Union, the applicant is making it clear that he no longer wishes to have recourse to international protection. As such, there is no longer any basis for the application of Regulation No 343/2003, the purpose of which is, firstly, to ensure a rapid procedure for asylum seekers and, secondly, to prevent potential abuse in the form of multiple concurrent or consecutive asylum applications.

17. The applicants in the main proceedings point out that they at no time ever intended to seek asylum; they merely sought the issuance of a residence permit. An asylum application was lodged only upon the advice of Migrationsverket.

VI – Law

A – *The first question referred*

18. By its first question, the referring court is essentially asking whether an asylum seeker who has lodged an asylum application in a Member State can avoid application of Regulation No 343/2003 by withdrawing that asylum application, if he has not lodged any further asylum application in another Member State.

19. In response to the assertion of the applicants in the main proceedings that they never intended to seek asylum, with a result that their application is not, in principle, to be assessed as an asylum application within the meaning of Regulation No 343/2003, but rather as an application for the issuance of a residence permit, it should be noted that, according to settled case-law of the Court, it is for the referring court alone to determine the subject-matter of the questions which it intends to refer to the Court of Justice. It is solely for the national courts before which actions are brought, and which must bear the responsibility for the subsequent judicial decision, to determine, in the light of the special features of each case, both the need for a preliminary ruling in order to enable them to deliver judgment and the relevance of the questions which they submit to the Court.[4] Against that background, the Court also does not have jurisdiction to establish the facts in the main proceedings.

20. Regard being had to the submission of the applicants in the main proceedings, it is therefore up to the referring court to determine whether the application in question made by the applicants in the main proceedings is to be assessed as an asylum application within the meaning of Regulation No 343/2003. On the basis of the definition of 'application for asylum' contained in Article 2(c) of

4 — See Case C-316/09 *MSD Sharp & Dohme* [2011] ECR I-3249, paragraph 21, and Joined Cases C-376/05 and C-377/05 *Brünsteiner and Autohaus Hilgert* [2006] ECR I-11383, paragraph 26.

Regulation No 343/2003, the referring court must therefore establish whether the application lodged by the applicants in the main proceedings constitutes an application which falls to be classified as a request for international protection within the terms of the Geneva Convention. In so far as the referring court may have doubts with regard to the application of that definition in the specific context of the main proceedings, it should request, by way of a new substantiated reference for a preliminary ruling, further clarification from the Court as to the application of that definition in a case such as that in the main proceedings.

21. Should the referring court conclude that the application made by the applicants in the main proceedings is to be assessed as an asylum application within the meaning of Regulation No 343/2003, the question referred by it then arises as to the legal consequences of the withdrawal of that application by the applicants in the main proceedings.

22. Even though the case in question in the main proceedings of the withdrawal of only one asylum application and the consequences arising from that withdrawal are not expressly dealt with in Regulation No 343/2003, a systematic interpretation of the regulation in accordance with its wording and objectives leads, in my view, to the conclusion that an asylum seeker who has lodged only one asylum application cannot exclude the applicability of Regulation No 343/2003 to that asylum application by unilaterally withdrawing the application.

23. The Court has consistently held that, in interpreting a provision of European Union law, it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it is part. [5]

24. The Commission set out the essential objectives of Regulation No 343/2003 in its Proposal for a Regulation of 26 July 2001. [6] Paragraph 2.1. of that proposal, under the heading 'Objectives', focuses firstly on guaranteeing the right of asylum by means of a procedure which is rapid, based on objective criteria and fair for all those involved, but also, secondly, on preventing abuse in the form of multiple applications in various Member States by rapidly determining one single responsible Member State. The general principle is that the responsible Member State should be that which played the greatest part in the asylum seeker's entry into or residence on the territories of the Member States [7] by issuing him with a visa or residence document, being negligent in border control or admitting him without a visa. [8]

25. Those essential objectives, which were expressed by the Commission, were subsequently reflected in Regulation No 343/2003. Recitals 3 and 4 in the preamble refer to the rapid determination of the Member State responsible on the basis of a clear and workable formula for the purpose of guaranteeing effective access to the procedures as being a crucial objective. Article 3 of Regulation No 343/2003 sets out the basic principle that every asylum application is to be examined only by one single Member State. As a result, on the one hand, the emergence of *refugees in orbit* is prevented, that is to say, the deportation of asylum seekers from one State to another and the corresponding virtual devaluation of their right of asylum. On the other hand, the so-called practice of *asylum shopping* is brought to an end by excluding unchecked further migration in pursuit of parallel or successive asylum procedures within the EU. [9]

5 — See Case C-301/98 *KVS International* [2000] ECR I-3583, paragraph 21; Case C-300/05 *ZVK* [2006] ECR I-11169, paragraph 15; and Case C-19/08 *Petrosian and Others* [2009] ECR I-495, paragraph 34.

6 — Proposal for a Council Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, COM(2001) 447 final.

7 — In accordance with Articles 1 and 2 of the Protocol annexed to the Treaty on European Union and the Treaty establishing the European Community, Denmark did not initially take part in Regulation No 343/2003 (see recital 18 in the preamble). However, the scope of that regulation was extended to Denmark by the Agreement between the European Community and the Kingdom of Denmark on the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in Denmark or any other Member State of the European Union and 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention (OJ 2006 L 66, p. 38). Some third countries have also participated under international agreements in the EU system for determining the State responsible for asylum applications, one example being the Swiss Confederation (OJ 2008 L 53, p. 5).

8 — See paragraph 3.1. of the Proposal for a Regulation, cited in footnote 6 above.

9 — See, in that regard, Hermann, M. in: Hailbronner, K. (ed.), *EU Immigration and Asylum Law*, Munich 2010, Commentary on Regulation No 343/2003, Article 1, paragraph 20 et seq., Filzwieser, C./Sprung, A., *Dublin II-Verordnung, Das Europäische Asylzuständigkeitssystem*, 3rd edition 2010, Article 3, paragraph K6, Huber, B./Göbel-Zimmermann, R., *Ausländer- und Asylrecht*, 2nd edition, Munich 2008, paragraph 1885.

26. In terms of the latter objective, Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention [10] was already enacted during the period when the Convention, signed in Dublin on 15 June 1990, determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities [11] was in force. [12] At first, that regulation served the application and enforcement of the Dublin Convention, which was replaced by Regulation No 343/2003. In that respect, a connection exists between both regulations, [13] which makes it clear that the determination of the responsible Member State should also be ensured by the cross-checking of data. [14]

27. Consequently, Chapter III of Regulation No 343/2003 contains criteria, listed in order of importance, for determining the responsible Member State, [15] which is designed to assist for purposes of the requirement of determining the responsible Member State solely on the basis of objective criteria to be enforced and serves the aim of preventing abuse by way of multiple concurrent or successive asylum applications through the determination of one single responsible Member State.

28. Precisely that, namely the determination of the responsible Member State, is the primary purpose of Regulation No 343/2003. As for the question of the applicability of Regulation No 343/2003, Article 4(1) thereof provides that the process of determining the responsible Member State is to start as soon as an application for asylum is first lodged with a Member State. By contrast, the actual examination of the application for asylum is carried out in accordance with the national provisions of each Member State, taking into account Directive 2005/85 as well as Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted. [16]

29. The Commission correctly points out in its written observations that, taking the entire body of rules into consideration, the asylum procedure consists of two phases, that is to say, the determination of the responsible Member State after an asylum application has been lodged for the first time in accordance with Regulation No 343/2003 and, subsequently, the actual examination, which is incumbent upon the Member State responsible in each case and in the context of which minimum standards in accordance with Directive 2005/85 must be observed. Two phases of the asylum procedure are thus involved, which must be distinguished from one another. That consideration was already the starting point for the first considerations on the drafting of Directive 2005/85 [17] and was then also reflected in recital 29 in the preamble to that directive, which expressly provides that Directive 2005/85 does not deal with procedures governed by Regulation No 343/2003. Accordingly, the objective of Regulation No 343/2003 is not to create procedural safeguards for asylum seekers in terms of the determination of conditions for the acceptance or rejection of their asylum applications. [18] Rather, that regulation primarily governs the allocation of the duties and tasks of the Member States amongst themselves. Against that background, the provisions of Regulation No 343/2003, which

10 — OJ 2000 L 316, p. 1.

11 — OJ 1997 C 254, p. 1.

12 — For a general analysis of the data-protection issues and background to the collection of personal data in the Eurodac databases, see Hofmann, H./Rowe, G./Türk, A., *Administrative Law and Policy of the European Union*, Oxford 2011, p. 480 et seq.

13 — See the Commission's report on the evaluation of the Dublin System, COM(2007) 299 final, paragraph 2.1, Hermann, M., cited in footnote 9 above, Article 1, paragraph 46.

14 — Huber, B./Göbel-Zimmermann, R., cited in footnote 9 above, paragraph 1904, Hailbronner, K., *Asyl- und Ausländerrecht*, 2nd edition, Stuttgart 2008, paragraph 46, and Filzwieser, C./Sprung, A., cited in footnote 9 above, Article 9, paragraph K2.

15 — See, in that regard, Alland, D./Chassin, C., *Répertoire de droit international*, v. Asile, paragraph 46.

16 — OJ 2004 L 304, p. 12.

17 — Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, COM(2000) 578 final, point 2 of the explanatory memorandum.

18 — See also, to this effect, Huber, B./Göbel-Zimmermann, R., cited in footnote 9 above, paragraph 1885, and Bergmann, J., in Renner, *Ausländerrecht*, 9th edition, 2011, paragraph 130.

concern the duties of Member States in regard to asylum seekers subject to the Dublin procedure, relate in principle only to the conduct of the procedures concerning the relationship of Member States amongst themselves or are aimed at guaranteeing conformity with other instruments of asylum law legislation. [19]

30. From the point of view of responsibility, Regulation No 343/2003 also contains rules which concern the effects that withdrawal of an asylum application has on the procedure for determining the Member State responsible for examining an asylum application. Express provisions exist, however, only for the case of the withdrawal of one of multiple applications, as provided for in Article 4(5) or in Article 16(1)(d) and 16(4), for instance. Those provisions concern, in particular, cases in which the asylum seeker has withdrawn his asylum application during the process for determining the Member State responsible for the examination of the asylum application (Article 4(5)) or has withdrawn that application only when it is already under examination (Article 16(1)(d)) and has lodged a fresh asylum application in another Member State.

31. Regulation No 343/2003 has not, however, made any express provision regarding the legal consequences of the withdrawal of an asylum application lodged in one Member State which does not accompany the lodging of a new asylum application in another Member State.

32. In my opinion, the fact that the consequences of the withdrawal of only one asylum application are not expressly dealt with in Regulation No 343/2003 is attributable to the fact that a conflict of competence cannot arise in that case. It cannot, however, be inferred from this that the withdrawal of an asylum application by an asylum seeker, who has not lodged any additional asylum applications, could by itself result in Regulation No 343/2003 being rendered inapplicable.

33. It is true that the assumption that the regulation applies only in the case of the lodging of an asylum application and that the corresponding need for protection on the part of the applicant disappears when he makes it clear, by withdrawing his application, that he is no longer seeking protection initially appears plausible. That is all the more so since the fact that such a set of circumstances is not mentioned might suggest the conclusion that the regulation is logically inapplicable in such a case.

34. Nevertheless, it follows from the general context of the rules on asylum procedures that, in principle, only the definitive conclusion of an asylum procedure can result in the responsibility given once to a Member State being removed. In addition, such a definitive conclusion cannot be presumed to have already taken place once a third-country national discontinues his asylum application, but rather only when the responsible authority in a Member State has arrived at a final decision.

35. The wording of Regulation No 343/2003 itself argues in favour of that interpretation.

36. The definition, contained in Article 2(f) of Regulation No 343/2003, of the term ‘withdrawal of the asylum application’ as meaning the actions by which the applicant for asylum terminates the procedures initiated by the submission of his application for asylum, ‘in accordance with national law’, either explicitly or tacitly, shows that a declaration of withdrawal is capable of ending the procedure only if it complies with the relevant national provisions. Since those national provisions must be consistent with the provisions of Directive 2005/85, the answer to the question as to the effects of the withdrawal of an asylum application on the applicability and the application of Regulation No 343/2003 follows only from an overall assessment of that regulation in conjunction with Directive 2005/85.

19 — See, in that regard, the Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, COM(2008) 820 final, in particular point 3 of the explanatory memorandum.

37. According to Directive 2005/85, a third-country national who has applied for asylum in a Member State should not be regarded as staying illegally in the territory of that Member State until a negative decision on the application, or a decision ending his or her right of stay as an asylum seeker, has entered into force. [20]

38. A decision of the responsible authorities in a Member State is required in order to bring about such a definitive decision. In the case of an explicit withdrawal of the asylum application, Article 19 of Directive 2005/85 provides that, in so far as Member States provide for the possibility of explicit withdrawal of the application under national law, it must be ensured that the determining authority, in a case where an applicant for asylum expressly withdraws his or her application for asylum, takes a decision to either discontinue the examination or to reject the application. Likewise, a decision taken by the determining authority to either reject the application or formally discontinue the examination is required in the case where the asylum application is implicitly withdrawn in accordance with Article 20 of Directive 2005/85.

39. It follows from those considerations that the declaration of withdrawal by the asylum seeker does not in itself lead to the termination of the asylum procedure. For this it is necessary, rather, that the determining authority of the Member State responsible in each case takes a corresponding decision. That logically requires, however, that the responsible determining authority can still be determined in accordance with the provisions of Regulation No 343/2003, notwithstanding the declaration of withdrawal.

40. As regards the relevance of the conclusion of the asylum procedure, from an administrative and legal angle, in the case of a voluntary withdrawal of an asylum application, the Commission already pointed out in its first proposal for Directive 2005/85 that such a conclusion alone can enable Member States to retrieve the necessary information in situations where the applicant resurfaces in the same or another Member State and the issue of responsibility for examining a new application arises. [21]

41. Even after thorough consultation with and hearing of all the Member States, that consideration remained significant not only in the substantially amended proposal of the Commission of 18 June 2002 for a directive, but it was also emphasised in the explanatory notes on the proposed provisions of the directive that it was considered imperative for reasons of efficiency to lay down clear and precise standards on what to do when procedures are interrupted or broken off — either as a result of an explicit withdrawal (Article 19) or for other reasons (Article 20) — and that those standards, therefore, exhaustively described the procedural options open to the Member States. The directive thus offers a choice to Member States as to whether to discontinue the examination or to reject the application in the case where the applicant wishes to withdraw his application. [22]

42. That consideration then also found its way into Articles 19 and 20 of Directive 2005/85, which, in addition, provides for the possibility of specific procedures for subsequent applications after a withdrawal which was initially carried out in accordance with Article 24(1)(a), read in conjunction with Article 32 et seq.. Thus, Member States can, in accordance with Article 34, oblige an asylum seeker who lodges a subsequent application to indicate facts and substantiate evidence which justify a new procedure, and even also — in derogation from Article 12 — reach a decision without hearing the applicant.

20 — See Article 7 of Directive 2005/85 as well as recital 13 in the preamble to that directive. See also recital 9 in the preamble to Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ 2008 L 348, p. 98).

21 — See the proposal for a directive, cited in footnote 17 (explanatory notes on the former Article 16 of the proposal).

22 — Amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status (COM(2002) 326 final, explanatory notes on Article 19).

43. If the asylum seeker were granted the possibility of withdrawing his application without any consequences in the context of Regulation No 343/2003, that would be incompatible with the rules laid down in Directive 2005/85 on the lodging of successive asylum applications and the legal consequences, which arise from those rules, for possible subsequent applications.

44. This interpretation of Regulation No 343/2003, according to which the asylum seeker cannot unilaterally influence the rules for the assignment of responsibility laid down in that regulation by withdrawing his asylum application, also corresponds to the structure and the objective of the regulation to establish the areas of competence of a Member State as quickly as possible solely on the basis of objective criteria and thereby to remove any influence which the asylum seeker might have, in that respect, through the lodging of multiple applications.

45. If an asylum seeker were in a position to influence the determination of the responsible Member State by continuously lodging new asylum applications whilst withdrawing his previous applications, although that is precisely what is supposed to be prevented by Regulation No 343/2003, those aims would be thwarted. Reference is made in this context to the rule in Article 13 of Regulation No 343/2003, which provides that, where responsibility cannot be determined on the basis of the criteria listed in that regulation, the Member State with which the first application for asylum was lodged is to be responsible for examining the asylum application. The legislature therefore saw the possibility that a responsible Member State cannot be determined despite all of the examination possibilities and adopted a residual rule on competence in order to cover that case. If the applicability of Regulation No 343/2003 were to disappear whenever an application is withdrawn, according to the circumstances of each case, the asylum seeker would be able to determine the responsible Member State through the choice of his place of residence. In addition, the objective of a swift processing through rapid determination of the responsible Member State could not be achieved.

46. In that context, reference must also be made to the problems relating to the responsibility for returning a former asylum seeker. It follows from Regulation No 343/2003 that the Member State responsible for examining an asylum application also, in principle, remains responsible for returning the former asylum seeker following an — express or tacit — declaration of withdrawal of the asylum application by the asylum seeker and corresponding concluding action on the part of the responsible authority in the Member State concerned.

47. The rule in Article 16(1)(e) of Regulation No 343/2003 thus makes it clear that, despite the conclusion of the asylum application by means of a final negative decision, the Member State responsible for examining the asylum application is obliged to take back a former asylum seeker if the latter is in the territory of another Member State without permission. That duty ceases, according to the provisions of Regulation No 343/2003, only if the third-country national has received a residence document from another Member State (Article 16(2)), if he left the territory of the Member States for at least three months without a valid residence document (Article 16(3)) or when the Member State responsible for examining the application has adopted and actually implemented, following the rejection of the application, the provisions that are necessary in order that the third-country national can go to his country of origin or to another country to which he may lawfully travel (Article 16(4)).

48. In that respect, Regulation No 343/2003 has essentially adopted the concept of the Dublin Convention of 15 June 1990, whereby, in an area in which the free movement of persons is guaranteed in accordance with the provisions of the Treaties, each Member State is responsible vis-à-vis other Member States for its actions in relation to the entry and residence of third-country nationals and must bear the consequences of its actions in the spirit of solidarity and cooperation in good faith. The main criteria for allocating responsibility, and the hierarchical order in which they are presented, reflect this general approach by placing the burden of responsibility on the Member State which, by issuing him with a visa or residence document, being negligent in border control or admitting him without a visa, played the greatest part in the applicant's entry into or residence on the territories of the Member States. A second group of criteria is designed to ensure that consequences

are drawn concerning a Member State's failure to meet its obligations with regard to combating illegal immigration. [23]

49. From this it is clear that the establishment of responsibility of a Member State vis-à-vis other Member States in relation to an asylum seeker is a crucial connecting factor for the application of Regulation No 343/2003 in light of the initiator principle (Veranlasserprinzip). That allows for the principle whereby the individual Member State accepts responsibility vis-à-vis the other Member States for its actions in relation to the entry and residence of third-country nationals. [24]

50. Responsibility under the initiator principle is supplemented by Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, [25] in which rules for returning an illegally staying third-country national are set out together with rules to cover the case in which such a return is not possible for any particular reason. The fact that specific rules for the assignment of responsibility are no longer provided for in that context makes it all the more clear that Regulation No 343/2003 is also still applicable at that stage of the procedure.

51. In conclusion, the answer to the first question referred should be that the withdrawal of an asylum application by an asylum seeker who has lodged an asylum application in only one Member State affects, as such, neither the applicability of Regulation No 343/2003 nor the determination of the Member State responsible for examining that application in accordance with the provisions of that regulation.

B – *The second question referred*

52. By its second question, the referring court seeks clarification as to whether the point in time at which the asylum application was withdrawn by an asylum seeker is relevant, in a case such as that in the main proceedings, with regard to the assessment of the legal consequences of that withdrawal in the light of Regulation No 343/2003.

53. That question can immediately be answered in the negative. It follows from my remarks above that the withdrawal of an asylum application by an asylum seeker who has lodged an asylum application in only one Member State affects, as such, neither the application of Regulation No 343/2003 nor the determination of the Member State responsible for examining that application in accordance with the provisions of that regulation. That is so irrespective of the stage of the procedure at which that withdrawal is announced.

VII – Conclusion

54. In the light of the foregoing considerations, I propose that the Court answer the questions referred for a preliminary ruling as follows:

The withdrawal of an asylum application by an asylum seeker, who has lodged an asylum application in only one Member State, affects, as such, neither the applicability of Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national nor the determination of the Member State responsible for examining that application in accordance with the provisions of that regulation. That is so irrespective of the stage of the procedure at which that withdrawal is announced.

23 — See, in that regard, the proposal for a regulation cited in footnote 6 (point 3.1. of the explanatory memorandum).

24 — Ibid., explanatory notes on Article 9. See also the proposal for a regulation cited in footnote 19 (point 3 of the explanatory memorandum).

25 — OJ 2008 L 348, p. 98.