Reports of Cases

OPINION OF ADVOCATE GENERAL
PIKAMÄE
delivered on 2 June 2022 [1]

Joined Cases C-245/21 and C-248/21

Bundesrepublik Deutschland vertreten durch Bundesministerium des Innern, für Bau und Heimat
v
MA,
PB (C-245/21)
and
LE (C-248/21)

(Requests for a preliminary ruling from the Bundesverwaltungsgericht (Federal Administrative Court, Germany))

(References for a preliminary ruling – Regulation (EU) No 604/2013 – Determination of the Member State responsible for examining an application for international protection – Transfer of the person concerned to the Member State responsible for examining his or her application – Articles 27 and 29 – Suspension of the transfer due to the COVID-19 pandemic – Connection with judicial protection – Consequences as regards the time limit for the transfer)

I. Introduction

1. These requests for a preliminary ruling, made by the Bundesverwaltungsgericht (Federal Administrative Court, Germany) pursuant to Article 267 TFEU, concern the interpretation of Article 27(4) and Article 29(1) of Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 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. [2]

2. The requests for a preliminary ruling have been made in proceedings between three third-country nationals and the Federal Republic of Germany, concerning decisions adopted by the Bundesamt für Migration und Flüchtlinge (Federal Office for Migration and Refugees, Germany; 'the office'), which, having found that none of the grounds which might have prevented the removal of those third-country nationals was made out, determined that their applications for asylum were inadmissible, ordered their removal to Italy, and banned them from entering or staying in Germany. The decisions to transfer them to Italy, the Member State which

[1] Original language: French.

[2] OJ 2013 L 180, p. 31 ('the Dublin III Regulation').

the German authorities regarded as being responsible for examining the applications for asylum, pursuant to the Dublin III Regulation, were suspended by the office itself, on the basis that it was practically impossible to implement those decisions because of the COVID-19 pandemic.

3. The present cases provide the Court with the opportunity to rule on the legal consequences of a decision to suspend a transfer which is taken by the administrative authorities of the requesting Member State in the context of the challenges posed by the pandemic, as a phenomenon which has significantly disrupted the proper functioning of the Common European Asylum System. More specifically, the Court will need to rule on whether the effect of such a decision to suspend is to interrupt the time limit for transfer or, in the event that the transfer does not take place within that time limit, whether the Member State responsible for examining the application for international protection is relieved of its obligation to take charge of the person concerned, with responsibility for examining his or her application for asylum passing to the requesting Member State. From that perspective, and inasmuch as the pandemic is ongoing, the present cases are of great importance for the management of the Common European Asylum System.

II. The legal framework

A. European Union law

4. The Dublin III Regulation lays down 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. In that regard, recitals 4, 5 and 19 of the regulation state as follows:

'(4) The … conclusions [of the European Council, at its special meeting in Tampere on 15 and 16 October 1999] also stated that the [Common European Asylum System] should include, in the short term, a clear and workable method for determining the Member State responsible for the examination of an asylum application.

(5) Such a method should be based on objective, fair criteria both for the Member States and for the persons concerned. It should, in particular, make it possible to determine rapidly the Member State responsible, so as to guarantee effective access to the procedures for granting international protection and not to compromise the objective of the rapid processing of applications for international protection.

…

(19) In order to guarantee effective protection of the rights of the persons concerned, legal safeguards and the right to an effective remedy in respect of decisions regarding transfers to the Member State responsible should be established, in accordance, in particular, with Article 47 of the Charter of Fundamental Rights of the European Union. In order to ensure that international law is respected, an effective remedy against such decisions should cover both the examination of the application of this Regulation and of the legal and factual situation in the Member State to which the applicant is transferred.'

5. Article 27(3) and (4) of that regulation provides:

‘3. For the purposes of appeals against, or reviews of, transfer decisions, Member States shall provide in their national law that:

(a) the appeal or review confers upon the person concerned the right to remain in the Member State concerned pending the outcome of the appeal or review; or

(b) the transfer is automatically suspended and such suspension lapses after a certain reasonable period of time, during which a court or a tribunal, after a close and rigorous scrutiny, shall have taken a decision whether to grant suspensive effect to an appeal or review; or

(c) the person concerned has the opportunity to request within a reasonable period of time a court or tribunal to suspend the implementation of the transfer decision pending the outcome of his or her appeal or review. Member States shall ensure that an effective remedy is in place by suspending the transfer until the decision on the first suspension request is taken. Any decision on whether to suspend the implementation of the transfer decision shall be taken within a reasonable period of time, while permitting a close and rigorous scrutiny of the suspension request. A decision not to suspend the implementation of the transfer decision shall state the reasons on which it is based.

4. Member States may provide that the competent authorities may decide, acting *ex officio*, to suspend the implementation of the transfer decision pending the outcome of the appeal or review.’

6. The third subparagraph of Article 28(3) of that regulation provides:

‘Where a person is detained pursuant to this Article, the transfer of that person from the requesting Member State to the Member State responsible shall be carried out as soon as practically possible, and at the latest within six weeks of the implicit or explicit acceptance of the request by another Member State to take charge or to take back the person concerned or of the moment when the appeal or review no longer has a suspensive effect in accordance with Article 27(3).’

7. Article 29(1) and (2) of that regulation is worded as follows:

‘1. ‘The transfer of the applicant … from the requesting Member State to the Member State responsible shall be carried out … as soon as practically possible, and at the latest within six months of acceptance of the request by another Member State to take charge or to take back the person concerned or of the final decision on an appeal or review where there is a suspensive effect in accordance with Article 27(3).

…

2. Where the transfer does not take place within the six months’ time limit, the Member State responsible shall be relieved of its obligations to take charge or to take back the person concerned and responsibility shall then be transferred to the requesting Member State. 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 person concerned or up to a maximum of eighteen months if the person concerned absconds.’

B. German law

1. Asylum law

8. Paragraph 29 of the Asylgesetz (Law on Asylum) deals with inadmissible applications for asylum. Its first subparagraph provides, in particular:

'An application for asylum is inadmissible if

1. another State is responsible for conducting the asylum procedure

(a) by virtue of [the Dublin III Regulation] or

(b) on the basis of other provisions of EU law or of an international treaty,

…'

9. Paragraph 34a of the Law on Asylum, headed 'Order for removal', provides inter alia as follows:

'(1) If the foreign national is to be removed to a safe third country (Paragraph 26a) or to a country responsible for conducting the asylum procedure (Paragraph 29(1), point 1), [the office] shall order his or her removal to that country as soon as it has been ascertained that the removal can be carried out. … No prior warning and setting of a time limit is required. If it is not possible to order the removal of a foreign national pursuant to the first or second sentences above, [the office] shall notify [the person concerned] that he or she is to be removed to the country in question.

(2) Applications made pursuant to Paragraph 80(5) of the Verwaltungsgerichtsordnung (Code of Administrative Court Procedure), in respect of the removal order, shall be lodged within one week of notification. Where an application is made within that time limit, no removal is permissible until the court has ruled on it.'

2. The Code of Administrative Court Procedure

10. Paragraph 80(4) and (5) of the Code of Administrative Court Procedure provides:

'(4) The authority which issued the administrative act or which has to decide on the objection may suspend execution in cases falling under paragraph 2 unless otherwise provided by federal law. …

(5) On request, the court dealing with the substantive case may make an order for total or partial suspensive effect …'

III. The facts giving rise to the disputes in the main proceedings, the main proceedings and the questions referred for a preliminary ruling

A. Case C-245/21

11. In November 2019, MA and PB made applications for asylum in Germany. As a EURODAC search had revealed that they had entered Italy illegally and registered as applicants for international protection in that Member State, the office sent a request to the Italian authorities, on 19 November 2019, for them to take charge of MA and PB on the basis of the Dublin III regulation. The Italian authorities did not respond to that request to take charge.

12. By decision of 22 January 2020, the office rejected as inadmissible MA and PB's applications for asylum, made a finding that there were no grounds for non-removal, ordered their removal to Italy, and banned them from entering or staying in Germany.

13. On 1 February 2020, MA and PB brought an appeal against the office's decision before the competent administrative court. PB also made an ancillary application to suspend the implementation of the transfer decision. That application was dismissed on 11 February 2020.

14. By letter of 8 April 2020, the office suspended implementation of the removal orders until further notice, pursuant to Article 80(4) of the Code of Administrative Court Procedure and Article 27(4) of the Dublin III Regulation, on the ground that, given the way in which the COVID-19 pandemic was developing, the transfers could not be carried out.

15. By decision of 14 August 2020, the administrative court annulled the office's decision. The basis of that decision was that, supposing that the Italian Republic had indeed been responsible for examining MA and PB's applications for asylum, that responsibility had passed to the Federal Republic of Germany on expiry of the time limit for transfer laid down by Article 29(1) of the Dublin III Regulation, given that the office's decision to suspend of 8 April 2020 had not interrupted that time limit.

16. The Federal Republic of Germany brought an appeal on a point of law against that decision of 14 August 2020 directly before the Bundesverwaltungsgericht (Federal Administrative Court).

B. Case C-248/21

17. In August 2019, LE made an application for asylum in Germany. As a EURODAC search had revealed that, on 7 June 2017, he had made an application for international protection in Italy, the office sent a request to the Italian authorities for them to take LE back pursuant to the Dublin III Regulation. The Italian authorities granted the request to take back.

18. The office rejected as inadmissible LE's application for asylum, made a finding that there were no grounds for non-removal, ordered his removal to Italy, and banned him from entering or staying in Germany.

19. On 11 September 2019, LE brought an appeal against the office's decision before the competent administrative court. He also made an ancillary application to suspend the implementation of the transfer decision. That application was dismissed on 1 October 2019.

20. By letter of 24 February 2020, the Italian authorities informed the German authorities that, because of the COVID-19 pandemic, transfers to and from Italy under the Dublin III Regulation would no longer take place.

21. By letter of 25 March 2020, the office suspended enforcement of the removal order until further notice, pursuant to Article 80(4) of the Code of Administrative Court Procedure and Article 27(4) of the Dublin III Regulation, on the ground that, given the way in which the COVID-19 pandemic was developing, the transfer could not be carried out.

22. After dismissing a second application to suspend the transfer decision on 4 May 2020, the administrative court dealing with the matter annulled the office's decision by judgment of 10 June 2020. That judgment was based on reasoning similar to that of the judgment referred to in point 15 of this Opinion.

23. The Federal Republic of Germany brought an appeal on a point of law against that judgment directly before the Bundesverwaltungsgericht (Federal Administrative Court).

C. Considerations common to both cases

24. The referring court considers that the appeals before it should be allowed if it is determined that a suspension of implementation of a removal order, granted on the basis of practical impossibility in carrying out the transfer due to the COVID-19 pandemic, falls within the scope of Article 27(4) of the Dublin III Regulation, and can therefore interrupt the time limit for transfer laid down in Article 29(1) of that regulation.

25. It takes the view that, although Article 27(4) of the Dublin III Regulation requires that the suspensions of implementation of transfer decisions for which it provides be connected with an appeal, it is conceivable that it may apply in circumstances such as those of the main proceedings, given that an appeal against a transfer decision is pending and the fact that the removal cannot be carried out may, under German law, cast doubt on the legality of that decision. It considers, nevertheless, that the objectives of that regulation must be taken into account, as well as the respective interests of the persons concerned and the Member State in question, which must be balanced in the current public health situation.

26. In those circumstances, the Bundesverwaltungsgericht (Federal Administrative Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Does suspension by the authorities of the implementation of a transfer decision, which is revocable only on account of the fact that transfers are (temporarily) impossible in fact due to the COVID-19 pandemic, fall within the scope of Article 27(4) of the Dublin III Regulation during appeal proceedings?

(2) If Question 1 is answered in the affirmative: Does such a suspension decision interrupt the time limit for transfer pursuant to Article 29(1) of the Dublin III Regulation?

(3) If Question 2 is answered in the affirmative: Does this also apply if, prior to the outbreak of the COVID-19 pandemic, a court had dismissed an application by the asylum seeker pursuant to Article 27(3)(c) of the Dublin III Regulation for implementation of the transfer decision to be suspended pending the outcome of the appeal proceedings?'

IV. Procedure before the Court

27. The orders for reference in Cases C-245/21 and C-248/21, dated 26 January 2021, reached the Registry of the Court of Justice on 19 April 2021 and 21 April 2021, respectively. By decision of the President of the Court of 7 June 2021, the present cases were joined for the purposes of the written and oral part of the procedures and of the judgment.

28. The referring court also asked the Court to deal with the present references for a preliminary ruling under the expedited procedure provided for in Article 105(1) of the Rules of Procedure of the Court. On 7 June 2021, the President of the Court decided, having heard the Judge-Rapporteur and the Advocate General, to reject that request.

29. The German and Swiss Governments, as well as the European Commission, submitted written observations within the period laid down in Article 23 of the Statute of the Court of Justice of the European Union.

30. At the hearing on 9 March 2022, the representatives of MA and PB, the German Government and the Commission presented oral argument.

V. Legal analysis

A. Preliminary remarks

1. The features of the Common European Asylum System

31. The right of asylum is an essential element of international law. First recognised in 1951 in the Convention Relating to the Status of Refugees, signed in Geneva on 28 July 1951,[3] it entitles persons fleeing persecution in their own country to international protection. Within the European Union, the creation of an area of free movement, with open internal borders, has encouraged harmonisation of asylum procedures. In the conclusions reached at its special meeting in Tampere on 15 and 16 October 1999, the European Council reaffirmed the importance that the European Union and its Member States attached to absolute respect of the right to seek asylum. It was agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention, thus ensuring that nobody was sent back to persecution, or in other words maintaining the principle of non-refoulement. Article 78(1) TFEU and Article 18 of the Charter of Fundamental Rights of the European Union ('the Charter') reflect that commitment.

32. The Common European Asylum System is currently governed by a number of legal instruments. The 'Dublin' system, so called because the convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities[4] was signed in that city, on 15 June 1990, is based on the principle that only one State has competence in relation to an applicant for asylum, and that the issue of competence must be determined on the basis of objective criteria. Following the Treaty of

3 *United Nations Treaty Series*, Vol. 189, p. 150, No 2545 (1954) ('the Geneva Convention').

4 OJ 1997 C 254, p. 1.

Amsterdam, Regulation (EC) No 343/2003 (the Dublin II Regulation)[5] entered into force and introduced procedural time limits and time limits for transfers, as well as the principle of protection of family unity. The Dublin III Regulation, which was adopted on the basis of the Treaty of Lisbon and has been in force since 19 July 2013, added, to the obligations of the Member State responsible for examining an application for asylum,[6] procedural safeguards for persons liable to be transferred. Rapid processing of applications for international protection and the guaranteed right to an effective remedy against transfer decisions are two cardinal principles of the Dublin system, which prove to be relevant in assessing the present cases.

2. The relevance of the questions referred in resolving the disputes in the main proceedings

33. The importance of the question whether the national administrative authorities have power to suspend the implementation of a transfer decision and to interrupt the time limit for transfer arises out of the particularities of the interaction between EU and national law, which I should briefly set out. Under Article 29(1) of the Dublin III Regulation, the time limit for transfer starts to run on acceptance of the request for admission by the other Member State. However, if the applicant appeals against the transfer decision, the time limit does not start to run until the final decision on the appeal, which delays the beginning of the transfer period. However, this only applies where the appeal has suspensive effect, pursuant to Article 27(3) of the Dublin III Regulation.

34. In German law, an action for annulment of a removal order, by virtue of Paragraph 75(1) of the Law on Asylum, does not have suspensive effect. However, the persons concerned may make an application, within one week, seeking an order conferring suspensive effect, pursuant to the first sentence of the second subparagraph of Paragraph 34a(2) of that law. If no such application for interim measures is made, or if an application is made but dismissed, the transfer period begins to run; during the COVID-19 pandemic, this situation gave rise to difficulties for the administrative authorities, particularly with regard to compliance with the time limit for transfers. In those circumstances, the German authorities made use of the possibility of interrupting the time limit by suspending implementation of the transfer decision, pursuant to Paragraph 80(4) of the Code of Administrative Court Procedure. This, however, raises the issue of whether such an approach is compatible with EU law.

35. The three questions referred by the national court for a preliminary ruling are intrinsically linked, in that it is not necessary to examine the second and third questions unless the first is answered in the affirmative. In the interest of a structured and comprehensible analysis of the questions referred, I propose to examine them together and to give a clear answer which will enable the court to resolve the disputes in the main proceedings. The questions relate, in essence, to the power of the national administrative authorities to suspend, on the basis of Article 27(4) of the Dublin III Regulation, the implementation of a transfer decision, and to interrupt the time limit for transfer laid down in Article 29(1) of that regulation.

36. In order to analyse the questions it is necessary, first of all, to describe the interaction between the provisions referred to above,[7] and, second of all, to consider whether the fact that it is practically impossible to carry out such a transfer, because of the COVID-19 pandemic,

[5] Council Regulation 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 (OJ 2003 L 50, p. 1).

[6] Warin, C., 'Le contentieux du règlement Dublin III', *Droit luxembourgeois et européen de l'asile*, (Chaouche, F., Gerkrath, J., Silga, J., Sinnig, J. and Warin, C. (eds), Luxembourg, 2019, p. 118.

[7] See point 37 et seq. of this Opinion.

constitutes a legitimate ground for the national authorities to make use of those provisions.[8] I will give detailed consideration to this second issue, which is at the heart of the present cases, always bearing in mind the particular facts of each of the cases before the referring court.[9]

B. The interaction between Article 27(4) and Article 29(1) of the Dublin III Regulation

1. Interpretation of the relevant provisions in the light of the case-law

37. The recognition of a power, on the part of the national administrative authorities, to suspend implementation of a transfer decision and, consequently, to interrupt the time limit for the transfer, requires an analysis of the interaction between the relevant provisions.

38. Under Article 27(4) of the Dublin III Regulation, 'Member States may provide that the competent authorities may decide, acting *ex officio*, to suspend the implementation of the transfer decision …'. Article 29(1) of that regulation provides that the 'transfer … from the requesting Member State to the Member State responsible shall be carried out … after consultation between the Member States concerned, as soon as practically possible, and at the latest within six months of acceptance of the request by another Member State to take charge or to take back the person concerned or of the final decision on an appeal or review where there is a suspensive effect in accordance with Article 27(3)'.

39. As is apparent when those provisions are read together, the first difficulty in determining how they interact with each other arises from the fact that Article 29(1) of the Dublin III Regulation refers to Article 27(3), and not to Article 27(4), of that regulation.

40. However, I do not consider that this absence of any express reference to Article 27(4) of the Dublin III Regulation precludes an interpretation on which the national administrative authorities are to have power to interrupt the time limit for transfer by suspending implementation of the transfer decision at issue. On the contrary, it seems to me that there are arguments in favour of the view that Article 29(1) of the Dublin III Regulation is to be interpreted as also including a suspension ordered by the national authorities on the basis of Article 27(4) of that regulation.

41. It follows from Article 29(1) of the Dublin III Regulation that the time limit for implementing the transfer only begins to run when it has been settled and is certain, in principle, that the transfer will be carried out, and only the practical arrangements for the transfer remain to be determined. That is not the case, however, where implementation of the transfer decision has been suspended pending an appeal or review.

42. In that regard, I would observe that there is *no objective reason to distinguish* between a suspension of the implementation of the transfer decision under Article 27(3) of the Dublin III Regulation and a suspension pursuant to Article 27(4) thereof. In both cases, the suspension of implementation is linked to an appeal against the transfer decision, and the Member States concerned face the same practical difficulties in arranging the transfer. Accordingly, in both cases they should have the same period of six months fully available to them to settle the technical details of the implementation of the transfer.

8 See point 47 et seq. of this Opinion.

9 See point 75 et seq. of this Opinion.

43. It should be noted, moreover, that in the context of the rule on deadlines contained in the third subparagraph of Article 28(3) of the Dublin III Regulation, the Court has already held that, although that rule refers only to Article 27(3) of that regulation and not to Article 27(4), as regards the beginning of the period, time only begins to run when the appeal or review no longer has suspensive effect and where the suspension of implementation of the transfer decision was – as in the case of Article 27(4) of that regulation – not specifically requested by the person concerned. [10]

44. The Court also emphasised *the similarity of the terms used* in the third subparagraph of Article 28(3) and the first subparagraph of Article 29(1) of the same regulation. In that regard, it observed that an interpretation of that provision on which the deadline for carrying out the transfer is calculated from the moment of acceptance of the take charge or take back request, even where the competent authority has made use of the power provided for in Article 27(4) of the Dublin III Regulation, would, in practice, greatly deprive that provision of its utility. It would not be possible to make use of that power without the risk of preventing the transfer being carried out within the time limits laid down by the regulation. [11]

45. The considerations set out above lead me to conclude that the period referred to in Article 29(1) and (2) of the Dublin III Regulation cannot begin to run so long as, by virtue of an administrative decision taken in accordance with Article 27(4) of that regulation, the implementation of the transfer decision is suspended pending the outcome of the appeal brought by the person concerned.

2. Interim conclusion

46. It follows from the foregoing that the national administrative authorities do, in principle, have power to suspend the implementation of a transfer decision and, consequently, to interrupt the time limit for transfer.

C. Whether the national administrative authorities have the power to suspend the implementation of a transfer decision and, consequently, interrupt the time limit for transfer, on the ground of practical impossibility arising from the pandemic

47. As I observed in my preliminary remarks, the question whether the national administrative authorities have that power, by reason of the fact that it is practically impossible, due to the COVID-19 pandemic, for them to implement a transfer, lies at the heart of the present cases.

48. To answer that question, it is necessary to determine, using the methods of interpretation recognised in the case-law of the Court, whether a measure such as that taken by the German authorities in the cases before the referring court falls within the scope of Article 27(4) of the Dublin III Regulation.

[10] Judgment of 13 September 2017, *Khir Amayry* (C-60/16, EU:C:2017:675, paragraphs 63 to 73).

[11] Judgment of 13 September 2017, *Khir Amayry* (C-60/16, EU:C:2017:675, paragraphs 70 and 71).

1. Application of the methods of interpretation recognised in the case-law

49. According to the Court's settled case-law, it follows from the need for a uniform application of EU law that, where a provision thereof makes no reference to the law of the Member States with regard to a particular concept, that concept must be given an autonomous and uniform interpretation throughout the European Union which will be arrived at by taking into account not only the wording of the provision in question but also its context and the objective pursued by the rules of which it forms part. [12]

(a) Literal interpretation

50. The wording of Article 27(4) of the Dublin III Regulation indicates that that provision concerns administrative decisions which have been adopted in the light of an appeal brought by the person concerned. Under that provision, the competent authorities of the Member States may decide, acting *ex officio*, 'to suspend the implementation of the transfer decision *pending the outcome* of the appeal or review.' [13] The very wording of the provision thus clearly presupposes *a relationship between the appeal brought by the person concerned and the decision to suspend taken by the authorities*.

51. Contrary to what the German Government maintains in its observations, that link is not merely a question of simultaneity. On analysis of various different language versions, it is possible to interpret Article 27(4) of the Dublin III Regulation as meaning that the decision to suspend must have been taken *with the intention of protecting the legal status* of the applicant for asylum for the whole duration of the appeal or review procedure. [14] That conclusion is confirmed by other methods of interpretation.

(b) Interpretation in the light of the regulation as a whole

52. The position of Article 27(4) within the structure of the Dublin III Regulation confirms that it can only relate to administrative decisions to suspend implementation which are *ancillary to an appeal* brought by the person concerned. As can be seen from the heading ('Remedies') and from paragraph 1 of Article 27 of that regulation, that article deals with appeals brought by the person concerned. Consequently, *only administrative decisions taken in connection with such an appeal can fall within* Article 27(4) of that regulation.

53. The place occupied by that provision within the general scheme of the Dublin III Regulation also indicates that such a connection is required. In particular, the fact that the provision is in Section IV ('Procedural safeguards') serves to emphasise the legislative goal, stated in recital 19 of that regulation, of guaranteeing effective protection of the rights of the persons concerned, by establishing legal safeguards and the right to an effective remedy in respect of decisions regarding transfers to the Member State responsible in accordance, in particular, with Article 47 of the Charter.

[12] Judgment of 19 March 2019, *Jawo* (C-163/17, EU:C:2019:218, paragraph 55).

[13] Emphasis added.

[14] See the versions in German ('um … bis zum Abschluss des Rechtsbehelfs oder der Überprüfung auszusetzen'); Estonian ('kuni vaidlustamise või läbivaatamise tulemuse selgumiseni'); Spanish ('para suspender … hasta la resolución del recurso o revisión'); French ('de suspendre … en attendant l'issue du recours ou de la demande de révision'); Dutch ('… op te schorten in afwachting van de uitkomst van het beroep of het bezwaar'); Italian ('sospendere … in attesa dell'esito del ricorso o della revisione'); Danish ('udsætte … indtil resultatet af klagen eller indbringelsen foreligger'); and Portuguese ('suspender … enquanto se aguarda o resultado do recurso ou da revisão').

(c) Purposive interpretation

(1) Considerations relating to the objective of guaranteeing effective judicial protection

54. In connection with the purposive interpretation, it must be borne in mind that the Court itself has also emphasised the importance of the implementation of transfer decisions being suspended on application by the person concerned to a court or tribunal, in the context of Article 27(3) to (6) of the Dublin III Regulation. The Court has held in its case-law that the EU legislature decided to involve asylum seekers in that process by obliging Member States to ensure that they have the right to an effective remedy in respect of any transfer decision that may be taken at its conclusion. [15]

55. For the reasons set out in the preceding points of the present Opinion, I am firmly of the view that the power given to the national administrative authorities, by virtue of Article 27(4) of the Dublin III Regulation, to decide *ex officio* to suspend the implementation of the transfer decision, *cannot be detached from its function of guaranteeing effective judicial protection* for the person concerned.

56. I therefore consider that an overly broad interpretation of Article 27(4) of the Dublin III Regulation, on which the national administrative authorities were able to suspend the implementation of a transfer decision, irrespective of whether an appeal had been brought by the person concerned, would inevitably enable them to postpone the transfer of the person concerned to the Member State responsible, for any reason, without any consequences as regards the transfer between Member States of responsibility for examining the application for international protection.

57. It seems to me that this would be diametrically opposed to the objective pursued by the Dublin III Regulation of establishing a method for rapidly determining the Member State responsible without compromising the objective of rapid processing of applications for asylum, referred to in recital 5 of that regulation. An applicant for asylum would be left at the mercy of the national administrative authorities, who would be able to extend the waiting time, when that time could more effectively be spent on processing the application for asylum.

58. In addition, it seems to me that the only possible justification for extending the six-month time limit laid down for carrying out the transfer *lies in the interest of the person concerned in having the legality of the transfer decision clarified by a judicial authority*, and not in any interest the administrative authorities may have in having the decision suspended. I would note that the Court has stated on numerous occasions that 'the EU legislature did not intend that the judicial protection enjoyed by asylum seekers should be sacrificed to the requirement of expedition in processing asylum applications'. [16] Thus, there has never been any intention on the part of the Court to leave national administrative authorities unlimited room for manoeuvre in the exercise of their powers. That applies in particular to the power conferred by Article 27(4) of the Dublin III Regulation, which, as the referring court itself points out, imposes certain limits on the broad discretion afforded under national law.

[15] Judgment of 7 June 2016, *Ghezelbash* (C-63/15, EU:C:2016:409, paragraphs 50 to 52).

[16] Judgment of 7 June 2016, *Ghezelbash* (C-63/15, EU:C:2016:409, paragraph 57).

59. I therefore take the view that an interpretation of that provision on which the national administrative authorities were able to interrupt the time limit for transfer as they saw fit, on the basis of a practical difficulty encountered in the course of their operations, whatever that difficulty might be, would not conform to the system established by the Dublin III Regulation.

(2) Considerations concerning the obligation to bear the risk of practical impossibility in carrying out the transfer

60. In this context, it should be borne in mind that similar situations have already been addressed in EU legislation or recognised in the case-law of the Court, and it has been expressly stated in that legislation and case-law that responsibility for examining the application for international protection must be transferred to the requesting Member State. For the purposes of the present analysis, I think it is worth mentioning two situations in which practical impossibility in transferring the applicant for asylum had precisely that consequence.

61. First, there is the situation referred to in Article 3(2) of the Dublin III Regulation, which provides that the Member State making the determination as to which Member State is responsible for examining an application for asylum itself becomes the responsible Member State where the transfer is impossible because of '*systemic flaws* in the asylum procedure and in the reception conditions for applicants …, resulting in a risk of inhuman or degrading treatment' in the Member State initially designated as responsible, and no other Member State can be designated as responsible. In that regard, I would note that that provision codifies the case-law of the Court, as established in *N.S. and Others*.[17]

62. Second, I would point out that in its judgment in *CK and Others*, the Court held that if the *state of health* of the asylum seeker concerned does not enable the requesting Member State to carry out the transfer before the expiry of the six-month period provided for in Article 29(1) of the Dublin III Regulation, the Member State responsible would be relieved of its obligation to take charge of the person concerned and responsibility would then be transferred to the first Member State, in accordance with paragraph 2 of that article.[18]

63. These examples show a clear intention on the part of the EU legislature to oblige the requesting Member State to *bear the risk of practical impossibility in carrying out the transfer* of the applicant for asylum to the Member State which is, in principle, responsible for examining the application for international protection.[19] As I have stated above,[20] this type of risk must not have a negative effect on the right of the person concerned to have his or her application for asylum processed with the requisite speed.

64. If the requesting Member State were to interrupt the time limit, probably indefinitely, where it faced the slightest difficulty in implementing a transfer decision, that would have precisely such a negative effect. The approach favoured by the EU legislature, as regards the allocation of risks in

17 Judgment of 21 December 2011 (C-411/10 and C-493/10, EU:C:2011:865).

18 Judgment of 16 February 2017 (C-578/16 PPU, EU:C:2017:127, paragraph 89).

19 Werdermann, D., 'Dublin-Überstellungsfristen in der Coronakrise: Die Taschenspielertricks des BAMF', *Legal Tribune Online*, 9 April 2020; Werdermann considers that the grounds of impossibility in carrying out the transfer which give rise to an extension of the time limit are exhaustively governed by Article 29(2) of the Dublin III Regulation. More specifically, that provision concerns situations in which the person concerned is imprisoned or absconds. In all other cases, the Member State which is unable to comply with the time limit bears the risk of practical impossibility in carrying out the transfer, and the right of the applicant for asylum to rapid processing of his or her application for protection prevails.

20 See point 57 of this Opinion.

the management of the system established by the Dublin III Regulation, would be bypassed if the Member State was able to escape its obligations by preventing a transfer of responsibility pursuant to Article 29(2) of that regulation.

65. The considerations just set out apply a fortiori in circumstances such as those of the main proceedings, involving a global pandemic which, as a situation of force majeure, cannot be ascribed either to the asylum seeker or to the Member State which is, in principle, responsible for examining the application for international protection. In the light of the considerations set out above, the system established by the Dublin III Regulation dictates that the Member State which has ordered the removal of the asylum seeker is the Member State which bears the risk of practical impossibility in carrying out the transfer.

66. There is no material difference between that situation and other situations which are regarded as cases of force majeure and may prevent the transfer from taking place, such as sudden illness of the person concerned, an unexpected technical fault in the aircraft assigned to the transfer flight, or a sudden change in weather conditions which makes the journey impossible.[21] Under the principle of equal treatment, these broadly comparable situations must not be treated differently.[22]

67. I would also draw attention to the fact that, in its guidance on the implementation of relevant EU provisions in the area of asylum and return procedures and on resettlement, adopted in the light of the COVID-19 pandemic,[23] the Commission expressly recognises the difficulties confronting the Member States in such circumstances. That having been said, I would note that the Commission emphasises the need to '*resume transfers as soon as practically possible* in view of the evolving circumstances' (emphasis added).

68. The Commission's statement in that document that 'where a transfer to the responsible Member State is not carried out within the applicable time limit, responsibility *shifts to the Member State that requested the transfer* pursuant to Article 29(2) of the Dublin [III] Regulation' seems to me to be of particular relevance in examining the present cases. That statement must be read in conjunction with the assessment set out in the same paragraph that '*no provision of the Regulation allows to derogate from this rule* in a situation such as the one resulting from the COVID-19 pandemic' (emphasis added). It seems to me that that assessment, which moreover supports the interpretation set out in this Opinion, is correct.[24]

[21] Petterson, P., 'Abschiebungen und Corona – Auswirkungen der Pandemie auf die Asylrechtsprechung', *Zeitschrift für Ausländerrecht und Ausländerpolitik*, No 7, 2020, p. 232; Petterson considers that the fact that a Member State cannot take charge of persons due to the pandemic constitutes a case of *force majeure*.

[22] Judgment of 15 April 2010, *Gualtieri* v *Commission* (C-485/08 P, EU:C:2010:188, paragraph 70).

[23] Communication from the Commission 'COVID-19: Guidance on the implementation of relevant EU provisions in the area of asylum and return procedures and on resettlement' (2020/C 126/02) (OJ 2020 C 126, p. 12).

[24] Neumann, C., 'Offene Fragen rund um die Aussetzung der sofortigen Vollziehung in Dublin-Verfahren durch das BAMF', *Zeitschrift für Ausländerrecht und Ausländerpolitik*, No 9, 2020, p. 319; Neumann does not consider the pandemic to be a justification for interrupting the time limit for transfers, as laid down by the Dublin III Regulation. Neumann equally does not consider that there is any room for application by analogy, on the basis that, in his view, there is no lacuna. He interprets the Commission's guidance as meaning that the Member States cannot treat the time limits referred to above as optional or has having been left to their discretion.

(3) Considerations relating to legal certainty in the context of the management of the Common European Asylum System

69. Furthermore, I think it is useful in this context to mention two further cases of temporary practical impossibility, already regulated by the EU legislature, in which Article 29(2) of the Dublin III Regulation provides not for an indefinite interruption of the time limit, but for the transfer period to be extended to a maximum of one year, if it has been impossible to carry out the transfer because the person concerned is in prison, or to a maximum of 18 months, if the person concerned absconds. These examples demonstrate that the EU legislature has sought to *lay down clear time limits in the interests of legal certainty*, by making the procedures of the Common European Asylum System sufficiently foreseeable to all Member States.

70. These situations, which have been addressed by specific legislation, support the observation that, according to the assessment of the EU legislature, derogations from the objective of rapid processing must be exceptional and are only possible on certain grounds recognised as legitimate. Among those grounds are conduct (imprisonment and absconding) which can be ascribed to the applicant for asylum. Another ground is the need to *guarantee effective judicial protection* of the applicant, which follows from the interaction between Article 27(3) and (4), on the one hand, and Article 29(1), on the other, of the Dublin III Regulation. In other words, the objective of rapid processing must give way to other interests which are protected by the legislature. In contrast, in circumstances which cannot be ascribed to the applicant or which do not relate to judicial protection of the applicant, it is the requesting Member State which must bear the risk of the transfer becoming impossible, or at least difficult, to arrange. [25]

71. Consequently, it seems to me that the considerations set out by the referring court, suggesting that there is an 'unforeseen gap in the regulation', with the consequence that Article 27(4) of the Dublin III Regulation should be applied by analogy, and that the time limit for transfer laid down by Article 29(1) of that regulation can be interrupted, are without foundation. On the contrary, the examples set out in the preceding points of the present Opinion militate in favour of an interpretation according to which *responsibility is transferred to the requesting Member State where the transfer is not carried out within the six-month time limit*, in accordance with Article 29(2) of that Regulation.

72. I therefore share the concerns expressed by the Swiss Government as regards an overly broad interpretation of the scope of Article 27(4) of the Dublin III Regulation. In particular, I consider that permitting the national administrative authorities to suspend implementation of the transfer decision 'until further notice' ('bis auf Weiteres' in German) and thus, at least for the time being, indefinitely, would *undermine legal certainty* in that the States party to the Dublin system would no longer be able to rely on firm time limits.

73. Other points of uncertainty would arise, furthermore, from the fact that on an interpretation such as that proposed by the referring court, the States party to the Dublin system would be able to point to factual obstacles to the transfer, and on each occasion this would have the effect of interrupting time limit for transfer, which would only begin to run again when it became possible to carry out the transfer. It is right to be concerned that such an interpretation might give rise to significant problems of competence as between the Member States concerned. The proper functioning of the Common European Asylum System would then be *significantly undermined*.

[25] See, to that effect, Lehnert, M. and Werdermann, D., 'Aussetzungen der Dublin-Überstellungen durch das Bundesamt für Migration und Flüchtlinge während der Corona-Krise', *Neue Zeitschrift für Verwaltungsrecht*, Vol. 39, No 18, 2020, p. 1310.

2. Interim conclusion

74. For the reasons set out above, I consider that Article 27(4) of the Dublin III Regulation must be interpreted as covering suspension decisions taken by the national administrative authorities on the basis of *doubts concerning the legality of the transfer decision which have been raised in the appeal brought by the person concerned*. On the other hand, that provision does not cover decisions of the national administrative authorities that are based on other considerations, in particular the interest of those authorities in having the decision suspended in order to avoid responsibility being transferred to the requesting State.

D. The grounds put forward by the German administrative authorities which ordered the suspension of implementation of the decision to transfer the applicants in the main proceedings

1. The claimed practical impossibility in implementing the transfer, resulting in potential illegality of the transfer decision

75. The next question arising is whether the claimed practical impossibility of carrying out the transfer of an applicant for asylum, arising from the COVID-19 pandemic, is, in the circumstances described by the referring court, a legitimate ground for the national authorities to invoke those provisions. In order to answer that question, it is necessary to consider whether the decision taken by the German administrative authorities in the cases before the referring court falls within the scope of Article 27(4) of the Dublin III Regulation, as defined in the preceding point of the present Opinion.

76. As has been explained in the preceding points, in examining the scope of Article 27(4) of the Dublin III Regulation, it is crucial to establish whether the doubts as to the legality of the transfer decision, arising from the fact that it is impossible, due to the COVID-19 pandemic, to carry out the transfer, have been *raised in the appeal* brought by the person concerned.

77. According to the information provided by the referring court, the suspension of implementation ordered by the German authorities is a matter of judicial protection in a situation of temporary impossibility in carrying out the transfer, as removal cannot be ordered until it is established that it can be carried out. The referring court explains that, under German law, if the removal cannot be carried out, the legality of the removal order is doubtful. That argument could be understood as meaning that what the office was claiming to have achieved, through the suspension, was *to have avoided a situation in which it would have been obliged to implement an illegal administrative decision*.

78. The background to the dispute in the main proceedings leads me to consider, however, that the German administrative authorities may in fact have decided to suspend the implementation of the transfer of the applicants in the main proceedings for reasons which are not envisaged by Article 27(4) of the Dublin III Regulation. There are certain indications that those administrative authorities adopted a measure which does not fall within the substantive scope of that provision. I will first set out my point of view in an analysis seeking to establish *the limits imposed by EU law on the latitude available to the Member States in applying that provision*. I will then identify the matters which, in my view, give rise to doubts as to whether it has been correctly applied.

2. The requirement of an 'appeal' or 'review' before a national administrative 'court or tribunal'

79. I would observe at the outset that Article 27(4) of the Dublin III Regulation provides unequivocally that 'the competent authorities may decide, acting *ex officio*, to suspend the implementation of the transfer decision *pending the outcome of the appeal or review*' (emphasis added). As has already been stated in this Opinion,[26] Article 27(4) of the Dublin III Regulation enables the national administrative authorities to have regard to the objective of guaranteeing the asylum seeker effective judicial protection.

80. In that regard, I would observe that, as can be seen, first, from the terminology employed in that provision and, second, by reading it in conjunction with paragraph 1 ('before a court or tribunal'), the administrative authorities cannot themselves rule on such an 'appeal' or 'review', and it is only the competent court hearing the matter which has that power. In other words, the administrative authorities can effect a *suspension ex officio*, but the *judicial review* itself – on the basis of which that measure is taken – cannot be carried out by them.

81. The suspension by the national administrative authorities of the implementation of a transfer decision where there is no case pending before a court cannot, therefore, be regarded as a measure covered by the legal basis referred to above, as such a measure is not taken 'pending the outcome of the appeal or review'. Consequently, such a suspension of the implementation of the transfer decision cannot have the effect of interrupting the time limit for transfer pursuant to Article 29(1) of the Dublin III Regulation. The same applies to a suspension decision adopted subsequently, or in other words after a definitive judgment has been given by the competent court.

82. When asked, at the hearing, about the extent of the administrative practice of the office that is at issue, the German Government assured the Court that the implementation of decisions relating to asylum seekers had not been suspended for all applicants, but *only for those who had brought an appeal before the national administrative courts*. That, moreover, is the situation of the applicants in the main proceedings. Accordingly, I conclude at this point in the analysis that one of the necessary conditions of applicability of Article 27(4) of the Dublin III Regulation, namely that an appeal is pending, is met in the present case.

3. Suspending implementation of a transfer decision 'until further notice' goes beyond the limits imposed by EU law

83. Although the Dublin III Regulation is directly applicable in the Member States, it is nonetheless necessary to have recourse to national law for the effective implementation of a number of its provisions. That is true, in particular, of the national procedural rules, which must be interpreted in a manner consistent with the letter and purpose of EU law. As follows from the exegesis set out in this Opinion,[27] Article 27(4) of the Dublin III Regulation requires an intrinsic link between the appeal against a transfer decision brought before the court and the suspensive effect granted by the administrative authorities. The expression '*pending the outcome* of the appeal' (emphasis added) indicates that the decision to suspend the implementation of the transfer decision *must remain in effect until the conclusion of the ongoing judicial proceedings*.

[26] See point 55 of this Opinion.

[27] See points 47 to 74 of this Opinion.

84. In that regard, I note that the office has suspended the implementation of the removal orders 'until further notice', pursuant to Paragraph 80(4) of the Code of Administrative Court Procedure. This means that it is to be expected that the transfer decision at issue will be implemented when the office considers it appropriate. From a semantic point of view, the phrase 'until further notice' connotes a *broad discretion* which, in my view, goes well beyond the latitude conferred on the national administrative authorities by Article 27(4) of the Dublin III Regulation.

85. Indeed, contrary to that provision, a suspension pursuant to Paragraph 80(4) of the Code of Administrative Court Procedure does not in any way require that an 'appeal' or an application for 'review' has been brought before a court or tribunal. Furthermore, the expression 'until further notice' entails that the implementation of an administrative act is suspended subject to a later decision, which is *left to the sole discretion of the administrative authorities*.[28]

86. In the absence of detailed information, it is logical to assume that the discretionary power claimed by the administrative authorities in the present case even extends to *determining the duration of the suspension*, whereas Article 27(4) of the Dublin III Regulation permits such a suspension only until '*the outcome* of the appeal or review' (emphasis added), or in other words for *the duration of the court proceedings*, thus ensuring that an applicant for asylum is not escorted to the border before the court hearing the appeal or review has ruled on the legality of the transfer decision. The latitude granted by the EU legislature to the national administrative authorities thus relates to *a specific objective* and, in principle, is *limited in time*. Those considerations reinforce my view that there are fundamental discrepancies between the office's approach and the legal framework laid down by EU law.

87. More specifically, it is conceivable that the suspension of the implementation of transfer decisions might be motivated by interests of the administrative authorities themselves, and in particular *their interest in preventing a transfer of responsibility* to the requesting Member State – in the present cases the Federal Republic of Germany – pursuant to Article 29(1) of the Dublin III Regulation, in view of the difficulties encountered by the administrative authorities of that Member State in carrying out transfers in a timely manner during the pandemic.[29] The effect of interrupting the six-month time limit laid down by Article 29(1) of the Dublin III Regulation is that the administrative authorities have 'additional time' in which to implement the transfers.

88. That view seems to me to be supported, at least in part, by the explanatory remarks of the applicants in the main proceedings, who, at the hearing, referred to the organisational challenges facing the German authorities. To apply Article 27(4) of the Dublin III Regulation on the basis of that type of consideration would, however, run counter to the objective of rapid processing of applications for asylum, referred to in recital 5 of that regulation.[30] The effect of suspending the

[28] Neumann, C., 'Offene Fragen rund um die Aussetzung der sofortigen Vollziehung in Dublin-Verfahren durch das BAMF', *Zeitschrift für Ausländerrecht und Ausländerpolitik*, No 9, 2020, p. 318. Neumann recognises that in a pandemic, there may be doubts as to the legality of a transfer decision. Nonetheless, he considers that a suspension of implementation on the basis of Paragraph 80(4) of the Code of Administrative Court Procedure is not, in reality, intended to guarantee a judicial review, but to put the administrative authorities in a position to resume the transfers, following a revocation of the decision to suspend, as soon as the practical difficulties arising from the pandemic have ceased to exist.

[29] Petterson, P., 'Abschiebungen und Corona – Auswirkungen der Pandemie auf die Asylrechtsprechung', *Zeitschrift für Ausländerrecht und Ausländerpolitik*, No 7, 2020, p. 232. Petterson does not consider that a national administrative authority can stop time running, for the purposes of the time limit for transfer, as it sees fit. That time limit is essential in order to meet the conditions of Article 27(4) of the Dublin III Regulation, namely to ensure judicial protection for the applicant for asylum. A suspension with the sole purpose of stopping time running would be an 'abuse of rights'. Petterson does not consider that the objective behind the office's approach is to guarantee effective judicial protection.

[30] See point 57 of this Opinion.

implementation of a transfer decision *indefinitely* is that the person concerned is unnecessarily left waiting for a longer period, when that time could be used to examine his or her application for asylum.

89. As the Commission rightly observed at the hearing, it seems unacceptable for a person who has applied for international protection to be left in a position of legal uncertainty for a long period. Furthermore, account must be taken of the fact that, in so far as the end of a global pandemic such as the COVID-19 pandemic cannot be predicted with sufficient certainty, the office's approach amounts in practice to an indefinite postponement, the effect of which would be to paralyse the Common European Asylum System. Clearly, such an outcome is not at all desirable. Such an approach would undermine legal certainty and compromise the proper functioning of the Common European Asylum System. [31]

4. The suspension of execution of a transfer decision cannot have the principal objective of preventing responsibility from passing to the requesting Member State

90. With regard to the specific reasons said to have prompted the office to suspend implementation of the transfer decisions, I would observe that the arguments advanced by the German Government and the referring court, the tenor of which is that *the interests of the Member State intending to carry out the transfer prevail over those of the asylum seeker*, are to some extent inconsistent with another line of argument advanced by that government, to the effect that the decision to suspend referred to above was taken in the interests of guaranteeing effective judicial protection of the asylum seeker. That inconsistency in the arguments put forward gives rise to doubts as to the true reasons for the office's approach.

91. Lastly, I would observe, though it is not strictly necessary, that it is apparent from the orders for reference that the office's decision to suspend implementation of the transfer decision was only taken after a German court dismissed the applicants' application for interim measures which would have given suspensive effect to their appeal. Accordingly, the competent court had given a ruling in advance, and had determined that it was not necessary for the applicants in the main proceedings to have interim judicial protection. It is therefore logical to suppose that *that judicial decision was based on very different reasoning from the decision taken subsequently*, during the pandemic, by the administrative authorities.

92. It seems to me, therefore, that the office's decision to suspend implementation of the transfer decision *was not taken with the intention of awaiting the 'outcome' of the judicial proceedings*, as required by Article 27(4) of the Dublin III Regulation, but on the basis of considerations alien to those contemplated by that provision, more specifically to prevent a transfer of responsibility pursuant to Article 29(1) of the Dublin III Regulation. In such circumstances, the fact that proceedings were pending before a court or tribunal was *entirely fortuitous*. [32] From that point of view, the argument advanced by the German Government, to the effect that the German administrative authorities had, ultimately, 'responded favourably to the application for judicial protection made by the applicants in the main proceedings' does not seem to me to be persuasive.

[31] See point 69 et seq. of this Opinion.

[32] Lehnert, M. and Werdermann, D., 'Aussetzungen der Dublin-Überstellungen durch das Bundesamt für Migration und Flüchtlinge während der Corona-Krise', *Neue Zeitschrift für Verwaltungsrecht*, Vol. 39, No 18, 2020, pp. 1310 and 1311. Lehnert and Werdermann consider that the decision to suspend implementation of the transfer decisions was not taken '*on the basis of* an appeal' so much as '*at a time when* an appeal was pending' (emphasis added). In their view, it is impossible to identify, in the decisions to suspend, any reason relating to the persons concerned that would justify a derogation from the objective of rapid processing.

93. In those circumstances, it must be asked whether it would have been more appropriate, given the practical impossibility in carrying out the transfer, to revoke the removal decision taken in respect of the person concerned and assume responsibility for examining his or her request for international protection, in the exercise of the discretion conferred by Article 17(1) of the Dublin III Regulation. I would point out that, under Article 67(2) and Article 80 TFEU, the Common European Asylum System, of which the Dublin III Regulation forms part, is based on 'solidarity between Member States' and 'fair sharing of responsibility' between them. As is apparent from recital 22 of that regulation, such solidarity is a 'pivotal element' in that system. The proposed approach would have reflected a greater solidarity, particularly towards those Member States which were facing the consequences of the pandemic at the same time as significant migratory flows. [33]

94. It is certainly conceivable that, where proceedings are pending before a national court or tribunal, the argument concerning the practical impossibility of implementing a transfer decision might also form part of the subject matter of the proceedings before the administrative court or tribunal. However, this requires that *national procedural law permits the parties to raise that argument in those proceedings*. In such a case, it could quite properly be said that a decision to suspend had been taken '*pending* the outcome of the appeal or review', as that expression is used in Article 27(4) of the Dublin III Regulation (emphasis added). As I have already stated in this Opinion, [34] that provision must be interpreted as relating to suspension decisions taken by the national administrative authorities on the basis of doubts concerning the legality of the transfer decision which have been raised in the appeal brought by the person concerned.

95. In that regard, it suffices to note, as regards the main proceedings, that there is nothing to indicate that the claimed illegality arising out of practical impossibility in carrying out the transfer has been raised in the appeals brought by the applicants in the main proceedings. In any event, the orders for reference do not contain any detailed information in that regard. Accordingly, it seems to me that, even on that assumption, the applicability conditions of Article 27(4) of the Dublin III Regulation are not met in the present case.

96. That having been said, I consider that it is for the referring court to assess the facts with a view to establishing, with the necessary certainty, whether the reasoning which led the office to suspend the implementation of transfer decisions was based *entirely on preventing responsibility from being transferred* to the Federal Republic of Germany under Article 29(2) of the Dublin III Regulation, in view of the difficulties encountered by the German administrative authorities in carrying out transfers in a timely manner during the pandemic, or in order to *guarantee effective judicial protection* of the applicants in the main proceedings. [35] In the former case, it is not permissible to interrupt the time limit for transfer.

97. In the latter case, *the possibility of interrupting the time limit for transfer must be subject to certain conditions*. More specifically, the office should have the right to invoke Article 27(4) and Article 29(1) of the Dublin III Regulation, on the basis of temporary practical impossibility in carrying out transfers, resulting from the COVID-19 pandemic, in so far as the decision to

[33] See judgment of 26 July 2017, *Jafari* (C-646/16, EU:C:2017:586, paragraph 100).

[34] See point 74 of this Opinion.

[35] In that context, I would observe that the case-law of the Bundesverwaltungsgericht (Federal Administrative Court) recognises the risk of an 'abuse of rights' in the application of Article 27(4) of the Dublin III Regulation, inter alia in circumstances where a decision to suspend a transfer has been taken by the German administrative authorities *with the sole purpose of interrupting the time limit*, because failings on the part of the administration have made it impossible to comply with the time limit (see judgment of the Bundesverwaltungsgericht (Federal Administrative Court) of 8 January 2019, BVerwG 1 C 16.18, paragraph 27).

suspend has been taken on the basis of doubts concerning the legality of the transfer decision which have been raised in an appeal against a transfer decision, or a review of a transfer decision, relating to the person concerned.

5. Interim conclusion

98. There are some indications that the office may have suspended implementation of the transfer decisions in order to prevent a transfer of responsibility, following expiry of the six-month period provided for in Article 29(2) of the Dublin III Regulation, resulting from difficulties in transferring asylum seekers to other Member States, in a timely manner, during the pandemic.

99. In so far as *that does not constitute, in itself, a legitimate reason for interrupting the time limit for transfers* pursuant to Article 27(4) and Article 29(1) of that regulation, it is appropriate to ask the referring court to determine whether the decision to suspend was taken *mainly on the basis of doubts concerning the legality of the transfer decision*.

100. I would add, however, that such a ground is only relevant to the application of the provisions referred to above if the doubts concerning legality have been *raised in proceedings before a court or tribunal*, more specifically in an appeal against or an application for revision of a transfer decision relating to the person concerned.

VI. Conclusion

101. In light of the foregoing considerations, I suggest that the Court of Justice should answer the questions referred by the Bundesverwaltungsgericht (Federal Administrative Court, Germany) as follows:

(1) The administration of the requesting Member State has the power, subject to certain conditions, to suspend the implementation of a transfer decision and, consequently, to interrupt the time limit for transfer pursuant to Article 27(4) and Article 29(1) of Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 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.

(2) The administration of the requesting Member State may exercise that power in so far as the suspension of implementation is ordered mainly on the basis of doubts concerning the legality of the transfer decision which have been raised before a national court or tribunal in an appeal against a transfer decision, or an application for review of a transfer decision, relating to the person concerned.

(3) The administration's interest in avoiding responsibility being transferred to the requesting Member State, following expiry of the six-month period provided for in Article 29(2) of Regulation No 604/2013, as a result of difficulties in transferring asylum seekers to other Member States, in a timely manner, during the COVID-19 pandemic, is not in itself a legitimate reason for interrupting the time limit for transfer, and it is therefore incumbent on the referring court to establish the reasons which led the administration to suspend the transfer decisions concerned.