Reports of Cases

OPINION OF ADVOCATE GENERAL
RANTOS
delivered on 2 February 2021 [1]

Case C-194/19

H. A.
v
État belge

(Request for a preliminary ruling from the Conseil d'État (Council of State, Belgium))

(References for a preliminary ruling – Area of freedom, security and justice – Regulation (EU) No 604/2013 – Determination of the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national – Transfer of responsibility – Article 27 – Legal remedies – Scope of judicial review – Obligation for national courts to take account of circumstances subsequent to the adoption of the transfer decision that could affect the determination of the Member State responsible for examining the application for international protection – Conditions)

I. Introduction

1. An applicant for international protection lodged his application in one Member State and was then made the subject of a decision for transfer to another Member State. A few days later, his brother arrived in the first Member State and there lodged an application for international protection.

2. Must the court or tribunal in the first Member State hearing the applicant's action for annulment of the transfer decision take account of the circumstance, arising after the adoption of that decision, that the applicant's brother has arrived and has lodged an application for international protection? That, in substance, is the question asked by the Conseil d'État (Council of State, Belgium). [2]

3. The present case will require the Court to expound its case-law on the interpretation of Regulation (EU) No 604/2013 [3] ('the Dublin III Regulation'), in the light of the Charter of Fundamental Rights of the European Union ('the Charter'). In particular, the Court will need to

[1] Original language: French.

[2] The situation here is different from the situation where the facts relied on by the applicant already existed at the time when the application for international protection was lodged, which is the issue in Case C-18/20, *Bundesamt für Fremdenwesen und Asyl (Subsequent application for international protection)*, currently pending before the Court.

[3] Regulation 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 (OJ 2013 L 180, p. 31).

consider the framework within which judicial review of a decision to transfer an applicant for international protection is to be carried out, and whether the arrival of a family member, the applicant's brother in this case, who is also an applicant for international protection constitutes a circumstance capable of affecting the determination of the Member State responsible for examining the application for international protection.

II. Legal framework

A. EU law

1. The Dublin III Regulation

4. Recitals 4, 5 and 19 of the Dublin III Regulation read 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]. In order to ensure that international law is respected, an effective remedy against such decisions should cover … the examination [both] 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 1 of the regulation, entitled 'Subject matter', states:

'This 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 …'

6. Article 2 of the regulation, entitled 'Definitions', provides, in point (g) thereof:

'For the purposes of this Regulation:

…

(g) "family members" means, in so far as the family already existed in the country of origin, the following members of the applicant's family who are present on the territory of the Member States:

– the spouse of the applicant or his or her unmarried partner in a stable relationship, where the law or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to third-country nationals,

– the minor children of couples referred to in the first indent or of the applicant, on condition that they are unmarried and regardless of whether they were born in or out of wedlock or adopted as defined under national law,

– when the applicant is a minor and unmarried, the father, mother or another adult responsible for the applicant, whether by law or by the practice of the Member State where the adult is present,

– when the beneficiary of international protection is a minor and unmarried, the father, mother or another adult responsible for him or her whether by law or by the practice of the Member State where the beneficiary is present'.

7. Article 3 of the regulation, entitled 'Access to the procedure for examining an application for international protection', provides, in paragraphs 1 and 2 thereof:

'1. Member States shall examine any application for international protection by a third-country national or a stateless person who applies on the territory of any one of them, including at the border or in the transit zones. 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.

2. Where no Member State responsible can be designated on the basis of the criteria listed in this Regulation, the first Member State in which the application for international protection was lodged shall be responsible for examining it.

Where it is impossible to transfer an applicant to the Member State primarily designated as responsible because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the [Charter], the determining Member State shall continue to examine the criteria set out in Chapter III in order to establish whether another Member State can be designated as responsible.

…'

8. Article 7 of the Dublin III Regulation, entitled 'Hierarchy of criteria', is worded as follows in paragraph 2 thereof:

'The Member State responsible in accordance with the criteria set out in this Chapter shall be determined on the basis of the situation obtaining when the applicant first lodged his or her application for international protection with a Member State.'

9. Article 10 of the regulation, entitled 'Family members who are applicants for international protection', states:

'If the applicant has a family member in a Member State whose application for international protection in that Member State has not yet been the subject of a first decision regarding the substance, that Member State shall be responsible for examining the application for international protection, provided that the persons concerned expressed their desire in writing.'

10. Article 12 of the regulation, entitled 'Issue of residence documents or visas', provides, in paragraph 2 thereof:

'Where the applicant is in possession of a valid visa, the Member State which issued the visa shall be responsible for examining the application for international protection, unless the visa was issued on behalf of another Member State under a representation arrangement as provided for in Article 8 of Regulation (EC) No 810/2009 of the European Parliament and of the Council, of 13 July 2009, establishing a Community Code on Visas. [4] In such a case, the represented Member State shall be responsible for examining the application for international protection.'

11. Article 17 of the Dublin III Regulation, entitled 'Discretionary clauses', provides, in paragraph 1 thereof:

'By way of derogation from Article 3(1), each Member State may decide to examine an application for international protection lodged with it by a third-country national or a stateless person, even if such examination is not its responsibility under the criteria laid down in this Regulation.

The Member State which decides to examine an application for international protection pursuant to this paragraph shall become the Member State responsible and shall assume the obligations associated with that responsibility. …

…'

12. Article 27 of the regulation, entitled 'Remedies', is worded as follows:

'1. The applicant … shall have the right to an effective remedy, in the form of an appeal or a review, in fact and in law, against a transfer decision, before a court or tribunal.

2. Member States shall provide for a reasonable period of time within which the person concerned may exercise his or her right to an effective remedy pursuant to paragraph 1.

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

4 OJ 2009 L 243, p. 1.

(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.

…'

13. Article 29 of the regulation, entitled 'Modalities and time limits', states, in paragraphs 1 and 2 thereof:

'1. The transfer of the applicant … from the requesting Member State to the Member State responsible shall be carried out in accordance with the national law of the requesting Member State, 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).

…

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.'

2. Directive 2013/32/EU

14. Article 1 of Directive 2013/32/EU[5] states:

'The purpose of this Directive is to establish common procedures for granting and withdrawing international protection pursuant to Directive 2011/95/EU. [6]'

[5] Directive of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (OJ 2013 L 180, p. 60).

[6] Directive of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (OJ 2011 L 337, p. 9).

15. Article 46 of Directive 2013/32 provides:

'1. Member States shall ensure that applicants have the right to an effective remedy before a court or tribunal, against the following:

(a) a decision taken on their application for international protection, including a decision:

(i) considering an application to be unfounded in relation to refugee status and/or subsidiary protection status;

…

3. In order to comply with paragraph 1, Member States shall ensure that an effective remedy provides for a full and *ex nunc* examination of both facts and points of law, including, where applicable, an examination of the international protection needs pursuant to Directive [2011/95], at least in appeals procedures before a court or tribunal of first instance.

4. Member States shall provide for reasonable time limits and other necessary rules for the applicant to exercise his or her right to an effective remedy pursuant to paragraph 1. The time limits shall not render such exercise impossible or excessively difficult.

…'

B. Belgian law

16. Article 39/2(2) of the loi sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers (Law on access to the territory, residence, establishment and removal of foreign nationals) of 15 December 1980,[7] in the version applicable at the material time in the main proceedings ('the Law of 15 December 1980'), states:

'The Conseil [du contentieux des étrangers (Belgian Asylum and Immigration Board; 'the Board')] shall give a ruling, by way of judgment, on other actions for annulment on the ground of infringement of procedural requirements which are essential or breach of which leads to nullity, or on the ground of abuse or misuse of powers.'

17. The second and fourth subparagraphs of Article 39/82(4) of that law provide:

'If the foreign national is the subject of a removal or refoulement order the enforcement of which is imminent, in particular if he or she is kept at a specific place as referred to in Articles 74/8 and 74/9 or is placed at the disposal of the government, he or she may, if he or she has not yet applied for the suspension of that order by way of the ordinary procedure, seek suspension of enforcement of that order on grounds of extreme urgency within the period referred to in Article 39/57(1)(3).

…

The President of the Chamber or the judge for asylum and immigration proceedings shall examine closely and rigorously all the evidence placed before him or her, in particular evidence that suggests that there is reason to believe that the enforcement of the contested decision would expose the

[7] *Moniteur belge* of 31 December 1980, p. 14584.

applicant to the risk of suffering a violation of fundamental human rights from which no derogation is permissible under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms[, signed at Rome on 4 November 1950 ('the ECHR')], which shall be the subject of a close and rigorous review.'

18. Article 39/84 of that law provides:

'Where an application for suspension of a decision is brought before the Board in accordance with Article 39/82, the Board shall have sole jurisdiction, provisionally and subject to the conditions laid down in Article 39/82(2)(1), to order any measures necessary to safeguard the interests of the parties or of the persons having an interest in the outcome of the case, with the exception of measures relating to civil-law rights.

Such measures shall be ordered, after the parties have been heard or have been duly summoned to appear, by reasoned decision of the President of the Chamber having jurisdiction to rule on the substance or by the judge for asylum and immigration proceedings appointed by the President for that purpose.

In cases of extreme urgency, interim measures may be ordered without the parties or some of them having been heard.

Article 39/82(2)(2) shall apply to decisions given pursuant to this article.

The King shall, by decree deliberated by the Council of Ministers, determine the procedure applicable to the measures covered by this article.'

19. Article 39/85(1) and (3) of the same law is worded as follows:

'1. If the foreign national is the subject of a removal or refoulement order the enforcement of which is imminent, in particular if he or she is subsequently kept at a specific place as referred to in Articles 74/8 and 74/9 or is placed at the disposal of the government, the foreign national may request, by way of interim measures in accordance with Article 39/84, that the Board examine as soon as practicable an ordinary application for suspension that he or she has already lodged, provided that it has been registered on the roll and provided that the Board has not yet given a decision with regard to him or her. Such application for interim measures shall be brought within the period referred to in Article 39/57(1)(3).

…

3. Without prejudice to paragraph 1, once the Board has received the application for interim measures, the order for removal or refoulement shall not be enforced until the Board has given a ruling on the request. If suspension is not granted, the order shall once again be enforceable.'

III. The dispute in the main proceedings, the question referred for a preliminary ruling and the procedure before the Court

20. On 22 May 2017, the applicant, H. A., who is of Palestinian origin, arrived in Belgium. The following day, he made an application for asylum in that Member State.

21. On 31 May 2017, the Belgian authorities heard the applicant with a view to determining which Member State was responsible for examining his application for international protection, in the context of the application of the Dublin III Regulation.

22. On 22 June 2017, the Belgian authorities sent the Spanish authorities a request to take charge of the applicant, on the basis of Article 12(2) of that regulation. On 4 July 2017, the Spanish authorities agreed to take charge of the applicant.

23. On 1 August 2017, the Belgian authorities took a decision refusing the applicant the right of residence and ordered him to leave the territory of Belgium ('the decision of 1 August 2017').

24. On 25 August 2017, the applicant brought an action for the annulment of that decision before the Board, together with an application for suspension of enforcement. He stated that his brother had arrived in Belgium on 22 August 2017, that his brother had lodged an application for asylum in that Member State and that, because of the similarities between his application for asylum and that of his brother, it was indispensable for the two applications to be examined together by the Belgian authorities.

25. By judgment of 30 November 2017, the Board dismissed that action, finding that the arrival in Belgium of the applicant's brother and the latter's application for international protection, then still pending, were circumstances arising after the decision of 1 August 2017 that could have no bearing on the lawfulness of that decision.

26. On 28 December 2017, the applicant brought an appeal on a point of law against that judgment before the Conseil d'État (Council of State), arguing, inter alia, that the judgment infringed Article 27 of the Dublin III Regulation, read together with Article 47 of the Charter.

27. In support of that appeal, the applicant stated that, at the time when he was heard by the Belgian authorities for the purposes of determining which Member State was responsible for examining his application for international protection, that is to say, on 31 May 2017, he had not been in a position to rely on the fact that his brother, who had arrived in Belgium subsequently, had lodged an application for asylum in that Member State or on the fact that the Belgian authorities had recognised their responsibility to examine his brother's application. It was therefore only in his action challenging the decision of 1 August 2017 that he had been able to put forward these new facts. The applicant has argued that the applications for asylum which he and his brother lodged, which were closely connected on account of the similar nature of the persecution which they had been suffering, should have been examined together by the Belgian authorities. In this connection, the applicant takes issue with the Board's refusal to take these new circumstances into consideration, on the ground that they arose after the indispensable decision of 1 August 2017, and with the Board's having confined itself to a review of lawfulness, even though the new circumstances were potentially of decisive importance in order for his application for asylum to be assessed fairly and might have prevented a decision to transfer him from being taken.

28. The Conseil d'État (Council of State) points out that, in accordance with Article 39/2 of the Law of 15 December 1980, the Board's judicial review of a transfer decision taken in the context of the Dublin III Regulation addresses the lawfulness of such a decision and is based on the case file and the information in the Board's possession. In this instance, the Board's refusal to take facts subsequent to the adoption of the decision of 1 August 2017 into account is therefore in accordance with that provision.

29. The referring court does, however, harbour doubts about the conformity with EU law and, in particular, with the right to an effective remedy provided for in Article 27 of the Dublin III Regulation, read together with Article 47 of the Charter, of the situation where judicial review of a transfer decision taken in the context of the Dublin III Regulation is carried out without consideration being given, for the purposes of examining the lawfulness of that decision, of circumstances arising after the adoption of the decision.

30. The referring court states that, as a court of cassation, it does not have jurisdiction to assess, in practice, the effect that the new circumstances on which the applicant relies could have on the determination of the Member State responsible for examining the applicant's application for international protection.

31. It was in those circumstances that the Conseil d'État (Council of State) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Must Article 27 of [the Dublin III Regulation], considered alone or in conjunction with Article 47 of the [Charter], be interpreted as requiring a national court, in order to guarantee the right to an effective remedy, to take account, where appropriate, of circumstances arising subsequent to a "Dublin transfer" decision?'

32. Written observations have been lodged by the applicant, the Belgian and Netherlands Governments and the European Commission. The applicant, the Belgian Government and the Commission also made oral submissions at the hearing, which took place on 9 November 2020.

IV. Analysis

A. Admissibility

33. In its written observations, the Belgian Government maintains that there is no need to adjudicate on the request for a preliminary ruling because, the six-month time limit for effecting the transfer laid down in Article 29(2) of the Dublin III Regulation having expired, the Kingdom of Belgium has become the Member State responsible for examining the applicant's application for international protection.

34. In response to a written question put by the Court, the Conseil d'État (Council of State) indicated that it is impossible for it to decide at present, *ex officio* and without debate, whether the applicant has no further interest in the Board's judgment of 30 November 2017 being set aside, and whether an answer to the question asked is no longer necessary for the resolution of the dispute before it, in its capacity as court of cassation.

35. It is settled case-law that, in the context of the cooperation between the Court and national courts provided for in Article 267 TFEU, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of EU law, the Court is in principle bound to give a ruling. [8]

[8] Judgment of 10 December 2020, *J & S Service* (C-620/19, EU:C:2020:1011, paragraph 31 and the case-law cited).

36. In the present case, having regard to the information provided by the referring court and the position which it has taken with regard to the relevance of the question it has referred for a preliminary ruling, it must be concluded – even if, personally, I entertain serious doubts about the reasoning underlying the position taken, inter alia, in the context of an action for annulment and a review of lawfulness – that an answer from the Court to the question referred continues to be useful for the resolution of the dispute in the main proceedings.

37. Consequently, I shall examine the present request for a preliminary ruling as admissible.

B. Substance

1. The need for judicial review which takes account of circumstances arising after the adoption of a decision to transfer an applicant for international protection

38. Article 27(1) of the Dublin III regulation provides that applicants for international protection have the right to an effective remedy, in the form of an appeal or a review, in fact and in law, against a transfer decision, before a court or tribunal.

39. The scope of the remedy available to an applicant for international protection against a decision to transfer him is made clear in recital 19 of the Dublin III regulation, which states that, in order to ensure compliance with international law, the effective remedy introduced by that regulation in respect of transfer decisions should cover (i) the examination of the application of that regulation and (ii) the examination of the legal and factual situation in the Member State to which the asylum seeker is to be transferred. [9]

40. Moreover, the wording of Article 27(1) of the Dublin III Regulation mentions no limitation of the arguments that may be raised by the asylum seeker when availing him or herself of that remedy. [10]

41. The Court has already examined on a number of occasions the question of whether circumstances arising after a decision has been taken to transfer an applicant for international protection should be taken into account. It has identified the following two situations in which the court or tribunal dealing with an action challenging a transfer decision must examine such supervening circumstances.

(a) Protection of the applicant for international protection against the risk of being subjected to inhuman or degrading treatment in the Member State responsible

42. The first situation is where a transfer decision that has been adopted is not implemented so that the European Union and the Member States may comply with their obligations relating to the protection of the fundamental rights of the applicant for international protection under Article 4 of the Charter.

43. Accordingly, the Court has held that the Member States, including the national courts, may not transfer an asylum seeker to the Member State responsible where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum

[9] Judgment of 26 July 2017, *Mengesteab* (C-670/16, EU:C:2017:587, paragraph 43 and the case-law cited).

[10] Judgment of 7 June 2016, *Ghezelbash* (C-63/15, EU:C:2016:409, paragraph 36).

seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter. [11]

44. In reaching that finding, the Court referred to the case-law of the European Court of Human Rights ('the ECtHR'). [12] It should also be noted that, in another case, the ECtHR held that, in assessing an alleged risk of treatment contrary to Article 3 of the ECHR in respect of aliens facing expulsion or extradition, *a full and* ex nunc *assessment* is called for, as the situation in the country of destination may *change in the course of time*. [13] Although reservations have been expressed, even within the ECtHR, about the need to carry out an *ex nunc* assessment, [14] it has nevertheless been confirmed. [15]

45. It is immaterial, for the purposes of the application of Article 4 of the Charter, whether it is at the very moment of the transfer, during the asylum procedure or following it that the person concerned would be exposed, because of his or her transfer to the Member State that is responsible within the meaning of the Dublin III Regulation, to a substantial risk of suffering inhuman or degrading treatment. [16]

46. The second subparagraph of Article 3(2) of the Dublin III Regulation represents a codification of the case-law of the Court. [17] Consequently, that regulation already expressly contemplates a circumstance, namely the existence of systemic flaws in the Member State responsible which result in a risk of inhuman or degrading treatment, within the meaning of Article 4 of the Charter, which, if it arises after a decision has been adopted to transfer an applicant for international protection, will preclude the enforcement of that decision.

47. In this instance, there is no suggestion in the case in the main proceedings of a risk of inhuman or degrading treatment in the Member State that was requested to take charge of the applicant. [18]

(b) The existence of circumstances subsequent to the adoption of a transfer decision which are decisive to the correction application of the Dublin III Regulation

48. The second situation in which circumstances arising after the adoption of a transfer decision should be taken into account derives from the case-law of the Court according to which the reference in recital 19 of the Dublin III Regulation to the examination of the application of the regulation in an appeal against a transfer decision, for which provision is made in Article 27(1) of the regulation, must be understood as being intended to ensure, in particular, that the criteria for

[11] Judgments of 21 December 2011, *N.S. and Others* (C-411/10 and C-493/10, EU:C:2011:865, paragraph 94), and of 10 December 2013, *Abdullahi* (C-394/12, EU:C:2013:813, paragraph 60).

[12] Judgment of 21 December 2011, *N.S. and Others* (C-411/10 and C-493/10, EU:C:2011:865, paragraph 88). The Court mentioned the judgment of the ECtHR of 21 January 2011, *M.S.S. v. Belgium and Greece* (CE:ECHR:2011:0121JUD003069609).

[13] ECtHR, 23 May 2007, *Salah Sheekh v. Netherlands* (CE:ECHR:2007:0111JUD000194804, § 136).

[14] Ravarani, G., *Évaluation de la crédibilité des demandeurs d'asile: charge de la preuve et limites de l'examen par la CEDH*, ECtHR, 2017, https://www.echr.coe.int/Documents/Speech_20170127_Ravarani_JY_FRA.pdf.

[15] See, in particular, ECtHR, 23 March 2016, *F.G. v. Sweden* (CE:ECHR:2016:0323JUD004361111, § 115).

[16] Judgment of 19 March 2019, *Jawo* (C-163/17, EU:C:2019:218, paragraph 88).

[17] Judgment of 23 January 2019, *M.A. and Others* (C-661/17, EU:C:2019:53, paragraph 84).

[18] It is apparent from the documents before the Court that, in the case in the main proceedings, the Belgian authorities examined this question in detail with regard to the applicant.

determining the Member State responsible laid down in Chapter III of the regulation are correctly applied, including the criterion for determining responsibility set out in Article 12 of the regulation. [19]

49. Thus, Article 27(1) of the Dublin III Regulation, read in the light of recital 19 thereof, may result in a Member State's responsibility being called into question, even where there are no systemic deficiencies in the asylum process or in the reception conditions for asylum applicants in that Member State resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter. [20]

50. The Court has also clarified that, as regards transfer decisions, the EU legislature has made their legality subject to the granting to the asylum seeker concerned, in Article 27 of the Dublin III Regulation, of the right to an effective remedy before a court or tribunal against such a decision, the scope of which covers both the factual and legal circumstances surrounding the decision. [21]

51. The judgment in *Shiri* [22] marks the first stage in the Court's taking account of circumstances arising after the adoption of a transfer decision, with a view to determining the Member State responsible for examining the application for international protection.

52. In the case which gave rise to that judgment, the competent Austrian authority had declared that Mr Majid Shiri's application for international protection was inadmissible, ordered his deportation and determined that his removal to Bulgaria was lawful. Mr Shiri brought an appeal against that decision, arguing that the Republic of Austria had become the Member State responsible for examining his application because the six-month period for a transfer laid down in Article 29(1) and (2) of the Dublin III Regulation had expired. In this case, the six-month period had expired on a date after that on which the transfer decision was adopted.

53. It therefore fell to the Court to determine whether it was consistent with EU law for the Austrian court hearing the appeal to take account of that circumstance, which had arisen after the adoption of the transfer decision.

54. The Court held that Article 27(1) of the Dublin III Regulation, read in the light of recital 19 thereof, and Article 47 of the Charter must be interpreted as meaning that an applicant for international protection must have an effective and rapid remedy available to him or her which enables him or her to rely on the expiry of the six-month period as defined in Article 29(1) and (2) of that regulation *that occurred after the transfer decision was adopted*. The right which national legislation such as that at issue in the main proceedings accords to such an applicant to plead circumstances subsequent to the adoption of that decision, in an action brought against it, meets that obligation to provide for an effective and rapid remedy. [23]

55. The Court further formalised its approach in its judgment in *Hasan*. [24] In the case which gave rise to that judgment, Mr Aziz Hasan had made an asylum application in Germany, but had been transferred to Italy, the Member State in which he had made his first asylum application, after his action for annulment of the transfer decision had been dismissed in Germany. He had then

[19] Judgment of 7 June 2016, *Ghezelbash* (C-63/15, EU:C:2016:409, paragraph 44).

[20] Judgment of 7 June 2016, *Karim* (C-155/15, EU:C:2016:410, paragraph 22).

[21] Judgment of 16 February 2017, *C. K. and Others* (C-578/16 PPU, EU:C:2017:127, paragraph 64).

[22] Judgment of 25 October 2017 (C-201/16, EU:C:2017:805; 'judgment in *Shiri*').

[23] Judgment in *Shiri*, paragraph 46.

[24] Judgment of 25 January 2018 (C-360/16, EU:C:2018:35; 'judgment in *Hasan*').

illegally returned to Germany. Mr Hasan brought an appeal. The German legislation provided that the court hearing an action against a transfer decision must, as a rule, decide the case on the basis of the factual situation obtaining at the time of the last hearing before that court or, where there is no hearing, at the time when the court gives its decision on the matter.

56. In its judgment in *Hasan*, the Court referred to the judgment in *Shiri* and held that an applicant for international protection must have an effective and rapid remedy available to him or her which enables him or her *to rely on circumstances subsequent to the adoption of the decision to transfer him or her*, when *the correct application of the Dublin III Regulation depends* upon those circumstances being taken into account. [25]

57. In so far as the present case is concerned, it seems to me that two lessons may be drawn from the interpretation adopted by the Court in its judgments in *Shiri* and *Hasan*.

58. First, under EU law, the competent national court or tribunal is required to take account of circumstances arising after the adoption of a transfer decision. To my mind, that solution is wholly justified in that, in the case in point, the circumstance relied on was capable of affecting the application of the Dublin III Regulation to the applicant for international protection. [26] In fact, the specific aim of that regulation, as is clear from recital 5 thereof, is the application of objective, fair criteria both for the Member States and for the persons concerned. If a circumstance arising after the adoption of a transfer decision is objectively capable of affecting the determination of the Member State responsible for examining the application for international protection, the applicant must be able to put it forward before the competent national court or tribunal and take advantage of it. [27]

59. Secondly, the right of an applicant for international protection to have circumstances subsequent to the adoption of the transfer decision be examined is directly drawn from provisions of EU law. Indeed, the Court reached that conclusion by interpreting Article 27(1) of the Dublin III Regulation, in conjunction with Article 47 of the Charter.

60. It seems clear to me that, in these two judgments, the Court laid down the principle that circumstances subsequent to the adoption of a transfer decision must imperatively be taken into account, but only if they are capable of affecting the determination of the Member State responsible for examining the application for international protection.

61. Indeed, permitting circumstances to be examined that are not decisive and are put forward after a transfer decision has been adopted, in one or more successive actions, could easily cause the six-month time limit referred to in Article 29(1) and (2) of the Dublin III Regulation to be exceeded and thus compromise the objective of the rapid processing of applications for international protection, to which recital 5 of the regulation refers. Such a situation would

[25] Judgment in *Hasan*, paragraph 31. In that case, the Court thus followed the Opinion of Advocate General Bot (C-360/16, EU:C:2017:653, point 79), according to whom it must be possible for the judicial review of a transfer decision to take into account, inter alia, matters of fact and law subsequent to the contested decision and to include any changes of circumstances relevant to determining Member States' responsibility for examining applications for international protection.

[26] The Court reiterated its interpretation in relation to the six-month period in its judgment of 19 March 2019, *Jawo* (C-163/17, EU:C:2019:218, paragraphs 66 to 69).

[27] See Hruschka, C., and Maiani, F., 'Dublin III Regulation (EU) No 604/2013', in Hailbronner, K., and Thym, D. (eds), *EU Immigration and Asylum Law: A Commentary*, 2nd edition, C.H. Beck/Hart/Nomos, 2016, pp. 1478-1604, in particular, p. 1567, according to which Article 27(1) of the Dublin III Regulation provides for a full and *ex nunc* examination of both facts and points of law, like Article 46(3) of Directive 2013/32.

constitute misuse of the mechanisms for determining the Member State responsible for examining an application for international protection, in particular, with regard to the first entry into the territory of the European Union.

2. The procedural scope of Article 27(1) of the Dublin III Regulation

62. Given that the Court has held that certain circumstances arising after the adoption of a transfer decision must be taken into account by the national court or tribunal hearing an action against the transfer decision, it seems necessary to me, in order to determine the procedural scope of this judicial review, to consider whether it has been harmonised by EU law.

(a) The arguments in favour of procedural autonomy having been conferred on the Member States

63. There are a number of textual arguments that militate in favour of the recognition of procedural autonomy on the part of the Member States as regards the taking into account of circumstances arising after the adoption of a transfer decision, in the context of the application of the Dublin III Regulation.

64. The first argument is drawn from the wording of Article 27(1) of that regulation. Indeed, that provision simply provides that the applicant must have the right to an effective remedy, in the form of an appeal or a review, in fact and in law, against a transfer decision, before a court or tribunal. The provision makes no reference to the possibility of an *ex nunc* examination by the national court or tribunal seised.

65. That is a notable difference from Article 46(3) of Directive 2013/32, which expressly states that Member States are to ensure that an effective remedy provides for a *full and* ex nunc examination of both facts and points of law.[28] The EU legislature's silence on the possibility of an examination of that sort in the context of Article 27(1) of the Dublin III Regulation, by contrast, tends to suggest that procedural autonomy has been conferred on the Member States.

66. The second argument arises from the wording of Article 7(2) of the regulation, in accordance with which the Member State responsible is to be determined on the basis of the situation obtaining when the applicant first lodged his or her application for international protection with a Member State. The purpose of that rule is to prevent applicants for international protection from circumventing the criteria laid down in the regulation. Accordingly, an *ex nunc* review may only take place in exceptional circumstances.

67. These provisions could be interpreted as indicating the absence of EU rules in the area. To similar effect, in a recent judgment, the Court took as a basis the wording of Article 46(4) of Directive 2013/32 in holding that that provision left to the Member States the task of providing the necessary rules for applicants for international protection to be able to exercise their right to

[28] On the meaning of this provision, see judgment of 4 October 2018, *Ahmedbekova* (C-652/16, EU:C:2018:801, paragraph 93). As the Court pointed out, the expression '*ex nunc*' points to the court or tribunal's obligation to make an assessment that takes into account, should the need arise, new evidence which has come to light after the adoption of the decision under appeal.

an effective remedy. The Court inferred that the rules at issue in that particular case fell within the scope of the principle of the procedural autonomy of the Member States, subject to regard for the principles of equivalence and effectiveness. [29]

(b) The arguments in favour of judicial review having been harmonised by EU law

68. The textual arguments in favour of procedural autonomy having been conferred on the Member States are certainly not irrelevant. However, it seems to me that the debate has already been settled by the Court, in its judgments in *Shiri* and *Hasan*.

69. Indeed, in those two judgments, the Court made no mention of the conferral on the Member States of any procedural autonomy such as might extend to precluding any possibility of the competent national court's examining circumstances arising after the adoption of a transfer decision. On the contrary, as I observed in point 59 of this Opinion, the Court arrived at the conclusion that supervening circumstances should be taken into account on the basis of Article 27(1) of the Dublin III Regulation, read together with Article 47 of the Charter. It is from those two articles, in conjunction with one another and together with recital 19 of the Dublin III Regulation, that applicants for international protection derive the right to have circumstances arising after the adoption of decisions to transfer them to be examined by the competent national court.

70. Moreover, the case-law I have mentioned does not conflict with the wording of Article 7(2) of the Dublin III Regulation. First, in accordance with that provision, *the authorities of the Member State* in which the applicant has lodged his or her application for international protection must determine the Member State responsible on the basis of the situation obtaining at the time when the application was lodged. Secondly, in order to ensure that the applicant has effective judicial protection, the *national court or tribunal* hearing an appeal against a transfer decision is required to take into account supervening circumstances, such as the expiry of the six-month time limit referred to in Article 29(1) and (2) of the Dublin III Regulation, which are decisive to the correct application of the regulation, in the context of an *ex nunc* examination.

(c) Interim conclusion

71. To my mind, the Court has clearly associated the right of applicants for international protection to the examination of circumstances arising after the adoption of a transfer decision that are capable of affecting the determination of the Member State responsible with specific provisions of EU law, which constitute the legal basis for that examination.

72. It follows that judicial review of such supervening circumstances has been harmonised by EU law, in the sense that, whatever the national procedural rules concerning the scope of that review, the competent national court or courts must necessarily take into account certain circumstances that arise after the adoption of a transfer decision.

[29] Judgment of 9 September 2020, *Commissaire général aux réfugiés et aux apatrides (Dismissal of a subsequent action – Time limit for bringing proceedings)* (C-651/19, EU:C:2020:681, paragraphs 33 to 35).

3. The situation where the national court or tribunal hearing an appeal against a transfer decision does not have the right to examine circumstances arising after a transfer decision

73. The national court asks the Court about the consistency with EU law of the situation where national rules make no provision for the possibility of national courts or tribunals taking into account circumstances arising after the adoption of a decision to transfer an applicant for international protection.

(a) The conditions under which national law will be consistent with EU law

74. The judgments in *Shiri* and *Hasan* concerned situations in which the national rules permitted an *ex nunc* examination of circumstances arising after the adoption of a transfer decision. However, since the Court did not make the applicability of those precedents subject to compliance with such a condition, the solution adopted seems to me to be capable of applying equally where the national rules make no provision for such an examination.

75. In the present case, the Conseil d'État (Council of State) points to the fact that the national legislation provides for a review of the lawfulness of the contested decision to be carried out by the Board. It follows that that tribunal must rule on the basis of the factual situation obtaining at the time when the transfer decision was taken. At the hearing, however, the Belgian Government argued that the Board is entitled, when conducting its review, to take into account circumstances arising after the adoption of the transfer decision.

76. It must be recalled, in this connection, that questions on the interpretation of EU law referred by a national court in the context of the factual and legislative context which that court is responsible for defining, and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance.[30] Therefore, having regard to the information provided by the referring court, it is appropriate to start from the premiss – even though I have doubts in this regard – that the review carried out by the Board does not permit it to take into account circumstances arising after the adoption of a decision to transfer an applicant for international protection.

77. A review of that sort does not, prima facie, seem to be consistent with EU law, since it does not appear to fit with the interpretation adopted by the Court in its judgments in *Shiri* and *Hasan*.

78. However, first of all, the taking into account of circumstances arising after the adoption of a transfer decision, such as is required by EU law, does not, in my opinion, mean that the type of review for which national law provides, namely a review of lawfulness, must be altered.

79. To that effect, I take the view that the case-law of the ECtHR does not require any such alteration.[31] It seems useful to point out in this connection that the ECtHR has already ruled that, while the national court could not have substituted its own findings of fact for those of the

[30] Judgment of 10 December 2020, *J & S Service* (C-620/19, EU:C:2020:1011, paragraph 31).

[31] The ECtHR has held that, by adopting Article 1 of Protocol No 7 to the ECHR containing guarantees specifically concerning proceedings for the expulsion of aliens, the States clearly intimated their intention not to include such proceedings within the scope of Article 6(1) of the ECHR (ECtHR, 5 October 2000, *Maaouia v. France*, CE:ECHR:2000:1005JUD003965298, § 37). Nevertheless, the Explanations relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. 17) state, with reference to Article 47 of the Charter, that, 'in Union law, the right to a fair hearing is not confined to disputes relating to civil law rights and obligations. That is one of the consequences of the fact that the Union is a community based on the rule of law as stated by the Court in [the judgment of 23 April 1986, *Les Verts* v *Parliament* (294/83, EU:C:1986:166)]. Nevertheless, in all respects other than their scope, the guarantees afforded by the ECHR apply in a similar way to the Union'.

administrative authority, it would have had the power to satisfy itself that the authority's findings of fact or the inferences based on them were neither perverse nor irrational, and that such an approach by an appeal tribunal could reasonably be expected in specialised areas of the law, particularly where the facts had already been established in the course of a quasi-judicial procedure governed by many of the safeguards required by Article 6(1) of the ECHR. Ultimately, the ECtHR held that the national court's review did not infringe Article 6(1) of the ECHR. [32]

80. In its judgment in *Sigma Radio Television Ltd v. Cyprus*, [33] the ECtHR summarised its interpretation in the context of the traditional exercise by an administrative body of its powers in specialised areas of the law which called for particular professional experience or specialist knowledge and laid down the criteria by which to assess whether a review has been sufficient for the purposes of the ECHR. It is clear from that case-law that, in order for an 'adjudicatory body' to be able to determine disputes over civil rights and obligations in compliance with Article 6(1) of the ECHR, it must have jurisdiction to examine all questions of fact and points of law relevant to the dispute before it. Under certain conditions, the review of lawfulness carried out by a national court satisfies those requirements.

81. On the basis of that case-law, it may be considered that, in the absence of any provision of EU law governing the point, EU law cannot require the Member States, in so far as concerns the taking into account of circumstances arising after the adoption of a decision to transfer an applicant for international protection, to require the national court carrying out the review to have unlimited jurisdiction.

82. Secondly, since the taking into account of certain supervening circumstances is necessary in order to comply with EU law, I consider that the examination of such circumstances must then be carried out by the same national court or tribunal, including in the context of a different legal action, or by means of an action brought before a different national court or tribunal, provided that those actions constitute an effective and rapid remedy. [34] Accordingly, the judgment delivered must, without compromising the objective of the rapid processing of applications for international protection, be binding upon the court or tribunal which heard the appeal against the transfer decision. Indeed, applicants for international protection must be assured that circumstances arising after the adoption of a transfer decision that are capable of affecting the determination of the Member State responsible will actually be taken into account, if they are to be guaranteed effective access to the procedures for granting international protection.

83. In conclusion, the fact that judicial review of circumstances arising after the adoption of a transfer decision is harmonised by EU law does not deprive the Member States of the freedom to designate the competent courts and tribunals and to establish procedural rules for actions in the context of the application of Article 27 of the Dublin III Regulation and Article 47 of the Charter. In this connection, the Member States must ensure that the lawfulness of transfer decisions can be called into question where circumstances arising after the adoption of a transfer decision are decisive to the correct application of that regulation.

84. Admittedly, the difference here from the situation at issue in the case which gave rise to the judgment in *Unibet* [35] appears very slight. In that case, the Court held that the principle of effective judicial protection of an individual's rights under EU law must be interpreted as

[32] ECtHR, 22 November 1995, *Bryan v. United Kingdom* (CE:ECHR:1995:1122JUD001917891, § 47).

[33] ECtHR, 21 October 2011 (CE:ECHR:2011:0721JUD003218104, §§ 151 to 157).

[34] See, to that effect, judgments in *Shiri*, paragraph 44, and *Hasan*, paragraph 31.

[35] Judgment of 13 March 2007 (C-432/05, EU:C:2007:163).

meaning that it does not require the national legal order of a Member State to provide for a free-standing action for an examination of whether national provisions are compatible with Article 49 EC (now Article 56 TFEU), provided that other effective legal remedies, which are no less favourable than those governing similar domestic actions, make it possible for such a question of compatibility to be determined as a preliminary issue.

85. Nevertheless, the difference resides in the fact that, in the context of the Dublin III Regulation, there is a specific legal basis for the review carried out by the national courts and tribunals, namely Article 27 of the regulation, which makes provision for a *main action* to be brought against the transfer decision. On the other hand, in so far as concerns supervening circumstances put forward by the applicant for international protection, national judicial review procedures may take various forms, provided that the requirements which I believe are laid down by EU law, mentioned in point 82 of this Opinion, are observed.

(b) The existence of urgent proceedings and interim measures

86. In its written observations, the Belgian Government points out that, under the Law of 15 December 1980, [36] circumstances arising after the adoption of a transfer decision may be taken into account as a matter of extreme urgency, by way of an administrative application for interim relief. The President of the Chamber or the judge for asylum and immigration proceedings will then be required to examine all the evidence placed before him or her. Belgian law thus provides for an *ex nunc* examination of the situation of applicants for international protection. In the context of interim measures, the Board must also carry out an *ex nunc* examination. Thus, the remedies available to such applicants, taken as a whole, permit the taking into account of circumstances arising after the adoption of a transfer decision.

87. As stated in point 82 of this Opinion, I am of the opinion that supervening circumstances may be taken into account in the context of a legal action other than the appeal against the transfer decision, provided that that action constitutes an effective and rapid remedy. However, in such a situation, the judgment given on that other action must be binding on the court or tribunal which heard the appeal against the transfer decision.

88. Therefore, the remedies available to applicants for international protection in a Member State, taken as a whole, must permit full account to be taken of circumstances arising after the adoption of a transfer decision that are capable of affecting the determination of the Member State responsible for examining an application for international protection. Accordingly, such remedies must be capable of resulting in the *definitive* non-enforcement of transfer decisions, if the circumstances arising after the adoption of the transfer decision have such implications.

89. It must be borne in mind that, according to settled case-law, the system of cooperation established by Article 267 TFEU is based on a clear division of responsibilities between the national courts and the Court. In proceedings brought on the basis of that article, the interpretation of provisions of national law is a matter for the courts of the Member States, not for the Court, and the Court has no jurisdiction to rule on the compatibility of rules of national

[36] Regarding this law, see Carlier, J.-Y., 'Évolution procédurale du statut de l'étranger: constats, défis, propositions', *Journal des tribunaux*, No 6425, 12 February 2011, p. 117.

law with EU law. However, the Court does have jurisdiction to provide the national court with all the guidance as to the interpretation of EU law necessary to enable that court to determine whether those national rules are compatible with EU law. [37]

90. Given that case-law, it is for the referring court to ascertain the extent to which the various remedies provided for in the national legislation fulfil the requirement that full effect be given to circumstances arising after the adoption of a transfer decision that are capable of affecting the determination of the Member State responsible for examining an application for international protection.

91. In the event that they do, the Belgian legislation will be consistent with the case-law precedents of the Court established in the judgments in *Shiri* and *Hasan*. If they do not, the obligation, under EU law, for national courts to take account of supervening circumstances will not be fulfilled.

4. The circumstance that, after the application made by the applicant for international protection was rejected, the applicant's brother lodged an application in the same Member State

92. Assuming that Belgian law does permit the taking into account of circumstances arising after the adoption of a decision to transfer an applicant for international protection, it will be necessary to consider the extent to which the circumstance on which the applicant relies, namely the fact that, after his application for international protection was rejected, his brother also lodged an application in the same Member State, is capable of affecting the determination of the Member State responsible, in the context of the application of the Dublin III Regulation.

93. The applicant has argued in this connection that, on account of the similar nature of the persecution which he and his brother had been suffering, a joint examination of their applications for international protection, in this instance by the Belgian authorities, was likely to guarantee them a fair assessment of those applications and effective access to international protection and might have prevented a decision to transfer him from being taken.

94. With regard to this argument, it must be emphasised that every application for international protection must be processed by conducting an examination of the particular case of the applicant. As the Court has pointed out, it follows from the requirements of an individual assessment and of an exhaustive examination of applications for international protection that applications lodged separately by members of a single family, although potentially subject to measures intended to address any interaction between applications, must be subject to an examination of the situation of each person concerned. Those applications cannot therefore be subject to a single assessment. [38]

95. Nevertheless, the Dublin III Regulation establishes specific criteria that may have an effect on the determination of the Member State responsible for examining an application for international protection. That is the case, in particular, where members of the same family are applicants for international protection, as provided for by Article 10 of that regulation.

[37] Judgment of 18 November 2020, *Syndicat CFTC* (C-463/19, EU:C:2020:932, paragraph 29 and the case-law cited).

[38] Judgment of 4 October 2018, *Ahmedbekova* (C-652/16, EU:C:2018:801, paragraph 58).

96. However, the brother of an applicant for international protection cannot be regarded as being a 'family member' within the meaning of Article 2(g) of the Dublin III Regulation, having regard to the definition given in that provision. Thus, neither the applicant nor his brother can derive any advantage from the application of Article 10 of the regulation. [39] In addition, adults, like the applicant's brother, fall outside the scope of Article 11 of the regulation.

97. At the hearing, the applicant stated that his application related to Article 17(1) of the Dublin III Regulation, which sets out a discretionary clause pursuant to which, by way of derogation from Article 3(1) of the regulation, each Member State may decide to examine an application for international protection lodged with it by a third-country national even if such examination is not its responsibility under the criteria laid down in the regulation.

98. However, as the Court has held, Article 27(1) of the Dublin III Regulation must be interpreted as meaning that it does not require a remedy to be made available against a decision not to use the option set out in Article 17(1) of that regulation, without prejudice to the fact that that decision may be challenged at the time of an appeal against a transfer decision. [40]

99. That being so, the mere fact that, after the adoption by one Member State of a decision refusing an applicant for international protection the right of residence, taken on the view that another Member State was responsible for examining his or her application, the applicant's brother has made an application for international protection in the same Member State does not appear to be a supervening circumstance capable of affecting the determination of the Member State responsible for examining the applicant's application for international protection, in the context of the application of the Dublin III Regulation, read together with Article 47 of the Charter.

V. Conclusion

100. In light of the foregoing considerations, I propose that the Court answer the question referred for a preliminary ruling by the Conseil d'État (Council of State, Belgium) as follows:

Article 27 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, read together with Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as precluding the absence of any remedy enabling an applicant for international protection to rely on circumstances arising after the adoption of a decision to transfer him or her that are capable of affecting the determination of the Member State responsible for examining his or her application. It must be possible for such supervening circumstances to be taken into account by the national court or tribunal that gave a ruling on the transfer decision, including in the context of a different legal action, or by means of an action brought before a different national court or tribunal, provided that those actions constitute an effective and rapid remedy, the outcome of which will be binding on the court or tribunal which heard the appeal against the transfer decision (that being a matter for the referring court to establish) for the purposes of determining which Member State is responsible for examining the application for international protection.

[39] The referring court also stated in its decision that the applicant does not dispute that Article 10 of the Dublin III Regulation does not apply to him.

[40] Judgment of 23 January 2019, *M.A. and Others* (C-661/17, EU:C:2019:53, paragraph 79).