Reports of Cases

OPINION OF ADVOCATE GENERAL
SHARPSTON
delivered on 17 March 2016[1]

Case C-63/15

Mehrdad Ghezelbash
v
Staatssecretaris van Veiligheid en Justitie
(Request for a preliminary ruling

from the Rechtbank Den Haag, sitting in 's-Hertogenbosch (Netherlands))

(Asylum — Examination of an application for international protection — Criteria for determining the responsible Member State — Interpretation of Article 27(1) of Regulation (EU) No 604/2013 — Right of appeal or review)

Introduction

1. The present request for a preliminary ruling from the Rechtbank Den Haag (District Court, The Hague) sitting in 's-Hertogenbosch (Netherlands) ('the referring court') and Case C-155/15 *Karim* are linked. In each, an applicant for asylum seeks to challenge the decision of the competent authorities in the Member State where he is located to transfer him to another State which has agreed with the first Member State to take responsibility for examining the asylum claim. The cases raise an important question. Is Regulation No 604/2013 ('the Dublin III Regulation'),[2] like its predecessor Regulation No 343/2003 ('the Dublin II Regulation'),[3] purely an inter-State mechanism which does not enable an individual asylum seeker to challenge such a decision? Or can such a person now bring appeal or review proceedings under Article 27(1) of the Dublin III Regulation to challenge a transfer decision on the ground that the Chapter III criteria to determine the responsible Member State have been wrongly applied?

2. As the factual circumstances relating to each applicant's claim are different, the specific questions that arise are not the same. I shall therefore deliver two Opinions on the same day.

1 — Original language: English.

2 — 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 (recast) (OJ 2013 L 180, p. 31).

3 — Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (OJ 2003 L 50, p. 1).

3. The Common European Asylum System ('the CEAS') encompasses a number of measures, including regulations which aim swiftly to determine the Member State responsible for examining an individual's application for asylum. Those measures are known collectively as 'the Dublin system'.[4] Where a third-country national has a connection with more than one Member State (for example, because he enters the European Union via one Member State but lodges his application for asylum in a second State), it is necessary to determine which State is responsible for examining his claim for asylum. The criteria for determining the responsible Member State are set out in a strict hierarchy ('the Chapter III criteria') in the Dublin III Regulation. If the Member State where an asylum application is lodged considers on the basis of those criteria that another Member State is responsible for determining the claim, the first State may ask the second State to take back (or to take charge of) the applicant. Once that issue is determined, the examination of the application for asylum is governed by the rules laid down in the relevant CEAS act.[5]

4. This Court has ruled in *Abdullahi*,[6] when considering Article 19(2) of the Dublin II Regulation, that the grounds of appeal or review against a transfer decision are limited in a situation where a Member State agrees to take charge of an applicant for asylum. In effect, the applicant can only call such a decision into question by pleading systemic deficiencies in the asylum procedure and in the conditions for the reception of applicants for asylum in that Member State, which provide substantial grounds for believing that he would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union.[7]

5. The referring court asks whether *Abdullahi* still applies in the context of the Dublin III Regulation and whether an individual such as Mr Ghezelbash is therefore precluded from challenging the application of the Chapter III criteria in appeal or review proceedings under Article 27(1) of that regulation.

Legal background

The Charter

6. Article 18 guarantees the right to asylum with due respect for the rules of the Geneva Convention of 28 July 1951 relating to the status of refugees[8] and in accordance with the Treaties.

4 — The relevant acts are now: (i) the Dublin III Regulation, replacing the Dublin II Regulation; (ii) Commission Regulation (EC) No 1560/2003 of 2 September 2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 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 222, p. 3) — that regulation was partially repealed by the Dublin III Regulation and substantially amended by Commission Implementing Regulation (EU) No 118/2014 of 30 January 2014 amending Regulation No 1560/2003 (OJ 2014 L 39, p. 1) ('the implementing regulation'); and (iii) 'the Eurodac Regulation' (Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013). In my Opinion in *Karim* (where it is relevant) I set out the necessary details from that regulation.

5 — Those acts include Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) (OJ 2013 L 180, p. 60) ('the Procedures Directive') and Directive 2011/95/EU 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 (recast) (OJ 2011 L 337, p. 9) ('the Qualification Directive'). That directive repealed and replaced Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ 2004 L 304, p. 12) ('Directive 2004/83') from 21 December 2013.

6 — Judgment in *Abdullahi*, C-394/12, EU:C:2013:813, paragraphs 60 and 62.

7 — OJ 2010 C 83, p. 389 ('the Charter').

8 — Signed at Geneva on 28 July 1951 and which entered into force on 22 April 1954 (*United Nations Treaty Series*, Vol. 189, p. 150, No 2545, 1954), as supplemented by the Protocol relating to the Status of Refugees, concluded in New York on 31 January 1967, which entered into force on 4 October 1967 ('the Geneva Convention').

7. The first paragraph of Article 47 provides that everyone whose rights and freedoms guaranteed by EU law are violated has the right to an effective remedy before a tribunal.[9]

8. Article 52(3) states that in so far as the Charter '… contains rights which correspond to rights guaranteed by the [ECHR], the meaning and scope of those rights shall be the same as those laid down by the [ECHR]. This provision shall not prevent Union law providing more extensive protection'.

The Dublin system — an overview

9. On 15 June 1990, the (then 12) Member States of the European Communities signed the Dublin Convention.[10] Because Article 63(1)(a) EC subsequently required the Dublin Convention to be replaced by a Community instrument, the Dublin II Regulation was adopted.[11] The criteria for determining the Member State responsible for examining an asylum application were contained in Chapter III (Articles 5 to 14) of that regulation. Article 19(2) provided as follows: 'The decision referred to in paragraph 1 shall set out the grounds on which it is based. It shall contain details of the time limit for carrying out the transfer and shall, if necessary, contain information on the place and date at which the applicant should appear, if he is travelling to the Member State responsible by his own means. This decision may be subject to an appeal or a review. Appeal or review concerning this decision shall not suspend the implementation of the transfer unless the courts or competent bodies so decide on a case by case basis if national legislation allows for this.'

The Dublin Regulation

10. A number of substantive changes were made to the Dublin II Regulation; and in the interests of introducing greater clarity that regulation was recast as the Dublin III Regulation. The preamble to the latter includes the following aims:

— establishing a clear and workable method for determining the Member State responsible for the examination of an asylum application;[12]

— that method should be based on objective criteria that are fair 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 processing applications for international protection expeditiously;[13]

9 — The corresponding rights to those contained in Article 47 of the Charter are set out in Articles 6 and 13 of the European Convention on Human Rights ('the ECHR').

10 — The Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities ('the Dublin Convention'; OJ 1997 C 254, p. 1) entered into force on 1 September 1997. Prior to that date, the arrangements for determining the Member State responsible for considering asylum applications were laid down in Chapter VII of the Convention Applying the Schengen Agreement (OJ 2000 L 239, p. 19), in accordance with the Protocol signed on 26 April 1994.

11 — The Dublin II Regulation applied in Denmark from 2006 by virtue of the Agreement between the European Community and the Kingdom of Denmark on the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in Denmark or any other Member State of the European Union and 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention (OJ 2006 L 66, p. 38). There is no corresponding agreement in relation to the Dublin III Regulation and Denmark is not bound by that regulation. In accordance with Article 3 and Article 4a(1) of Protocol No 21 on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, annexed to the TEU and to the TFEU, those Member States have notified their wish to take part in the adoption and application of the Dublin III Regulation.

12 — Recital 4.

13 — Recital 5.

— in the light of the first phase of the CEAS instruments, while making the necessary improvements, in the light of experience to the effectiveness of the Dublin system and the protection granted to applicants under that system, a comprehensive 'fitness check' should be carried out by conducting an evidence-based review covering the legal, economic and social effects of the Dublin system, including its effects on fundamental rights; [14]

— the effective protection of the rights of the persons concerned should be guaranteed by providing legal safeguards and the right to an effective remedy in respect of transfer decisions to the Member State responsible; such guarantees 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 both the examination of the application of the regulation and of the legal and factual situation in the Member State to which the applicant is transferred. [15]

11. The preamble also contains the following statements regarding the treatment of persons falling within the scope of the Dublin III Regulation: '… Member States are bound by their obligations under instruments of international law, including the relevant case-law of the European Court of Human Rights'; [16] '[the] Regulation respects the fundamental rights and observes the principles which are acknowledged, in particular, in [the Charter]. In particular, this Regulation seeks to ensure full observance of the right to asylum guaranteed by Article 18 of the Charter as well as the rights recognised under Articles 1, 4, 7, 24 and 47 thereof …'. [17]

12. Article 2 contains the following relevant definitions:

'(a) "third-country national" means any person who is not a citizen of the Union within the meaning of Article 20(1) TFEU and who is not [a] national of a State which participates in this Regulation by virtue of an agreement with the European Union;

(b) "application for international protection" means an application for international protection as defined in Article 2(h) of [the Qualification Directive];

(c) "applicant" means a third-country national or a stateless person who has made an application for international protection in respect of which a final decision has not yet been taken;

(d) "examination of an application for international protection" means any examination of, or decision or ruling concerning, an application for international protection by the competent authorities in accordance with [the Procedures Directive] and [the Qualification Directive], except for procedures for determining the Member State responsible in accordance with this Regulation;

…

(m) "visa" means the authorisation or decision of a Member State required for transit or entry for an intended stay in that Member State or in several Member States …'.

13. Article 3 provides:

'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.

14 — Recital 9.
15 — Recital 19.
16 — Recital 32.
17 — Recital 39.

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.

Where the transfer cannot be made pursuant to this paragraph to any Member State designated on the basis of the criteria set out in Chapter III or to the first Member State with which the application was lodged, the determining Member State shall become the Member State responsible.

…'

14. Article 4 is entitled 'Right to information'. By virtue of Article 4(1)(d), Member States must inform applicants of their right to challenge a transfer decision and, where applicable, to request suspension of that decision.

15. Article 5(1) introduces a right to a personal interview in order to facilitate the process of determining the responsible Member State and requires the competent authorities to conduct such a personal interview with the applicant. The interview may be omitted if, inter alia, 'after having received the information referred to in Article 4, the applicant has already provided the information relevant to determine the Member State responsible by other means. The Member State omitting the interview shall give the applicant the opportunity to present all further information which is relevant to correctly determine the Member State responsible before a decision is taken to transfer the applicant to the Member State responsible pursuant to Article 26(1)'.[18] The personal interview must take place in a timely manner and, in any event, before any decision is taken to transfer the applicant to the Member State responsible.[19]

16. Chapter III is entitled 'Criteria for determining the Member State responsible'. The hierarchy of criteria is set out in Article 7, which states:

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

2. The Member State responsible in accordance with the criteria 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.

3. In view of the application of the criteria referred to in Articles 8, 10 and 16, Member States shall take into consideration any available evidence regarding the presence, on the territory of a Member State, of family members, relatives or any other family relations of the applicant, on condition that such evidence is produced before another Member State accepts the request to take charge or take back the person concerned, pursuant to Articles 22 and 25 respectively, and that the previous applications for international protection of the applicant have not yet been the subject of a first decision regarding the substance.'

18 — Article 5(2)(b).

19 — Article 5(3).

17. At the top of the hierarchy of criteria are family considerations. Where the applicant is an unaccompanied minor, the responsible Member State is that where a family member or a sibling is legally present.[20] For adult applicants, the responsible Member State is that where family members are lawfully present.[21] If neither of those two criteria applies, responsibility is allocated by establishing the first State through which the applicant entered the European Union.

18. The following provisions in Article 12 are relevant:

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

2. 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.[22] In such a case, the represented Member State shall be responsible for examining the application for international protection.

…

4. Where the applicant is in possession only of one or more residence documents which have expired less than two years previously or one or more visas which have expired less than six months previously and which enabled him or her actually to enter the territory of a Member State, paragraphs 1, 2 and 3 shall apply for such time as the applicant has not left the territories of the Member States.

Where the applicant is in possession of one or more residence documents which have expired more than two years previously or one or more visas which have expired more than six months previously and enabled him or her actually to enter the territory of a Member State and where he has not left the territories of the Member States, the Member State in which the application for international protection is lodged shall be responsible.

5. The fact that the residence document or visa was issued on the basis of a false or assumed identity or on submission of forged, counterfeit or invalid documents shall not prevent responsibility being allocated to the Member State which issued it. However, the Member State issuing the residence document or visa shall not be responsible if it can establish that a fraud was committed after the document or visa had been issued.'

19. Pursuant to Article 17(1) and derogating 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'.[23]

20. Article 18 lays down the obligations of the responsible Member State. They include taking back an applicant in circumstances where: (i) his application is under examination and he makes an application in another Member State or if he is within the territory of another Member State without a residence document;[24] (ii) he withdraws his application which is under examination and where he makes an

20 — Article 8(1). Decisions must be made in the best interests of the child (see further Article 6(1)).

21 — Articles 9, 10 and 11. See further Article 16 relating to Member States' discretion as to whether to accept responsibility for asylum seekers who are dependent on other family members.

22 — OJ 2009 L 243, p. 1.

23 — Where a Member State decides to examine an application under Article 17(1) it then becomes the responsible Member State. That provision is known in shorthand as the 'sovereignty clause'.

24 — Article 18(1)(b).

application in another Member State;[25] or (iii) his application has been rejected and he makes another application in a different Member State or if he is within the territory of another Member State without a residence document.[26] In such cases the Member State responsible must examine or complete the examination of the application for international protection.[27]

21. The procedures for taking back an applicant for asylum are governed by the provisions of Chapter VI. The process of determining the Member State responsible must start as soon as possible.[28] Where a Member State with which an application for international protection has been lodged considers that another Member State is responsible for examining the application, it may, as quickly as possible and in any event within three months of the date on which the application was lodged, request that other Member State to take charge of the applicant.[29] The requested Member State must make the necessary checks and give its decision within two months of receipt of the request.[30] In the procedure for determining the Member State responsible, elements of proof and circumstantial evidence are to be used.[31] The relevant elements of proof and circumstantial evidence are indicated in the implementing regulation.[32]

22. Article 26 states:

'1. Where the requested Member State accepts to take charge of or to take back an applicant or other person as referred to in Article 18(1)(c) or (d), the requesting Member State shall notify the person concerned of the decision to transfer him or her to the Member State responsible and, where applicable, of not examining his or her application for international protection. If a legal advisor or other counsellor is representing the person concerned, Member States may choose to notify the decision to such legal advisor or counsellor instead of to the person concerned and, where applicable, communicate the decision to the person concerned.

2. The decision referred to in paragraph 1 shall contain information on the legal remedies available, including on the right to apply for suspensive effect, where applicable, and on the time limits applicable for seeking such remedies and for carrying out the transfer, and shall, if necessary, contain information on the place where, and the date on which, the person concerned should appear, if that person is travelling to the Member State responsible by his or her own means. …'[33]

23. Article 27 provides:

'1. The applicant or another person as referred to in Article 18(1)(c) or (d) 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. …'

25 — Article 18(1)(c).

26 — Article 18(1)(d). Article 18(1)(b) to (d) must be read together with Articles 23, 24, 25 and 29.

27 — Article 18(2).

28 — Article 20(1).

29 — Article 21(1).

30 — Article 22(1).

31 — Article 22(2).

32 — Article 22(3).

33 — The French text of Article 26(1) of the Dublin III Regulation states: 'Lorsque l'État membre requis accepte la prise en charge ou la reprise en charge d'un demandeur ou d'une autre personne visée à l'article 18, paragraphe 1, point c) ou d), l'État membre requérant notifie à la personne concernée la décision de le transférer vers l'État membre responsable et, le cas échéant, la décision de ne pas examiner sa demande de protection internationale. …' That seems to me to indicate more clearly than the English text that a Member State may combine, in a single decision, the transfer decision itself and the (parallel) decision not to examine the applicant's request for international protection.

24. Where an applicant lodges an appeal against or review of a transfer decision, under Article 27(3), Member States are subject to a number of obligations in relation to guaranteeing that person's rights. These include: (i) providing for an applicant to remain in the Member State concerned pending the outcome of the proceedings or for the transfer decision to be suspended [34] and (ii) ensuring that the applicant has access to legal assistance and is granted free legal assistance where it is requested and where the person concerned cannot afford the costs involved. However '[w]ithout arbitrarily restricting access to legal assistance, Member States may provide that free legal assistance and representation not be granted where the appeal or review is considered by the competent authority or a court or tribunal to have no tangible prospect of success'. [35]

25. Article 37 provides that Member States may have recourse to a conciliation procedure if they cannot resolve a dispute on any matter related to the application of the Dublin III Regulation.

Facts, procedure and questions referred

26. On 4 March 2014 Mr Ghezelbash, an Iranian national, applied for asylum in the Netherlands. The Netherlands authorities consulted the EU Visa Information System [36] and discovered that he had been granted a visa by the French authorities on 17 December 2013 which was valid from that date until 11 January 2014. On 7 March 2014 the Netherlands authorities then asked the French authorities to deal with his asylum request. The latter agreed to do so on 5 May 2014. Accordingly, on 21 May 2014 the Netherlands authorities rejected Mr Ghezelbash's request taking at the same time a decision to transfer him to France. Mr Ghezelbash appealed against that decision on 22 May 2014 and applied for interim relief.

27. Mr Ghezelbash agrees that he did make use on 18 December 2013 of the visa issued by the French authorities. However, he maintains that he returned to Iran after spending only one night in Paris. As a journalist, he had travelled to Paris for work to report on a table football tournament. He went back to Iran on 19 December 2013 because Iran decided to withdraw from the tournament at the last minute.

28. Mr Ghezelbash did not have problems in his home State until 15 February 2014. He left Iran on 20 February 2014 and travelled via Turkey to the Netherlands where he arrived on 1 March 2014. His passport with the relevant December 2013 entry and exit stamps from the French authorities had been retained by the Sepah-e Pasdaran-e Enqelab-e Eslami (Islamic Revolutionary Guard Corps); and he had not kept any other evidence of his journeys because at the time he had not needed to do so. He does, however, possess other documents which provide evidence in support of his version of events. These documents comprise a declaration from his employer, a doctor's certificate and a signed contract relating to the sale of immovable property. Mr Ghezelbash states that the contract of sale was drawn up on 10 January 2014 whilst he was in Iran, that he had to be present in person in order to conclude the contract and that he had indeed signed it. All that material ('the circumstantial evidence') was submitted to the Netherlands authorities on 28 May 2014, *after* their French counterparts had indicated their agreement to assume responsibility for examining Mr Ghezelbash's asylum claim.

29. Mr Ghezelbash argues that his application should be examined under the extended asylum application procedure [37] in order to allow him to submit the original documents and to enable the Netherlands authorities to examine them. He did not seek asylum in France and the French authorities were never at any point responsible for such a request on his behalf.

34 — Article 27(3)(a) and (b).

35 — Article 27(5) and (6) respectively.

36 — See Council Decision 2004/512/EC of 8 June 2004 establishing the Visa Information System (VIS) (OJ 2004 L 213, p. 5), in particular Article 1.

37 — A leaflet produced by the Netherlands indicates that the competent national authority normally assesses whether an applicant meets the conditions for an asylum residence permit under 'the General Asylum Procedure'. However, if the competent authorities need more time to investigate the application the 'Extended Asylum Procedure' may be used.

30. The Netherlands authorities consider that under Article 12(4) of the Dublin III Regulation the French authorities are responsible for examining Mr Ghezelbash's asylum application for the following reasons. First, they granted a visa to Mr Ghezelbash on 17 December 2013. Second, France agreed to accept responsibility for examining his request. Third, that agreement can be challenged only on the limited grounds in Article 7(3) of the Dublin III Regulation (namely the presence of family members or other relatives within the territory of a particular Member State) and that circumstance is not relevant here. Fourth, Mr Ghezelbash has failed to show that he had left the territory of the Member States and to prove that he subsequently travelled from Iran to the Netherlands (via Turkey). The circumstantial evidence that he has submitted does not prove his account conclusively. Fifth, the Netherlands authorities were not obliged to transmit that information to their French counterparts, because Mr Ghezelbash did not explicitly argue that France's obligations had ceased under Article 19(2) of the Dublin III Regulation. [38]

31. The referring court takes the view that the Netherlands authorities acted prematurely in requesting France to take responsibility for Mr Ghezelbash. The Netherlands authorities acted contrary to Article 21 of the Dublin III Regulation in omitting to forward to their French counterparts the circumstantial evidence submitted by Mr Ghezelbash in support of his claim that after his stay in France he had returned to Iran. In order to comply with Article 22 of that regulation, the French authorities should also have been placed in a position to take the circumstantial evidence into account when determining whether France was responsible for examining Mr Ghezelbash's asylum application. That information is indeed extremely relevant to that assessment.

32. The referring court states that certain material provided by Mr Ghezelbash was contradictory and that he was therefore unable to establish a presumption that he had left the territory of the Member States. However, other documents he submitted (notably the doctor's certificate and the contract of sale), were indeed circumstantial evidence making out a prima facie case that he had returned to Iran after an apparently fleeting visit to France.

33. The referring court understands this Court to have held in *Abdullahi*, that an applicant for asylum who has lodged an appeal against a decision not to examine his application cannot challenge the application of the Chapter III criteria for determining the Member State responsible where the requested Member State has agreed to a request to take him back. The application of those criteria concerns only the inter-State relationship between the requesting and the requested Member States.

34. However, in the light of the changes introduced by the Dublin III Regulation strengthening judicial protection for asylum applicants, the referring court wishes to know whether the amended Chapter III criteria now constitute a ground of appeal against a transfer decision for the purposes of Article 27(1) of that regulation.

35. Accordingly, the referring court asks:

'(1) What is the scope of Article 27 of [the Dublin III Regulation], whether or not [read] in conjunction with recital 19 of that regulation?

Does an asylum seeker — in a situation such as that in the present case, in which the foreign national was confronted with the request for assumption of responsibility to deal with the asylum application only after that request had been agreed to, and that foreign national submits evidence, subsequent to the agreement to that request, which could lead to the conclusion that it is the requesting Member State, and not the requested Member State, which is responsible for examining the application for asylum, and the requesting Member State subsequently does not examine those documents or

38 — I examine that provision in my Opinion in *Karim*.

forward them to the requested Member State — have the right, pursuant to that article, to an (effective) legal remedy against the application of the criteria for determining the Member State responsible laid down in Chapter III of [the Dublin III Regulation]?

(2) If under [the Dublin III Regulation], or under the operation of [the Dublin II Regulation], the foreign national is in principle not entitled to invoke the incorrect application of the criteria for determining the Member State responsible when the requested Member State has agreed to a request to take charge, is the defendant correct in its contention that an exception to that assumption may be contemplated only in the case of family situations as referred to in Article 7 of [the Dublin III Regulation], or is it conceivable that there may also be other special facts and circumstances on the basis of which the foreign national may be entitled to invoke the incorrect application of the criteria for determining the Member State responsible?

(3) If the answer to Question 2 is that, in addition to family situations, there are also other circumstances which could lead to the foreign national being entitled to invoke the incorrect application of the criteria for determining the Member State responsible, can the facts and circumstances described in [points 31 to 33 above] [39] constitute such special facts and circumstances?'

36. Written observations have been submitted by Mr Ghezelbash, the Czech Republic, France, the Netherlands and the European Commission. At the hearing on 15 December 2015 the same parties with the exception of the Czech Republic presented oral argument.

Assessment

Preliminary observations

37. The CEAS is underpinned by the assumption that all the participating States observe fundamental rights, including the rights based on the Geneva Convention, and on the ECHR, and that the Member States can and should have mutual trust in the level of protection that they guarantee. The Dublin III Regulation was adopted in the light of that principle of mutual trust in order to rationalise the treatment of asylum claims, to avoid blockages in the system arising from the obligation on authorities in different Member States to examine multiple claims by the same applicant, to increase legal certainty with regard to the determination of the State responsible for examining the asylum claim and to avoid forum shopping. In practical terms, the overarching objective of the Dublin system is thereby to speed up the handling of claims in the interests both of asylum seekers and the participating States. [40]

38. It is common ground that Mr Ghezelbash's application for asylum falls within the scope of the Dublin III Regulation. Thus, the criteria for determining the responsible Member State for examining his application are those laid down in Chapter III of that regulation. [41]

39. Where an applicant for asylum has a connection with two or more Member States that determination is primarily an inter-State process. [42] Consequently, it is not a feature of that process to take account of the individual's preferences or desires. [43] However, there are a number of exceptions to that general rule within the legislative scheme of the regulation.

39 — The referring court makes a cross-reference in its third question to point 12 in its order for reference.

40 — Judgment in *NS*, C-411/10 and C-493/10, EU:C:2011:865, paragraphs 78 and 79.

41 — Articles 1 and 3.

42 — See for example, judgment in *Puid*, C-4/11, EU:C:2013:740, paragraphs 27 to 29.

43 — See for example, judgment in *Puid*, C-4/11, EU:C:2013:740, paragraphs 32 to 34.

40. First, when applying the Chapter III criteria the Member States must take account of the presence of an applicant's family members in the EU territory (where relevant) before another Member State accepts a request to take back or take charge of the applicant. [44]

41. Second, in circumstances where it is impossible to transfer an applicant to another Member State 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 must examine whether a different Member State can be designated as responsible under the Chapter III criteria. [45]

42. Third, each Member State retains discretion, pursuant to the so called 'sovereignty clause', to decide to examine an application, even where it is not obliged to do so under the Chapter III criteria. Furthermore, a Member State may request another State to take charge of an applicant with a view to bringing together family members on humanitarian grounds, even where the other Member State is not responsible on the basis of the criteria in Articles 8 to 11 and 16 of the regulation. In such cases the persons concerned must provide written consent. [46]

43. Those exceptions indicate that the scheme of the Dublin III Regulation provides some scope for taking account of an individual applicant's particular situation and views on which State should examine his asylum application. That said, none of them appears to apply to Mr Ghezelbash and there is nothing in the order for reference indicating that he seeks to rely on any of them.

Question 1

44. The broad issue raised by the referring court in Question 1 concerns the interpretation and the scope of Article 27(1) read together with recital 19 of the Dublin III Regulation. Does an applicant for asylum have the right to an appeal or review against a Member State's application of the Chapter III criteria? Within Question 1 the referring court also asks a more specific question, concerning the circumstances of Mr Ghezelbash's case. I shall consider that sub-question in points 85 to 90 below.

45. According to Mr Ghezelbash and the Czech Republic, although an applicant for asylum could not — following the Court's judgment in *Abdullahi* — contest the way in which the Chapter III criteria in an appeal under Article 19(2) of the Dublin II Regulation was applied, the position has now changed by virtue of Article 27(1) of the Dublin III Regulation. However, the Czech Republic emphasises that in its view, an applicant does not enjoy a generalised right to choose which Member State shall deal with his asylum claim.

46. Both France and the Commission also refer to *Abdullahi* and submit that Mr Ghezelbash still does not have a right of appeal against the application of the Chapter III criteria. In principle it does not matter which Member State examines his application. Article 27(1) applies only where the Dublin III Regulation confers specific substantive or procedural rights which an applicant can invoke, which in turn reflect the (required) protection of certain fundamental rights. Article 12(4) of the regulation, on which the transfer decision was based, is not such a provision; and Mr Ghezelbash does not invoke protection of other substantive or procedural fundamental rights derived from the regulation. The French Government also submits that an appeal or review under Article 27(1) of the regulation can only target the transfer decision and not the agreement of the requested Member State (in this case, France) to examine the request for international protection.

44 — Article 7(3). See further Article 8 concerning minors and Articles 9 to 11 in relation to family members.

45 — See the second subparagraph of Article 3(2).

46 — Article 17(2).

47. The Netherlands Government considers that, applying *Abdullahi*, an asylum applicant cannot contest the application of the Chapter III criteria nor the manner in which the Member State concerned has reached a decision, even where the applicant maintains that a fundamental right guaranteed by the Charter which is expressly mentioned in the regulation is at issue. Any other interpretation would delay establishing which Member State is responsible for examining a given asylum application. That would be contrary to the objective of the Dublin III Regulation.

The judgment in *Abdullahi*

48. Ms Abdullahi was a Somali national who first entered Greece having travelled from Syria via Turkey. She travelled on through the Former Yugoslav Republic of Macedonia, Serbia and Hungary. She then crossed the border into Austria where she claimed asylum. All border crossings were illegal. The Austrian authorities applied the equivalent, in the Dublin II Regulation, of the Chapter III criteria and concluded that Hungary was the responsible Member State. The Hungarian authorities agreed to examine her application. However, Ms Abdullahi sought to argue that Greece should be considered to be the responsible State as that was where she had first entered the EU territory. At that time, the return of applicants for asylum to Greece had been suspended. That would therefore have allowed her to seek to have her application examined in Austria.

49. In my view, the ruling in *Abdullahi* should not simply be transposed so as to determine the scope of the right of review for two reasons.

50. First, *Abdullahi* concerned very specific (and very complex) facts, involving multiple illegal border crossings, creating a situation in which the applicant for asylum had (potentially) links to not two but *three* Member States. Purely on that basis, the present matter is clearly very different and therefore distinguishable.

51. There is no suggestion that Mr Ghezelbash entered France illegally on 17 December 2013. He had a visa, he entered but he did not claim asylum there.[47] Furthermore, there is no finding that he passed through France en route to the Netherlands before making his asylum claim.

52. Unlike Ms Abdullahi, Mr Ghezelbash is not arguing that under the Chapter III criteria the responsible Member State is not France, but another State which cannot examine his asylum claim on the grounds of systemic deficiency and potential infringements of his rights under Article 4 of the Charter, so that his claim falls to be examined back where he lodged it. Mr Ghezelbash argues that the Netherlands is the State where he made his first application for international protection (Article 7(2)) and that Article 12(4) does not apply, because (he claims) he left the EU territory on 18 December 2013, returned to his home State and subsequently travelled to the Netherlands from Iran via Turkey. He therefore, as I understand it, seeks to obtain review by a judicial authority of whether the competent authorities have applied the criteria in the first subparagraph of Article 12(4) of the Dublin III Regulation correctly.

53. Second, the terms of Article 27(1) of the Dublin III Regulation, which the Court is now being asked to interpret, differ significantly from the wording of Article 19(2) of the Dublin II Regulation which the Court ruled on in *Abdullahi*. Thus, the reasoning in *Abdullahi* cannot in my view merely be applied automatically to the successor provision.

47 — Mr Ghezelbash's case is that, at that time, he had no need to claim asylum: see points 28 and 29 above. Establishing whether Mr Ghezelbash's case is sufficiently supported by the evidence is a matter for the competent national authority, subject to review by the national court as sole judge of fact.

Article 27 of the Dublin III Regulation

54. In what follows, I first examine the context and wording of Article 27(1) of the Dublin III Regulation in the light of the recitals that set out what the objective of that provision is meant to be and the overall aims of the regulation. Against that background, I then consider the three options for interpreting Article 27(1) that have been proposed to the Court.

55. By way of prelude, I note that before a transfer decision that can be reviewed under Article 27 is taken, the Member State where the asylum applicant is located must apply the Chapter III criteria and consider whether it or another Member State is the responsible State. Where the second State agrees to be the responsible Member State, the first Member State can make a transfer decision. Already at this stage the Dublin III Regulation introduces procedural safeguards (in Article 26(1) and (2)) which were not in the Dublin II Regulation. These provisions contain detailed rules requiring the first Member State to notify the applicant of the transfer decision and to provide information on the legal remedies available to him, including the right to apply for the transfer decision to be suspended.

56. An applicant cannot lodge an application for appeal or review before the requesting State takes a transfer decision. The challenge, if one is made, is to the transfer decision, not to the requested Member State's agreement to accept responsibility as such. That is logical, as it is the transfer decision which directly affects the individual asylum applicant.

57. Article 27(1) of the Dublin III Regulation then creates, in unequivocal terms, a 'right to an effective remedy'. What that remedy is to be is also specified: 'in the form of an appeal or a review, in fact or in law, against a transfer decision, before a court or tribunal'. A number of differences, additions and clarifications to be found in the wording of Article 27(1) as compared with its predecessor, Article 19(2) of the Dublin II Regulation, should be noted.

58. First, the right of appeal against (or review of) a transfer decision is available to all applicants for asylum [48] against whom a transfer decision has been taken. Second, the right of appeal or review is expressed in mandatory terms ('the applicant … shall have the right …'). Third, the appeal or review is to cover both fact and law. Fourth, the appeal or review is to provide judicial oversight of the administrative decision taken by the competent authorities (because it is brought 'before a court or tribunal'). Finally, Member States must also allow applicants a reasonable period of time within which to exercise their right to an effective remedy (Article 27(2)).

59. Article 27(1) of the Dublin III Regulation does not specify what components of the competent authority's decision-making process leading up to the transfer decision may be the subject of the appeal or review for which it provides. Three options have been canvassed before the Court.

60. The *first option* (espoused by the Netherlands) is that — to put it simply — nothing has changed. Now as before, a transfer decision can only be challenged on the single restrictive ground identified in the *Abdullahi* judgment. That ground had already been codified in the second subparagraph of Article 3(2) of the Dublin III Regulation. [49] Thus, where it is impossible to transfer an applicant to the Member State designated as responsible because there are substantial grounds for believing that there

48 — And also to 'another person' as identified in Article 27(1) of the Dublin III Regulation. Such persons comprise two categories: (i) a third-country national or a stateless person who withdraws his application and has made an application in another Member State or who is within the territory of another Member State without a residence document (Article 18(1)(c)), and (ii) a third county national or stateless person whose application has been rejected and who has made an application in another Member State or who is within the territory of another Member State without a residence document (Article 18(1)(d)).

49 — Article 3(2) codifies the judgment of the Court in *NS*, C-411/10 and C-493/10, EU:C:2011:865, paragraph 94. Since the Dublin III Regulation (adopted on 26 June 2013) preceded the Court's judgment in *Abdullahi* (delivered on 10 December 2013) by almost six months, the Dublin III Regulation cannot be taken to have incorporated or codified the latter.

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 must continue to examine the criteria set out in Chapter III in order to establish whether another Member State can be designated as responsible.

61. The *second option* (put forward by France and the Commission) is to accept that, in addition to that ground, Article 27(1) creates a right of appeal or review in instances in which the Dublin III Regulation expressly confers rights on individual applicants which reflect substantive fundamental rights protected by the Charter.[50] Where (but only where) an applicant claims that the competent authorities' decision infringed one of these 'protected rights', he is also entitled to an appeal or review under Article 27(1) of the transfer decision.

62. The *third option* (proposed by Mr Ghezelbash) is to read Article 27(1) as conferring a wider right of appeal or review, ensuring judicial oversight of the competent authorities' application of the relevant law (including the Chapter III criteria) to the facts presented to them.

63. In the absence of wording indicating which of those options is correct, it is necessary to look at the aims and the context of the regulation.[51]

64. Those aims certainly include establishing a clear and workable method for determining the Member State responsible for examining an asylum application, based on objective criteria that are fair both for the Member States and for the person concerned. That method 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 processing applications for international protection expeditiously.[52] However, another stated aim of the Dublin III Regulation is to improve the legal protection afforded to applicants for asylum.[53] Should the enhanced judicial protection for asylum applicants expressly created by Article 27(1) of the Dublin III Regulation then be read restrictively in the interests of expedition in processing asylum claims?

65. Recital 19 of the Dublin III Regulation (which finds expression as a substantive provision in Article 27(1)) explicitly states that in order to guarantee effective protection of applicants' rights, legal safeguards and the right to an effective remedy in respect of decisions regarding transfers are to cover both 'the application of this Regulation' and 'the legal and factual situation in the Member State to which the applicant [might be] transferred'.

66. The second limb of that guarantee seems to me to identify what has now been codified in Article 3(2), second subparagraph, of the Dublin III Regulation. The natural way to construe the first limb of the guarantee is that the scope of Article 27(1) includes the manner in which the Dublin III Regulation is applied by the Member States.

67. On the basis of the text of Article 27(1), the double guarantee contained in recital 19 and my earlier comments on *Abdullahi*,[54] it seems to me that the *first option* is to be discarded and that the choice lies between the *second* and the *third option*.

50 — The right to information (Article 4), the right to a personal interview (Article 5) and the right to family reunification (Articles 9 to 11) were canvassed before the Court as examples of such rights. At the hearing, counsel for Mr Ghezelbash confirmed that the applicant had *not* alleged a violation of one of these rights before the national court.

51 — Judgment in *Petrosian and Others*, C-19/08, EU:C:2009:41, paragraph 34.

52 — Recitals 4 and 5 respectively.

53 — See recital 9.

54 — See points 48 to 53 above.

68. The main reasons advanced in favour of the *second option* are that a narrow interpretation is more consistent with the legislative scheme. It is argued that the Dublin III Regulation is an inter-State measure; that if the manner in which the Chapter III criteria are applied by Member States were to be subject to judicial scrutiny under Article 27(1), the system would become unworkable as it would be impossible to ensure the swift determination of the responsible Member State; and that the mechanisms to do precisely that serve to eliminate 'forum shopping' (that is, opportunities for multiple simultaneous or consecutive claims), which should be discouraged.

69. I am not convinced by those arguments.

70. First, it seems to me over-simplistic to describe the Dublin III Regulation purely as an inter-State instrument. Whilst certain inter-State aspects indubitably remain,[55] the legislator has introduced and reinforced certain substantive individual rights and procedural safeguards. An example of the former is the right to family reunification in Articles 9 to 11. The latter is reflected in, for example, Article 4 (an applicant's right to information) and Article 5 (the right to a personal interview). Both provisions underline the importance of the information provided by the applicant in the process of determining the responsible Member State within the scheme of the Dublin III Regulation. Yet under the second option, an applicant would have the right to challenge a transfer decision if the personal interview had been omitted, but no right to challenge a transfer decision which could clearly only have been taken by the competent authorities on the basis of disregarding the information that the applicant had supplied during that personal interview.

71. Second, it seems to me that, in administering the appeal or review system under Article 27, Member States retain powerful tools. Thus, under Article 27(3) they may choose whether to grant the right to remain pending the outcome of an appeal or review or whether transfer is to be suspended (either automatically or at the applicant's request). Thus, the speed at which transfers are effected is not entirely determined by whether an applicant lodges an appeal or request for review — it also depends on the rules chosen and put in place by the Member State. Member States may also, under the second subparagraph of Article 27(6), decide to restrict access to legal assistance where an appeal is considered by the competent authority or a court or tribunal to have no tangible prospect of success. Overall, the Dublin III Regulation has introduced provisions to make the general process more speedy and efficient as compared to its predecessor. Time limits are reduced and new deadlines have been inserted.[56] The existence of all these mechanisms suggests that Member States can act effectively to prevent the smooth working of the Dublin III system becoming blocked by frivolous or vexatious applications for appeal or review. Furthermore, the Court stated in *Petrosian* (when considering the question of judicial protection guaranteed by Member States whose courts may suspend the implementation of a transfer decision under Article 19(2) of the Dublin II Regulation) that the legislator did not intend that such protection should be sacrificed to the requirement of expedition in processing asylum applications.[57]

72. I add that the possibilities for challenging the application of the Chapter III criteria are not unlimited. For example, in relation to verification of the criteria concerning residence documents and visas under Article 12, not every instance of complaint would fall within the scope of Article 27(1). Thus, the fact that such documents may have been issued on the basis of a false or assumed identity or on submission of forged, counterfeit or invalid documents does not prevent responsibility from being allocated to the issuing Member State.[58]

55 — For example, the conciliation procedure under Article 37.

56 — See the provisions of Chapter VI of the Dublin III Regulation, which deal with procedures for taking charge and taking back an asylum applicant.

57 — Judgment in *Petrosian and Others*, C-19/08, EU:C:2009:41, paragraph 48.

58 — See Article 12(5).

73. Against that background, it seems to me that the 'floodgates' argument advanced by the intervening Member States may overstate the consequences of interpreting Article 27(1) as conferring a right of appeal or review which includes judicial scrutiny of the application of the Chapter III criteria.

74. Thirdly, I do not consider that making an application to a court to seek judicial scrutiny of an administrative decision can properly be equated with forum shopping. As I see it, the appeal or review under Article 27 protects the individual against disregard or incorrect characterisation of the relevant facts and against misinterpretation and misapplication of the relevant law. In a European Union founded on the rule of law,[59] that is surely a legitimate objective.

75. I turn therefore to consider the *third option*.

76. I have already indicated that, in my view, Article 27(1) must be construed at least as widely as the second option proposed. However, in the present case Mr Ghezelbash is not invoking breach of a specific right conferred under the Dublin III Regulation, such as those laid down in Articles 4 and 5, nor does he seek to rely on the provisions concerning family reunification in Articles 9 to 11. He wishes to challenge an application of the Chapter III criteria by the competent authorities resulting in a transfer decision that, if executed, will remove him from the Netherlands to France. *If* — and I emphasise that word — his version of the facts as supported by the circumstantial evidence is correct, he is indeed making his first application for international protection in the Netherlands and, applying the Chapter III criteria, his application should be processed there. Unless Article 27(1) is construed in accordance with the third option, there is no mechanism whereby he can make his views known effectively and challenge that transfer decision.

77. My starting point for the analysis of the third option is that a transfer decision is potentially capable of affecting an asylum applicant's interests adversely. Were that not so, there would have been little purpose in introducing a mandatory right of appeal or review in Article 27(1) of the Dublin III Regulation.

78. Outside the context of what would be covered by the second option, can a transfer decision potentially affect an asylum seeker's interests adversely?

79. Suppose a third country national, already suspect in his home State as a 'student political activist', decides to continue his studies abroad. He makes a brief exchange visit to Member State A, where he is readily accepted by a university but cannot secure the necessary finance to stay on to study. He returns to his home State and then, with support from the academic network, tries again in Member State B, where he is offered a three year post-graduate scholarship. Initially, he does not have real grounds for applying for asylum in Member State B. In any event, he is engrossed in his studies, making new friends and integrating himself in the new environment of the host Member State. Meanwhile back in his home State the situation deteriorates, and with his known political views he becomes *persona non grata*. A year into his postgraduate studies, he decides to apply for asylum in Member State B. However, the competent authorities apply the Chapter III criteria, and on the documented strength of his brief sojourn in Member State A, request and obtain the latter's agreement to deal with his asylum application and accordingly take a transfer decision which cancels his student visa and which, if executed, will remove him from Member State B to Member State A. It would, I suggest, be difficult to conclude on the facts in this example that that transfer decision did not have an adverse impact on the student asylum seeker.

59 — See for example, judgment in *van Gend & Loos*, 26/62, EU:C:1963:1, concerning the vigilance of individuals in protecting their rights under EU law. See further judgment in *Schrems*, C-362/14, EU:C:2015:650, paragraph 60 and the case law cited, regarding the rule of law.

80. I note, in this connection, that the notion that establishing the responsible Member State is always neutral for applicants is not a universal view.[60] It has been questioned by the European Court of Human Rights ('the Strasbourg Court');[61] and this Court has of course acknowledged that there is no conclusive presumption that an asylum seeker's fundamental rights will be observed in the Member State primarily responsible for his application.[62] Other strands in this Court's case-law likewise suggest, when applied by analogy, that it may be more appropriate to take account of the individual position of the applicant when determining the responsible Member State than to disregard the impact on the person concerned.[63]

81. The point may be simply put: where there is material to support an arguable case that a transfer decision is based on a misapplication of the Chapter III criteria, does the principle of effective protection and/or rights of the defence lead to the conclusion that an applicant should be able to challenge that transfer decision under Article 27(1) of the Dublin III Regulation?

82. The Court has already held, in relation to Directive 2004/83, that observance of the rights of the defence constitutes a fundamental principle of EU law.[64] It seems to me that, by analogy, the same must hold good in respect of the Dublin III Regulation, which will determine which Member State applies the successor to Directive 2004/83, namely the Qualification Directive, to any particular claim. Rights of the defence are, moreover, affirmed in Article 47 of the Charter which ensures respect of both the rights of the defence and the right to fair legal process in all judicial proceedings.[65] The Court's settled case-law confirms the importance of the right to be heard and its very broad scope in the EU legal order, considering that it must apply in all proceedings likely to culminate in a measure adversely affecting a person.[66]

83. The right to an effective remedy in Article 47 of the Charter corresponds to the rights guaranteed by Article 13 of the ECHR. It follows from Article 52(3) of the Charter that the case-law of the Strasbourg Court is relevant in interpreting the scope of that provision. That Court has held there must be remedies available at national level which enforce the rights and freedoms guaranteed. It requires provision of a domestic remedy to deal with the substance of an arguable complaint and to grant appropriate relief, and that remedy must be effective in practice as well as in law.[67]

84. In my view, these arguments militate in favour of endorsing the third option for interpreting Article 27(1) of the Dublin III Regulation.

60 — See, for example, Morgades Gil, S., 'The discretion of States in the Dublin III system for determining responsibility for examining applications for asylum: What remains of the sovereignty and humanitarian clauses after the interpretations of the ECtHR and CJEU?', *International Journal of Refugee Law*, 2015, p. 433.

61 — See, for example, Eur. Court H. R., *Tarakhel v. Switzerland* [GC], no. 29217/12, ECHR 2014 (extracts).

62 — Judgment in *NS*, C-411/10 and C-493/10, EU:C:2011:865, paragraphs 81, 99 and 100.

63 — See for example, judgments in *K*, C-245/11, EU:C:2012:685, and *MA and Others*, C-648/11, EU:C:2013:367; see further judgment in *Cimade and GISTI*, C-179/11, EU:C:2012:594.

64 — See judgment in *M.M.*, C-277/11, EU:C:2012:744, paragraph 81.

65 — See judgment in *M.M.*, C-277/11, EU:C:2012:744, paragraph 82, where the Court also refers to the right to good administration guaranteed by Article 41 of the Charter.

66 — See judgment in *M.M.*, C-277/11, EU:C:2012:744, paragraph 85.

67 — See Eur. Court H. R., *Mohammed v. Austria*, no. 2283/12, judgment of 6 June 2013, paragraphs 69 and 70.

The requesting Member State's obligations as regards information provided by the applicant for asylum

85. The referring court also wishes to know whether there should be a right of appeal or review under Article 27(1) in a case, such as that in the main proceedings, where the requested Member State agrees to examine an application for asylum but the applicant submits evidence after that Member State has communicated its agreement, and the evidence submitted means that the agreement might not have been forthcoming had the requesting Member State examined the documents or forwarded the material to the requested Member State's authorities. [68]

86. The Netherlands disputes the referring court's findings as to how the evidence submitted by Mr Ghezelbash relating to his return to Iran from France in 2013 was treated. It states that its authorities did examine the documents, but did not consider them to be of probative value and accordingly did not forward them to the French authorities.

87. First, it is for the national court as sole judge of fact to determine whether the evidence submitted by Mr Ghezelbash was, or was not, examined by the Netherlands authorities. Likewise, only the national court can assess the probative value of that evidence, its relevance and whether it should have influenced the transfer decision.

88. Second, the material submitted by Mr Ghezelbash (which, I recall, included a report from his doctor and documents concerning sale of property in Iran) constitutes circumstantial evidence within the meaning of point 9 of List B in Annex II to the implementing regulation. What is required in order to ensure that an applicant for asylum has access to an effective remedy under Article 27(1) of the Dublin III Regulation? Should failure to examine that material and/or to transmit it to the requested State constitute grounds for appeal or review under that provision?

89. The effectiveness of the judicial review guaranteed by Article 47 of the Charter requires an assessment of the lawfulness of the grounds which are the basis of the decision and whether the latter is taken on a sufficiently solid factual basis. Accordingly, judicial review cannot be restricted to an assessment of the cogency in the abstract of the reasons relied on, but must concern whether those reasons, or, at the very least, one of those reasons, deemed sufficient in itself to support that decision, is substantiated. [69] Applied to the present context, that entails verification of the facts relating to the application of the relevant Chapter III criteria underpinning the transfer decision.

90. Article 27(1) does not specify how that examination is to be conducted. That is therefore a matter for the national court to oversee pursuant to domestic procedural rules. Those rules would also govern the intensity of the review process and the outcome — that is, whether a successful challenge would result in the application being remitted to the competent national authorities for reconsideration, or whether the decision is taken by the courts themselves, subject always to the principle of effectiveness. [70]

91. I therefore conclude that the Dublin III Regulation should be interpreted as meaning that an applicant (in circumstances such as those in the main proceedings) is able to challenge, on appeal or by review, a transfer decision under Article 27(1) and to request the national court to verify whether the criteria in Chapter III have been correctly applied in his case. The effectiveness of judicial review guaranteed by Article 47 of the Charter requires an assessment of the lawfulness of the grounds which were the basis of the transfer decision and whether it was taken on a sufficiently solid factual

68 — See points 31 and 32 above.

69 — See by analogy judgment in *Commission and Others* v *Kadi*, C-584/10 P, C-593/10 P and C-595/10 P, EU:C:2013:518, paragraph 119.

70 — See by analogy judgment in *Samba Diouf*, C-69/10, EU:C:2011:524, paragraph 60.

basis. The manner in which the examination is conducted as to whether the Chapter III criteria have been applied objectively and fairly in any particular case is governed by national procedural rules. Subject to the principle of effectiveness, those rules also govern the intensity and outcome of the appeal or review process.

Questions 2 and 3

92. By Question 2 the referring court asks whether, if the asylum applicant cannot invoke the Chapter III criteria, he can instigate an appeal or review under Article 27(1) of the Dublin III Regulation only in cases where family circumstances are in issue as set out in Article 7 of that regulation or whether there are other grounds for so doing.

93. Should the Court agree with my preference for the third option, there is no need for it to answer Question 2. However, should the Court decline to follow that wider reasoning, it follows from my discussion of the second option canvassed before the Court[71] that I consider that an asylum applicant may bring proceedings under Article 27(1) of the Dublin III Regulation in order to challenge an alleged violation of any substantive or procedural right specifically conferred by that regulation. The examples proposed before the Court in the present proceedings included the guarantees for minors (in Articles 6 and 8) and the right to family reunification (in Articles 9 to 11). I stress that since, on my approach, an answer to Question 2 is unnecessary, I have not conducted a complete and detailed examination of the Dublin III Regulation; nor have I attempted to compile an exhaustive list of rights whose alleged violation would, under the second option, be susceptible of challenge under Article 27(1).

94. It follows from my reply to Question 2 that consideration of Question 3 also becomes unnecessary. I add for the sake of good order that it would appear that Mr Ghezelbash has not sought to rely, in the national proceedings, on any of the substantive or procedural rights that were drawn to the Court's attention in the context of the second option. The circumstantial evidence on which he seeks to rely (which I have discussed at points 85 to 90 above) appears to me to be pertinent, therefore, exclusively in the context of the application of the Chapter III criteria.

Conclusion

95. In the light of all the foregoing considerations, I am of the opinion that the Court should answer the questions raised by the Rechtbank Den Haag, sitting in 's-Hertogenbosch (Netherlands), as follows:

— 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 should be interpreted as meaning that an applicant in circumstances such as those in the main proceedings is able to challenge, on appeal or by review, a transfer decision under Article 27(1) and to request the national court to verify whether the criteria in Chapter III have been correctly applied in his case. The effectiveness of judicial review guaranteed by Article 47 of the Charter of Fundamental Rights of the European Union requires an assessment of the lawfulness of the grounds which were the basis of the transfer decision and whether it was taken on a sufficiently solid factual basis. The manner in which the examination is conducted as to whether the Chapter III criteria have been applied objectively and fairly in any particular case is governed by national procedural rules. Subject to the principle of effectiveness, those rules also govern the intensity and outcome of the appeal or review process.

71 — See points 68 to 74 above.

— There is no need to answer Questions 2 and 3.