Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

15 April 2021 *

(Reference for a preliminary ruling – Regulation (EU) No 604/2013 – Determination of the Member State responsible for examining an application for international protection – Article 27 – Remedy – Whether account should be taken of circumstances subsequent to the transfer decision – Effective judicial protection)

In Case C-194/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Conseil d'État (Council of State, Belgium), made by decision of 12 February 2019, received at the Court on 28 February 2019, in the proceedings

**H. A.**

v

**État belge,**

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, J.-C. Bonichot, A. Arabadjiev, E. Regan, M. Ilešič, L. Bay Larsen (Rapporteur), A. Kumin and N. Wahl, Presidents of Chambers, E. Juhász, S. Rodin, F. Biltgen, K. Jürimäe, C. Lycourgos and N. Jääskinen, Judges,

Advocate General: A. Rantos,

Registrar: M. Krausenböck, Administrator,

having regard to the written procedure and further to the hearing on 9 November 2020,

after considering the observations submitted on behalf of:

– H. A., by J. Hardy, advocaat, and by M. El Khoury and I. Fontignie, avocates,

– the Belgian Government, by C. Pochet, M. Jacobs and P. Cottin, acting as Agents, and by D. Matray, J. Matray, S. Matray and C. Pironт, avocats,

– the Netherlands Government, by M.K. Bulterman and C.S. Schillemans, acting as Agents,

* Language of the case: French.

– the European Commission, by G. Wils and M. Condou-Durande, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 2 February 2021,

gives the following

## Judgment

1 This request for a preliminary ruling concerns the interpretation of 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 (OJ 2013 L 180, p. 31; 'the Dublin III Regulation'), and of Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter').

2 The request has been made in proceedings between H. A., a third-country national, and the État belge (Belgian State) concerning the decision of the Office des étrangers (Belgian Immigration Office) rejecting H. A.'s application for asylum and ordering him to leave Belgian territory.

## Legal context

### *European Union law*

#### *Directive 2013/32/EU*

3 Article 46(1) and (3) of 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 (OJ 2013 L 180, p. 60) 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;
   (ii) considering an application to be inadmissible …
   (iii) taken at the border or in the transit zones of a Member State …
   (iv) not to conduct an examination …

(b) a refusal to reopen the examination of an application after its discontinuation …

(c) a decision to withdraw international protection …

…

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 … at least in appeals procedures before a court or tribunal of first instance.'

### *The Dublin III Regulation*

4 Recitals 4, 5 and 19 of the Dublin III Regulation are worded as follows:

'(4) The [conclusions of the European Council at its special meeting in Tampere (Finland) 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 both the examination of the application of this Regulation and of the legal and factual situation in the Member State to which the applicant is transferred.'

5 Article 2 of that regulation provides:

'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 …

– the minor children of couples referred to in the first indent or of the applicant …

– when the applicant is a minor and unmarried, the father, mother or another adult responsible for the applicant …

– when the beneficiary of international protection is a minor and unmarried, the father, mother or another adult responsible for him or her …'

6 Article 10 of that regulation provides:

'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.'

7 Article 17 of that regulation provides:

'1. 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.

…

2. The Member State in which an application for international protection is made …, or the Member State responsible, may, at any time before a first decision regarding the substance is taken, request another Member State to take charge of an applicant in order to bring together any family relations, on humanitarian grounds based in particular on family or cultural considerations, even where that other Member State is not responsible under the criteria laid down in Articles 8 to 11 and 16. The persons concerned must express their consent in writing.

…'

8 Article 27 of the Dublin III Regulation 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

(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. …

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.

5. Member States shall ensure that the person concerned has access to legal assistance and, where necessary, to linguistic assistance.

6. Member States shall ensure that legal assistance is granted on request free of charge where the person concerned cannot afford the costs involved. …'

### *Belgian law*

9 Article 39/2 of the loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers (*Moniteur belge* of 31 December 1980, p. 14584) (Law of 15 December 1980 on access to Belgian territory, residence, establishment and removal of foreign nationals; 'the Law of 15 December 1980'), provides, in paragraph 2:

'The Conseil [du contentieux des étrangers (Belgium) (Council for asylum and immigration proceedings; 'the CCE')] 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.'

## The dispute in the main proceedings and the question referred for a preliminary ruling

10 H. A. made an application for asylum in Belgium on 22 May 2017.

11 After hearing H. A. on 31 May 2017, the Immigration Office asked the Spanish authorities on 22 June 2017 to take charge of him.

12 On 4 July 2017 the Spanish authorities accepted the request to take charge of H. A.

13 On 1 August 2017 the Immigration Office rejected H. A.'s application for asylum and ordered him to leave the territory of Belgium.

14 H. A. challenged that decision before the CCE by an action lodged on 25 August 2017, claiming, in particular, that his brother had arrived in Belgium on 22 August 2017, that his brother had lodged an application for asylum there and that it was essential that their respective applications be examined together in order to ensure the fairness of the procedure.

15 By a judgment of 30 November 2017, the CCE dismissed that action. That judgment was based, in part, on the finding that the circumstances relating to the arrival of H. A.'s brother in Belgium arose after the adoption of the disputed decision of the Immigration Office and could not, therefore, be taken into consideration in the assessment of the lawfulness of that decision.

16 On 28 December 2017 H. A. lodged an appeal on a point of law against that judgment before the referring court. In support of that appeal, he submits that the CCE infringed his right to an effective remedy, as follows from Article 27 of the Dublin III Regulation and Article 47 of the Charter, since it refused to take into consideration circumstances arising after a transfer decision for the purpose of examining the lawfulness of that decision.

17 In those circumstances, the Conseil d'État (Council of State, Belgium) 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 into consideration, where appropriate, circumstances arising subsequent to a "Dublin transfer" decision?'

**Whether the subject matter of the dispute in the main proceedings still obtains**

18 The Belgian Government maintains that there is no longer any need to rule on the request for a preliminary ruling. It submits that H. A. no longer has an interest in pursuing an appeal on a point of law since the Belgian authorities began to examine his application for international protection on 31 January 2019 and subsequently granted him asylum on 28 August 2019.

19 Upon being asked by the Court of Justice to indicate whether it considered that a reply to the question referred was still necessary in order for it to decide the dispute in the main proceedings, the referring court stated that it wished to maintain its request for a preliminary ruling.

20 The referring court explained, in particular, that the appeal on a point of law in the main proceedings still has a purpose in that it concerns a judicial decision which cannot be removed from the legal order by any factual circumstance. That said, it considers that if the matters relied on by the Belgian Government were correct, the question of H. A.'s continuing interest in having the judgment under appeal in the main proceedings set aside could indeed arise. However, it is not possible for the referring court to decide of its own motion and without an adversarial debate that that interest has ceased to exist and that the answer to the question referred is no longer necessary for the resolution of the dispute in the main proceedings.

21 In that regard, it should be recalled that, according to the Court's settled case-law, the procedure provided for in Article 267 TFEU is an instrument of cooperation between the Court of Justice and national courts by means of which the Court provides the national courts with the points of interpretation of EU law which they need in order to decide the disputes before them (judgments of 12 March 1998, *Djabali*, C-314/96, EU:C:1998:104, paragraph 17, and of 19 November 2019, *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, C-585/18, C-624/18 and C-625/18, EU:C:2019:982, paragraph 69).

22 In accordance with the Court's equally settled case-law, in the context of the cooperation between the Court and the 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 required to give a ruling (judgment of 24 November 2020, *Openbaar Ministerie (Forgery of documents)*, C-510/19, EU:C:2020:953, paragraph 25 and the case-law cited).

23 Since the referring court considers that it remains obliged, under the procedural rules of Belgian law, to rule on the dispute in the main proceedings, it must be concluded that that dispute is still pending before the referring court and that a reply from the Court to the question referred remains useful for resolving that dispute.

24 Accordingly it is necessary to rule on the request for a preliminary ruling.

## Consideration of the question referred

25 By its question, the referring court asks, in essence, whether Article 27(1) of the Dublin III Regulation, read where appropriate in the light of Article 47 of the Charter, must be interpreted as precluding national legislation which provides that the court or tribunal seised of an action for annulment of a transfer decision may not, in the context of the examination of that action, take account of circumstances subsequent to the adoption of that decision.

26 As a preliminary point, since the Belgian Government maintained at the hearing that the procedural rules of Belgian law were consistent with EU law, in so far as they provide that the court having jurisdiction is required to take account, in the context of the examination of an action for annulment of a transfer decision, of circumstances subsequent to the adoption of that decision which are decisive for the correct application of the Dublin III Regulation, it is appropriate to recall that the Court must take into account, under the division of jurisdiction between the Courts of the European Union and national courts, the factual and legal context, as set out in the order for reference, of the questions referred for a preliminary ruling. Accordingly, a reference for a preliminary ruling cannot be examined in the light of the interpretation of national law relied on by the government of a Member State (see, to that effect, judgment of 21 June 2016, *New Valmar*, C-15/15, EU:C:2016:464, paragraph 25).

27 The referring court has clearly established that, according to its interpretation of Belgian law, an administrative court must rule, in the context of the examination of an action for annulment brought against a transfer decision, on the lawfulness of that decision as taken by the administrative authority concerned, that is to say, on the basis of the information in the possession of that authority, without its being able to take into consideration circumstances subsequent to the adoption of that decision.

28 The interpretation of the procedural rules of Belgian law put forward by the Belgian Government cannot, therefore, be accepted by the Court for the purposes of the present preliminary ruling proceedings.

29 In addition, the Belgian and Netherlands Governments and the European Commission submitted that the circumstances subsequent to the adoption of the transfer decision at issue in the main proceedings as pleaded by H. A. were not decisive for the correct application of the Dublin III Regulation.

30 In that regard, it is true that, without prejudice to the possible use by the Member State concerned of a discretionary clause provided for in Article 17 of the Dublin III Regulation, the arrival in the requesting Member State of the brother of the applicant for international protection cannot, in view of the definition of 'family members' in Article 2(g) of that regulation, justify the application

of Article 10 of that regulation, which relates to a situation in which 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.

31 However, that finding is not such as to provide the referring court with an answer that is sufficient for it to rule on the appeal on a point of law before it, the referring court having stated that, in the context of the examination of that appeal on a point of law, it must determine whether the CCE was required to take into account circumstances subsequent to the adoption of the transfer decision at issue, without being able to assess whether or not the circumstances specifically relied on by H. A. before the CCE could have any bearing on the determination of the Member State responsible.

32 In the light of the issue which the referring court must therefore address in the main proceedings, it should be recalled that Article 27(1) of the Dublin III Regulation provides that a person who is the subject of a transfer decision is to have the right to an effective remedy, in the form of an appeal or a review, in fact and in law, against that decision, before a court or tribunal.

33 The scope of that remedy is explained in recital 19 of the Dublin III Regulation, which states that, in order to ensure that international law is respected, the effective remedy introduced by that regulation in respect of transfer decisions must 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 (judgments of 25 October 2017, *Shiri*, C-201/16, EU:C:2017:805, paragraph 37, and of 2 April 2019, *H. and R.*, C-582/17 and C-583/17, EU:C:2019:280, paragraph 39).

34 In the light, in particular, of the general thrust of the developments that have taken place, as a result of the adoption of the Dublin III Regulation, in the system for determining the Member State responsible for examining an application for international protection made in one of the Member States, and of the objectives of that regulation, Article 27(1) of the regulation must be interpreted as meaning that the remedy which it provides against a transfer decision must be capable of relating both to observance of the rules attributing responsibility for examining an application for international protection and to the procedural safeguards laid down by that regulation (judgments of 25 October 2017, *Shiri*, C-201/16, EU:C:2017:805, paragraph 38, and of 2 April 2019, *H. and R.*, C-582/17 and C-583/17, EU:C:2019:280, paragraph 40).

35 Furthermore, the Court has held that, in the light (i) of the objective, referred to in recital 19 of the Dublin III Regulation, of guaranteeing, in accordance with Article 47 of the Charter, effective protection of the persons concerned, and (ii) of the objective of determining rapidly the Member State responsible for processing an application for international protection set out in recital 5 of that regulation, the applicant 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 transfer decision, where the taking into account of those circumstances is decisive for the correct application of the regulation (see, to that effect, judgments of 25 October 2017, *Shiri*, C-201/16, EU:C:2017:805, paragraph 44, and of 25 January 2018, *Hasan*, C-360/16, EU:C:2018:35, paragraph 31).

36 It is also apparent from the Court's case-law that national legislation which allows the applicant for international protection concerned to plead circumstances subsequent to the adoption of the transfer decision, in an action brought against that decision, meets that obligation to provide for a

rapid and effective remedy (see, to that effect, judgments of 25 October 2017, *Shiri*, C-201/16, EU:C:2017:805, paragraph 45, and of 25 January 2018, *Hasan*, C-360/16, EU:C:2018:35, paragraph 32).

37 Nevertheless, the latter case-law does not mean that the Member States must, pursuant to Article 27 of the Dublin III Regulation, necessarily organise their systems of legal remedies in such a way that compliance with the requirement to take into account decisive circumstances subsequent to the adoption of the transfer decision, as referred to in paragraph 35 of the present judgment, takes place within the framework of the examination of the action by which the lawfulness of the transfer decision may be called into question.

38 Indeed, the EU legislature has harmonised only some of the procedural rules governing the action brought against, or the review, in fact and in law, of a transfer decision before a court or tribunal that must be available to the person concerned.

39 In that regard, while Article 27(1) of the Dublin III Regulation and recital 19 thereof help to define the subject matter of that remedy and provide that it must be capable of being exercised before a court or tribunal, Article 27(2) to (6) of that regulation provides clarification only as regards the period of time within which that remedy must be capable of being exercised, the conditions for suspension of the implementation of the transfer decision where such a remedy is sought and the legal assistance which the person concerned must be able to receive.

40 By contrast, Article 27 of the Dublin III Regulation does not specify whether the right to a remedy which it provides necessarily means that the court or tribunal seised may carry out an *ex nunc* examination of the lawfulness of the transfer decision.

41 The wording of Article 27 thus differs from that of Article 46(3) of Directive 2013/32, adopted on the same day as the Dublin III Regulation in the context of the general review of the Common European Asylum System, which states that the effective remedy available against the acts referred to in Article 46(1) of that directive, which do not include transfer decisions, provides for a 'full and *ex nunc* examination of both facts and points of law'.

42 In accordance with the Court's settled case-law, in the absence of EU rules on the matter, it is for the national legal order of each Member State to establish procedural rules for actions intended to safeguard the rights of individuals, in accordance with the principle of procedural autonomy, on condition, however, that those rules are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not make it excessively difficult or impossible in practice to exercise the rights conferred by EU law (principle of effectiveness) (see, to that effect, judgments of 18 June 2002, *HI*, C-92/00, EU:C:2002:379, paragraph 67; of 13 December 2017, *El Hassani*, C-403/16, EU:C:2017:960, paragraph 26; and of 9 September 2020, *Commissaire général aux réfugiés et aux apatrides (Rejection of a subsequent application – time limit for bringing proceedings)* (C-651/19, EU:C:2020:681, paragraph 34)).

43 It should also be borne in mind that when the Member States implement EU law, they are required to ensure compliance with the right to an effective remedy enshrined in the first paragraph of Article 47 of the Charter, a provision which constitutes a reaffirmation of the principle of effective judicial protection (judgment of 19 December 2019, *Deutsche Umwelthilfe*, C-752/18, EU:C:2019:1114, paragraph 34).

44 As regards, in the first place, the principle of equivalence, this requires that all the rules applicable to actions apply without distinction to actions alleging infringement of EU law and to similar actions alleging infringement of national law (judgment of 15 March 2017, *Aquino*, C-3/16, EU:C:2017:209, paragraph 50 and the case-law cited).

45 As regards, in the second place, the principle of effectiveness, it should be noted that an action for annulment brought against a transfer decision, in the context of which the court or tribunal seised cannot take account of circumstances subsequent to the adoption of that decision which are decisive for the correct application of the Dublin III Regulation, does not ensure sufficient judicial protection enabling the person concerned to exercise his or her rights under that regulation and Article 47 of the Charter.

46 However, as the Advocate General noted in points 82 and 85 of his Opinion, it is conceivable that sufficient judicial protection may be afforded, in the context of the national judicial system viewed as a whole, otherwise than by the taking into account of decisive circumstances arising after the adoption of the transfer decision, when the action is examined as to the lawfulness of that decision.

47 In order to provide sufficient judicial protection for the person concerned, a specific remedy, distinct from the remedy mentioned in the preceding paragraph, must, in practice, ensure that that person has the opportunity to prevent the competent authorities of the requesting Member State from being able to carry out the transfer of that person to another Member State, where a circumstance arising after the transfer decision precludes implementation of that decision. That remedy must also ensure that, when a circumstance subsequent to the transfer decision means that the requesting Member State is responsible, the competent authorities of that Member State are obliged to take the measures necessary to acknowledge that responsibility and to initiate without delay the examination of the application for international protection lodged by that person (see, to that effect, judgment of 25 October 2017, *Shiri*, C-201/16, EU:C:2017:805, paragraph 43).

48 It follows that it must be possible for the specific remedy allowing account to be taken of circumstances subsequent to the adoption of the transfer decision that are decisive for the correct application of the Dublin III Regulation to be exercised after such circumstances have arisen, but without such exercise being made conditional on the person concerned having been deprived of his or her liberty or on implementation of the relevant transfer decision being imminent.

49 Having regard to all of the above considerations, the answer to the question referred is 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 precluding national legislation which provides that the court or tribunal seised of an action for annulment of a transfer decision may not, in the context of the examination of that action, take account of circumstances subsequent to the adoption of that decision which are decisive for the correct application of that regulation, unless that legislation provides for a specific remedy entailing an *ex nunc* examination of the situation of the person concerned, the results of which are binding on the competent authorities, a remedy which may be exercised after such circumstances have arisen and which, in particular, is not made conditional on the deprivation of that person's liberty or on the fact that implementation of that decision is imminent.

## Costs

50 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

**Article 27(1) of Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, read in the light of recital 19 thereof, and Article 47 of the Charter of Fundamental Rights of the European Union must be interpreted as precluding national legislation which provides that the court or tribunal seised of an action for annulment of a transfer decision may not, in the context of the examination of that action, take account of circumstances subsequent to the adoption of that decision which are decisive for the correct application of that regulation, unless that legislation provides for a specific remedy entailing an *ex nunc* examination of the situation of the person concerned, the results of which are binding on the competent authorities, a remedy which may be exercised after such circumstances have arisen and which, in particular, is not made conditional on the deprivation of that person's liberty or on the fact that implementation of that decision is imminent.**

[Signatures]