Reports of Cases

OPINION OF ADVOCATE GENERAL
TRSTENJAK
delivered on 27 June 2012[1]

Case C-245/11

K

(Reference for a preliminary ruling from the Asylgerichtshofs (Austria))

(Regulation (EC) No 343/2003 — Determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national — Article 3(2) — Sovereignty clause — Article 15 — Humanitarian clause — Application of Regulation No 343/2003 consistent with fundamental rights — Article 4 of the Charter of Fundamental Rights — Prohibition of torture and inhuman or degrading treatment or punishment — Article 7 of the Charter of Fundamental Rights — Respect for private and family life)

I – Introduction

1. This reference for a preliminary ruling from the Austrian Asylgerichtshof (Asylum Court) relates to the interpretation of Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national.[2] By its first question the referring court is asking in essence whether the application of the 'humanitarian clause' set out in Article 15 of Regulation No 343/2003 can oblige a Member State to examine an asylum claim in place of the Member State responsible under the basic rules, even if that Member State has not requested it to do so, if family members in need of support in the first-named Member State are dependent on the assistance of the asylum seeker. By its second question the referring court is asking whether under Article 3(2) of Regulation No 343/2003 a duty to intervene in the examination of an asylum application may arise for a Member State not prima facie responsible, if the responsibility of another Member State actually determined under the Regulation would result in an infringement of Article 3 or Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR') or Article 4 or Article 7 of the Charter of Fundamental Rights of the European Union ('the Charter of Fundamental Rights' or 'the Charter'). In addition, the referring court seeks to know the manner in which the case-law of the European Court of Human Rights is to be taken into account in this connection.

1 — Original language: German. Language of the proceedings: German.

2 — OJ 2003 L 50, p. 1.

II – Legal background

A – *The Charter of Fundamental Rights*

2. Article 4 of the Charter provides, under the heading 'Prohibition of torture and inhuman or degrading treatment or punishment':

'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'

3. Article 7 of the Charter states, under the heading 'Respect for private and family life':

'Everyone has the right to respect for his or her private and family life, home and communications.'

B – *Regulation No 343/2003*

4. Article 2(i) of Regulation No 343/2003 states:

'For the purposes of this Regulation:

...

(i) 'family members' means insofar as the family already existed in the country of origin, the following members of the applicant's family who are present in the territory of the Member States:

(i) the spouse of the asylum seeker or his or her unmarried partner in a stable relationship, where the legislation or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to aliens;

(ii) the minor children of couples referred to in point (i) or of the applicant, on condition that they are unmarried and dependent and regardless of whether they were born in or out of wedlock or adopted as defined under the national law;

(ii) the father, mother or guardian when the applicant or refugee is a minor and unmarried;'.

5. Article 3 of Regulation No 343/2003 provides:

'1. Member States shall examine the application of any third-country national who applies at the border or in their territory to any one of them for asylum. The application shall be examined by a single Member State, which shall be the one which the criteria set out in Chapter III indicate is responsible.

2. By way of derogation from paragraph 1, each Member State may examine an application for asylum lodged with it by a third-country national, even if such examination is not its responsibility under the criteria laid down in this Regulation. In such an event, that Member State shall become the Member State responsible within the meaning of this Regulation and shall assume the obligations associated with that responsibility. Where appropriate, it shall inform the Member State previously responsible, the Member State conducting a procedure for determining the Member State responsible or the Member State which has been requested to take charge of or take back the applicant.

...'

6. Article 15 of Regulation No 343/2003 provides:

‘1. Any Member State, even where it is not responsible under the criteria set out in this Regulation, may bring together family members, as well as other dependent relatives, on humanitarian grounds based in particular on family or cultural considerations. In this case that Member State shall, at the request of another Member State, examine the application for asylum of the person concerned. The persons concerned must consent.

2. In cases in which the person concerned is dependent on the assistance of the other on account of pregnancy or a new-born child, serious illness, severe handicap or old age, Member States shall normally keep or bring together the asylum seeker with another relative present in the territory of one of the Member States, provided that family ties existed in the country of origin.

...

4. Where the Member State thus approached accedes to the request, responsibility for examining the application shall be transferred to it.

...’

III – Facts and procedure before the national court and the questions referred

7. The applicant in the main proceedings (‘the applicant’), a national of the Russian Federation of Chechen ethnicity, entered Poland irregularly via Belarus and made her first application for asylum in Poland. She left that Member State without waiting for the procedure to be completed and entered Austria irregularly where she made her second application for asylum.

8. One of the applicant’s several adult sons lives in Austria, together with his wife and three young children. All the members of the son’s family came to Austria several years ago and have been granted asylum.

9. The son’s wife, who is consequently the applicant’s daughter-in-law, was raped during the civil war in Chechnya and, as a result, became infected with HIV. Following that incident, she sought to take her own life on several occasions; however, the applicant, in whom she had confided, was able to dissuade her from doing so. At this time, the two women had known each other only for a few months.

10. The applicant is the only person in the family who knows that her daughter-in-law was raped, and since the women came into contact again in Austria has become her daughter-in-law’s closest adviser and confidante not only on the basis of the family relationship but also because, in her country of origin, the applicant trained and acquired professional experience as a teacher and child psychologist.

11. In the event of her rape becoming known, in order supposedly to preserve the family honour the daughter-in-law is at risk of serious violence or even death at the hands of her husband, other men in the family, or individuals from her own birth family, some of whom live in Austria whereas others live in Poland. The applicant’s son knows only that his wife is infected with HIV; however, he assumes that this results from dental treatment carried out under unhygienic conditions.

12. The daughter-in-law suffers from a severe form of post-traumatic stress disorder (PTSD) and is under permanent psychiatric and psychological supervision. The HIV infection is being treated with powerful drugs in order to prevent or, at least, delay the onset of AIDS. In addition, as a result of several strokes, she recently developed severe kidney problems and has become paralysed on one side. The birth of her youngest child was effected by caesarean section because of her multiple health problems.

13. As a result of her illnesses, the daughter-in-law is not in a position to manage her own household nor can she care for her three children. Consequently, immediately after the birth of the second child, the child protection authority took steps to ensure that the applicant's grandchildren were placed in official care. Following the arrival of the applicant, who since then has taken principal responsibility for the children's care, that measure has been temporarily suspended.

14. Following her entry into Austria, the applicant lived initially with her son's family. Since her son's family was granted asylum, she no longer lives in the same household as her daughter-in-law and grandchildren, in accordance with the legislation governing the basic support for persons in the context of asylum procedures.

15. In July 2008 the Bundesasylamt (Federal Asylum Office) (Austria) rejected the applicant's Austrian asylum application as inadmissible on the ground that Poland is the Member State responsible. Poland acceded to a request from Austria to take charge of the applicant. The applicant's appeal against the decision to reject her asylum application is the subject of the proceedings before the referring court.

16. As the referring court has doubts concerning the application of Articles 15 and 3 of Regulation No 343/2003 in a case such as that in the main proceedings, it has stayed the proceedings and referred the following questions to the Court for a preliminary ruling.

(1) Must Article 15 of Regulation No 343/2003 be interpreted as meaning that a Member State prima facie not responsible for examining the asylum claim of a person in accordance with the rules of Articles 6 to 14 of that regulation becomes automatically responsible if in that country the asylum seeker has a daughter-in-law who is seriously ill and, on account of cultural factors, at risk or has grandchildren below the age of majority who, as a result of the daughter-in-law's illness, are in need of care and the asylum seeker is both willing and able to support her daughter-in-law and grandchildren? Does the same apply even if the Member State prima facie responsible has not made a request in accordance with the second sentence of Article 15(1) of Regulation No 343/2003?

(2) Must Article 3(2) of Regulation No 343/2003 be interpreted as meaning that in the circumstances mentioned in Question 1 the Member State prima facie not responsible becomes automatically responsible if the responsibility otherwise provided for by Regulation No 343/2003 will result in an infringement of Article 3 or Article 8 of the ECHR (Article 4 or Article 7 of the Charter)? In that case, in the accessory interpretation and application of Article 3 or Article 8 of the ECHR (Article 4 or Article 7 of the Charter), may more extensive notions of 'inhuman treatment' or 'family', at variance with the interpretation developed by the European Court of Human Rights, be applied?

IV – Proceedings before the Court of Justice

17. The order for reference of 20 May 2011 was received at the Registry of the Court on 23 May 2011. The applicant, the Czech Republic, the Republic of Poland, the Republic of Austria, the Republic of Hungary, the Italian Republic, the French Republic, the United Kingdom of Great Britain and Northern Ireland and the European Commission submitted written observations. The representatives of the applicant, the Republic of Austria and the Commission took part in the hearing on 8 May 2012.

V – The submissions of the parties

18. In answer to the questions from the referring court, the Czech and Austrian Governments consider that Article 15 of Regulation No 343/2003 is not applicable if the asylum seeker is already in the territory of a Member State in which he seeks to be brought together with family members and has made application for asylum in that State. In their view, Article 3(2) of Regulation No 343/2003, by contrast, governs situations in which the asylum seeker is in the territory of a Member State that is not responsible under Chapter III of the regulation. Hence, in their view, only Article 3(2) of the regulation is relevant in the present case. The French, Hungarian, United Kingdom and Italian Governments also hold that in a case such as that in the main proceedings only Article 3(2) of Regulation No 343/2003 is applicable, but they base their view on the absence of a request from the responsible Member State to take responsibility. With regard to the application of Article 3(2) of Regulation No 343/2003, the French and Hungarian Governments consider that the right to intervene under that provision is essentially within the discretion of the Member State, but that a duty to exercise that right may arise in the event of infringement of the Charter or of the ECHR. In the opinion of the Czech, United Kingdom and Italian Governments, the Member State's decision to intervene under Article 3(2) of Regulation No 343/2003 in the examination of an asylum application is not subject to EU law. The Czech and United Kingdom Governments point out, however, that the Member States of the European Union, as signatories to the ECHR, have a duty to comply with this international treaty.

19. The Polish Government, the Commission and the applicant base their replies to the first question on the assumption that Article 15(2) of Regulation No 343/2003 applies in a situation such as that in the main proceedings. Whereas in its reply to the second question the Polish Government takes the view that the Member States are entirely free to exercise the discretion granted to them under Article 3(2) of Regulation No 343/2003, the Commission and the applicant consider that they may be under an obligation to take charge in the event of infringements of fundamental rights.

VI – Legal assessment

20. By its reference for a preliminary ruling the referring court seeks clarification as to both the application of the 'sovereignty clause' set out in Article 3(2) of Regulation No 343/2003 and the application of the 'humanitarian clause' contained in Article 15 of that regulation in a situation such as that in the main proceedings.

21. I shall first examine the objectives of Regulation No 343/2003 and the position of Articles 3(2) and 15 within that regulation. On that basis, I shall then give concrete answers to the two questions referred.

A – *Objectives of Regulation No 343/2003 and position of Articles 3(2) and 15 within that regulation*

1. Main objectives of Regulation No 343/2003

22. Regulation No 343/2003 replaced the Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities, signed in Dublin on 15 June 1990 [3] (the 'Dublin Convention').

3 — OJ 1997 C 254, p. 1.

23. The Commission explained the essential objectives of Regulation No 343/2003 in detail in its proposal for a regulation of 26 July 2001.[4] Paragraph 2.1 of the grounds, under the heading 'Objectives', focuses first on guaranteeing the right of asylum by means of a procedure for determining the Member State responsible for examining an asylum application which is rapid, based on objective criteria and fair for all those involved, but also, secondly, on preventing abuse in the form of multiple applications in various Member States.

24. Those essential objectives expressed by the Commission were reflected in Regulation No 343/2003. In recitals 3 and 4 in the preamble the rapid determination of the Member State responsible on the basis of a clear and workable formula for the purpose of guaranteeing effective access to the procedures is described as a crucial objective. The second sentence of Article 3(1) of Regulation No 343/2003 sets out the basic principle that every asylum application is to be examined only by one single Member State. As a result, on the one hand, the emergence of so-called refugees in orbit is prevented, that is to say, the deportation of asylum seekers from one State to another and the devaluation of their right of asylum. On the other hand, the so-called practice of asylum shopping is brought to an end by excluding unchecked further migration in pursuit of parallel or successive asylum procedures within the EU.[5]

25. Furthermore, recital 6 in the preamble to Regulation No 343/2003 emphasises that family unity should be preserved in so far as this is compatible with the other objectives of the regulation. Recital 7 sets out the objective that a single Member State may process the asylum applications of several members of one family, even where that means derogating from the responsibility criteria, so as to make it possible to bring family members together on humanitarian grounds.

26. Against that background, Chapter III of Regulation No 343/2003 contains, in Article 5(1), a hierarchy of criteria, arranged in descending order, for determining the Member State responsible for examining an asylum application. Articles 6 to 8 of the regulation give priority to preserving family unity, and it is only subsequently, in Articles 9 to 12 of the regulation, that criteria are listed that place responsibility on a Member State by reason of the fact that it permitted the asylum seeker to enter EU territory. The purpose of this hierarchy of responsibility criteria is first to meet the requirement to determine the Member State responsible solely on the basis of objective criteria and to take account of the objective of preserving the family. Secondly, it is aimed at preventing abuse in the form of multiple simultaneous or consecutive applications for asylum and ensuring that only one single Member State is declared responsible.

2. Systematic position of Articles 3(2) and 15 in Regulation No 343/2003

27. The legislature did not overlook the fact that there may be situations in which the determination of responsibility in accordance with a strict catalogue of criteria may have unacceptable consequences. In order to avoid such an outcome, two provisions were introduced that derogate from the abovementioned hierarchy of criteria and permit another Member State to bear responsibility for special reasons, namely the 'sovereignty clause' in Article 3(2) and the 'humanitarian clause' in Article 15 of Regulation No 343/2003.

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

5 — Hermann, M., in: Hailbronner, K. (ed.) *EU Immigration and Asylum Law*, Munich 2010, Kommentierung zu VO 343/2003, Article 1, paragraph 20 et seq.; Filzwieser, C., and Sprung, A., *Dublin II-Verordnung, Das Europäische Asylzuständigkeitssystem*, 3rd edition, 2010, Article 3, paragraph K6; Huber, B., and Göbel-Zimmermann, R., *Ausländer- und Asylrecht*, 2nd edition, Munich 2008, paragraph 1885.

28. In its proposal for a regulation of 26 July 2001 the Commission justified the humanitarian clause on the grounds that it served first and foremost to prevent or remedy the dispersal of family members which could sometimes result from the strict application of the responsibility criteria. Although the intended Regulation contained several binding provisions aimed at bringing family members together or maintaining the unity of the family group, the situations that could arise were so diverse that they could not all be covered by special provisions, with the result that the provision of a humanitarian clause was necessary in the interests of the Member States and of asylum seekers. [6]

29. Hence, as a result of the way in which it was conceived, Article 15 of Regulation No 343/2003 contains an exception to the hierarchy of responsibilities set out in Chapter III of the regulation.

30. The same applies to the right to intervene under Article 3(2) of Regulation No 343/2003. It is clear from the Commission's proposal for a Council regulation of 26 July 2001 that the decision to exercise that right may be based on political, humanitarian or merely practical considerations by a Member State that is not responsible under the basic rules. [7]

31. Both Article 15 and Article 3(2) of Regulation No 343/2003 therefore constitute derogations from the responsibility criteria set out in Chapter III of the regulation. Whereas Article 15 was inserted into Chapter IV of the regulation under the heading 'Humanitarian clause', Article 3(2) is located in Chapter II, headed 'General principles'. Having one derogation located in the general principles of Chapter II and the other in a separate Chapter IV is not an optimum solution, as evidenced by the Commission's proposal for a regulation of the European Parliament and of the Council for a new version of Regulation No 343/2003, [8] where it is suggested that, for reasons of clarity, the sovereignty and humanitarian clauses be revised and brought together in one Chapter under the heading 'Discretionary clauses'. [9]

3. Relationship between Articles 3(2) and 15 of Regulation No 343/2003

32. So far, the relationship between Articles 3(2) and 15 of Regulation No 343/2003 has not been determined.

33. The Czech and Austrian Governments regard the place of residence of the asylum seeker as a determining criterion for the application of these provisions and consider that Article 3(2) of Regulation No 343/2003 should be applied if the asylum seeker is present in a State that is not responsible for examining the asylum application, whereas in their view Article 15 of the regulation should be applied if the asylum seeker is present in a State responsible for examining the asylum application but it appears advisable for the asylum procedure to be conducted in another State. I cannot support that approach.

34. Such an interpretation, which is based solely on the place of residence of the asylum seeker without considering other circumstances, would not be consistent with the stated objective of Article 15 of Regulation No 343/2003.

6 — COM(2001) 447 final (cited in footnote 4 above), commentary on Article 16.

7 — Ibid., commentary on Article 3.

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

9 — Ibid., point 4 of the Explanatory Memorandum.

35. As I have already pointed out, the purpose of introducing Article 15 of Regulation No 343/2003 was to preserve or restore family unity as a backstop provision for situations in which the responsibility criteria set out in Chapter III might cause the asylum seeker humanitarian hardship. Even the Commission's first proposal for a regulation of 26 July 2001 pursued the objective of creating a backstop clause to avoid the dispersal of family members.[10] The final version of Article 15 of Regulation No 343/2003 is clearly based on that proposal. The application of the humanitarian clause is predicated essentially on bringing family members together or avoiding their dispersal.[11]

36. In accordance with its genesis and wording, Article 15 of Regulation No 343/2003 is therefore a special provision for humanitarian family reasons, whereas Article 3(2) of that regulation is a general hardship provision. This is particularly clear from the fact that individual cases in which Article 3(2) of Regulation No 343/2003 applies are not more precisely defined, by contrast with Article 15 of the regulation.

37. Another fundamental difference between Article 3(2) and Article 15 of Regulation No 343/2003 is that in the case of Article 3(2) an asylum application has already been lodged in the Member State not responsible under the basic rules, whereas in the case of Article 15 this need not be so.

38. To summarise, it must therefore be held that both Article 3(2) and Article 15 of Regulation No 343/2003 are special provisions for discretionary decisions by Member States, that their fields of application may overlap and that, if the factual preconditions are met, they may be applicable in tandem. Article 15 of Regulation No 343/2003 is a special provision for discretionary decisions regarding family reunion on humanitarian grounds, irrespective of the place of residence of the asylum seeker, whereas invocation of the right to intervene under Article 3(2) of the regulation may also depend on factors other than humanitarian grounds. Hence, the humanitarian clause of Article 15 is not a general provision for cases of hardship but depends necessarily on the applicant having a family member in the territory of the Member States.

B – *The first question referred*

39. By its first question the court of reference essentially seeks clarification as to whether in a case such as that in the main proceedings the Republic of Austria may have a duty under Article 15 of Regulation No 343/2003 to examine the applicant's asylum application in place of the Member State primarily responsible under the provisions of Articles 6 to 14 and whether this also applies if the Member State primarily responsible has made no request for the Republic of Austria to assume responsibility.

40. In order to answer that question, I shall first examine the relationship between Article 15(1) and Article 15(2) of Regulation No 343/2003. Against that background I shall then investigate whether Article 15(2) can be relevant in a case such as that in the main proceedings. Since in my opinion this question must be answered in the negative, I shall then answer the first question on the basis of Article 15(1) of Regulation No 343/2003.

10 — COM(2001) 447 final (cited in footnote 4 above), commentary on Article 16.

11 — This objective is also set out in the abovementioned Commission proposal for a revised version of Regulation No 343/2003. That proposal suggests differentiating between the sovereignty clause and the humanitarian clause, in that it proposes that the sovereignty clause be used mainly for humanitarian and compassionate reasons, whereas the humanitarian clause should be used whenever the strict application of the binding criteria will lead to a separation of family members; see COM(2008) final (cited in footnote 8 above), point 3 of the Explanatory Memorandum.

1. The relationship between Article 15(1) and Article 15(2) of Regulation No 343/2003

41. Article 15(1) of Regulation No 343/2003 enables Member States to bring together family members and other dependent relatives on humanitarian grounds and for that purpose to examine asylum applications for which it is not responsible under the responsibility criteria of Chapter III. Pursuant to the second sentence of Article 15(1), this necessitates a request from another Member State. In addition, the third sentence of Article 15(1) lays down that the asylum seeker must consent.

42. Article 15(2) of Regulation No 343/2003 sets out examples of humanitarian grounds. It is clear from the overall configuration of the provision and its genesis that Article 15(1) lays down both the prerequisites and the procedure where humanitarian grounds exist, while Article 15(2) indicates situations in which the existence of humanitarian grounds within the meaning of that provision is to be assumed in principle and the humanitarian clause should consequently be applied.

43. In its proposal for a regulation of 26 July 2001 the Commission had already recommended clarifying the principles for derogating from the responsibility criteria for the purposes of bringing family members together.[12] This recommendation, and the final version of Article 15(2) of Regulation No 343/2003, can be traced back to the fourth sentence of Article 2(2) of Decision No 1/2000 of 31 October 2000 of the Committee set up by Article 18 of the Dublin Convention,[13] which provided that under the Dublin Convention families shall normally be reunited in any of the cases that are now listed in Article 15(2) of Regulation No 343/2003.

44. The reason for the differentiation between Article 15(1) and Article 15(2) of Regulation No 343/2003 is that the legislature realised that an indeterminable number of diverse situations for the application of the humanitarian clause can arise and that they cannot all be covered by special provisions.[14] Examples are asylum seekers from the territory of former colonial powers that continued to have a decisive influence on cultural conditions in the countries of origin of some asylum seekers, or their linguistic knowledge, which might make it appropriate to give particular weight to the family aspect of reunion.[15] Whether in such cases there are humanitarian grounds for bringing a family together is for the Member States to determine in the light of Article 15(1) of Regulation No 343/2003. By contrast, Article 15(2) of the regulation specifies essential situations in which the special circumstances are so important that the existence of humanitarian grounds must as a rule be assumed to exist and family reunion under Article 15(1) of the regulation will therefore usually take place.

45. This assessment is confirmed by the fact that Article 15(2) of Regulation No 343/2003 differs from Article 15(1) not only in that it lists individual cases in which humanitarian grounds should as a rule be assumed to exist but also in that it lays down no further conditions. Article 15(2) neither explicitly provides that a Member State can take over responsibility for examining an asylum application only if requested to do so by another Member State nor that the persons concerned must consent. If the first two paragraphs of Article 15 were regarded as separate provisions, in particularly serious cases an application would be examined by a Member State that is not responsible according to the criteria of Chapter III without the asylum seeker having an opportunity to state his views. It is obvious that the legislature did not intend such an outcome.

12 — COM(2001) 447 final (cited in footnote 4 above), commentary on Article 16.

13 — Decision No 1/2000 of 31 October 2000 of the Committee set up by Article 18 of the Dublin Convention concerning the transfer of responsibility for family members in accordance with Article 3(4) and Article 9 of that Convention, OJ 2000 L 281, p. 1. The second recital in the preamble to that decision emphasises that pursuant to Article 3(4) and Article 9 of the Dublin Convention, a Member State could examine an application for asylum even if such examination was not its responsibility under the criteria defined in that Convention. Decision No 1/2000 states that the objective of the decision is to lay down provisions for the interpretation and application of these articles for processing applications for asylum from family members.

14 — See COM(2001) 447 final (cited in footnote 4 above), commentary on Article 16.

15 — See Filzwieser, C., and Sprung, A., loc. cit. (footnote 5), Article 15, paragraph K8.

46. Hence, Article 15(2) of Regulation No 343/2003 lists and clarifies the humanitarian grounds mentioned in Article 15(1).

47. The essential difference between Article 15(1) and Article 15(2) of Regulation No 343/2003 lies in the discretion they allow the Member States. The discretion of the deciding authorities in the cases described in Article 15(2) is much narrower than that laid down in Article 15(1). Article 15(2) describes situations in which family reunion should usually take place. In such a situation, a decision not to bring family members together can be taken only in exceptional circumstances.[16] There must therefore be a specific reason for denying the existence of humanitarian grounds despite the existence of a circumstance described in Article 15(2).

48. By contrast, Article 15(1) of Regulation No 343/2003 gives the Member States discretion in individual cases, in which the Member State itself must weigh all the relevant factors, because the terms 'humanitarian' and 'family or cultural considerations' are undefined legal concepts open to flexible application to a wide variety of situations with a family connotation. This considerably wider discretion by comparison with Article 15(2) stems from the objective of the humanitarian clause to take account of the requirements of the Charter and the ECHR in covering situations that cannot be defined in detail *ex ante* because of the multitude of conceivable situations and circumstances.

2. Article 15(2) of Regulation No 343/2003 is not applicable to a case such as that in the main proceedings

49. According to its wording, Article 15(2) of Regulation No 343/2003 lays down that in cases in which the 'person concerned' is dependent on the assistance of the 'other [person]' on account of pregnancy or a newborn child, serious illness, severe handicap or old age, Member States shall normally keep or bring together the asylum seeker with another relative present in the territory of one of the Member States, provided that family ties existed in the country of origin.

50. The question of who is meant by the 'person concerned' and the 'other [person]' within the meaning of Article 15(2) of Regulation No 343/2003 is not difficult to ascertain on the basis of Article 15(1) of the regulation, for under the second sentence of Article 15(2) the Member State not primarily responsible may examine the asylum application from the 'person concerned' at the request of another Member State, subject to the conditions laid down in that paragraph. Hence, the 'person concerned' within the meaning of Article 15(1) is the asylum seeker.

51. Taking account of the systematic relationship between Article 15(1) and Article 15(2) of Regulation No 343/2003, it must therefore be assumed that the 'person concerned' referred to in Article 15(2) is the asylum seeker, while the 'other [person]' within the meaning of that provision is a family member of the asylum seeker.

52. Consequently, according to its wording Article 15(2) of Regulation No 343/2003 is not applicable to a case such as that in the main proceedings, because in those proceedings it is not the asylum seeker who is dependent on the assistance of a family member present in a Member State but a family member who needs the help of the asylum seeker.

53. In my view, there are no teleological grounds for extending this interpretation, which is based on the wording and systematic position of Article 15(2) of Regulation No 343/2003, to mean that this derogation should also be applicable if a family member present in a Member State needs the assistance of the asylum seeker.

16 — See Filzwieser, C., and Sprung, A., loc. cit. (footnote 5), Article 15, paragraph K11; Hailbronner and Thiery, Schengen II und Dublin. Der zuständige Asylstaat in Europa, ZAR 1997, p. 57.

54. That view is not contradicted by the fact that Article 11(1) of Commission Regulation (EC) No 1560/2003 laying down detailed rules for the application of Regulation No 343/2003[17] states that Article 15(2) of Regulation No 343/2003 shall apply whether the asylum seeker is dependent on the assistance of a relative present in another Member State or a relative present in another Member State is dependent on the assistance of the asylum seeker, since Regulation No 1560/2003 is an implementing regulation which can only supplement or clarify the provisions of the main regulation but cannot alter it substantively.

55. Against that background, it therefore remains that Article 15(2) of Regulation No 343/2003 cannot be applied in a case such as that in the main proceedings.

3. The application of Article 15(1) of Regulation No 343/2003 to a case such as that in the main proceedings

56. Pursuant to Article 15(1) of Regulation No 343/2003, any Member State, even where it is not responsible under the criteria set out in Chapter III of this regulation, may bring together family members, as well as other dependent relatives, on the humanitarian grounds stated in that article, in which case, at the request of another Member State and with the consent of the person concerned, it shall examine that person's application for asylum. Article 15(4) of Regulation No 343/2003 confirms that in such a case responsibility for examining the application shall be transferred to the Member State thus approached.

57. In order to answer the question whether in a case such as that in the main proceedings this provision may give rise to an obligation for the Republic of Austria to examine the applicant's asylum claim, it is necessary to clarify in particular:

— whether the applicant can be considered to be a family member within the meaning of Article 15(1) of Regulation No 343/2003;

— whether – and, if so, in what circumstances – the possibility under Article 15(1) for an asylum application to be examined by a Member State not responsible under Chapter III can crystallise into an obligation to examine;

— and whether, if such an obligation to examine exists, it is possible to dispense with the request to take charge of the application.

58. I shall address these three questions below.

a) The applicant can be considered to be a family member within the meaning of Article 15(1) of Regulation No 343/2003

59. Under Article 15(1) of Regulation No 343/2003 a Member State may, if the conditions set out in that paragraph are met, bring together 'family members, as well as other dependent relatives' for the purpose of examining applications for asylum.

60. Article 2(i) of Regulation No 343/2003 contains a relatively narrow legal definition of the term 'family members' that does not extend to the relationship between mother-in-law and daughter-in-law. This raises the question whether a wider family definition should be used for the circle of family members under Article 15(1) than is stated in Article 2(i).

17 — Commission Regulation (EC) No 1560/2003 of 2 September 2003 laying down detailed rules for the application of Regulation No 343/2003, OJ 2003 L 222, p. 3.

61. In my view, this question must be answered in the affirmative. From a comparison of the German language version of Regulation No 343/2003 with the other language versions of that regulation it is clear that the term 'Familienmitglied' in Article 15(1) corresponds to the definition of 'Familienangehörige' given in Article 2(i) of the regulation.[18] However, the fact that there is also mention of 'andere Familienangehörige' indicates that the definition contained in Article 2(i) cannot be decisive in this context. This is borne out by the English-language version, which at this point speaks of 'other dependent relatives'.

62. These considerations lead me to conclude that the applicant can be regarded as belonging to the circle of 'family members and other dependent relatives' within the meaning of Article 15(1) of Regulation No 343/2003.

b) The circumstances in which the possibility of examining an asylum application provided for in Article 15(1) of Regulation No 343/2003 might crystallise into an obligation to examine

63. As I argued in my Opinion of 22 September 2011 in the *N. S. and Others* case[19] and the Court confirmed in its judgment of 21 December 2011 in that case,[20] a decision made by a Member State under Article 3(2) of Regulation No 343/2003 whether to examine a claim for asylum is to be regarded, for the purposes of Article 51(1) of the Charter, as a national implementing measure for Regulation No 343/2003, so that in taking such a decision the Member States must comply with the requirements of the Charter.

64. This assessment can be transposed to the humanitarian clause in Article 15 of Regulation No 343/2003. Accordingly, a decision made by a Member State under Article 15(1) of Regulation No 343/2003 whether to examine a claim for asylum is to be regarded, for the purposes of Article 51(1) of the Charter, as a national implementing measure for Regulation No 343/2003, in which the Member State must comply with the requirements of the Charter.

65. In the light of this requirement to comply with the Charter, in particular circumstances the Member States may be obliged to exercise their right to examine an asylum application on humanitarian grounds in accordance with the requirements of Article 15 of Regulation No 343/2003 if otherwise there would be a serious risk of an unjustified limitation of the asylum seeker's fundamental rights as enshrined in the Charter.[21]

66. In its reference for a preliminary ruling, the referring court points in this regard to a possible infringement of the prohibition on inhuman or degrading treatment enshrined in Article 4 of the Charter and of the protection of private and family life guaranteed under Article 7 of the Charter.

67. As regards a possible infringement of Article 4 of the Charter, the referring court states that in the main proceedings the applicant would be handed over to Poland if Austria were not responsible for examining the applicant's asylum claim. This would lead to the applicant being separated from her daughter-in-law, who is in need of assistance and under threat from her family, which would be likely

18 — In the English-language version the term 'family members' is used at this point in both Article 15(1) of Regulation No 343/2003 and Article 2(i). This uniform terminology is also to be found in the French and Spanish versions of the regulation.

19 — Opinion of 22 September 2011 in Case C-411/10 *N. S. and Others* [2011] ECR I-13905, paragraph 69 et seq.

20 — Judgment in *N. S. and Others*, paragraph 64 et seq.

21 — With regard to the comparable duty of the Member States to exercise their right to intervene under Article 3(2) of Regulation No 343/2003 in order to prevent a serious risk of violation of the asylum seeker's fundamental rights guaranteed by the Charter, see my Opinion in the *N. S. and Others* case, cited in footnote 19 above, paragraph 116 et seq. Although in its judgment in the *N. S. and Others* case the Court was rather non-committal in this regard (see in particular the *N. S. and Others* judgment, cited in footnote 20 above, paragraph 82), it nevertheless concluded that the Member State in which the asylum seeker is present and for whose asylum application it is not responsible under the criteria set out in Chapter III of Regulation No 343/2003 must ensure that it does not worsen a situation where the fundamental rights of that applicant have been infringed by using a procedure for determining the Member State responsible which takes an unreasonable length of time and, if necessary, it must itself examine the application in accordance with the procedure laid down in Article 3(2) of Regulation No 343/2003 (point 98). See also point 84 et seq. of this Opinion.

to result in a deterioration in the health of the daughter-in-law and to place her at risk of harm at the hands of the family clan. With regard to a possible infringement of Article 7 of the Charter, the referring court points out furthermore that the handing-over of the applicant to Poland would result in a separation from her grandchildren, who are minors and who, in turn, would then risk being separated from their mother as she cannot provide adequate care. [22]

68. Although the decision whether in the main proceedings there is a serious risk of infringement of Article 4 of the Charter rests ultimately with the referring court, it must be pointed out that an infringement of the prohibition on inhuman or degrading treatment enshrined in the Charter presupposes the infliction of physical or mental pain or suffering of sufficient intensity or duration. [23] Neither the applicant nor her daughter-in-law is at direct risk of such treatment from state bodies. Only indirect effects on the life and existence of the daughter-in-law would have to be feared.

69. Although it is to be assumed in this connection that Article 4 of the Charter can also oblige the Member States to provide protection from torture and inhuman or degrading treatment by private individuals, [24] in my opinion it is doubtful whether the adverse effects of the transfer of the applicant to Poland on the life and existence of the daughter-in-law in a case such as that in the main proceedings would be sufficiently serious to constitute an infringement of Article 4 of the Charter. Taking particular account of the circumstances, namely first that the daughter-in-law entered Austria with her husband and children (and without the applicant), clearly lived there for several years without the applicant and was granted asylum in Austria, and secondly that since the daughter-in-law was granted refugee status the applicant no longer lives in the same household with her and the grandchildren, the referring court must examine carefully whether the effects of the transfer of the applicant to Poland on the life and existence of the daughter-in-law in Austria are to be categorised plainly as inhuman or degrading within the meaning of Article 4 of the Charter.

70. If the referring court nevertheless concluded that there was a serious risk of violation of the daughter-in-law's fundamental rights guaranteed by Article 4 of the Charter, the Republic of Austria must be granted sufficient discretion in its choice of measures to guard against the impending actions. [25] Even if in a case such as that in the main proceedings Article 4 of the Charter created a positive obligation for the Republic of Austria to prevent the daughter-in-law being endangered by her family clan as a result of the applicant's transfer to Poland, it would be left to the Republic of Austria to choose the appropriate protection measures.

71. It follows directly from this that a prohibition on the transfer of the applicant to Poland cannot be deduced from Article 4 of the Charter even if this fundamental right in a case such as that in the main proceedings would require positive action by the Republic of Austria to protect the daughter-in-law, for in this case the Republic of Austria would be free to choose another reasonable measure to protect her.

22 — See in particular the order for reference, paragraphs 33, 41 and 45.

23 — To that effect, see Jarass, D., *Charta der Grundrechte der Europäischen Union*, Munich 2010, Article 4, paragraph 8; Callies, C., in *EUV/AEUV* (ed. Callies and Ruffert), 4th edition, Munich 2011, EU-GRCharta Article 4, paragraph 8 et seq.

24 — According to the settled case-law of the European Court of Human Rights, the obligation on the High Contracting Parties under Article 1 of the ECHR to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals. See, for example, *Ebcin v. Turkey* no. 19506/05, § 35, 1 February 2011; *Z and Others v. the United Kingdom* [GC], no. 29392/95, § 73, ECHR 2001-V; and *A. v. the United Kingdom*, 23 September 1998, § 22, *Reports of Judgments and Decisions* 1998-VI.

25 — See also in this connection the settled case-law of the European Court of Human Rights, under which the steps to be taken by the States to prevent indirect infringements of Article 1 of the ECHR, in conjunction with Article 3, should enable 'effective protection' to be provided and should include 'reasonable measures' to prevent ill-treatment of which the authorities have or ought to have knowledge, judgments of the European Court of Human Rights in *Karaman and Others v. Turkey*, no. 60272/08, § 46, 15 January 2008, and *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, no. 13178/03, § 53, ECHR 2006-XI. Moreover, in its judgment in *Opuz v. Turkey*, no. 33401/02, § 165, ECHR 2009 the Court expressly confirmed that it is not the Court's role to replace the national authorities and to choose in their stead from among the wide range of possible measures that could be taken to secure compliance with their positive obligations under Article 3 of the ECHR.

72. In the light of all of this, the question whether the Republic of Austria can be obliged to examine the applicant's asylum application on humanitarian grounds in accordance with the requirements of Article 15 of Regulation No 343/2003 in order to prevent inhuman or degrading treatment of a person other than the applicant that is prohibited under Article 4 of the Charter requires no further consideration.

73. As regards the possible infringement of the right to respect for family life guaranteed by Article 7 of the Charter, the referring court points first to the relationship between the applicant as grandmother and her grandchildren. Secondly, it emphasises that if the applicant were handed over to Poland it is likely that the grandchildren would be separated from their mother as a result of child protection measures.

74. For Article 7 of the Charter to be applied to a case such as that in the main proceedings it must be assumed that the relationship between the applicant as grandmother and her grandchildren can be covered by the right to respect for family life, particularly as the cohabitation of family members is not automatically necessary for that purpose.[26] Accordingly, it cannot be excluded that the transfer of the applicant to Poland could constitute interference with her right to respect for family life within the meaning of Article 7 of the Charter.

75. Such interference could, however, be justified in accordance with the requirements of Article 52(1) and (3) of the Charter. Article 52(1) of the Charter lays down in particular that any limitation on the exercise of the right to respect for family life must be provided for by law[27] and must respect the essence of that right and the principle of proportionality. Since the transfer of the applicant to Poland would be a measure implementing the rules laid down in Regulation No 343/2003 to determine the Member State responsible for examining her asylum application, it would have a legal basis. Moreover, in its judgment in the *N. S. and Others* case the Court emphasised that the responsibility criteria laid down in Chapter III of Regulation No 343/2003 can be altered only in exceptional circumstances, even in the event of a restriction of a fundamental right.[28] In a case such as that in the main proceedings, this must be taken into account in the context of an examination of the proportionality of interference with the right to respect for family life[29] and in the context of an examination of respect for the essence of that right.[30] Accordingly, only a particularly serious restriction of the right to respect for family life could be classified as a prohibited restriction such as to affect the responsibility rules of Regulation No 343/2003.

76. With regard to the referring court's observations on the risk of the grandchildren being separated from the daughter-in-law if the applicant were handed over to Poland, it must also be pointed out that the referring court states that such a separation is likely as a result of child protection measures.[31] Moreover, the referring court mentions that this would be a lawful separation of the daughter-in-law from her children.[32] In the light of the fact that the Republic of Austria is a High Contracting Party to the ECHR, it must be assumed that a lawful separation of the grandchildren from their mother as a result of child protection measures under Austrian law cannot normally constitute an unjustified restriction of the right to respect for the family life of the grandchildren and

26 — See Jarass, D., loc. cit. (footnote 23), Article 7, paragraph 21.

27 — Because of this statutory limitation on restrictions of fundamental rights, limitations of the rights enshrined in the Charter of Fundamental Rights must be provided for either by the EU legislature or by the national legislature.

28 — See the *N. S. and Others* judgment, cited in footnote 20 above, paragraph 82.

29 — This examination of proportionality must be based on a three-stage procedure in which not only the appropriateness and necessity but also the reasonableness of the restriction of the fundamental right must be examined.

30 — The question even arises whether the guarantee of respect for the essence of the right can acquire autonomous significance that goes beyond the three-stage verification of proportionality (see Kingreen, T., in *EUV/EGV* (ed. Calliess and Ruffert), 4th edition, Munich 2011, EU-GRCharta Article 52, paragraph 64; Jarass, D., loc. cit. (footnote 23), Article 52, paragraph 45). If a limitation is so comprehensive that it completely disregards crucial aspects of the fundamental right in question and consequently affects its essence, it must as a rule be challenged as unreasonable and hence as disproportionate.

31 — Order for reference, paragraph 41.

32 — Order for reference, paragraph 46.

the daughter-in-law within the meaning of Article 7 of the Charter. Against that background, there is no need to consider further the question whether in order to avoid an infringement of the fundamental right to respect for the family life of a person other than the applicant the Republic of Austria can be obliged to examine the applicant's asylum application on humanitarian grounds in accordance with the requirements of Article 15 of Regulation No 343/2003.

77. To summarise, in the light of all of the above, it can be held that in exceptional circumstances the Member States can be obliged to exercise their right to examine an asylum application on humanitarian grounds in accordance with the requirements of Article 15 of Regulation No 343/2003 if otherwise there would be a serious risk of an unjustified interference with the asylum seeker's rights enshrined in the Charter.

c) The need for a request to take over the application if there is a duty to take responsibility

78. Under Article 15(1) of Regulation No 343/2003 a Member State may bring together family members, as well as other dependent relatives, on the humanitarian grounds mentioned in that paragraph for the purpose of examining asylum applications, provided that the persons concerned consent and a request to carry out such an examination has been received from another Member State.

79. According to the wording of the regulation, a request from another Member State to assume responsibility must therefore have been received in order to apply the humanitarian clause.

80. In my opinion, the requirement for a request to assume responsibility can be explained by the need to coordinate the actions of the various Member States in the examination of asylum applications. In this regard, it is particularly important to resolve the question of responsibility for the asylum procedure in accordance with Regulation No 343/2003 as quickly and uniformly as possible. It appears to me that the importance of the request lies in the fact that in this way it is possible to settle clearly between the various Member States involved in an asylum procedure who will assume responsibility for examining the asylum application in accordance with Regulation No 343/2003.

81. Against that background, the requirement for a request to assume responsibility cannot be waived even where a Member State has a duty in exceptional circumstances to exercise its right to examine an asylum application on humanitarian grounds pursuant to Article 15 of Regulation No 343/2003. In such a case the requirement for a request laid down in Article 15(1) should be understood to mean that the Member State with a duty to assume responsibility would be obliged, in the light of an interpretation and application of Article 15 of Regulation No 343/2003 consistent with fundamental rights, to inform the other Member State involved in the asylum procedure about the factual and legal situation and to seek its agreement to the first State's taking-over of the asylum procedure.

4. Findings

82. In the light of the above considerations, the answer to the first question referred should be that in exceptional circumstances a Member State may have a duty to exercise its right to examine an asylum application on humanitarian grounds under Article 15 of Regulation No 343/2003 if otherwise there would be a serious risk of an unjustified interference with one of the asylum seeker's rights enshrined in the Charter. If in such a case no request to take over the procedure within the meaning of the second sentence of Article 15(1) of Regulation No 343/2003 is received, the Member State with a duty to assume responsibility would be obliged to inform the other Member State involved in the asylum procedure about the factual and legal situation and seek its agreement to the taking-over of the asylum procedure.

C – *The second question referred*

83. By its second question the referring court seeks clarification as to whether the right of the Republic of Austria laid down in Article 3(2) of Regulation No 343/2003 to intervene in a case such as that in the main proceedings may crystallise into a duty to intervene if the responsibility otherwise prescribed by Regulation No 343/2003 would constitute an infringement of Article 3 or Article 8 of the ECHR (Article 4 or Article 7 of the Charter). The referring court also enquires as to the significance of the case-law of the European Court of Human Rights on Article 3 or Article 8 of the ECHR for the interpretation of Article 4 or Article 7 of the Charter.

84. The answer to the question whether and on what conditions the right to intervene provided for in Article 3(2) of Regulation No 343/2003 may crystallise into a duty to intervene must be based on the abovementioned judgment in the *N. S. and Others* case, in which the Court held that a decision made by a Member State under Article 3(2) of Regulation No 343/2003 whether to examine a claim for asylum is to be regarded, for the purposes of Article 51(1) of the Charter, as a national implementing measure for Regulation No 343/2003, so that in taking such a decision the Member States must comply with the requirements of the Charter. [33]

85. The Court deduced from this that the Member State in which the asylum seeker is present but which in accordance with the criteria of Chapter III of Regulation No 343/2003 is not responsible for his asylum application may not transfer the asylum seeker to the Member State responsible under Chapter III of Regulation No 343/2003, if it cannot be unaware that this would lead to an infringement of the asylum seeker's rights guaranteed by the Charter. [34] In such a case the Member State in which the asylum seeker is present must, subject to the right itself to examine the application referred to in Article 3(2) of this regulation, disregard the criterion of Chapter III under which the other Member State is responsible and ascertain whether one of the other criteria enables another Member State to be identified as responsible for the examination of the asylum application, to which the asylum seeker can be transferred without infringing his fundamental rights. [35] The Member State in which the asylum seeker is present must, however, ensure that it does not worsen a situation where the fundamental rights of that applicant have been infringed by using a procedure for determining the Member State responsible which takes an unreasonable length of time. If necessary, that Member State must itself examine the application in accordance with the procedure laid down in Article 3(2) of Regulation No 343/2003. [36]

86. In answering the question as to the manner in which the case-law of the European Court of Human Rights on Articles 3 and 8 of the ECHR is to be taken into account for the interpretation and application of Articles 4 and 7 of the Charter, regard must be had to Article 52(3) of the Charter. Under that provision, the rights contained in the Charter of Fundamental Rights which correspond to rights guaranteed by the ECHR have the same meaning and scope as the corresponding rights laid down by the ECHR. It is also expressly provided in Article 52(3) of the Charter that that provision does not prevent EU law providing more extensive protection.

87. As I stated in my Opinion of 22 September 2011 in the *N. S. and Others* case, [37] this provision is to be interpreted as meaning that under Article 52(3) of the Charter it must be ensured that the protection guaranteed by the Charter in the areas in which the provisions of the Charter overlap with the provisions of the ECHR is no less than the protection granted by the ECHR. Because the extent

33 — The *N. S. and Others* judgment, cited in footnote 20 above, paragraph 64 et seq.

34 — Ibid., paragraph 94.

35 — Ibid., paragraph 96 et seq.

36 — Ibid., paragraph 98.

37 — See my Opinion of 22 September 2011 in the *N. S. and Others* case (cited in footnote 19 above), paragraph 4 of the proposed tenor of the judgment.

and scope of the protection granted by the ECHR has been clarified in the case-law of the European Court of Human Rights, particular significance and high importance are to be attached to that case-law in connection with the interpretation of the relevant provisions of the Charter of Fundamental Rights by the Court of Justice.

88. Finally, the question from the referring court whether in a case such as that in the main proceedings definitions of 'inhuman treatment' and 'family' at variance with those used in the case-law of the European Court of Human Rights on Articles 3 or 8 of the ECHR must be used when examining whether there is an unjustified limitation of Articles 4 or 7 of the Charter must, in my opinion, be answered in the negative.

89. As I have already stated,[38] an infringement of the prohibition on inhuman or degrading treatment enshrined in Article 4 of the Charter presupposes the infliction of physical or mental pain or suffering of sufficient intensity or duration. Hence, the concept of 'inhuman or degrading treatment' within the meaning of Article 4 of the Charter essentially corresponds to the same term in Article 3 of the ECHR. According to the settled case-law of the European Court of Human Rights, in order for ill-treatment to fall within the scope of Article 3 of the ECHR it must attain a minimum level of severity. The assessment of this minimum depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim.[39]

90. As regards the interpretation of the term 'family life', the referring court wishes to know in particular whether Article 7 of the Charter protects only 'effective' family life, as demanded in the case-law of the European Court of Human Rights on Article 8 of the ECHR, or whether Article 7 of the Charter also protects family relationships that do not represent 'effective' family life within the meaning of the case-law of the European Court of Human Rights. That question arises in the main proceedings because the applicant cohabited with her daughter-in-law and grandchildren only to a limited extent in Austria and this is currently no longer the case.

91. According to the case-law of the European Court of Human Rights on Article 8 of the ECHR, this provision guarantees the right to respect for family life, and thus presupposes the existence of a family. The deciding factor is whether real family life existed between the persons concerned,[40] and it is a question of determining in particular whether close personal ties truly and actually existed.[41]

92. In my opinion this clarification in the case-law of the European Court of Human Rights that Article 8 of the ECHR protects only actual family life can be transposed directly to the right to respect for family life guaranteed by Article 7 of the Charter. In this connection, it is necessary to refer to the Explanations relating to the Charter of Fundamental Rights,[42] in particular to the explanation on Article 7 of the Charter, where it is emphasised that the rights guaranteed in Article 7 of the Charter correspond to those guaranteed by Article 8 of the ECHR.[43] Accordingly, it must be assumed that family life within the meaning of Article 7 of the Charter is also predicated on actual and close personal ties existing between the persons concerned.

38 — See point 68 of this Opinion.

39 — See in this connection the judgments of the European Court of Human Rights in *Stanev v. Bulgaria* [GC], no. 36760/06, § 202, ECHR 2012; *Gäfgen v. Germany* [GC], no. 22978/05, § 88, ECHR 2010; *Testa v. Croatia*, no. 20877/04, § 43, 12 July 2007; and *Jalloh v. Germany* [GC], no. 54810/00, § 67, ECHR 2006-IX.

40 — See the judgment of the European Court of Human Rights in *Marckx v. Belgium*, 13 June 1979, § 31, Series A no. 31.

41 — See the judgments of the European Court of Human Rights in *Şerife Yigit v. Turkey* [GC], no. 3976/05, § 93, 2 November 2010, and *K. and T. v. Finland* [GC], no. 25702/94, § 150, ECHR 2001-VII.

42 — OJ 2007 C 303, p. 32. Under Article 52(7) of the Charter, the Explanations, drawn up as a way of providing guidance in the interpretation of the Charter, are to be given due regard by the courts of the European Union and of the Member States. The importance of the Explanations for the interpretation of the individual provisions of the Charter is also expressly confirmed in the third subparagraph of Article 6(1) TEU.

43 — For confirmation of this principle, see the judgment of 5 October 2010 in Case C-400/10 PPU *McB.* [2010] ECR I-8965, paragraph 53.

VII – Conclusion

93. In the light of the foregoing considerations, I propose that the Court should give the following answers to the questions referred to it by the Asylgerichtshof:

1) In exceptional circumstances, a Member State may have a duty to exercise its right to examine an asylum application on humanitarian grounds under Article 15 of Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national if otherwise there would be a serious risk of unjustified interference with one of the asylum seeker's rights enshrined in the Charter of Fundamental Rights. If in such a case no request to take over the procedure within the meaning of the second sentence of Article 15(1) of Regulation No 343/2003 is made, the Member State with a duty to assume responsibility would be obliged to inform the other Member State involved in the asylum procedure about the factual and legal situation and seek its agreement to the taking-over of the asylum procedure.

2) The Member State in which the asylum seeker is present but which in accordance with the criteria of Chapter III of Regulation No 343/2003 is not responsible for his asylum application may not transfer the asylum seeker to the Member State responsible under Chapter III of Regulation No 343/2003 if it cannot be unaware that this would lead to an infringement of the asylum seeker's rights guaranteed by the Charter of Fundamental Rights. In such a case the Member State in which the asylum seeker is present must, subject to the right itself to examine the application referred to in Article 3(2) of this regulation, disregard the criterion of Chapter III under which the other Member State is responsible and ascertain whether one of the other criteria enables another Member State to be identified as responsible for the examination of the asylum application, to which the asylum seeker can be transferred without infringing his fundamental rights. The Member State in which the asylum seeker is present must, however, ensure that it does not worsen a situation where the fundamental rights of that applicant have been infringed by using a procedure for determining the Member State responsible which takes an unreasonable length of time. If necessary, that Member State must itself examine the application in accordance with the procedure laid down in Article 3(2) of Regulation No 343/2003.

3) The examination whether in a case such as that in the main proceedings the transfer of the applicant to the Member State responsible for that applicant's asylum application under Chapter III of Regulation No 343/2003 would lead to an unjustified restriction of Article 4 or of Article 7 of the Charter of Fundamental Rights may not be based on definitions of 'inhuman treatment' and 'family' at variance with those used in the case-law of the European Court of Human Rights within the meaning of Articles 3 and 8 respectively of the ECHR.