Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

3 May 2012 *

(Dublin system — Regulation (EC) No 343/2003 — Procedure for determining the Member State responsible for examining an asylum application — Third-country nationals in possession of a valid visa issued by the 'Member State responsible' within the meaning of Regulation No 343/2003 — Asylum application lodged in a Member State other than the State responsible pursuant to that regulation — Application for a residence permit in a Member State other than the State responsible followed by the withdrawal of the asylum application — Withdrawal occurring before the Member State responsible accepted that it should take charge — Withdrawal terminating the procedures set up by Regulation No 343/2003)

In Case C-620/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Kammarrätten i Stockholm — Migrationsöverdomstolen (Sweden), made by decision of 16 December 2010, received at the Court on 27 December 2010, in the proceedings

Migrationsverket

v

Nurije Kastrati,

Valdrina Kastrati,

Valdrin Kastrati,

THE COURT (Fourth Chamber),

composed of J.-C. Bonichot, President of the Chamber, A. Prechal, K. Schiemann, L. Bay Larsen (Rapporteur) and C. Toader, Judges,

Advocate General: V. Trstenjak,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 30 November 2011,

after considering the observations submitted on behalf of:

— Migrationsverket, by H. Karling and M. Ribbenvik, acting as Agents,

— Mrs Kastrati and her minor children, by H.-O. Krokstäde, juris kandidat, and S. Kastrati,

* Language of the case: Swedish.

— the German Government, by T. Henze, acting as Agent,

— the Greek Government, by M. Michelogiannaki and L. Kotroni, acting as Agents,

— the Italian Government, by G. Palmieri, acting as Agent, assisted by M. Russo, avvocato dello Stato,

— the Netherlands Government, by C. Wissels, M. Noort and C. Schillemans, acting as Agents,

— the United Kingdom Government, by H. Walker, acting as Agent,

— the European Commission, by M. Condou-Durande and C. Tufvesson, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 12 January 2012,

gives the following

Judgment

1 The present reference for a preliminary ruling concerns 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 (OJ 2003 L 50, p. 1).

2 The reference has been made in proceedings between Migrationsverket (the Swedish Migration Board), which is responsible for issues relating to immigration, and Mrs Kastrati and her two minor children, Valdrina and Valdrin, who are nationals of Kosovo, relating to the annulment of the decision of that authority not to allow their applications for residence permits and for asylum in Sweden and to order their transfer to the 'Member State responsible' within the meaning of Regulation No 343/2003.

Legal context

Regulation No 343/2003

3 Recitals 3 and 4 in the preamble to Regulation No 343/2003 read as follows:

'(3) The Tampere conclusions … 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.

(4) 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 determining refugee status and not to compromise the objective of the rapid processing of asylum applications.'

4 Article 1 of Regulation No 343/2003 states that that regulation 'lays down the criteria and mechanisms for determining the Member State responsible for examining an application for asylum lodged in one of the Member States by a third-country national'.

5 According to the terms of Article 2(c) to (f) of Regulation No 343/2003:

‘For the purposes of this Regulation:

…

(c) “application for asylum” means the application made by a third-country national which can be understood as a request for international protection from a Member State, under the Geneva Convention. Any application for international protection is presumed to be an application for asylum, unless a third-country national explicitly requests another kind of protection that can be applied for separately;

(d) “applicant” or “asylum seeker” means a third-country national who has made an application for asylum in respect of which a final decision has not yet been taken;

(e) “examination of an asylum application” means any examination of, or decision or ruling concerning, an application for asylum by the competent authorities in accordance with national law except for procedures for determining the Member State responsible in accordance with this Regulation;

(f) “withdrawal of the asylum application” means the actions by which the applicant for asylum terminates the procedures initiated by the submission of his application for asylum, in accordance with national law, either explicitly or tacitly’.

6 Article 3(1) of Regulation No 343/2003 states that:

‘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.’

7 Article 4 of that regulation states that:

‘1. The process of determining the Member State responsible under this Regulation shall start as soon as an application for asylum is first lodged with a Member State.

…

5. An asylum seeker who is present in another Member State and there lodges an application for asylum after withdrawing his application during the process of determining the Member State responsible shall be taken back, under the conditions laid down in Article 20, by the Member State with which that application for asylum was lodged, with a view to completing the process of determining the Member State responsible for examining the application for asylum.

This obligation shall cease if the asylum seeker has in the meantime left the territories of the Member States for a period of at least three months or has obtained a residence document from a Member State.’

8 In order to determine the ‘Member State responsible’ within the meaning of Article 3(1) of Regulation No 343/2003, Chapter III of that regulation, which comprises Articles 5 to 14, features a list of objective criteria set out in hierarchical order.

9 Under Article 5(2) of Regulation No 343/2003, the Member State responsible in accordance with those criteria is to be determined on the basis of the situation obtaining when the asylum seeker first lodged his application with a Member State.

10 Article 9(2) of that regulation states, inter alia, that, where the asylum seeker is in possession of a valid visa, the 'Member State responsible' within the meaning of that regulation is in principle that which issued the visa.

11 Chapter V of Regulation No 343/2003, entitled 'Taking charge and taking back', includes Article 16, which is worded as follows:

'1. The Member State responsible for examining an application for asylum under this Regulation shall be obliged to:

(a) take charge, under the conditions laid down in Articles 17 to 19, of an asylum seeker who has lodged an application in a different Member State;

(b) complete the examination of the application for asylum;

(c) take back, under the conditions laid down in Article 20, an applicant whose application is under examination and who is in the territory of another Member State without permission;

(d) take back, under the conditions laid down in Article 20, an applicant who has withdrawn the application under examination and made an application in another Member State;

(e) take back, under the conditions laid down in Article 20, a third-country national whose application it has rejected and who is in the territory of another Member State without permission.

…

3. The obligations specified in paragraph 1 shall cease where the third-country national has left the territory of the Member States for at least three months, unless the third-country national is in possession of a valid residence document issued by the Member State responsible.

4. The obligations specified in paragraph 1(d) and (e) shall likewise cease once the Member State responsible for examining the application has adopted and actually implemented, following the withdrawal or rejection of the application, the provisions that are necessary before the third-country national can go to his country of origin or to another country to which he may lawfully travel.'

12 Article 17(1) of Regulation No 343/2003 states that:

'Where a Member State with which an application for asylum has been lodged considers that another Member State is responsible for examining the application, it may, as quickly as possible and in any case within three months of the date on which the application was lodged within the meaning of Article 4(2), call upon the other Member State to take charge of the applicant.

Where the request to take charge of an applicant is not made within the period of three months, responsibility for examining the application for asylum shall lie with the Member State in which the application was lodged.'

13 Article 18(1) of that regulation states that:

'The requested Member State shall make the necessary checks, and shall give a decision on the request to take charge of an applicant within two months of the date on which the request was received.'

14 Article 19(1) and (3) of Regulation No 343/2003 states that:

‘1. Where the requested Member State accepts that it should take charge of an applicant, the Member State in which the application for asylum was lodged shall notify the applicant of the decision not to examine the application, and of the obligation to transfer the applicant to the responsible Member State.

…

3. The transfer of the applicant from the Member State in which the application for asylum was lodged to the Member State responsible shall be carried out in accordance with the national law of the first Member State … as soon as practically possible, and at the latest within six months of acceptance of the request that charge be taken or of the decision on an appeal or review where there is a suspensive effect.’

15 Article 20 of Regulation No 343/2003 sets out the detailed procedure according to which an asylum seeker is to be taken back in accordance with Articles 4(5) and 16(1)(c) to (e), respectively, of that regulation.

Directive 2005/85/EC

16 Recital 29 in the preamble to Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (OJ 2005 L 326, p. 13) provides that that directive is without prejudice to the rules laid down by Regulation No 343/2003.

17 Article 19 of Directive 2005/85, entitled ‘Procedure in case of withdrawal of the application’, provides as follows:

‘1. Insofar as Member States provide for the possibility of explicit withdrawal of the application under national law, when an applicant for asylum explicitly withdraws his/her application for asylum, Member States shall ensure that the determining authority takes a decision to either discontinue the examination or reject the application.

2. Member States may also decide that the determining authority can decide to discontinue the examination without taking a decision. In this case, Member States shall ensure that the determining authority enters a notice in the applicant’s file.’

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

The application for residence permits lodged before Mrs Kastrati and her children entered the territory of the European Union

18 During 2004, Mrs Kastrati met, in Kosovo, Mr Kastrati, a Swedish national who has been living in Sweden since 1992. Mr Kastrati is not the father of Mrs Kastrati’s minor children.

19 On 20 September 2007, Mrs Kastrati and her children lodged an application for permits to reside in Sweden with the embassy of the Kingdom of Sweden in Skopje (Former Yugoslav Republic of Macedonia) on the basis of the existence of a link with Mr Kastrati.

20 On 13 May 2008, finding that there was no link connecting Mrs Kastrati and Mr Kastrati such as to allow residence permits to be granted to Mrs Kastrati and her children, Migrationsverket dismissed their application. Following an appeal brought by Mrs Kastrati and her children before the Länsrätten i Skåne län — Migrationsdomstolen (Skåne Regional Administrative Court, ruling on immigration matters), that court upheld the dismissal of the applications for residence permits by way of a judgment dated 23 December 2008.

21 Mrs Kastrati and her children thereupon lodged an appeal against that judgment before the Kammarrätten i Stockholm — Migrationsöverdomstolen (Stockholm Administrative Court of Appeal, Chamber for matters relating to migration) before withdrawing that appeal. As a consequence, that court decided, on 19 March 2009, to remove the case from its register.

The asylum application and the new application for residence permits submitted by Mrs Kastrati and her children after they had entered the territory of the European Union

22 On 3 March 2009, Mrs Kastrati and her children entered Sweden, being in possession of a valid short-stay visa issued by the French authorities.

23 On 30 April 2009, without having submitted asylum applications in France, they submitted such applications in Sweden, where they had been since entering the territory of the European Union.

24 However, as Mrs Kastrati and her children were in possession of a valid visa issued by the French authorities, Migrationsverket, on 4 June 2009, requested, on the basis of the criterion laid down in Article 9(2) of Regulation No 343/2003, the French authorities to take charge of Mrs Kastrati and her children in accordance with Article 16(1)(a) of that regulation.

25 On 16 June 2009, Mrs Kastrati and her children submitted a new application for permits to reside in Sweden, once more on the basis of a connecting link with Mr Kastrati.

26 On 22 June 2009, however, they withdrew their applications for asylum in Sweden, which, they submitted, had been lodged only on the advice of Migrationsverket. Furthermore, the decision under challenge in the main proceedings, submitted with the national file, does not indicate that Mrs Kastrati and her children had raised any ground of persecution for the purpose of securing refugee status.

27 On 23 July 2009, the French authorities, which were unaware of that withdrawal, accepted the request that they take charge of Mrs Kastrati and her children.

28 By decision of 30 July 2009, Migrationsverket rejected the applications for residence permits and the asylum applications. As regards the new application for residence permits, Migrationsverket was firstly of the view that its decision of 13 May 2008 to reject the first application for residence permits had become final. It went on to reject the asylum applications on the ground that the French Republic was the Member State responsible in the matter. Finally, it decided to transfer the applicants to France on the basis of Article 19(1) and (3) of Regulation No 343/2003.

29 Mrs Kastrati and her children contested that rejection decision before the Migrationsdomstolen.

30 In a judgment of 15 September 2009, that court set aside the rejection decision of 30 July 2009, holding that, at the time when Migrationsverket gave its decision, the conditions for applying Regulation No 343/2003 were not met, since Mrs Kastrati and her children had withdrawn their asylum applications. It accordingly referred the case back to Migrationsverket in order to enable the applications for permits to reside in Sweden to be re-examined on the basis of an investigation into the alleged connecting link.

31 In its judgment, the Migrationsdomstolen observed that the asylum applications lodged by Mrs Kastrati and her children had been withdrawn after the competent Swedish authority, with a view to concluding the process of determining the Member State responsible, had requested the French authorities, but before those authorities had accepted, on 23 July 2009, to take charge of the persons concerned and before Migrationsverket had notified them of its decision of 30 July 2009 to transfer them to the French Republic.

32 Migrationsverket lodged an appeal before the referring court, claiming, essentially, that it did not follow from Regulation No 343/2003 that the obligation on the Member State with responsibility for taking charge of an asylum seeker who has lodged an application in another Member State ceases in the event of withdrawal of an asylum application.

33 In its decision, the referring court explains that, in a decision which it delivered on 30 June 2008 (MIG 2008:28), it admittedly held that the withdrawal of an asylum application did not make Regulation No 343/2003 inapplicable. However, the circumstances of the case which gave rise to that decision differed from those of the dispute at present pending before it, in so far as the asylum application at issue in that earlier case had been withdrawn only after the person concerned had been notified, in accordance with Article 19(1) of that regulation, of the decision to transfer him to the Member State responsible.

34 The referring court also sets out the results of an administrative inquiry carried out by Migrationsverket involving several States bound by the Dublin system and regarding the issue of the effect of a withdrawal of an asylum application on the application of Regulation No 343/2003. It was possible to identify three different approaches. Under the first approach, once that regulation has become applicable, the asylum application procedure can be terminated only by the occurrence of one of the grounds for cessation set out in Article 16(3) and (4) of that regulation. By contrast, under the second approach, Regulation No 343/2003 is no longer applicable if the asylum application lodged in one single Member State has been withdrawn. Finally, under the third approach, it is the moment at which the withdrawal of an asylum application takes place in relation to the process of identifying the Member State responsible that determines whether or not that regulation continues to be applicable.

35 In those circumstances, the Kammarrätten i Stockholm — Migrationsöverdomstolen decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) In the light of, inter alia, the stipulations of Article 5(2) of Regulation No 343/2003 and/or the absence of provisions in the regulation on the cessation of a Member State’s responsibility to examine an asylum application other than those contained in the second subparagraph of Article 4(5) and Article 16(3) and (4), is Regulation No 343/2003 to be interpreted as meaning that the withdrawal of an asylum application does not affect the possibility of applying the regulation?

(2) Is the stage in the process at which the asylum application is withdrawn relevant in answering the question set out above?’

The questions referred for a preliminary ruling

36 As a preliminary point, it is important to note that the referring court seeks clarification as to the effects which the withdrawal of an asylum application may have in regard to the application of Regulation No 343/2003.

37 In this respect, it is appropriate to point out, however, that, in the light of the facts in the main proceedings, as they appear from, inter alia, paragraphs 18 to 21 and from paragraph 26 of the present judgment, Mrs Kastrati and her children claim that, in actual fact, they did not at any time intend to lodge applications for asylum within the terms of Article 2(c) of Regulation No 343/2003.

38 However, the referring court alone has jurisdiction to determine the importance which should be attributed to such a submission. It is for the Court of Justice to rule on the matter in the light of the factual and legal considerations set out in the order for reference (Case C-306/09 *B.* [2010] ECR I-10341, paragraph 47).

39 In the light of those initial observations and the circumstances of the main proceedings, the referring court is essentially asking, by means of its questions, which it is appropriate to examine together, whether Regulation No 343/2003 must be interpreted as meaning that the withdrawal of an application for asylum within the terms of Article 2(c) of that regulation, which occurs before the Member State responsible for examining that application has agreed to take charge of the applicant, has the effect that that regulation can no longer be applicable.

40 It must be pointed out that, under the first subparagraph of Article 17(1) of Regulation No 343/2003, where a Member State within the territory of which a person has lodged an asylum application considers that another Member State is responsible for examining that application, it may call upon that other Member State to take charge of the applicant.

41 Furthermore, it is appropriate to point out that it is apparent from Article 1 of Regulation No 343/2003 that the purpose of that regulation is to lay down criteria and mechanisms with a view to determining the Member State responsible for examining the merits of an asylum application lodged in a Member State by a third-country national.

42 In addition, where, as in the main proceedings in the present case, the applicant withdraws his single asylum application before the requested Member State has agreed to take charge of him/her, the principal objective of Regulation No 343/2003, namely the identification of the Member State responsible for examining an asylum application in order to guarantee effective access to an appraisal of the refugee status of the applicant, can no longer be attained.

43 Furthermore, it must be stated that the European Union legislature has not expressly ruled on situations, such as that at issue in the main proceedings, in which asylum seekers have withdrawn their applications without having also lodged an application in at least one other Member State.

44 The wording of the provisions in the second subparagraph of Article 4(5) and Article 16(3) and (4) of Regulation No 343/2003, to which the national court also refers in its questions, cannot lead to any other result.

45 It is, admittedly, true that those provisions determine, in principle exhaustively, the situations in which the obligations on the Member State responsible for examining an asylum application to 'take charge' or 'take back' an applicant who has lodged an asylum application in a Member State other than the State responsible may cease. However, they presuppose the existence of an asylum application which the Member State responsible must examine, is in the process of examining or on which it has already taken a decision.

46 The same, moreover, holds true for Article 5(2) of Regulation No 343/2003.

47 Consequently, the withdrawal of an asylum application which occurs in circumstances such as those in the main proceedings in the present case, that is to say, before the requested Member State has agreed to take charge of the asylum seeker, has the effect that Regulation No 343/2003 can no longer be applicable.

48 In such circumstances, it is for the Member State within the territory of which the application was lodged to take the decisions required as a result of that withdrawal and, in particular, as Article 19 of Directive 2005/85 provides, to discontinue the examination of the application, with a record of the information relating to it being placed in the applicant's file.

49 Having regard to all the foregoing considerations, the answer to the questions raised is that Regulation No 343/2003 must be interpreted as meaning that the withdrawal of an application for asylum within the terms of Article 2(c) of that regulation, which occurs before the Member State responsible for examining that application has agreed to take charge of the applicant, has the effect that that regulation can no longer be applicable. In such a case, it is for the Member State within the territory of which the application was lodged to take the decisions required as a result of that withdrawal and, in particular, to discontinue the examination of the application, with a record of the information relating to it being placed in the applicant's file.

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 (Fourth Chamber) hereby rules:

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 must be interpreted as meaning that the withdrawal of an application for asylum within the terms of Article 2(c) of that regulation, which occurs before the Member State responsible for examining that application has agreed to take charge of the applicant, has the effect that that regulation can no longer be applicable. In such a case, it is for the Member State within the territory of which the application was lodged to take the decisions required as a result of that withdrawal and, in particular, to discontinue the examination of the application, with a record of the information relating to it being placed in the applicant's file.

[Signatures]