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Provisional text

OPINION OF ADVOCATE GENERAL

SHARPSTON

delivered on 8 June 2017(1)

Case C-490/16

A.S.

v

Republic of Slovenia

(Request for a preliminary ruling from the Vrhovno sodišče Republike Slovenije (Supreme Court of the Republic of Slovenia))

and

Case C-646/16

Jafari

(Request for a preliminary ruling from the Verwaltungsgerichtshof Wien (Supreme Administrative Court, Vienna) (Austria))

(Area of freedom, security and justice – Borders, asylum and immigration – Determination of the Member State responsible for examining a third-country national's application for asylum – Criteria for determining the Member State responsible for examining applications for international protection – Interpretation of Articles 12, 13 and 14 of Regulation (EU) No 604/2013 – Interpretation of Article 5(4)(c) of Regulation (EC) No 562/2006)

Introduction

1. If one looks at a map of Europe and superimposes upon it a map of the European Union, carefully marking in the EU's external frontiers, certain obvious truths emerge. There is an extended land frontier to the east bordering nine EU Member States. (2) As one moves into the Balkans the geography – like the history – becomes a little complicated. (3) The essential point to stress is that a 'land bridge' leads directly from Turkey into the European Union. To the south of the territory of the European Union lies the Mediterranean – crossable by improvised craft if the conditions in one's homeland are sufficiently appalling to lead one to attempt that desperate venture. The closest crossing points lead to landfalls in Greece, Malta or Italy – or, at the extreme western end, in Spain. The eastern and south-eastern borders of the European Union are therefore potentially open to overland migration; (4) whilst the southern border is potentially open to migration across the Mediterranean.

2. The western edge of the European Union is significantly less open to migration. There is, first, the Atlantic seaboard along the entire western edge of the EU's territory. Then, to the north, there is more sea – the Irish Sea, the Channel and the North Sea; (5) the Skagerrak, (6) the Kattegat and the Baltic Sea. (7) As well as the Baltic Sea on its southern border, Sweden has a land border to the north with its neighbour, Norway. Finland has both sea frontiers (8) and land frontiers. (9) To the west and north, therefore, geography and climate combine to render migration significantly more difficult.

3. The 'Dublin system' (10) does not take the map of Europe that I have just described as its starting point. Rather, it tacitly assumes that all applicants for international protection will arrive by air. Were they to do so, there would in theory be something closer to an equal chance that (very roughly) equal numbers of applicants would arrive in each of the 28 Member States. (11) Against that background, the system put in place makes very reasonable sense.

4. Another essential element of the Dublin system is that it focuses on the individual applicant for international protection. It is that individual applicant (as defined in Article 2(c) of the Dublin III Regulation) who is assessed by reference to the criteria set out in its Chapter III in order to determine which Member State is responsible for considering his application for international protection. The whole regulation is cast in terms of the individual. That is self-evidently right and proper. Individual human beings seeking protection are not statistics; they are to be treated humanely and with respect for their fundamental rights. In normal times, giving effect to the approach enshrined in the Dublin III Regulation may require administrative coordination and cooperation between the competent authorities of different Member States, but it presents no intrinsic or insurmountable difficulties.

5. Between September 2015 and March 2016, the times were anything but normal.

6. This is how the Vice-President of the European Commission described the root cause of the sudden, overwhelming migration towards the European Union:

'There is a hell on earth. It is called Syria. The fact that millions of people try to flee from that hell is understandable. The fact that they try to stay as close to their home as possible is also understandable. And it is self-evident that they try to find safe shelter somewhere else if that does not work. … More and more people are fleeing. The situation in neighbouring countries offers little or sometimes no hope. So people look for a safe haven [via Turkey which shelters itself more than two million refugees] in Europe. The problem will not solve itself. The influx of refugees will not stop as long as the war continues. Much has to be done to end this conflict, and the whole world will be involved. Meanwhile, we have to make every effort to manage the flow of refugees, to offer people a safe place to stay, in the region, in the EU and in the rest of the world.' (12)

7. Very large numbers of Syrian displaced persons therefore joined existing patterns of persons making their way towards the European Union from other war-torn or famine-struck corners of the globe: (13) from Afghanistan and Iraq. The appalling maritime tragedies of overloaded, leaking inflatable boats that sank crossing the Mediterranean during the summer months of 2015 captured most of the media attention. But there was a second, major, overland migration route towards the European Union: 'the West Balkans Route'.

8. That route involved a journey by sea and/or by land from Turkey westwards to Greece, then into the Western Balkans. Individuals travelled primarily through the FYR Macedonia, Serbia, Croatia, Hungary and Slovenia. (14) The route first became a popular passageway into the European Union in 2012 when Schengen visa restrictions were relaxed for five Balkan countries – Albania, Bosnia and Herzegovina, Montenegro, Serbia and the FYR Macedonia. Until March 2016 many people were thus able to travel on a single major route leading from Turkey to Greece and then northwards through the Western Balkans. (15)

9. Those travelling along the Western Balkans Route did not want to stay in the countries they had to pass through in order to reach their destination of choice. Those countries also did not wish them to remain. The FYR Macedonia and the Serbian authorities provided transport (which was paid for by the individuals using it) (16) and allowed people using the route to cross the border into Croatia, in particular after the border with Hungary was closed. The Croatian and the Slovenian authorities also provided transport (this time, free of charge) and allowed the individuals to cross their respective borders towards Austria and Germany. The policy of the Western Balkans States in allowing these third-country nationals to enter their territories and providing facilities such as transport to take them to the border en route to their destination of choice has been described as 'waving through' or 'wave through'.

10. On 27 May 2015 the Commission proposed, inter alia, a Council Decision based on Article 78(3) TFEU to establish an emergency mechanism to assist principally Italy and Greece as they were generally the first Member States of entry and were thus confronted by a sudden inflow of third-country nationals. This was the first proposal made to trigger that provision. On 14 September 2015 the Council adopted a decision on that proposal. (17) In so doing the Council noted that the specific situation of Greece and Italy had implications in other geographical regions, such as the 'Western Balkans migratory Route'. (18) The aims of Decision 2015/1523 included the relocation of applicants for international protection who lodged applications for asylum in one of those States. Another objective was to allow a temporary suspension of the rules in the Dublin III Regulation, notably the criterion that placed responsibility for examining applications for international protection on the Member State of first entry where the applicant irregularly crossed the border from a third country. The avowed aim of the measure was to relocate 40 000 applicants within two years to other Member States. The decision was adopted by unanimous vote.

11. Within a week the Council adopted a second decision providing for a relocation scheme for 120 000 third-country nationals in need of international protection. (19) Decision 2015/1601 also introduced a distribution key indicating how the third-country nationals concerned were to be placed in the Member States. (20) That decision was politically controversial and it was adopted by a qualified majority vote. (21) On 25 October 2015 a high level meeting took place at the invitation of the President of the Commission which included both EU and non-EU States. (22) The participants agreed on a series of measures (set out in a 'Statement') in order to improve cooperation and establish consultation between the countries along the Western Balkans Route. They also decided on measures (to be implemented immediately) aimed at limiting secondary movements, providing shelter for third-country nationals, managing borders and combatting smuggling and trafficking. (23) Both the precise legal basis and the precise legal effect of those measures are unclear. (24)

12. Meanwhile, on 21 August 2015 Germany was described in the press as having 'exempted' Syrian nationals from the Dublin III Regulation. (25) In September 2015 it reinstated border controls with Austria after having received hundreds of thousands of people in a few days. It removed the so-called 'exemption' in November 2015.

13. On 15 September 2015 Hungary closed its border with Serbia. A consequence of the closure was that a large influx of people was re-routed to Slovenia. On 16 October 2015 Hungary erected a fence along its border with Croatia. Between November 2015 and February 2016 the FYR Macedonia erected a fence along its border with Greece.

14. By the end of October 2015 nearly 700 000 people had travelled along the Western Balkans Route from Greece to central Europe. The numbers have variously been described as 'unprecedented', a 'massive inflow' and 'exceptional'. The statistics regarding entry and registration vary between the countries along the route. Approximate daily arrivals in Serbia were 10 000 (October) and 5 000 (November). (26)

15. On 11 November 2015 Slovenia started to erect a fence along its border with Croatia. In December 2015 Austria erected a fence at the main border crossing with Slovenia. Austria had meanwhile temporarily reintroduced controls at internal borders on 16 September 2015.

16. On 14 February 2016 Austria announced that it was admitting people from Afghanistan, Iraq and Syria only. On 18 February 2016 the heads of various police services held a meeting in Zagreb and a Statement was issued. (27) The policy of waving people through the Western Balkans States stopped when Austria changed its liberal asylum policy (that is, in February 2016).

17. As regards other States, France temporarily reintroduced controls at internal borders between July 2016 and January 2017. Denmark introduced a similar initiative, subsequently prolonging controls from 4 January to 12 November 2016. Norway reintroduced internal border controls from 26 November 2015 to 11 February 2017 and Sweden adopted measures of the same kind from 12 November 2015 to 11 November 2016.

18. The sheer numbers of people travelling along the Western Balkans Route within a relatively short space of time in late 2015 and early 2016 together with the political difficulties that ensued are commonly described in shorthand as ‘the refugee crisis’ or ‘the humanitarian crisis’ in the Western Balkans. It was the greatest mass movement of persons across Europe since World War II. These were the wholly exceptional circumstances that form the background to these two references for a preliminary ruling.

International law

The Geneva Convention

19. Article 31(1) of the Geneva Convention relating to the Status of Refugees (28) prohibits the imposition of penalties, on account of their illegal entry or presence, on refugees who flee a territory where their life or freedom was threatened, where they are present in a State without authorisation, provided they present themselves to the authorities and show good cause for their illegal entry or presence. In accordance with Article 31(2), States should not apply restrictions to the movements of refugees within their territory other than those which are necessary. Any restrictions should be applied only until the refugees’ status is regularised or they obtain admission to another country. States must allow refugees a reasonable period and the necessary facilities to obtain admission to another country.

The Convention for the Protection of Human Rights and Fundamental Freedoms

20. Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms (29) provides that no one is to be subjected to inhuman or degrading treatment or punishment.

EU legislation

The Charter

21. Article 4 of the Charter of Fundamental Rights of the European Union (30) corresponds to Article 3 of the ECHR. Article 18 of the Charter guarantees the right to asylum with due respect for the rules of the Geneva Convention.

The Dublin system

The Dublin III Regulation

22. The rules governing the territorial scope of the Dublin III Regulation are complex. Its predecessor, the Dublin II Regulation applied in Denmark from 2006 by virtue of the Agreement between the European Community and the Kingdom of Denmark on the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in Denmark or any other Member State of the European Union and 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention. (31) There is no corresponding agreement in relation to the Dublin III Regulation. In accordance with Article 3 and Article 4a(1) of Protocol No 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the TEU and to the TFEU, those Member States have notified their wish to take part in the adoption and application of the Dublin III Regulation. The regulation applies to other EU Member States in the ordinary way, without qualification.

23. Pursuant to the Agreement between the European Union and the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland, the Dublin III Regulation applies to that State. (32)

24. The preamble to the Dublin III Regulation includes the following statements.

– The Common European Asylum System ('the CEAS') is part of the European Union's objective of progressively establishing an area of freedom, security and justice open to those who, forced by circumstances, legitimately seek protection in the European Union. It is based on the full and inclusive application of the Geneva Convention. The CEAS should include, in the short-term, a clear and workable method for determining the Member State responsible for the examination of an application for international protection. (33)

– Such a method should be based on objective, fair criteria both for the Member States and for the persons concerned. It should, in particular, make it possible to determine rapidly the Member State responsible, so as to guarantee effective access to the procedures for granting international protection and not to compromise the objective of the rapid processing of applications for international protection. (34)

– The Dublin system is a cornerstone of the CEAS as it clearly allocates responsibility among Member States for the examination of applications for international protection. (35)

– In applying the Dublin system it is necessary to take into account the provisions of the EU asylum *acquis*. (36)

– Protecting the best interests of the child and respect for family life are primary considerations in applying the Dublin III Regulation. (37) The processing together of applications for international protection of the members of one family by a single Member State is consistent with respect for the principle of family unity. (38)

– In order to guarantee effective protection of the rights of the persons concerned, legal safeguards and the right to an effective remedy in respect of decisions regarding transfers to the Member State responsible should be established, in accordance, in particular, with Article 47 of the Charter. In order to ensure that international law is respected, an effective remedy against such decisions should cover both the examination of the application of this Regulation and of the legal and factual situation in the Member State to which the applicant is transferred. (39)

– The progressive creation of an area without internal frontiers in which free movement of persons is guaranteed in accordance with the TFEU and the establishment of Union policies regarding the conditions of entry and stay of third-country nationals, including common efforts towards the management of external borders, makes it necessary to strike a balance between responsibility criteria in a spirit of solidarity. (40)

– With respect to the treatment of persons falling within the scope of the Dublin III Regulation, Member States are bound by their obligations under instruments of international law, including the relevant case-law of the European Court of Human Rights. (41)

– The Dublin III Regulation respects fundamental rights and observes the principles which are acknowledged, in particular, in the Charter. (42)

25. As Article 1 indicates, the Dublin III Regulation 'lays down the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person ("the Member State responsible")'.

26. The following definitions are set out in Article 2:

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

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

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

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

…

(l) “residence document” means any authorisation issued by the authorities of a Member State authorising a third-country national or a stateless person to stay on its territory, including the documents substantiating the authorisation to remain on the territory under temporary protection arrangements or until the circumstances preventing a removal order from being carried out no longer apply, with the exception of visas and residence authorisations issued during the period required to determine the Member State responsible as established in this Regulation or during the examination of an application for international protection or an application for a residence permit;

(m) “visa” means the authorisation or decision of a Member State required for transit or entry for an intended stay in that Member State or in several Member States. The nature of the visa shall be determined in accordance with the following definitions:

— “long-stay visa” means an authorisation or decision issued by one of the Member States in accordance with its national law or Union law required for entry for an intended stay in that Member State of more than three months,

— “short-stay visa” means an authorisation or decision of a Member State with a view to transit through or an intended stay on the territory of one or more or all the Member States of a duration of no more than three months in any six-month period beginning on the date of first entry on the territory of the Member States,

— “airport transit visa” means a visa valid for transit through the international transit areas of one or more airports of the Member States;

…’

27. Pursuant to Article 3(1), Member States must examine any application for international protection by a third-country national or a stateless person who applies on the territory of any one of them, including at the border or in the transit zones. Any such

application is to be examined by a single Member State, namely the one which the criteria set out in Chapter III indicate is responsible.

28. Article 3(2) provides:

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

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

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

29. The criteria for determining the Member State responsible (for the purposes of Article 1) are laid down in Chapter III ('the Chapter III criteria'). Article 7(1) states that the criteria are to be applied in accordance with the hierarchy set out in that chapter. The Member State responsible is determined on the basis of the situation obtaining when the applicant first lodged his or her application for international protection with a Member State as provided in Article 7(2). At the top of the hierarchy are the criteria relating to minors (Article 8) and family members (Articles 9, 10 and 11). They are not directly at issue in either of the main proceedings. (43)

30. Next in the hierarchy is Article 12, which sets out the conditions for the criterion relating to the issue of residence documents or visas. Under Article 12(1), where an applicant has a valid residence document, the Member State which issued the document shall be responsible for examining the application for international protection. In accordance with Article 12(2), where an applicant is in possession of a valid visa, the Member State which issued the visa shall be responsible for examining the application for international protection, unless the visa was issued on behalf of another Member State under a representation arrangement as provided for in Article 8 of Regulation (EC) No 810/2009. (44) In such a case, the represented Member State shall be responsible for examining the application for international protection.

31. Article 13 is entitled 'Entry and/or stay'. Article 13(1) provides:

'Where it is established, on the basis of proof or circumstantial evidence as described in the two lists mentioned in Article 22(3) of this Regulation, including the data referred to

in Regulation (EU) No 603/2013, [(45)] that an applicant has irregularly crossed the border into a Member State by land, sea or air having come from a third country, the Member State thus entered shall be responsible for examining the application for international protection. That responsibility shall cease 12 months after the date on which the irregular border crossing took place.'

32. The penultimate criterion, set out in Article 14, concerns 'visa waived entry'. It states:

'1. If a third-country national or a stateless person enters into the territory of a Member State in which the need for him or her to have a visa is waived, that Member State shall be responsible for examining his or her application for international protection.

2. The principle set out in paragraph 1 shall not apply if the third-country national or the stateless person lodges his or her application for international protection in another Member State in which the need for him or her to have a visa for entry into the territory is also waived. In that case, that other Member State shall be responsible for examining the application for international protection.'

33. The final criterion (Article 15) concerns applications for international protection made in an international transit area of an airport and is not relevant to the present references.

34. Member States have a discretion under Article 17(1) to derogate from Article 3(1) of the Dublin III Regulation and to decide to examine an application for international protection lodged by a third-country national even if, under the Chapter III criteria, such examination is not the responsibility of the Member State concerned.

35. Chapter V contains the provisions governing the obligations of 'the Member State responsible'. Within that chapter, Article 18 lists certain obligations, which include taking charge of an applicant who has lodged an application in a different Member State (Article 18(1)(a)) or taking back an applicant whose application is under examination and who made an application in another Member State or who is on the territory of another Member State without a residence document (Article 18(1)(b)).

36. Article 20(1) provides that the process of determining the Member State responsible must start as soon as an application for international protection is first lodged with a Member State. Applications for international protection are deemed to have been lodged once a form submitted by the applicant or a report prepared by the authorities reaches the competent authorities of the Member State concerned, as provided by Article 20(2). (46)

37. By virtue of Article 21, where a Member State with which an application for international protection has been lodged considers that another Member State is responsible for examining the application, it may, as quickly as possible and in any event within three months of the date on which the application was lodged within the meaning

of Article 20(2), request that other Member State to take charge of the applicant. In accordance with Article 22(1), (47) 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 receipt of such a request. Article 22(7) provides that failure to act within that period is tantamount to accepting the request. (48)

38. Likewise, a request under Article 23 to take back an applicant who lodges a new application for international protection must be made as quickly as possible. By virtue of Article 25 the requested Member State must reply as quickly as possible – no later than one month from the date on which the request was received. Under Article 25(2), failure to do so is treated as acceptance of the request.

39. Certain procedural safeguards are set out in Articles 26 and 27. The former provides that where the requested Member State agrees to take charge of or take back an applicant, the requesting Member State must notify the person concerned of the decision to transfer him to the Member State responsible. That decision must contain information regarding the legal remedies available.

40. Under Article 27(1), applicants have the right to an effective remedy in the form of an appeal or a review, in fact and in law, against a transfer decision, before a court or tribunal.

41. Article 29 provides:

'1. The transfer of the applicant or of another person as referred to in Article 18(1)(c) or (d) from the requesting Member State to the Member State responsible shall be carried out in accordance with the national law of the requesting Member State, after consultation between the Member States concerned, as soon as practically possible, and at the latest within six months of acceptance of the request by another Member State to take charge [of] or to take back the person concerned or of the final decision on an appeal or review where there is a suspensive effect in accordance with Article 27(3).

…

2. Where the transfer does not take place within the six months' time limit, the Member State responsible shall be relieved of its obligations to take charge [of] or to take back the person concerned and responsibility shall then be transferred to the requesting Member State. This time limit may be extended up to a maximum of one year if the transfer could not be carried out due to imprisonment of the person concerned or up to a maximum of eighteen months if the person concerned absconds.

…' (49)

42. Article 33 is entitled 'A mechanism for early warning, preparedness and crisis management'. Article 33(1) states: 'Where, on the basis of, in particular, the information gathered by [the European Asylum Support Office: 'the EASO'] pursuant to Regulation

(EU) No 439/2010, [(50)] the Commission establishes that the application of this Regulation may be jeopardised due either to a substantiated risk of particular pressure being placed on a Member State's asylum system and/or to problems in the functioning of the asylum system of a Member State, it shall, in cooperation with [the EASO], make recommendations to that Member State, inviting it to draw up a preventive action plan.

…'

Rules implementing the Dublin III Regulation

43. Regulation (EU) No 603/2013 (51) established the Eurodac system. Its purpose is to assist in determining which Member State is responsible pursuant to the Dublin III Regulation for examining an application for international protection lodged in a Member State by a third-country national.

44. Annex II of Commission Implementing Regulation (EU) No 118/2014 laying down detailed rules for the application of the Dublin III Regulation (52) contains two lists indicating the means of proof for determining the Member State responsible for the purposes of the Dublin III Regulation. List 'A' refers to formal proof which determines responsibility as long as it is not refuted by proof to the contrary. List 'B' refers to circumstantial evidence: indicative elements which, although refutable, may be sufficient in certain circumstances to determine responsibility.

Schengen

45. In some guise or another, free movement between European countries has been taking place since the Middle Ages. (53) The Schengen Agreement, signed on 14 June 1985, covered the gradual abolition of internal borders and provided control of the external border of the States signatory. On 19 June 1990 the Convention Implementing the Schengen Agreement was signed. (54) The convention covered issues such as the organisation and management of the external border and the abolition of internal border controls, procedures for issuing a uniform visa and the operation of a single database for all members (the Schengen Information Service ('the SIS')), as well as establishing a means for cooperation between the members' immigration services. Those matters were brought within the framework of the EU *acquis* by the Treaty of Amsterdam. All 28 EU Member States do not participate fully in the Schengen *acquis*. (55) There are particular arrangements for Ireland and the United Kingdom. (56)

The Schengen Borders Code

46. The recitals of the Schengen Borders Code (57) make the following pertinent statements. The creation of an area in which individuals move freely is to be flanked by other measures, such as a common policy on the crossing of external borders. (58) In that respect, the establishment of a 'common corpus' of legislation is one of the fundamental components of the common policy on the management of the external borders. (59)

Border control is in the interest not only of the Member State at whose external borders it is carried out but of all Member States which have abolished internal border control.

47. The recitals go on to state that border controls should help to combat illegal immigration and trafficking in human beings and to prevent any threat to the Member States' internal security, public policy, public health and international relations. (60) Border checks should be performed in such a way as to fully respect human dignity. Border control should be carried out in a professional and respectful manner and be proportionate to the objectives pursued. (61) Border control comprises not only checks on persons at border crossing points and surveillance between these border crossing points, but also an analysis of the risks for internal security and analysis of the threats that may affect the security of external borders. It is therefore necessary to lay down the conditions, criteria and detailed rules governing checks at border crossing points and surveillance. (62) Provision should be made for relaxing checks at external borders in the event of exceptional and unforeseeable circumstances in order to avoid excessive waiting time at border crossing points. Even if border checks are relaxed, however, the systematic stamping of the documents of third-country nationals remains obligatory. Stamping makes it possible to establish with certainty the date on which, and where, the border was crossed, without establishing in all cases that all required travel document control measures have been carried out. (63)

48. Article 1 effectively sets out a twofold objective for the Schengen Borders Code. First, it provides for the absence of border control of persons crossing the borders between participating Member States. Second, it establishes rules governing border control of persons crossing the external border of the Member States of the European Union.

49. The following definitions are set out in Article 2:

'…

2. "external borders" means the Member States' land borders, including river and lake borders, sea borders and their airports, river ports, sea ports and lake ports, provided that they are not internal borders;

…

5. "persons enjoying the … right of free movement under Union law" means:

(a) Union citizens within the meaning of [Article 20(1) TFEU], and third-country nationals who are members of the family of a Union citizen exercising his or her right to free movement to whom Directive 2004/38/EC of the European Parliament and of the Council [(64)] applies;

(b) third-country nationals and their family members, whatever their nationality, who, under agreements between the Union and its Member States, on the one hand, and those

third countries, on the other hand, enjoy rights of free movement equivalent to those of Union citizens;

6. “third-country national” means any person who is not a Union citizen within the meaning of Article 20(1) of the Treaty and who is not covered by point 5 of [Article 2];

7. “persons for whom an alert has been issued for the purposes of refusing entry” means any third-country national for whom an alert has been issued in the Schengen Information System (SIS) in accordance with and for the purposes laid down in Article 96 of the [CISA];

8. “border crossing point” means any crossing-point authorised by the competent authorities for the crossing of external borders;

…

9. “border control” means the activity carried out at a border, in accordance with and for the purposes of this Regulation, in response exclusively to an intention to cross or the act of crossing that border, regardless of any other consideration, consisting of border checks and border surveillance;

10. “border checks” means the checks carried out at border crossing points, to ensure that persons, including their means of transport and the objects in their possession, may be authorised to enter the territory of the Member States or authorised to leave it;

11. “border surveillance” means the surveillance of borders between border crossing points and the surveillance of border crossing points outside the fixed opening hours, in order to prevent persons from circumventing border checks;

…

13. “border guard” means any public official assigned, in accordance with national law, to a border crossing point or along the border or the immediate vicinity of that border who carries out, in accordance with this Regulation and national law, border control tasks;

…

15. “residence permit” means:

(a) all residence permits issued by the Member States according to the uniform format laid down by Council Regulation (EC) No 1030/2002 [(65)] and residence cards issued in accordance with Directive 2004/38/EC;

(b) all other documents issued by a Member State to third-country nationals authorising a stay on its territory, that have been the subject of a notification and subsequent publication in accordance with Article 34, with the exception of:

(i) temporary permits issued pending examination of a first application for a residence permit as referred to in point (a) or an application for asylum; and

(ii) visas issued by the Member States in the uniform format laid down by Council Regulation (EC) No 1683/95;

…' (66)

50. Pursuant to Article 3, the Schengen Borders Code covers 'any person crossing the internal or external borders of Member States, without prejudice to: (a) the rights of persons enjoying the right of free movement under Union law; and (b) the rights of refugees and persons requesting international protection, in particular as regards non-refoulement'.

51. Under Article 3a, Member States must act in full compliance with relevant EU law, including the Charter, the Geneva Convention and fundamental rights when applying the regulation. That includes an obligation to take decisions on an individual basis.

52. Article 5 is entitled 'Entry conditions for third-country nationals'. In accordance with Article 5(1), the conditions for such a person whose intended stay is of no more than 90 days in any 180-day period (67) are as follows: (a) possession of a valid travel document entitling him to cross the border; (b) possession of a valid visa; (c) he should justify the purpose and conditions of his intended stay, and he should have sufficient means of subsistence, both for the duration of the intended stay and for the return to his country of origin or transit to a third country into which he is certain to be admitted, or is in a position to acquire such means lawfully; (d) he is not a person for whom an alert has been issued in the SIS for the purposes of refusing entry; and (e) he is not, inter alia, considered to be a threat to public policy or internal security. (68)

53. By way of derogation from those requirements, Article 5(4)(c) provides that 'third-country nationals who do not fulfil one or more of the conditions laid down in paragraph 1 may be authorised by a Member State to enter its territory on humanitarian grounds, on grounds of national interest or because of international obligations. Where the third-country national concerned is the subject of an alert as referred to in paragraph 1(d), the Member State authorising him or her to enter its territory shall inform the other Member States accordingly'.

54. Article 8 allows border guards to relax the checks that are to be conducted at the external border in exceptional and unforeseen circumstances. Such exceptional and unforeseen circumstances shall be deemed to be those where unforeseeable events lead to traffic of such intensity that the waiting time at the border crossing point becomes

excessive, and all resources have been exhausted as regards staff, facilities and organisation.

55. However, Article 8(3) states that even where checks are relaxed, the border guard must nonetheless stamp the travel documents of third-country nationals both on entry and exit, in accordance with Article 10(1), which provides that the travel documents of third-country nationals must be systematically stamped on entry and exit. Stamps must be affixed to: (a) the documents, bearing a valid visa, enabling third-country nationals to cross the border; (b) the documents enabling third-country nationals to whom a visa is issued at the border by a Member State to cross the border; and (c) the documents enabling third-country nationals not subject to a visa requirement to cross the border.

56. Article 13 states that a third-country national who does not fulfil all the entry conditions laid down in Article 5(1) and does not belong to the categories of persons referred to in Article 5(4) shall be refused entry to the territories of the Member States. This shall be without prejudice to the application of special provisions concerning the right of asylum and to international protection or the issue of long-stay visas.

The SIS

57. The SIS is in essence an information system that supports external border control and law enforcement cooperation in the States that are party to the Schengen Borders Code ('the Schengen States'). Its main purpose is to assist in preserving internal security in those States in the absence of internal border checks. (69) That is ensured, inter alia, by means of an automated search procedure which provides access to alerts on persons for the purposes of border checks. In relation to third-country nationals (that is, individuals who are not EU citizens or nationals of States who under agreements with the European Union and the States concerned enjoy rights to freedom of movement equivalent to those of EU citizens), (70) Member States must enter an alert within the SIS where a competent authority or a court takes a decision refusing entry or stay, based on a threat to public policy or public security or to national security which the presence of that individual may pose. (71) Alerts may also be entered when such decisions are based on the fact that the third-country national has been subject to a measure involving expulsion, refusal of entry or removal which has not been rescinded or suspended. (72)

Regulation (EC) No 1683/95

58. Council Regulation (EC) No 1683/95 (73) lays down a uniform format (sticker) for visas issued by the Member States which must conform to the specifications in the Annex thereto. The specifications cover 'security features', such as an integrated photograph, an optically variable mark, a logo of the issuing Member State, the word 'visa', and a nine digit national number.

Regulation (EC) No 539/2001

59. Annex I to Council Regulation (EC) No 539/2001 lists the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement. (74) That requirement is without prejudice to the European Agreement on the Abolition of Visas for Refugees. (75) The third-country nationals of the States listed in Annex II are exempt from the requirement for short-stay visas. Member States are also entitled to provide exception from the visa requirement for certain limited categories of persons. (76)

Visa Information System

60. The Visa Information System ('the VIS') was established by Council Decision 2004/512/EC. (77) Pursuant to Article 1 of Regulation (EC) No 767/2008, (78) the VIS allows the Schengen States to exchange visa data on applications for short-stay visas and on the decisions taken in relation thereto. Article 2(f) states that the objectives of the VIS include facilitating the application of the Dublin II Regulation. In accordance with Article 4, a 'visa' is defined by reference to the CISA. A visa sticker refers to the uniform format for visas defined in Regulation No 1683/95. The expression 'travel document' means a passport or other equivalent document entitling the holder to cross the external borders and to which a visa may be affixed.

61. Article 21 provides that for the sole purpose of determining the Member State responsible for examining an asylum application where that involves establishing whether a Member State has issued a visa or whether the applicant for international protection has 'irregularly crossed the border of a Member State' (under what are now Articles 12 and 13 respectively of the Dublin III Regulation), the competent authorities must have access to search the database against the fingerprints of the asylum seeker concerned.

Regulation No 810/2009

62. As Article 1(1) of Regulation No 810/2009 states, that regulation establishes the procedures and conditions for issuing visas for transit through or intended stays in the territory of the Member States not exceeding 90 days in any 180-day period. The requirements apply to any third-country national who must possess a valid visa when crossing the external borders of a Member State.

63. Article 2 defines a third-country national as any person who is not an EU citizen. A visa is an authorisation issued by a Member State with a view to either transit through, or an intended stay in, the territory of the Member States of a duration of no more than three months in any six-month period from the date of first entry into the territory of the Member States or transit through the international transit areas of airports of the Member States. A 'visa sticker' means the uniform format for visas as defined by Regulation No 1683/95. Recognised travel documents are documents recognised by one or more Member States for the purpose of affixing visas. (79)

The Procedures Directive

64. As its title suggests, the Procedures Directive establishes common procedures for granting and withdrawing international protection pursuant to the Qualification Directive. Article 3 states that the directive applies to all such applications made within the territory of the European Union.

65. In accordance with Article 31, Member States must ensure that applications for international protection are processed pursuant to the examination procedure laid down in the directive as soon as possible. (80) The general rule is that the examination procedure should be concluded within six months of an application being lodged. However, where applications are subject to the procedure laid down in the Dublin III Regulation, the six months' time limit starts to run from the moment the Member State responsible for examining the individual's application is determined under that regulation. (81) Member States may provide that the examination procedure is to be accelerated and/or conducted at the border or in transit zones if an applicant, inter alia, enters the territory of the Member State concerned 'unlawfully', or refuses to have his fingerprints taken in accordance with the Eurodac Regulation. (82)

The Return Directive

66. Article 1 of Directive 2008/115/EC (83) states that that directive sets out common standards and procedures to be applied in Member States for returning illegally staying third-country nationals, in accordance with fundamental rights as general principles of EU law as well as international law, including refugee protection and human rights obligations.

67. Article 2 provides that the directive applies to third-country nationals staying illegally on the territory of a Member State. Member States may decide not to apply the directive to third-country nationals who are subject to a refusal of entry in accordance with Article 13 of the Schengen Borders Code, or who are apprehended or intercepted by the competent authorities in connection with the irregular crossing by land, sea or air of the external border of a Member State and who have not subsequently obtained an authorisation or a right to stay in that Member State.

68. In accordance with Article 3, a third-country national means any person who is not an EU citizen and who does not enjoy free movement rights as defined in Article 2(5) of the Schengen Borders Code. The expression 'illegal stay' is defined as 'the presence on the territory of a Member State of a third-country national who does not fulfil, or no longer fulfils, the conditions of entry as set out in Article 5 of the Schengen Borders Code or other conditions for entry, stay or residence in that Member State'. (84)

The requests for preliminary rulings

69. In these two references for preliminary rulings, the Court is asked for guidance on the interpretation of the Dublin III Regulation and the Schengen Borders Code. *A.S.* (85) is a reference from the Vrhovno sodišče Republike Slovenije (Supreme Court of the

Republic of Slovenia). *Jafari* (86) has been referred by the Verwaltungsgerichtshof Wien (Supreme Administrative Court, Vienna) (Austria).

70. The questions raised by the two referring courts are linked and overlap substantially. I shall therefore deal with both cases in one Opinion. I shall use the word 'migration' generically to describe the inflow of third-country nationals between September 2015 and March 2016 ('the material time'). That inflow included both people who were refugees or intending to apply for international protection within the European Union and migrants in the more general sense of that word. (87)

Case C-490/16 A.S.

Facts, procedure and questions referred

71. The referring court states that Mr A.S., a Syrian national, left Syria for Lebanon and from there travelled to Turkey, then Greece, the FYR Macedonia, Serbia, Croatia and Slovenia. It is common ground between the parties that he travelled through Serbia in an organised manner by means of what is described as a 'migrants' train', that he entered Croatia from Serbia and that, at the designated crossing point of the national border, he was accompanied by the Serbian State authorities. He was transferred to the Croatian national border-control authorities. The latter did not prevent him from entering Croatia, did not initiate a procedure to expel him from Croatian territory and did not ascertain whether he fulfilled the conditions for lawful entry into Croatia. Rather, the Croatian authorities organised onwards transport to the Slovenian national border.

72. On 20 February 2016 Mr A.S. entered Slovenia with the inflow of people on the 'migrants' train' at the border post of Dobova, where he was registered. On the following day (21 February 2016) he together with other third-country nationals travelling through the Western Balkans were taken to the Austrian security authorities at Slovenia's border with Austria, who sent them back to Slovenia. On 23 February 2016 Mr A.S. lodged an application for international protection with the Slovenian authorities. On that same day the Slovenian authorities sent a letter to the Croatian authorities in accordance with Article 2(1) of the Agreement between the two countries on the extradition and return of individuals who entered or stayed irregularly within Slovenian territory (an international agreement). Slovenia asked Croatia to take back 66 people of whom Mr A.S. was one. By letter of 25 February 2016 the Croatian authorities confirmed that they would take those persons back. A formal take-back request under the Dublin III Regulation was made by Slovenia on 19 March 2016. On 18 May 2016 the Croatian authorities confirmed their acceptance that Croatia was the Member State responsible.

73. By decision of 14 June 2016 the Slovenian Ministry of the Interior ('the Slovenian Ministry') informed Mr A.S. that his application for international protection would not be examined by Slovenia and that he would be transferred to Croatia, as the Member State responsible ('the Slovenian Ministry's decision').

74. That decision was based on the criterion in Article 13(1) of the Dublin III Regulation. In accordance with that provision, where a third-country national has irregularly crossed the border of a Member State, that Member State is responsible for examining an application for international protection. Whether there has been an irregular border crossing in any particular case is established by reference to proof or circumstantial evidence as described in the two lists in Annex II to the Dublin Implementing Regulation which includes any available data in Eurodac.

75. The Slovenian Ministry took the view that Mr A.S. entered Croatia irregularly during February 2016. It also took into account that on 18 May 2016 the Croatian authorities responded positively to the Slovenian authorities' request to take charge of Mr A.S.'s application under the Dublin III Regulation on the basis of the criterion in Article 13(1) of that regulation, to the effect that Croatia is the Member State competent for examining Mr A.S.'s application. (88) The Eurodac system did not provide a positive match for Croatia for Mr A.S., but that is not decisive for interpreting Article 13(1) of the Dublin III Regulation. The action of the national authorities when individuals from the 'migrants' train' crossed the national border into Croatia had been the same as in cases in which migrants had been registered in the Eurodac system.

76. On 27 June 2016 Mr A.S. challenged that decision before the Upravno sodišče (Administrative Court, Slovenia) on the grounds that the Article 13(1) criterion had been wrongfully applied. The Croatian State authorities' conduct must be interpreted as meaning that he entered Croatia lawfully.

77. On 4 July 2016 that challenge was rejected, but Mr A.S. was successful in obtaining suspension of the Ministry's decision.

78. He appealed against the first instance decision to the referring court on 7 July 2016. The latter takes the view that in order to determine which Member State is responsible for examining Mr A.S.'s application for international protection, it needs guidance as to the interpretation of the condition in Article 13(1) of the Dublin III Regulation 'that an applicant has irregularly crossed the border into a Member State'. The referring court wishes in particular to know whether the words 'irregularly crossed' should be interpreted independently or in conjunction with Article 3(2) of the Return Directive and Article 5 of the Schengen Borders Code. The referring court also seeks to ascertain whether the fact that Mr A.S. crossed the border from Serbia to Croatia under the supervision of the Croatian authorities, even though he did not meet the requirements of Article 5(1) of the Schengen Borders Code (because he did not possess the necessary documents, such as a valid visa), is relevant in assessing whether his entry into EU territory was irregular.

79. The referring court further seeks guidance on the application of certain procedural aspects of the Dublin III Regulation, namely whether Mr A.S.'s right to an effective remedy under Article 27 of that regulation covers the assessment in law of how the terms 'irregular' or 'unlawful entry' into a Member State in Article 13(1) are to be applied. If the answer to that question is affirmative, it then becomes necessary to establish how the

time limits in Articles 13(1) and 29(2) of the Dublin III Regulation operate. In essence the referring court wants to know if time continues to run where a challenge is lodged under Article 27(1), in particular where a transfer has been ruled out pursuant to Article 27(3).

80. On 13 September 2016 the referring court therefore sought a preliminary ruling on the following questions:

'(1) Does judicial protection under Article 27 of [the Dublin III Regulation] concern also the interpretation of the conditions of the criterion under Article 13(1) in respect of a decision that the Member State will not examine the application for international protection, that another Member State has already assumed responsibility for examining the applicant's application on the same basis and where the applicant challenges this?

(2) Is the condition of irregular crossing under Article 13(1) of [the Dublin III Regulation] to be interpreted independently or in conjunction with Article 3(2) of [the Return Directive] and Article 5 of the Schengen Borders Code which define illegal crossing of the border and must that interpretation be applied in relation to Article 13(1) of [that regulation]?

(3) In view of the answer to the second question, is the concept of irregular crossing under Article 13(1) of [the Dublin III Regulation] in the circumstances of the present case to be interpreted as meaning that there is no irregular crossing of the border where the public authorities of a Member State organise the crossing of the border with the aim of transit to another Member State of the EU?

(4) In the event that the answer to the third question is in the affirmative, is Article 13(1) of [the Dublin III Regulation] consequently to be interpreted as meaning that it prohibits sending a national of a third State back to the [Member] State where he initially entered EU territory?

(5) Is Article 27 of [the Dublin III Regulation] to be interpreted as meaning that the time limits of Article 13(1) and Article 29(2) do not run where the applicant exercises the right to judicial protection, *a fortiori* where that implies also a question for a preliminary ruling or where the national court is awaiting the answer of the [Court] to such a question which has been submitted in another case? In the alternative, would the time limits run in such a case, the Member State responsible however not being entitled to refuse reception?'

Procedure before the Court

81. The referring court asked this Court to apply the urgent preliminary reference procedure. The Court rejected that request by order dated 27 September 2016. The case was however subsequently accorded priority treatment by decision dated 22 December 2016, as it raises issues in common with Case C-646/16 *Jafari* which is subject to the expedited procedure.

82. Written observations have been submitted by Mr A.S., Greece, Hungary, Slovenia, the United Kingdom and Switzerland, and the European Commission. Given the similarities with Case C-646/16 *Jafari*, the Court decided to organise a joint hearing of the two cases. (89)

Case C-646/16 Jafari

Facts, procedure and questions referred

83. Ms Khadija Jafari and Ms Zainab Jafari are nationals of Afghanistan. They are sisters. Ms Khadija Jafari has a son, born in 2014, and Ms Zainab Jafari has two daughters, born in 2011 and 2007. The children are also Afghan nationals.

84. The two sisters together with their respective children ('the Jafari families') fled from Afghanistan, because their respective husbands had been taken by the Taliban and were required to fight in the Taliban's army. They refused to do so and were killed by the Taliban. The respective fathers-in-law of the two Jafari sisters then kept the women locked behind closed doors: one considered that keeping his daughter-in-law behind lock and key was appropriate for religious reasons; the other thought that it would be safer for his daughter-in-law to be locked away. The Jafari sisters' father managed to organise their flight from Afghanistan. The sisters fear that if they return to Afghanistan they will be locked away again by their respective families and they are also at risk of being stoned to death.

85. The Jafari families left Afghanistan during December 2015. With the assistance of a 'people trafficker' they first travelled via Iran (where they spent three months) through Turkey (where they spent around 20 days) to Greece (where they spent three days). The Greek authorities took biometric data from Ms Zainab Jafari and transmitted her digital fingerprints via Eurodac. The Jafari families then travelled through the FYR Macedonia, Serbia, Croatia and Slovenia before finally reaching Austria. No more than five days elapsed between their departure from Greece and their re-entry into EU territory.

86. From 18 November 2015 onwards, Croatia had started to filter the inflow of third-country nationals. It allowed only those from Afghanistan, Iraq and Syria – who were likely to qualify for refugee status – to pass through its territory. The Jafari families satisfied that test. In Croatia they requested access to a doctor to attend to one of Ms Zainab Jafari's daughters. No assistance was forthcoming. They spent an hour waiting for a bus and were then taken across the border into Slovenia.

87. On 15 February 2016 the competent authorities in Slovenia drew up a document recording the Jafari families' personal details. It indicated 'NEMČIJA/DEU' ('journey destination Germany') for Ms Zainab Jafari. For Ms Khadija Jafari, the letters 'DEU' had been struck out by hand and replaced by 'AUT' in manuscript (thus, 'NEMČIJA /AUT' 'journey destination Austria'). (90) On the same day the sisters crossed the Austrian border together and made their applications for international protection for themselves

and for their children in that State. The Austrian authorities state that they had originally indicated that they wished to travel to Sweden. That is however disputed by the sisters.

88. The Austrian competent authority (the Austrian Federal Office for immigration and asylum (Bundesamt für Fremdenwesen und Asyl; 'the Federal Office' or 'the BFA')) did not verify the sisters' account of their flight from Afghanistan, because it took the view that Croatia was the Member State responsible for examining their application for international protection. After having first approached the Slovenian authorities, by letter of 16 April 2016 the BFA requested the competent Croatian authority to take charge of the sisters and their children in accordance with Article 18(1)(a) of the Dublin III Regulation. The BFA asserted that, since the Jafari families had entered the territory of the Member States irregularly via Croatia, that Member State was responsible for examining their applications. The competent Croatian authority did not reply. Consequently, the BFA informed it by letter of 18 June 2016 that, under Article 22(7) of the Dublin III Regulation, responsibility for examining the applications for international protection now lay irrevocably with Croatia.

89. By decisions of 5 September 2016, the Federal Office rejected the applications for international protection as 'inadmissible', it noted that Croatia was responsible for examining the applications by virtue of Article 13(1) of the Dublin III Regulation and issued an expulsion order to the effect that the Jafari families should be returned to Croatia. In its statement of reasons, the Federal Office proceeded on the assumption that the sisters and their children had first entered the territory of the European Union in Greece. According to the BFA, they had, however, then left EU territory again and had subsequently re-entered the territory of the Member States in Croatia. The entries into Greece and Croatia were stated to have been irregular. In Greece, however, there were ongoing systemic failings in the asylum procedure. Therefore, in application of Article 13(1) of the Dublin III Regulation, Croatia was to be regarded as the Member State responsible. There were said to be no systemic failings in the asylum system there. The sisters contest that conclusion. (91)

90. Both the administrative authorities and the Bundesverwaltungsgericht (Federal Administrative Court, Austria) which ruled on their application challenging the contested decisions considered that the Jafari families' account and the information given relating to their journey from Afghanistan were plausible. It is also not in dispute that the Jafari families' odyssey took place during the mass inflow of third-country nationals into EU territory from the Western Balkans between September 2015 to March 2016.

91. By decisions of 10 October 2016 the Bundesverwaltungsgericht (Federal Administrative Court) dismissed the Jafari families' appeals. In so doing, it essentially upheld the findings of the BFA. It found that when the Jafari families entered Croatia from Serbia they had crossed the border without an entry visa, although as Afghan nationals they should have had one. Thus, the entry across that border was irregular. As far as could be established, the entry into Austria had also been without a visa and was therefore likewise 'irregular'.

92. The two sisters (but not their children) challenged that ruling on appeal before the referring court. They submit that the particular circumstances of their respective cases should be taken into account in establishing which Member State is responsible for examining their applications for international protection. They claim to have entered EU territory under Article 5(4)(c) of the Schengen Borders Code (that is, for humanitarian reasons). The border crossing was therefore not an 'irregular entry' for the purposes of Article 13(1) of the Dublin III Regulation. That was the reasoning behind the Agreement of 18 February 2016 allowing third-country nationals to enter EU territory to cross Member States in order to reach the place where they wished to claim asylum. (92) Under Article 14(2) of the Dublin III Regulation, Austria is therefore the Member State responsible for examining their applications for international protection.

93. The referring court was aware that a reference had already been made by the Vrhovno sodišče Republike Slovenije (Supreme Court of the Republic of Slovenia) in Case C-490/16 *A.S*. However, it is of the view that the underlying circumstances of the Jafari families' application for international protection differ from those in *A.S*. In the case of the Jafari families, the competent Croatian authority failed to respond to the take charge request made under Article 18(1)(a) of the Dublin III Regulation. The referring court considers that Article 13(1) of the Dublin III Regulation is the relevant Chapter III criterion which applies to determine the Member State responsible. That regulation does not however define 'irregular crossing' of the border. The referring court therefore seeks guidance as to whether that concept should be interpreted independently or by reference to other EU acts which lay down rules governing the requirements relating to third-country nationals who cross the EU external border, such as those in the Schengen Borders Code. In so far as the Croatian authorities allowed the Jafari families to enter their country and supervised their transport to the Slovenian border, the referring court asks whether such conduct is in effect a 'visa' for the purposes of Articles 2(m) and 12 of the Dublin III Regulation.

94. The Jafari families submit that the relevant Chapter III criterion is Article 14 (waiver of visa requirements). The referring court is not convinced that that view is correct. It therefore wishes to know whether that provision or Article 13(1) is the appropriate criterion to determine the Member State responsible. In view of the Court's rulings in *Ghezelbash* and *Karim*, (93) the referring court observes that an applicant can rely upon a wrongful application of the Dublin III criteria in an appeal against a transfer decision taken on the basis of that regulation. It is therefore necessary to ascertain which is the correct criterion to apply.

95. The referring court also questions the Jafari families' contention that they fall within the scope of Article 5(4)(c) of the Schengen Borders Code. It accordingly also seeks the Court's view on the correct interpretation of that provision.

96. Thus, the referring court asks the following questions:

‘(1) Is it necessary, for the purpose of understanding Articles 2(m), 12 and 13 of [the Dublin III Regulation], for other acts, linked to that regulation, to be taken into account, or are those provisions to be interpreted independently of such acts?

(2) In the event that the provisions of the Dublin III Regulation are to be interpreted independently of other acts:

(a) In the circumstances of the cases in the main proceedings, which are characterised by the fact that they fall within a period in which the national authorities of the States principally involved were faced with an unusually large number of people demanding transit through their territory, is the entry into the territory of a Member State, where such entry is de facto tolerated by that Member State and was intended to be solely for the purpose of transit through that Member State and the lodging of an application for international protection in another Member State, to be regarded as a “visa” within the meaning of Article 2(m) and Article 12 of the Dublin III Regulation?

If Question 2(a) is answered in the affirmative:

(b) Must it be assumed, in the light of the fact that entry is de facto tolerated for the purpose of transit, that the “visa” ceased to be valid upon departure from the Member State concerned?

(c) Must it be assumed, in the light of the fact that entry is de facto tolerated for the purpose of transit, that the “visa” continues to be valid if departure from the Member State concerned has not yet taken place, or does the “visa” cease to be valid, notwithstanding non-departure, at the point at which an applicant finally abandons his plan to travel to another Member State?

(d) Does the applicant’s abandonment of his plan to travel to the Member State which he originally envisaged as being his destination mean that a fraud can be said to have been committed after the “visa” had been issued, within the meaning of Article 12(5) of the Dublin III Regulation, so that the Member State issuing the “visa” is not to be responsible?

If Question 2(a) is answered in the negative:

(e) Is the expression used in Article 13(1) of the Dublin III Regulation, “has irregularly crossed the border into a Member State by land, sea or air having come from a third country”, to be interpreted as meaning that, in the special circumstances of the cases in the main proceedings referred to, an irregular crossing of the external border is to be regarded as not having taken place?

(3) In the event that the provisions of the Dublin III Regulation are to be interpreted taking other acts into account:

(a) In assessing whether, for the purposes of Article 13(1) of the Dublin III Regulation, there has been an “irregular crossing” of the border, must regard be had in particular to the question whether the entry conditions under the Schengen Borders Code – notably under Article 5 of [that act], which is particularly relevant to the cases in the main proceedings, given the timing of the entry – have been fulfilled?

If Question 3(a) is answered in the negative:

(b) Of which provisions of EU law is particular account to be taken when assessing whether there has been an “irregular crossing” of the border for the purposes of Article 13(1) of the Dublin III Regulation?

If Question 3(a) is answered in the affirmative:

(c) In the circumstances of the cases in the main proceedings, which are characterised by the fact that they fall within a period in which the national authorities of the States principally involved were faced with an unusually large number of people demanding transit through their territory, is the entry into the territory of a Member State, where such entry is, without any assessment of the circumstances of individual cases, de facto tolerated by that Member State and was intended to be solely for the purpose of transit through that Member State and the lodging of an application for international protection in another Member State, to be regarded as authorisation to enter within the meaning of Article 5(4)(c) of the Schengen Borders Code?

If Questions 3(a) and 3(c) are answered in the affirmative:

(d) Does authorisation to enter pursuant to Article 5(4)(c) of the Schengen Borders Code mean that an authorisation comparable to a visa within the meaning of Article 5(1)(b) of the Schengen Borders Code, and thus a “visa” under Article 2(m) of the Dublin III Regulation, must be deemed to exist, so that, when applying the provisions for establishing the Member State responsible under the Dublin III Regulation, regard must be had also to Article 12 of that regulation?

If Questions 3(a), 3(c) and 3(d) are answered in the affirmative:

(e) Must it be assumed, in the light of the fact that entry is de facto tolerated for the purpose of transit, that the “visa” ceased to be valid upon departure from the Member State concerned?

(f) Must it be assumed, in the light of the fact that entry is de facto tolerated for the purpose of transit, that the “visa” continues to be valid if departure from the Member State concerned has not yet taken place, or does the “visa” cease to be valid, notwithstanding non-departure, at the point at which an applicant finally abandons his plan to travel to another Member State?

(g) Does the applicant's abandonment of his plan to travel to the Member State which he originally envisaged as being his destination mean that a fraud can be said to have been committed after the "visa" had been issued, within the meaning of Article 12(5) of the Dublin III Regulation, so that the Member State issuing the "visa" is not to be responsible?

If Questions 3(a) and 3(c) are answered in the affirmative, but Question 3(d) is answered in the negative:

(h) Is the expression used in Article 13(1) of the Dublin III Regulation, "has irregularly crossed the border into a Member State by land, sea or air having come from a third country", to be interpreted as meaning that, in the special circumstances of the cases in the main proceedings referred to, a border crossing which is to be categorised as authorised entry for the purposes of Article 5(4)(c) of the Schengen Borders Code is not to be regarded as an irregular crossing of the external border?'

Procedure before the Court

97. Pursuant to Article 105 of the Rules of Procedure, the referring court requested that this case should be made subject to the expedited procedure. That request was granted by order of the President dated 15 February 2017.

98. Written observations have been submitted by the Jafari families, Austria, France, Hungary, Italy, Switzerland and the European Commission.

99. At the hearing on 28 March 2017 held jointly with Case C-490/16 *A.S.*, pursuant to Article 77 of the Rules of Procedure, Mr A.S. and the Jafari families, as well as Austria, France, Greece, Italy, the United Kingdom and the Commission presented oral argument.

Assessment

Preliminary remarks

The Dublin system: a brief overview

100. The Dublin system establishes a procedure for determining the Member State responsible for examining an application for international protection. (94) The possibility that third-country nationals could travel freely within the Schengen area (95) created potential difficulties and a mechanism was designed to ensure that, in principle, only one participating State would be responsible for examining each request for asylum. The aims are, inter alia, to determine the Member State responsible rapidly, to prevent and discourage forum shopping, (96) to prevent and discourage secondary movements (97) and to avoid the phenomenon of asylum seekers 'in orbit' – that is, to avoid a situation in which each Member State claims that it has no responsibility because another Member State constitutes a safe third country and should therefore be responsible. (98) The Eurodac Regulation underpins the Dublin III Regulation.

101. The first set of criteria in Chapter III of the Dublin III Regulation allocate responsibility for examining applications on the basis of guaranteeing respect for the family unit. (99) The succeeding criteria aim to determine which State has contributed to the greatest extent to the applicant's entry or residence within the territory of the Member States by issuing a visa or residence permit, by failing to be diligent in controlling its borders, or by waiving the requirement for the third-country national concerned to possess a visa. (100)

Schengen

102. Under the Schengen Borders Code, Member States have an obligation to maintain the integrity of the EU external border, which should be crossed only at certain authorised points. Third-country nationals must satisfy certain requirements. (101) A third-country national who crossed the border irregularly and who has no right to stay on the territory of the Member State concerned must be apprehended and made subject to the return procedures. (102) In practice, third-country nationals who arrive at the external borders of Member States often do not wish to request asylum there and refuse to have their fingerprints taken, if indeed the competent authorities seek to do so. (103) In principle, from that moment onwards the persons concerned could be designated illegally staying third-country nationals who do not fulfil the entry conditions set out in Article 5(1) of the Schengen Borders Code, pursuant to Article 3(2) of the Return Directive. (104)

103. The preferred procedure under the Return Directive is for voluntary return. In cases of forced return, the Member State concerned must issue an EU-wide entry ban and may place that information into the SIS.

104. The Dublin system, the Schengen *acquis* and the Return Directive appear to provide a comprehensive package of measures. However, the two cases at issue expose the lacunae and the practical difficulties in applying such rules where extraordinarily large numbers of people travel by land, rather than by air, to the European Union in a relatively short period of time to seek sanctuary. I have already described the circumstances that subsisted between September 2015 and March 2016. (105)

The general themes to the referring courts' questions

105. The questions posed by the two referring courts concern a number of common themes.

106. First, what general methodology should be applied to interpreting the criteria in Articles 12, 13 and 14 of the Dublin III Regulation? In particular, should those provisions be read in conjunction with the Schengen *acquis*? (106) Second, did the cooperation and facilities provided by the EU transit States (in particular, Croatia and Slovenia) amount in effect to visas within the meaning of Articles 2(m) and 12 of that regulation? (That question is not raised expressly in *A.S.*, but the Court's reply might nonetheless be of assistance to the referring court in determining the main proceedings.) (107) Third, how should Article 13(1) of the Dublin III Regulation be interpreted? In particular, what is the

meaning of the phrase 'irregularly crossed the border' and what is the relationship (if any) between that provision and Article 5(1) of the Schengen Borders Code and Article 3(2) of the Return Directive? (108) Fourth, do those third-country nationals allowed to enter the Schengen area during the humanitarian crisis in the Western Balkans come within the exception in Article 5(4)(c) of the Schengen Borders Code to the entry conditions for third-country nationals? (109) Fifth, what constitutes 'visa waived entry' within the meaning of Article 14 of the Dublin III Regulation?

107. In *A.S.*, the Court is also asked to examine certain procedural aspects of the Dublin III Regulation. (110) Finally, it is necessary to assess the practical consequences of the interpretation of the provisions at issue for the two cases. (111)

108. Those questions are asked in a context in which one Member State was described as having suspended the application of the Dublin III Regulation for a period of time, whilst others were described as having 'suspended Schengen' in so far as they erected barriers across their internal borders with other EU Member States that are also in the Schengen area. (112)

109. The Court's function is exclusively judicial: to ensure, in accordance with Article 19(1) TEU, that 'in the interpretation and application of the Treaties the law is observed'. It is self-evidently *not* for the Court to enter the political arena in order to address the (thorny) question of how, given the geography of Europe, to allocate applicants for international protection between the Member States of the European Union. The unprecedented circumstances that pertained in the Western Balkans between September 2015 and March 2016 nevertheless thrust into the limelight the mismatch between geography and the elaborate criteria in Chapter III of the Dublin III Regulation. Put bluntly, the Court is now asked to provide a legal solution and to fit it retrospectively to a factual situation with which the applicable legal rules are ill-equipped to deal. Whichever solution is chosen is likely to be controversial in some quarter.

First issue: methodology to be applied when interpreting the criteria in Articles 12, 13 and 14 of the Dublin III Regulation

110. The referring courts in *A.S.* and *Jafari* seek to ascertain whether it is necessary to take account of other EU acts linked to the Dublin III Regulation or whether that regulation (in particular Articles 2(m), 12, 13 and 14 thereof) should be construed independently of such acts. It is common ground that transit was arranged with the cooperation of the States concerned. Thus, the question necessarily arises as to whether the rules relating to third-country nationals who cross the European Union's external borders impinge upon the interpretation of the Dublin III Regulation.

111. The applicants in *Jafari* together with Austria, France, Greece, Hungary, Switzerland and the Commission submit that the Chapter III criteria should be construed in conjunction with other acts, namely the Schengen Borders Code and the Return Directive.

112. Mr A.S. argues that the interpretation of the Chapter III criteria should not be based on national or international rules alone. It must take account of the factual situation and the obligations of the EU transit States, which acted in accordance with Article 33 of the Geneva Convention and Article 3 of the ECHR (the prohibition against torture), as well as Articles 4(2) and 5(4) of the Schengen Borders Code.

113. Italy considers that the key issue is not whether the general approach to interpretation takes account of other EU acts or not. It states, first, that between September 2015 and March 2016 the EU transit States did not issue visas to those passing through their territory. Second, it emphasises that Article 13(1) of the Dublin III Regulation should be interpreted in the light of the Geneva Convention.

114. In the United Kingdom's view the Schengen Borders Code and the Return Directive have no legal bearing on the term 'irregular crossing' in Article 13(1) of the Dublin III Regulation. The latter should therefore be interpreted independently of those acts.

115. I do not see the approach to interpreting the Chapter III criteria as being a binary choice between two options: construing the Dublin III Regulation in total isolation, or construing it in a manner that results in the terms of that regulation being defined by reference to the enacting provisions of other EU acts.

116. It is settled case-law that when interpreting a provision of EU law, it is necessary to consider not only its wording, but also the context in which it occurs and the objectives pursued by the rules of which it is part. (113) The first of the 'General principles' in the 'Joint Practical Guide for the drafting of EU legislation' (114) states that legislation must be clear, simple and precise, leaving no uncertainty in the mind of the reader. Where an act shares common definitions with other EU legislation, it would be reasonable to expect to find an express cross reference, as the concept of a definition which is to be incorporated by implication is inconsistent with the principle of legal certainty. (115) Neither the Schengen Borders Code nor the Return Directive include definitions which cross refer to the Chapter III criteria in the Dublin III Regulation.

117. The wording of Article 12 of the Dublin III Regulation differs from Articles 13 and 14 in so far as it does expressly cross refer to the Visa Code which is part of the Schengen *acquis*. That reference is sufficiently clear, simple and precise to indicate that the Visa Code is relevant to the interpretation of that provision. (116) That said, it does not follow that the word 'visa' in Article 12 is limited to the definition that falls within the scope of the Visa Code. (117)

118. First, the Dublin III Regulation applies to Member States that are not part of the Schengen *acquis*, notably Ireland and the United Kingdom. In relation to those States, 'visa' must refer to a document recognised as such under national rules. Second, 'visa' covers categories of document beyond the short-stay visa which is within the scope of the Visa Code. It is clear from the wording of Article 2(m) of the Dublin III Regulation that that act applies to three different types of visa. (118)

119. That reasoning applies equally to Article 14 where the word 'visa' is also used. That term must also be construed in the same way as Article 12 for the sake of coherence and consistency.

120. It follows that the Schengen *acquis* is a relevant element to consider when interpreting the word 'visa', but that it does not determine the meaning of that term for the purposes of Articles 2(m) and 12 of the Dublin III Regulation.

121. Article 13 of the Dublin III Regulation makes no express reference to any measures in the Schengen *acquis* or to the Return Directive.

122. However, the statutory context indicates that the Dublin III Regulation is an integral part of the CEAS which is based on the full and inclusive application of the Geneva Convention. (119) That convention provides the international framework for the protection of refugees and those who seek refugee status. In accordance with Article 31(2) thereof, States should not in principle restrict the movements of refugees within their territory; and any restrictions which are considered to be necessary should only be applied until the refugees' status is regularised or they obtain admission to another country. States must allow refugees a reasonable period and the necessary facilities to obtain admission to another country. It is necessary to bear that provision in mind when interpreting the Dublin III Regulation. (120) Accordingly, the regulation should be interpreted in the light of its context and purpose and in a manner which is consistent with the Geneva Convention. That follows from Article 78(1) TFEU. It is also apparent from recital 39 that the Dublin III Regulation must be interpreted in a manner consistent with the rights recognised by the Charter. (121)

123. Since the Dublin III Regulation is an integral part of the CEAS, the EU asylum *acquis* is also a relevant factor. (122) There are express references to the Qualification Directive, the Reception Directive and the Procedures Directive. (123) The CEAS was conceived in a context in which it was reasonable to assume that all the participating States, whether Member States or third States, observed fundamental rights, including the rights based on the Geneva Convention and the 1967 Protocol and on the ECHR, (124) and that the Member States could therefore have confidence in each other in that regard. (125) 'It is precisely because of that principle of mutual confidence that the EU legislature adopted [the Dublin II Regulation] in order to rationalise the treatment of applications for asylum and to avoid blockages in the system as a result of the obligation on State authorities to examine multiple applications by the same applicant, and in order to increase legal certainty with regard to the determination of the State responsible for examining the asylum application and thus to avoid forum shopping, it being the principal objective of all these measures to speed up the handling of claims in the interests both of asylum seekers and the participating Member States.' (126) These issues go to the heart of the concept of an 'area of freedom, security and justice' (127) and, in particular, the CEAS, based on mutual confidence and a presumption of compliance, by other Member States, with European Union law and, in particular, fundamental rights. (128)

124. The principal objectives of the Dublin III Regulation attest to the EU legislature's intention to lay down organisational rules governing the relations between the Member States, as regards the determination of the Member State responsible for examining an asylum application, just as was the case for the earlier Dublin Convention. (129) Recitals 4, 5 and 7 of the Dublin III Regulation also refer to establishing a clear and workable method for determining rapidly the Member State responsible for processing an asylum application so as to guarantee effective access to the procedures for determining refugee status and not to compromise the objective of processing of asylum applications rapidly. (130)

125. To what extent are non-CEAS measures, such as the Schengen Borders Code and the Return Directive, relevant to interpreting the Chapter III criteria in Articles 12, 13(1) and 14?

126. I have already explained that I consider that Articles 12 and 14 should be interpreted autonomously, although the Visa Code is relevant to the meaning of the word 'visa' in certain respects. (131)

127. Regarding the interpretation of 'irregular crossing' in Article 13(1) of the Dublin III Regulation, there is no corresponding term in the Schengen Borders Code. There is therefore no question of attempting to transpose that term from the Schengen Borders Code to the Dublin III Regulation.

128. Furthermore, the personal scope of the rules in Title II, Chapter I, of the Schengen Borders Code concerning the entry conditions for third-country nationals crossing the EU external border is not the same as in the Dublin III Regulation. The latter applies solely to third-country nationals seeking international protection: (132) a category of persons that enjoys a special status under international law by virtue of the Geneva Convention.

129. The legislative history shows that the arrangements for determining responsibility for considering asylum applications which the Dublin Convention replaced were initially part of the intergovernmental Schengen Convention, (133) whilst the origins of the Dublin III Regulation and the Schengen Borders Code can both be traced back to the CISA. The scope of the two acts differs and their respective objectives are not the same. Thus, there should be no presumption that because there is an historical link, the two acts must be interpreted in the same manner.

130. The United Kingdom points out that the Schengen Borders Code and the Return Directive do not apply to certain Member States (notably itself). It considers that it would therefore be wrong to interpret the Dublin III Regulation by reference to legislation which does not extend throughout the European Union.

131. It is true that the scope of legislation that does not apply to all Member States should not be extended to them by the back door. However, the variable geometry found in the area of freedom, security and justice as a result of, inter alia, the United Kingdom's special position has not created a consistent pattern. The United Kingdom has opted into

certain elements of the Schengen *acquis* whilst eschewing others. (134) The fact that the United Kingdom is not bound by the Schengen Borders Code or the Return Directive cannot alter the binding nature of the Dublin III Regulation. (135) Nor can the United Kingdom's absence from certain EU instruments place a de facto stranglehold on the interpretation that should logically be given to measures that form part of a package. The United Kingdom tail cannot wag the European Union dog.

132. That said, there is no reference to the Return Directive in Article 13(1) of the Dublin III Regulation. The legislature did make such a reference in Article 24 of that regulation, which concerns the submission of a take-back request when no new application has been lodged with the requesting Member State. Thus, if the legislature had wished to refer expressly to the Return Directive in Article 13(1) it presumably could and would have made that choice.

133. The concept of an 'illegal stay' in Article 3(2) of the Return Directive covers a wider category of people than the personal scope of the Dublin III Regulation. The directive covers all third-country nationals (as defined). Its scope of application is not limited to the particular category of foreign nationals seeking international protection while their requests remain pending. (136)

134. The term 'illegal stay' in the Return Directive deals with a different situation to that of an 'irregular border crossing' as envisaged by Article 13(1) of the Dublin III Regulation. The Court ruled in *Affum* (137) that a third-country national on a bus in transit through a Member State fell within the scope of Article 3(2) of the Return Directive, because if the person concerned is present on the territory of a Member State in breach of the conditions for entry, stay or residence he is 'staying there illegally'. That remains true, but it is not the question at issue in *A.S.* or *Jafari*. Here, the referring courts seek to establish whether the third-country nationals concerned have irregularly *crossed* the EU external border.

135. Of course, there may sometimes be an overlap between the circumstances that give rise to an irregular border crossing and to an 'illegal stay' for the purposes of the Return Directive, but they are not the same thing. (138) It cannot aid clarity of understanding to conflate the two concepts in two different legal acts.

136. Moreover, under the second paragraph of Article 288 TFEU, regulations are of general application, binding in their entirety and directly applicable in all Member States. Owing to their very nature and their place in the system of sources of EU law, regulations thus operate to confer rights on individuals which the national courts have a duty to protect. (139) Given the hierarchy of norms, it would be odd to construe a regulation by reference to a directive that does not even provide a precise definition of the terms used in either measure.

137. Thus, I reject the submission that the Dublin III Regulation should be construed by reference to the Schengen Borders Code and Article 3(2) of the Return Directive.

138. Finally, whilst the Dublin III Regulation, the Schengen Borders Code and the Return Directive all fall within Title V of the TFEU concerning the area of freedom, security and justice, the legal basis for all three acts is not the same. The absence of a common legal basis indicates that the context and the objectives of the three acts is not entirely the same. (140)

139. That said, Articles 77, 78 and 79 TFEU concern policies that are part of the same chapter and Article 80 TFEU makes it clear that those policies are governed by the principle of 'solidarity and fair sharing of responsibility, including financial implications between the Member States'. Recital 25 of the Dublin III Regulation likewise states that EU policies regarding the conditions of entry and stay of third-country nationals, including common efforts towards the management of external borders, make it necessary to strike a balance between responsibility criteria in a spirit of solidarity.

140. Given the explicit instructions in the TFEU to ensure coordination between the different area of freedom, security and justice policies, it would clearly therefore also be wrong to interpret the Dublin III Regulation as though the Schengen *acquis* were totally irrelevant.

141. I therefore conclude that the Dublin III Regulation should be interpreted by reference to the wording, context and objectives of that regulation alone, rather than in conjunction with other EU acts – including in particular the Schengen Borders Code and the Return Directive, notwithstanding that when construing the Dublin III Regulation the provisions of those acts should be taken into account in so far as it is necessary to ensure coherence between the various policies in Chapter 2, Title V, TFEU.

Second issue: Article 12 of the Dublin III Regulation

142. Between September 2015 and March 2016 the Croatian and the Slovenian authorities, faced with an inflow of third-country nationals seeking transit through their territories, allowed entry to those who wished to lodge applications for international protection in another Member State. (141) In *Jafari* the referring court seeks to ascertain whether the permission to pass through their territories afforded by those Member States should be deemed to be a 'visa' within the meaning of Articles 2(m) and 12 of the Dublin III Regulation. It also asks what the consequences of such a visa might be (Questions 2(b) to (d)).

143. There is no express question as to the meaning of Articles 2(m) and 12 of the Dublin III Regulation in *A.S.* Nonetheless, Mr A.S. also travelled along the Western Balkans Route and was allowed to enter the territory of various Member States in order to reach his destination of choice. The issue of whether the 'wave through' approach amounts to a visa for the purposes of the Chapter III criteria is therefore equally relevant to his situation and it is implicit in Question 3 in his case. Moreover, the Court has consistently held that the fact that a question submitted by the referring court refers only to certain provisions of EU law does not mean that the Court may not provide the national court with all the guidance on points of interpretation that may be of assistance in adjudicating

on the case pending before it, whether or not that court has referred to those points in its questions. (142)

144. The applicants in *Jafari*, all of the Member States that lodged written observations and the Commission agree that the answer to the referring court's question should be 'no'. Articles 2(m) and 12 of the Dublin III Regulation read together do not mean that Member States which allow third-country nationals to enter their territory and to pass through en route to a Member State where they wish to submit an application for international protection should be considered to have issued visas. Switzerland did not make written observations on that point.

145. I agree with that general view.

146. The Jafari sisters first point out that they did not possess valid residence permits when they entered EU territory. Thus, Article 12(1) of the Dublin III Regulation is not relevant to them.

147. As nationals of Afghanistan the Jafari families were required to possess visas when crossing the external borders of the EU Member States. (143) They did not meet that condition. (144) The issue is whether, in the circumstances of their passage through differing Member States prior to their arrival in Slovenia or Austria as the case may be, they should be regarded as being deemed to have been issued with visas having regard to the terms of the applicable legislation.

148. If so, Article 12 of the Dublin III Regulation would be the relevant criterion to determine the Member State responsible.

149. The rules governing the issuing of visas are complicated and involve compliance with a number of formalities. There are good reasons for this. Most fundamentally they require the delivery of a piece of paper. Neither order for reference suggests, however, that a Member State *issued* a visa in accordance with the ordinary meaning of those words: that is, that a Member State took action by formally sending out or handing over a visa to an applicant. (145) It is common ground that none of the usual conditions were met here. There was no stamp indicating that the visa application was admissible, no period of validity and no visa sticker. (146) Thus, none of the requirements laid down in Regulation No 1683/95 could conceivably have been met.

150. The formalities are particularly important for the proper operation of the VIS, which enables border guards to verify that a person presenting a visa is its rightful holder and to identify persons found within the Schengen area with fraudulent documents. (147)

151. I am therefore of the view that the circumstances described by the referring courts in the respective orders for reference in *A.S.* and *Jafari* cannot be construed as having given rise to the issuance of a 'visa' for the purposes of Articles 2(m) and 12 of the Dublin III Regulation.

152. To construe the words 'issued the visa' in Article 12 otherwise would be contrary to their natural meaning. There is force in the applicants' argument that if an informal 'wave through' were equivalent to a visa it would be impossible to apply Article 12(4) and (5) of the Dublin III Regulation. It would be inconsistent with that regulation. Such an interpretation would also wreak havoc with the elaborate and complex rules relating to visas in the Visa Code and the related acts and it would undermine the operation of the VIS. (148)

153. Thus, in the wholly exceptional circumstances in which a mass inflow of third-country nationals entered the European Union between late 2015 and early 2016 and was allowed to cross the EU external border from third countries, the fact that certain Member States allowed the third-country nationals concerned to cross the external border of the European Union and subsequently to travel through to other EU Member States in order to lodge applications for international protection in a particular Member State does not equate to the issuance of a 'visa' for the purposes of Articles 2(m) and 12 of the Dublin III Regulation.

154. In view of the conclusion that I have just reached there is no need to answer Questions 2(b), (c) and (d) in *Jafari*.

Third issue: interpretation of 'irregularly crossed the border into a Member State' in Article 13(1) of the Dublin III Regulation

155. Both referring courts seek guidance as to the meaning of the words 'an applicant has irregularly crossed the border into a Member State' in Article 13(1) of the Dublin III Regulation. In essence, they wish to know whether the wholly exceptional situation at the material time in which Member States expressly permitted an inflow of third-country nationals into their territories in order to allow them to pass through in transit so as to claim international protection in an EU Member State of their choice constitutes an 'irregular crossing' and thus falls within that provision.

156. France, Greece, Hungary, Slovenia, the United Kingdom, Switzerland and the Commission submit that Article 13(1) of the Dublin III Regulation applies in such circumstances. Austria is of the view that given the circumstances pertaining at the material time, the interpretation of that provision should be considered in conjunction with Article 5(4)(c) of the Schengen Borders Code, which allows third-country nationals who do not meet the requirements in Article 5(1) for admission to the territory of the European Union nevertheless to be authorised to enter on humanitarian grounds. Italy considers that there was not an 'irregular crossing' for the purposes of the Dublin III Regulation, since the Chapter III criteria should be construed by reference to Article 31 of the Geneva Convention.

157. The applicants in both cases emphasise that they crossed the EU's external border with the express authorisation and assistance of the relevant national authorities. They therefore have not 'irregularly crossed the border' within the meaning of Article 13(1) of the Dublin III Regulation.

158. The background to these two requests for preliminary rulings gives rise to a complex and controversial question. (149) When third-country nationals cross an EU external border in a manner that does not comply with the provisions of the Schengen Borders Code, does that automatically trigger consequences within the Dublin scheme such that the first Member State into whose territory they cross remains responsible for examining their respective applications for international protection? Although it is clear from the wording that Article 13(1) of the Dublin III Regulation applies where an applicant has irregularly crossed the border of a Member State, it is not at all clear that the legislature intended that provision to apply in the unprecedented circumstances of the two present cases.

159. The Hungarian, Italian, Slovenian and Swiss Governments point out that some versions of the text refer to an 'illegally crossed border', (150) whilst others speak of 'an irregularly crossed border'. (151)

160. The adjectives 'irregular' and 'illegal' are not regarded as synonyms in international refugee law particularly in the context of the movement of third-country nationals across borders. The word 'irregular' is broader than 'illegal'. It also has the merit of being less tendentious as it does not carry the connotation or overtone of (implicit) criminality in relation to the person so described. (152)

161. That said, I agree with the parties' observation that the linguistic differences do not mean that there is ambiguity in the sense that they necessarily give rise to divergent interpretations of the words 'an applicant has irregularly crossed the border into a Member State'. (153) The differences identified are the result of different translations of the original text. That view is confirmed by the fact that the English text of Annex II to the Dublin Implementing Regulation is not consistent with the English text of Article 13(1) of the Dublin III Regulation. Point 7 of list A of the former is entitled: 'Illegal entry at an external frontier (Article 13(1))'. It sets out the probative evidence that is relevant in such an assessment (see point 44 above). It makes an express cross-reference to Article 13(1) of the Dublin III Regulation; but the word 'illegal' is used instead of 'irregular' (the term found in Article 13(1) itself). It is not credible that the legislature intended there to be a substantive difference between the two adjectives in the two texts.

162. I add that recital 12 states that the Procedures Directive applies in addition and without prejudice to the procedural safeguards laid down in the Dublin III Regulation. Article 31(8)(h) of that directive provides that an application for international protection may be examined under an accelerated procedure and/or conducted at the border or in transit zones where an applicant enters the territory of the Member State 'unlawfully'. The word 'unlawfully' is yet a third adjective applied by the legislature to the manner in which the third-country national concerned by that provision crossed the border of a Member State. It is presumably to be read in a manner that is coherent with the words 'irregularly crossed' in Article 13(1) of the Dublin III Regulation, which are sufficiently broad to encompass it. (154)

163. The Dublin III Regulation does not define the concept of an ‘irregular border crossing’.

164. The references to elements of proof in Article 22(3) of the Dublin III Regulation and the Dublin Implementing Regulation clearly indicate that *whether there is an irregular entry in any particular case is primarily a question of fact* for the national authorities.

165. Thus, whether a border crossing is ‘irregular’ is established by reference to Annex II to the Dublin Implementing Regulation, which contains two lists of criteria to be used for the purposes of determining the State responsible for an application for international protection. (155) List A sets out the relevant elements of formal proof. The indicative elements (or circumstantial evidence) are in list B. (156) The probative evidence listed includes ‘entry stamp in a passport; exit stamp from a country bordering on a Member State, bearing in mind the route taken by the applicant and the date the frontier was crossed; tickets conclusively establishing entry at an external frontier; entry stamp or similar endorsement in passport’.

166. The purpose of the Eurodac system is also to assist in determining which Member State is to be responsible for examining an application for international protection pursuant to the Dublin III Regulation. (157) Member States are required promptly to take the fingerprints of applicants who are at least 14 years of age and to transmit them (no later than 72 hours after the application is lodged) to the Central Eurodac System. (158) Member States are subject to a similar obligation to take the fingerprints of third-country nationals who are apprehended in connection with an irregular border crossing. (159)

167. The Dublin Implementing Regulation specifies that a positive Eurodac match creates a presumption that there has been an irregular entry. (160)

168. For the Schengen area, the Schengen Borders Code is also a useful tool for establishing whether a third-country national’s entry into EU territory was regular. The conditions for entry are laid down in Article 5(1), whilst Article 7 lays down the rules relating to border checks. It is likely that if such checks show that the conditions in Article 5(1) of the Schengen Borders Code were not met, the probative evidence listed in point 7 of list A in Annex II to the Dublin Implementing Regulation or the circumstantial evidence at point 7 of list B will be established.

169. Thus, in cases where there has been a failure to comply with the formal legal requirements for third-country nationals to cross the external border there is normally likely to have been an irregular crossing.

170. It is common ground that the applicants in the two sets of main proceedings did not comply with the formalities laid down by the Schengen Borders Code.

171. However, the Dublin III Regulation was not conceived as an instrument to deal with determining the Member State responsible for international protection in the event of a

massive inflow of people. (161) The circumstances at the material time fall within a gap for which there is no precise legal provision in the Treaties or secondary legislation.

172. Can the existing provisions be interpreted in a way that covers those circumstances?

173. The Geneva Convention does not contain a blueprint for a system for determining the State responsible for examining applications for international protection. (162) That act (unlike the EU *acquis*) is based in a separate system of international law. Nonetheless, I agree with the Italian Government that in the light of Article 78(1) TFEU, it is right to refer to Articles 31 and 33 of the Geneva Convention as the starting point in interpreting Article 13(1) of the Dublin III Regulation. Thus, the States that permitted the applicants to transit through their territories acted consistently with their obligations under the Geneva Convention in so doing.

174. The right to asylum enshrined in Article 18 of the Charter and the prohibition against torture and inhuman and degrading treatment in Article 4 should also be taken into account. (163) The latter is particularly relevant as regards the issue of returning third-country nationals seeking international protection to conditions that would contravene Article 4 or forcing them to remain in limbo at national borders in conditions that are degrading. (164)

175. The truly difficult question is, where should the balance be struck?

176. On the one hand, it seems clear that third-country nationals in the position of Mr A.S. and the Jafari families are unlikely to have met the Article 5(1) requirements. They cannot therefore be regarded as having 'regularly' crossed the external border of the European Union. On the other hand, it is equally clear that at the material time, the authorities of the transit EU Member States not only *tolerated* the mass border crossings, thus *tacitly authorising them*: they *actively facilitated* both entry into and transit across their territories. Is such a crossing 'irregular' in the ordinary sense of that word? Surely not. But how should we define that term; and does it really sensibly describe what was happening?

177. Article 13(1) of the Dublin III Regulation is the most widely used Chapter III criterion for determining the Member State responsible for examining applications for international protection. (165) The aim of that provision is to encourage Member States to be vigilant in guaranteeing the integrity of the external EU border. It also aims to discourage secondary movements and forum shopping by applicants. (166)

178. Let us step back for a moment and look first at the 'normal' situation under the Dublin III Regulation before returning to the two cases at issue.

179. In normal circumstances, Article 13(1) of the Dublin III Regulation is applied to an individual who has, by subterfuge or clandestine means, entered the territory of a Member State without that entry being approved (procedurally and substantively) by the competent authorities. That individual's entry and subsequent stay are clearly 'irregular'.

There is a set of rules that should have been, but were not, complied with. The entry was not condoned by the Member State in question – but it failed to prevent the entry occurring. Perhaps if the Member State had been more vigilant about defending the EU's external border, that individual would not have succeeded in sneaking into EU territory.

180. In such circumstances one can fully understand the logic in making that Member State responsible under Article 13(1) of the Dublin III Regulation for determining that individual's subsequent application for international protection.

181. Now let us return to the humanitarian crisis which occurred in the period from September 2015 to March 2016.

182. There is a human flood of desperate people – those fleeing the war in Syria swelling the numbers of those who have trekked from Iraq or Afghanistan. They sweep up to the Croatian border post in their hundreds, their thousands. (167) They have little or nothing with them. If they are kept out, they will somehow make improvised camps, with international assistance – as and when it is forthcoming – from bodies such as UNHCR, the Red Cross and Médecins Sans Frontières to help feed, shelter and care for them. There will be a humanitarian crisis on the European Union's doorstep. There is an obvious risk that neighbouring Balkan States will be de-stabilised, creating a real danger to peace and security in the region. Winter is coming on.

183. Geography, not choice, dictates which EU Member States are in the front line. Those Member States – like all EU Member States – have international obligations under the Geneva Convention. For humanitarian reasons, they should clearly admit these suffering fellow human beings into their territory. But if they do so, those Member States will not be able to guarantee suitable reception conditions for everyone. (168) Nor can they examine everyone's application for international protection swiftly if their administrations are overwhelmed by the sheer number of claims to process. (169)

184. There has been a tension since the Dublin Convention was first introduced between two different objectives. (170) On the one hand, the Dublin system seeks to establish a system that provides an inter-State mechanism allowing Member States to determine speedily the country responsible for examining an application for international protection. In pursuing that aim, Member States seek to prevent two phenomena, forum shopping and secondary movements. The Commission has stated recently: 'most importantly, all Member States must commit to ending the "wave-through" approach to those who indicate an interest in applying for asylum elsewhere. People arriving in the Union must know that if they need protection they will receive it, but it is not their choice to decide where'. (171) On the other hand, that approach contrasts with the aim espoused by many civil society organisations and the UNHCR, which is based on allocating responsibility according to where an application for international protection is made. The latter has never progressed because the necessary political will has not thus far been forthcoming. (172)

185. There is nothing to suggest that Mr A.S. or the Jafari families intend to make multiple applications in several Member States. (173) Likewise, concerns about secondary movements are also not justified in these two cases. The entry of Mr A.S. and the Jafari families into the European Union was documented. Their respective journeys were not illicit in the way that the legislation anticipates. (174)

186. It is evident that the border crossings that took place in the present cases were not ‘regular’. But I do not accept that those border crossings are properly to be classified as ‘irregular’ within the meaning of Article 13(1) of the Dublin III Regulation, which results in the Member State whose border was crossed ‘irregularly’ becoming responsible for determining a subsequent application for international protection.

187. Here, I note a further difficulty with the arguments advanced in particular by France and the Commission. Mr A.S. and the Jafari families first entered EU territory from a third country when they crossed the border into Greece, which is therefore the first Member State of entry. On a strict interpretation of Article 13(1) of the Dublin III Regulation, Greece would therefore be the Member State responsible for examining their respective applications for international protection. However, it has been recognised since 2011 that applicants for international protection cannot be returned to Greece. (175)

188. As part of the same overland journey, Mr A.S. and the Jafari families then briefly left EU territory before *re*-entering by crossing the Croatian border. The latter is therefore the *second* Member State into which they crossed from a third country. At the risk of stating the obvious, not all EU Member States have contiguous land borders with other Member States. (176) Nothing in the text of Article 13(1) of the Dublin III Regulation supports the reading that responsibility under that provision transfers to the *second* Member State of entry.

189. The plain truth is that Article 13(1) of the Dublin III Regulation was meant to address the normal situation of individual border crossings and individual applications where the third-country national concerned enters an EU Member State illicitly from a third country. Neither that provision nor the Dublin III Regulation as a whole was designed to cover a situation of *authorised* border crossings by a mass inflow of potential applicants for international protection. That regulation is not aimed at ensuring a sustainable sharing of responsibility for applicants for international protection across the European Union in response to such an inflow of people. That is, however, precisely the background to the present references. (177)

190. I therefore conclude that the words ‘an applicant has irregularly crossed the border into a Member State’ in Article 13(1) of the Dublin III Regulation do not cover a situation where, as the result of a mass inflow of third-country nationals seeking international protection within the European Union, Member States allow the third-country nationals concerned to cross the external border of the European Union and subsequently to travel through to other EU Member States in order to lodge applications for international protection in a particular Member State.

Fourth issue: Article 5(4)(c) of the Schengen Borders Code

191. The referring court seeks to ascertain whether the 'wave through' approach means that the third-country nationals concerned were 'authorised' to cross the EU's external border within the meaning of Article 5(4)(c) of the Schengen Borders Code.

192. Given the approach that I propose to the interpretation of the Dublin III Regulation (set out in point 141 above), there is strictly speaking no need to examine that provision of the Schengen Border Code. I shall nevertheless do so for the sake of completeness.

193. Mr A.S. and the Jafari families initially crossed the EU external border in Greece. They then crossed the external border into a third country, the FYR Macedonia. Finally, they crossed the EU external border to enter Croatia from Serbia. It seems prima facie that they fall within the scope of the Schengen Borders Code. (178)

194. Article 5(1) of the Schengen Borders Code lays down the entry conditions for third-country nationals for 'short stays'. (179) A third-country national (notably, here, a national of Afghanistan or Syria) must meet the following conditions: (i) possess a valid travel document; (180) (ii) possess a valid visa; (181) and (iii) be able to justify the purpose and conditions of the intended stay. (182) The third-country national concerned must also not be the subject of an SIS alert and must not be considered to be a threat to public policy, internal security, public health or the international relations of the State concerned. (183) The conditions listed in Article 5(1) are cumulative.

195. The Schengen Borders Code envisages that border checks will be conducted in accordance with Articles 6 and 7 thereof. There is provision for such checks to be relaxed in exceptional and unforeseen circumstances. (184) The travel documents of third-country nationals should nevertheless be stamped systematically on entry and on exit pursuant to Article 10. The main purpose of border surveillance set out in Article 12(1) of the Schengen Borders Code is to prevent unauthorised border crossings, to counter cross-border criminality and to take measures against persons who have crossed the border 'illegally'. (185) A third-country national who does not meet all the conditions in Article 5(1) must be refused entry, unless one of the exceptions in Article 5(4) applies.

196. The first sentence of Article 5(4)(c) allows Member States to authorise entry on, inter alia, humanitarian grounds or to comply with international obligations.

197. France and the Commission are of the view that Article 5(4)(c) of the Schengen Borders Code does not apply to the two cases at issue. They argue that the Member States are required to conduct an individual assessment in each case to establish whether that provision is triggered. No such assessment was conducted in either *A.S.* or *Jafari*. They therefore conclude that Article 5(4)(c) cannot be invoked.

198. I disagree.

199. First, the wording used in the derogation in Article 5(4)(c) is similar to that used in Article 5(2) of the CISA. The second subparagraph of that provision contains the following additional wording: ‘these rules shall not preclude the application of special provisions concerning the right of asylum …’.

200. The legislative history shows that the Commission proposal for the Schengen Borders Code explained that the proposed regulation broadly reproduced Articles 3 to 8 of Chapter 1 of the CISA. (186) The text of Article 5(2) of the CISA was set out in Articles 5(6) and 11(1) of the Commission’s proposal. The European Parliament introduced the derogation that is now Article 5(4)(c) in order to clarify the rules. (187)

201. I do not read the absence of a specific reference to ‘special provisions concerning the right to asylum’ as meaning that the derogation cannot be applied in circumstances such as those that pertained between September 2015 and March 2016. It may be that the legislature considered the text of Article 5(4)(c), read together with Article 3a and in the light of recital 7, to be sufficiently clear without the insertion of further additional words.

202. Second, the term ‘humanitarian grounds’ is not defined in the Schengen Borders Code. Advocate General Mengozzi has recently expressed the view that the expression is an autonomous concept of EU law. (188) I agree with him. It is a broad expression which covers the position of persons who are fleeing persecution and who are subject to the principle of non-refoulement. Furthermore, the interpretation of that expression in Article 5(4)(c) should take into account the obligation in Article 3a – that Member States are required to act in full compliance with relevant EU law including the Charter, the Geneva Convention and fundamental rights.

203. It therefore seems to me that the respective situations of Mr A.S. and the Jafari families would fall within the first sentence of Article 5(4)(c) of the Schengen Borders Code.

204. There is nothing to indicate that an individual assessment was conducted in either case. It seems very likely that it was not. Does that provision nonetheless apply?

205. I consider that it does.

206. It is true that the second sentence of Article 5(4)(c) of the Schengen Borders Code requires an individual assessment in order to establish whether the person concerned is the subject of an SIS alert. However, the wording does not state that the first sentence of that provision can only be applied if the condition in the second sentence has already been fulfilled. The two parts of Article 5(4)(c) are undeniably linked, but the first can be read independently of the second.

207. I therefore take the view that, even if the Article 13(1) criterion of the Dublin III Regulation is to be read in conjunction with the Schengen Borders Code, a border Member State would have been entitled to choose to rely on the derogation in Article 5(4)(c) of the latter to authorise third-country nationals to cross its external border without

conducting an individual assessment in the circumstances that pertained at the material time. Whilst such a Member State should, if possible, endeavour also to comply with the second sentence of that provision, application of the first sentence of Article 5(4)(c) is not contingent on such compliance.

208. Where a Member State authorises a third-country national to enter its territory on the basis of Article 5(4)(c), the person concerned is someone who by definition does not fulfil the entry conditions laid down in Article 5(1) of the Schengen Borders Code. In so far as those entry conditions are not satisfied, the crossing of the external border by the third-country national concerned must, in the formal sense, be irregular. However, that person's entry is *de facto authorised* and the legal basis for that authorisation is the derogation in Article 5(4)(c).

209. That authorisation cannot be ignored for the purposes of Article 13(1) of the Dublin III Regulation.

210. Thus, I conclude in the alternative that, where a Member State authorises a third-country national to enter its territory on the basis of Article 5(4)(c) of the Schengen Borders Code, the third-country national concerned is, by definition, someone who does not fulfil the entry conditions laid down in Article 5(1) of that regulation. In so far as those entry conditions are not satisfied, the crossing of the external border by the third-country national concerned must, in the formal sense, be irregular. However, his entry will de facto have been authorised and the legal basis for that authorisation is the derogation in Article 5(4)(c) of the Schengen Borders Code.

Fifth issue: Article 14 of the Dublin III Regulation

211. It follows from my conclusions in points 152 and 190 above that I consider that the Chapter III criteria in Articles 12 (visas) and 13 (irregular entry) of the Dublin III Regulation do not apply in the circumstances that pertained in the Western Balkans from September 2015 to March 2016.

212. The applicants in *Jafari* argue that Article 14 of the Dublin III Regulation (visa waived entry) is the relevant criterion.

213. I do not find that view persuasive.

214. First, Regulation No 539/2001 lays down rules listing the third countries whose nationals must possess a visa when crossing into the EU territory from its external borders. Where those rules apply (as here), the third-country national concerned *must* possess the requisite visa. (189) The regulation includes certain exemptions from that general requirement, such as those that apply to third-country nationals of the States listed in Annex II to Regulation No 539/2001 who intend to make a 'short stay' in the European Union. (190) It is also possible to make exceptions to the general rule where the conditions in Article 4 of that regulation apply. (191) However, apart from those

express exceptions to the general rule there are no other circumstances in which a third-country national may be exempted from the requirement to possess a visa.

215. Second, in the absence of express wording in Article 14 of the Dublin III Regulation it seems to me that the words ‘the need [for the third-country national] to have a visa is waived’ cannot be interpreted as meaning that a Member State may unilaterally disapply, on other or additional grounds, the general requirement to possess a visa laid down in Article 1 of Regulation No 539/2001 (read with Annex I thereto for certain third-countries). The regulation is, after all, directly applicable in all the Member States in accordance with Article 288 TFEU. Rather, I read those words as referring primarily to visa requirements that are *not* governed by Regulation No 539/2001, such as long-stay visas.

216. Third, as Afghan nationals the Jafari families were required to have visas to enter the European Union. (192) That requirement is mandatory for both the third-country national and the Member State concerned in respect of the countries listed in Annex I to Regulation No 539/2001. It would appear to be common ground that the Jafari families do not come within the exceptions in Articles 1(2) or 4 of that regulation. (193)

217. An alternative interpretation of Article 14 of the Dublin III Regulation might be that a Member State may waive the visa requirement in a specific individual case, recognising that in so doing it is taking on responsibility for determining that individual’s application for international protection. But such a waiver would, I think, require an individual assessment. No such assessment is recorded as having taken place here. The circumstances in fact point to the opposite, namely that there was a policy of authorising third-country nationals from Afghanistan, Iraq and Syria to cross Member States’ internal borders without any individual assessment. (194)

218. I therefore reject the submission that in the circumstances of the Jafari families’ case, the authorisation of third-country nationals to enter the territory of the EU Member States constitutes visa waived entry for the purposes of Article 14(1) of the Dublin III Regulation. I also do not accept that Article 14(2) applies as regards the position of Austria (the Member State where the application for international protection was lodged). It seems to me that the same reasoning logically applies both to Article 14(1) and to Article 14(2).

Application of the Dublin III Regulation to the two cases at issue

219. The family relationship criteria in Articles 8 to 11 and Article 15 of the Dublin III Regulation are not relevant to the circumstances of either Mr A.S. or the Jafari families.

220. I have reached the view that none of the Chapter III criteria apply to these two cases in the circumstances which arose between September 2015 and March 2016 in the Western Balkans. Those criteria cannot be interpreted and applied in a way that achieves the objective described in recital 5 of the Dublin III Regulation, namely establishing ‘a method … based on objective, fair criteria both for the Member States and for the persons

concerned. It should, in particular, make it possible to determine rapidly the Member State responsible, so as to guarantee effective access to the procedures for granting international protection and not to compromise the objective of the rapid processing of applications for international protection'.

221. There is no criterion in Chapter III that specifically addresses the situation where one or more Member States are confronted by a sudden massive inflow of third-country nationals. It seems unlikely that the legislature, when it adopted a new regulation to update the Dublin II Regulation and maintained the latter's approach to designating the Member State responsible (based on considering each individual application for international protection in isolation), ever envisaged that such a situation would arise.

222. It is true that Article 78(3) TFEU provides a legal basis for EU common action to deal with such an emergency situation. It is also true that there were certain initiatives, such as the measures adopted to relocate third-country nationals from Greece and Italy. (195) There were also less formal initiatives, such as the meeting on 'the Western Balkans Migration Route' held in Brussels on 25 October 2015 at the invitation of the Commission which led to a statement being issued aimed at improving cooperation and consultation between the States concerned. (196) The Commission was asked to monitor the implementation of the Statement.

223. Crucially, there was no political consensus on a solution for the Western Balkans. (197)

224. Germany's liberal position was described in press headlines as 'Germany suspends Dublin agreement for Syrian refugees' (198) and the Dublin III Regulation was dismissed as 'broken'. Germany's initial policy (see point 12 above) of admitting Syrians seeking international protection without limitation, was reported as 'Germany stopped using [Dublin]'. (199) Germany was not, however, the only Member State that took initiatives at the material time. Others took a rather different approach. (200)

225. Thus, Member States acted sometimes unilaterally, sometimes bilaterally, and sometimes in groups, with or without third States. The precise legal status of the various arrangements in relation to the EU legal framework is not entirely clear, even if the provisions governing the area of freedom, security and justice in Title V of the TFEU do leave some scope for flexibility.

226. In any event, the fact remains that no bespoke criterion was inserted into the Dublin III Regulation to cover the situation in the Western Balkans at the material time. Nor was any other legal act proposed or adopted to fill the vacuum.

227. That is the background against which the Court is now asked to give a coherent interpretation of the Dublin III Regulation.

228. On the one hand (and contrary to the views that I have expressed above) France and the Commission argue that Article 5(4)(c) of the Schengen Borders Code does not apply

and that the criterion in Article 13(1), Chapter III, is relevant and should be applied strictly. It follows from that submission that third-country nationals who crossed the EU external border must lodge claims for international protection in the border Member States in which they first arrived 'irregularly'.

229. On the other hand, if the 'wave through' policy means that third-country nationals are entitled to transit one or more Member States in order to lodge their requests for international protection in a subsequent Member State of their choice, is that perhaps inconsistent with the Dublin III Regulation's aims of preventing secondary movements and forum shopping?

230. This is again a question of where to strike the balance between two opposing perspectives. (201)

231. The major difficulty with the strict interpretation advanced by France and the Commission is that it does not take realistic account of the circumstances that pertained in the Western Balkans at the material time and it ignores the factual elements relating to the border crossings. By virtue of their geographical location, the border Member States – in particular Croatia and Slovenia (which does not border a third country) but is the first Schengen State (202) – would have been overwhelmed by the numbers of applicants they had to receive and the corresponding number of applications for international protection they would have been obliged to process. Between 16 September 2015 and 5 March 2016 a total of 685 068 people entered Croatia. Daily arrivals were on average approximately 5 500 third-country nationals; on 17 September 2015 the figure leapt to 11 000. (203)

232. Such an outcome cannot be equated with the aims of basing the determination on 'fair criteria both for the Member States and the persons concerned'. (204) Where Member State's national asylum system is overburdened, that Member State cannot guarantee effective access to the procedures for granting international protection; and the objective of processing applications for international protection rapidly laid down in the Procedures Directive is inevitably compromised. It is probable that the Member State concerned will also find it difficult if not impossible to comply with the rules in the Reception Directive laying down standards for the reception of applicants for international protection. (205)

233. In *N.S. and Others*, (206) the Court stated that an infringement of the Procedures Directive or the Reception Directive is not a factor to be taken into account in determining the Member State responsible, as to do so would add, by the back door, a criterion to those listed in Chapter III of the Dublin II Regulation. (207) However, the Court went on to rule that 'if there are substantial grounds for believing that there are systemic flaws in the asylum procedure and reception conditions for asylum applicants in the Member State responsible, resulting in inhuman or degrading treatment, within the meaning of Article 4 of the Charter, of asylum seekers transferred to the territory of that Member State, the transfer would be incompatible with [the Dublin II Regulation]'. (208) That case concerned the position in Greece and the predecessor to the Dublin III Regulation.

234. I perceive a real risk that if the border Member States, such as Croatia, are deemed to be responsible for accepting and processing exceptionally high numbers of asylum seekers, they will be confronted with a disproportionate burden as regards the return of third-country nationals who had been 'waved through' between September 2015 and March 2016. Some of those applicants, like Mr A.S. and the Jafari families, have subsequently become the subject of transfer requests which the border Member State concerned must then process. In all likelihood, that Member State will then have to examine the substantive application for international protection. It is clear that the increase in the number of asylum seekers returned under the Dublin III Regulation has already put additional pressure on the Croatian asylum system. (209) It is entirely possible that Croatia – as is already the case for Greece – will simply be unable to cope with the situation if it is, in addition, required to receive large numbers of applicants who previously transited through that Member State.

235. Slovenia was faced with similar numbers of people seeking access to its territory and its administrative capacities for the reception of applicants were also stretched beyond capacity. (210) The Slovenian Government described the position as constituting one of the biggest humanitarian challenges that it has faced since the Second World War. (211) That could in turn place that Member State also in a position where it is unable to comply with its obligations under Article 4 of the Charter and Article 3 of the ECHR. (212)

236. I do not think that at the material time applicants for international protection could reasonably have been expected or required to make a request for international protection in the first Member State into which they crossed, as the Commission seemed to suggest at the hearing. It is true that the Dublin system is designed to work on that premiss and that an individual applicant's fingerprints are taken and entered into Eurodac on that basis. However, none of that reflects the reality of the situation between September 2015 to March 2016, where the competent authorities had to deal with a mass inflow of people. I add that there is no question of forcing people to be fingerprinted under the current rules (possibly, because both the Dublin III Regulation and the Eurodac Regulation respect fundamental rights and such a practice may not be compatible with that aim) – yet that would probably have been the only way of ensuring that everyone was fingerprinted as they passed through.

237. Precisely because the situation was so unprecedented, I do not think that (legitimate) concerns relating to secondary movements and forum shopping materialise in the same way as they would under normal circumstances. The present cases do not concern individuals who have made clandestine border crossings into EU territory. The crossings in both cases were authorised. The persons concerned made their intentions known to the authorities and they were recorded. (213) We are not dealing here with illicit secondary movements. There is nothing in the material before the Court to suggest that the applicants wished to engage in 'forum shopping'. They simply wished to make their respective applications in particular Member States which had indicated a willingness to entertain and examine such claims. The situation does not fit the existing archetypes. Therefore, it does not necessarily follow that concerns about secondary movements and

forum shopping – concerns that do legitimately apply to the conventional individual applicant – are relevant here.

238. The Chapter III criteria were not designed with the situation in the Western Balkans in mind. (214) Insisting on rigorous application of those criteria runs counter to another avowed aim of the Dublin III Regulation, namely ensuring that Member States do not keep applicants for international protection 'in orbit'. (215)

239. Does that mean that the Dublin III Regulation is 'broken'?

240. I do not believe so.

241. Article 3 of the Dublin III Regulation introduces certain general principles and safeguards which Member States may use. The rule in Article 3(1), that applications are to be examined by a single Member State, continues to apply. Article 3(2) provides that in circumstances 'where no Member State responsible can be designated on the basis of the criteria listed in this Regulation, the first Member State in which the application for international protection was lodged shall be responsible for examining it'. Member States may also decide to use the discretionary clause in Article 17(1), under which they can examine applications for international protection lodged by third-country nationals even if such examination is not their responsibility under the Chapter III criteria.

242. In the light of the wholly exceptional circumstances in the Western Balkans in the period from September 2015 to March 2016, the Member State responsible can be determined on the basis of either of those provisions of the Dublin III Regulation. In neither case currently before the Court has the Member State concerned voluntarily assumed responsibility under Article 17(1). The Member State responsible should therefore be designated on the basis of Article 3(2). That view honours the safeguard for fundamental rights introduced by the EU legislature and it is consistent with the general aim in recital 7 in so far as it clearly allocates responsibility for examining applications for international protection among the Member States.

243. I conclude that the facts of the cases in the main proceedings do not allow for any 'Member State responsible' to be designated under Chapter III of the Dublin III Regulation. It follows that the respective applications for international protection should be examined by the first Member State in which those applications were lodged pursuant to Article 3(2) of that regulation.

Case C-490/16 *A.S.*

244. The referring court raises an additional issue in this reference, concerning the right to effective judicial protection and how time limits are calculated.

245. By its first question the referring court asks in essence whether Mr A.S. is entitled to challenge, under Article 27 of the Dublin III Regulation, the decision of the Slovenian

competent authorities requesting that Croatia takes responsibility for examining his application for asylum on the basis of Article 13(1) of that regulation.

246. In the light of this Court's ruling in *Ghezelbash* (216) the answer to that question must be an unequivocal 'yes'. The Court there stated that 'Article 27(1) of [the Dublin III Regulation], read in the light of recital 19 of the regulation, must be interpreted as meaning that, in a situation such as that in the main proceedings, an asylum seeker is entitled to plead, in an appeal against a decision to transfer him, the incorrect application of one of the criteria for determining responsibility laid down in Chapter III of the regulation …'. (217)

247. I conclude that, where an applicant for international protection challenges a transfer decision on the grounds that the Article 13(1) criterion was wrongly applied, Article 27(1) of the Dublin III Regulation must be interpreted as meaning that that person is entitled to plead, in an appeal against a decision to transfer him, the incorrect application of that criterion for determining responsibility laid down in Chapter III of that regulation.

248. By its fifth question the referring court seeks to ascertain whether the time limits in Articles 13(1) and 29(2) of the Dublin III Regulation continue to run where an applicant for international protection challenges a transfer decision under Article 27(1).

249. Article 13(1) provides that in cases where the determination of the Member State responsible for examining a request for international protection is based on the fact that the applicant irregularly crossed the border and entered that State from a third country, responsibility for examining the application ceases 12 months after the date on which the irregular border crossing took place.

250. Given that Mr A.S. has exercised his right to appeal against the transfer decision, the time limit in Article 13(1) would have expired before the litigation is resolved. That is even more evident since the national proceedings are currently suspended pending this Court's decision.

251. It seems to me from the wording that the time limit in Article 13(1) is aimed solely at ensuring that the Member State which requests the transfer ('the requesting Member State') to the State where the third-country national first crossed the external border and entered EU territory acts promptly. (218) If the requesting State fails to act within 12 months, it then by default becomes the Member State responsible for examining the application for international protection. That time limit is not linked to an applicant's right of appeal. To read the 12 months period as operating in that way would be contrary to the objective of rapidly determining the Member State responsible within the Dublin regime.

252. Article 29(2) provides that in cases where the transfer of an applicant for international protection from the requesting Member State (here, Slovenia) to the Member State responsible (here, Croatia) does not take place within six months of the transfer request having been accepted, the Member State responsible is relieved of its

obligations. Pursuant to Article 27(3), the lodging of an appeal or an application for review challenging a transfer decision has suspensive effects for the applicant. However, the regulation is silent as to whether a challenge of that nature suspends the time limits laid down in Article 29(2) of the Dublin III Regulation.

253. Where challenges to transfer decisions under Article 27(1) of the Dublin III Regulation have suspensive effects within the meaning of Article 27(3)(a) and (b), any transfer decision is suspended in accordance with the express wording of those provisions. It seems clear that in such circumstances the time limit in Article 29(2) does not run.

254. The position is less straightforward where Article 27(3)(c) applies. In such a case, Member States must allow an applicant the opportunity to request the suspension of the transfer decision. The time limit under Article 29(2) cannot run during the period of suspension. If the applicant is unsuccessful, however, the suspension ends and the period of six months starts to run again.

255. It seems to me that to read Articles 27 and 29 so as to mean that the six months' time limit continues to run notwithstanding any legal challenge to the transfer decision would be incompatible with the aim and the scheme of the regulation. It would mean that the transfer process could be subverted by extended legal proceedings.

256. I therefore consider that the time limit of six months laid down by Article 29(2) of the Dublin III Regulation stops running where a legal challenge under Article 27(1) has suspensive effect within the meaning of Article 27(3) of that regulation.

257. It is unclear precisely what the implications might be for Mr A.S. The Court has no information before it indicating how Slovenia has chosen to implement Article 27(3) of the Dublin III Regulation.

258. However, it is common ground that the conditions in which Mr A.S. entered the European Union were unprecedented. It is also accepted that he was authorised to enter Croatia by the Croatian authorities and that he similarly gained authorised entry to the Schengen area when he crossed the border from Croatia into Slovenia. At the hearing, Slovenia indicated that the authorisation was made on the basis of Article 5(4)(c) of the Schengen Borders Code. In those circumstances, as I have indicated, it seems to me that Mr A.S.'s entry was not 'irregular' for the purposes of Article 13(1) of the Dublin III Regulation. He was registered as he crossed the external border and there is nothing to indicate that he was the subject of an SIS alert. He cannot be returned to Greece (his original point of entry into the European Union). (219) It follows that Slovenia is the Member State responsible for examining his application for international protection pursuant to the first subparagraph of Article 3(2) of the Dublin III Regulation.

Case C-646/16 *Jafari*

259. It follows from point 243 above that I consider that the Jafari families' applications for international protection should be examined by the Austrian authorities on the basis of Article 3(2) of the Dublin III Regulation. I do not consider that the 'wave through' policy of the Western Balkans States amounted to a visa for the purposes of Article 12 of the Dublin III Regulation. Nor was there a visa waiver within the meaning of Article 14 of the Dublin III Regulation.

260. However, the Jafari families' entry into the European Union from a third State was authorised, as were their subsequent crossings of EU internal borders. It is unclear whether that was expressly on the legal basis of Article 5(4)(c) of the Schengen Borders Code. What is irrefutable is that they were permitted to enter and were indeed assisted in so doing by the competent national authorities. In the unprecedented circumstances that pertained in the Western Balkans between September 2015 and March 2016, that suffices to render inapplicable the criterion in Article 13(1) of the Dublin III Regulation.

261. The Jafari families cannot be returned to Greece (their original point of entry into the European Union). (220) It follows that Austria is the Member State responsible for examining their applications for international protection pursuant to the first subparagraph of Article 3(2) of the Dublin III Regulation.

Conclusion

262. In the light of all the above considerations I am of the opinion that the Court should declare as follows:

As regards both Case C-490/16 *A.S.* and Case C-646/16 *Jafari*:

(1) Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person should be interpreted by reference to the wording, context and objectives of that regulation alone, rather than in conjunction with other EU acts – including in particular Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) and Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, notwithstanding that when construing Regulation No 604/2013 the provisions of those acts should be taken into account in so far as it is necessary to ensure coherence between the various policies in Chapter 2, Title V, TFEU.

(2) In the wholly exceptional circumstances in which a mass inflow of third-country nationals entered the European Union between late 2015 and early 2016 and was allowed to cross the EU external border from third countries, the fact that certain Member States allowed the third-country nationals concerned to cross the external border of the

European Union and subsequently to travel through to other EU Member States in order to lodge applications for international protection in a particular Member State does not equate to the issuance of a ‘visa’ for the purposes of Articles 2(m) and 12 of Regulation No 604/2013.

(3) The words ‘an applicant has irregularly crossed the border into a Member State’ in Article 13(1) of Regulation No 604/2013 do not cover a situation where, as the result of a mass inflow of third-country nationals seeking international protection within the European Union, Member States allow the third-country nationals concerned to cross the external border of the European Union and subsequently to travel through to other EU Member States in order to lodge applications for international protection in a particular Member State.

(4) Alternatively, where a Member State authorises a third-country national to enter its territory on the basis of Article 5(4)(c) of the Schengen Borders Code, the third-country national concerned is, by definition, someone who does not fulfil the entry conditions laid down in Article 5(1) of that regulation. In so far as those entry conditions are not satisfied, the crossing of the external border by the third-country national concerned must, in the formal sense, be irregular. However, his entry will de facto have been authorised and the legal basis for that authorisation is the derogation in Article 5(4)(c) of the Schengen Borders Code.

(5) In the circumstances pertaining in the Western Balkans between late 2015 and early 2016, the authorisation of third-country nationals to enter the territory of the EU Member States does not constitute a visa waived entry for the purposes of Article 14(1) of Regulation No 604/2013.

(6) The facts of the cases in the main proceedings do not allow for any ‘Member State responsible’ to be designated under Chapter III of Regulation No 604/2013. It follows that the respective applications for international protection should be examined by the first Member State in which those applications were lodged pursuant to Article 3(2) of that regulation.

As regards Case C-490/16 *A.S.*:

(7) Where an applicant for international protection challenges a transfer decision on the grounds that the Article 13(1) criterion was wrongly applied, Article 27(1) of Regulation No 604/2013 must be interpreted as meaning that that person is entitled to plead, in an appeal against a decision to transfer him, the incorrect application of that criterion for determining responsibility laid down in Chapter III of that regulation.

(8) The time limit of six months laid down in Article 29(2) of Regulation No 604/2013 stops running where a legal challenge under Article 27(1) has suspensive effect within the meaning of Article 27(3) of that regulation.

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1 – Original language: English.

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2 – Moving from north to south: Finland, Estonia, Latvia, Lithuania, Poland, Slovakia, Hungary, Bulgaria and Romania. The Russian exclave of Kaliningrad Oblast is surrounded by Poland, Lithuania and the Baltic Sea.

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3 – Thus, Croatia, in addition to its borders with its EU neighbours Slovenia and Hungary, also has external borders with Bosnia and Herzegovina, Serbia and Montenegro. Greece has an EU internal border with Bulgaria and external borders with Albania, the Former Yugoslav Republic of Macedonia ('the FYR Macedonia') and Turkey.

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4 – The Geneva Convention (see point 19 below) defines refugees as people fleeing conflict or persecution; the term 'refugees' is also used in a broad sense to cover those people who are part of a flow from a country or a region that is stricken by conflict, before they have had an opportunity to apply formally and be accorded refugee status. Migration is a very different concept. At international level there is no universally accepted definition of the word 'migrant'. The term is usually understood to cover all cases where the decision to migrate was taken freely by the individual concerned for reasons of 'personal convenience' and without the intervention of an external compelling factor. That is a crucial difference between 'migrants' and 'refugees'. The expression 'migrant' is often used in the press to cover so-called 'economic migrants' – those who leave their country of origin purely for economic reasons that are not related to the 'refugee' concept, in order to seek material improvement to their quality of life; see the Glossary of the International Office for Migration and the Glossary of the European Migration Network, as well as the statement issued by the United Nations High Commissioner for Refugees ('UNHCR') on 11 July 2016, '"Refugee" or "migrant" – which is right?'.

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5 – Between (respectively): Ireland and the United Kingdom; the United Kingdom and France and Belgium; and the United Kingdom and the Netherlands and Germany.

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6 – The Skagerrak separates Denmark from its EEA neighbour, Norway.

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7 – The Kattegat and the Baltic Sea separate Denmark and Germany from Sweden.

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8 – The Baltic Sea, the Gulf of Bothnia and the Gulf of Finland.

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9 – Finland's land borders are with Sweden (a fellow EU Member State), Norway (an EEA state) and Russia (a third country).

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10 – I use this term to describe, successively, a sequence of legal instruments. There was first the Dublin Convention (Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities; OJ 1997 C 254, p. 1). The Member States signed that convention in Dublin on 15 June 1990. The Dublin Convention entered into force on 1 September 1997 for the 12 original signatories, on 1 October 1997 for the Republic of Austria and the Kingdom of Sweden, and on 1 January 1998 for the Republic of Finland. It was replaced by 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; 'the Dublin II Regulation'). Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (OJ 2013 L 180, p. 31; 'the Dublin III Regulation') repealed the Dublin II Regulation and is the version currently in force.

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11 – I note that, in practice, which Member States are readily served by what airlines arriving from which destinations will play a part in determining which is the Member State in which an applicant for international protection arriving by air will first land.

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12 – 'Editorial Comments', *Common Market Law Review* 52, No 6 of 6 December 2015, pp. 1437 to 1450, citing the letter of First Vice-President Frans Timmermans to the S & D group in the European Parliament of 21 October 2015.

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13 – See the Communication from the Commission to the European Parliament and the Council of 10 February 2016 on the state of play of implementation of the priority actions under the European Agenda on migration (COM(2016) 85 final).

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14 – Described collectively as ‘the transit States’.

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15 – *Migration to Europe through the Western Balkans – Serbia & the Former Yugoslav Republic of Macedonia, Report, December 2015 to May 2016*, REACH, p. 4. The route is described as a passage of relative ease and safety compared to other routes; see p. 19 of that report.

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16 – *At the Gate of Europe*, a report on refugees on the Western Balkans Route by Senado Šelo Šabić and Sonja Borić. Once the inflow of third-country nationals arrived in Šid, a border town along the Croatian border, free transport was provided to take them across the border to a reception centre in Croatia.

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17 – Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece (OJ 2015 L 239, p. 146).

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18 – Recital 7 of Decision 2015/1523.

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19 – Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece (OJ 2015 L 248, p. 80).

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20 – By February 2017 (18 months into the relocation period) a total of 11 966 asylum seekers had been relocated from Greece and Italy: see the report of the Directorate-General for Internal Policies, *Implementation of the 2015 Council decisions establishing provisional measures in the area of international protection for the benefit of Italy and of Greece*, published by the European Parliament. The Commission has described the level of implementation of the relocation scheme as ‘unsatisfactory’: Communication from the

Commission to the European Parliament, the European Council and the Council, First report on relocation and resettlement of 16 March 2016 (COM(2016) 165 final).

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21 – Hungary did not consider itself to be a frontline State and took the view that it would not benefit from the measure. The Czech Republic, Hungary, Slovakia and Romania voted against, Finland abstained – European Parliament's Research Service, '*Legislation on emergency relocation of asylum seekers in the European Union*'.

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22 – Those taking part were Albania, Austria, Bulgaria, Croatia, the FYR Macedonia, Germany, Greece, Hungary, Romania, Serbia and Slovenia.

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23 – Commission Press release IP/15/5904 of 25 October 2015.

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24 – The most plausible analysis is perhaps that this was intended as inter-State action under international rather than EU law. That said, it is unclear whether the Member States retained the necessary competence to take such action.

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25 – That does not appear to me to be a strictly accurate reflection of the position. It does demonstrate, however, how the situation was perceived by some.

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26 – The various reports on the situation include 'the Frontex statement on trends and routes concerning the Western Balkans Route'.

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27 – The heads of the police services of Austria, Croatia, the FYR Macedonia, Serbia and Slovenia met. Points 5, 6 and 7 of that statement record that the participants agreed to authorise the first entry only of persons meeting the entry conditions in the Schengen Borders Code. Nationals of Iraq and Syria were to be allowed to enter on humanitarian grounds provided that they met certain conditions (such as proof of nationality); and common criteria to be verified in the course of registration were established. There were a number of initiatives at EU level and by various Member States (outlined in points 12 to 17 above). I have mentioned this particular statement because it relates directly to the questions referred for a preliminary ruling.

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

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29 – Signed in Rome on 4 November 1950 ('the ECHR').

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30 – OJ 2010 C 83, p. 389 ('the Charter'). With the entry into force of the Treaty of Lisbon on 1 December 2009, the Charter was elevated to the status of primary law (Article 6(1) TEU).

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31 – Council Decision 2006/188/EC of 21 February 2006 on the conclusion of the Agreement between the European Community and the Kingdom of Denmark extending to Denmark the provisions of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national and Council Regulation (EC) No 2725/2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention (OJ 2006 L 66, p. 38).

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32 – The Agreement and the Protocol with the Swiss Confederation and the Principality of Liechtenstein came into effect on 1 March 2008 (OJ 2008 L 53, p. 5). It was approved by Council Decision 2008/147/EC of 28 January 2008 (OJ 2008 L 53, p. 3) and Council Decision 2009/487/EC of 24 October 2008 (OJ 2009 L 161, p. 6). Thus, the Dublin system also applies to the Principality of Liechtenstein. Iceland and Norway apply the Dublin system by virtue of bilateral agreements with the European Union which were approved by Council Decision 2001/258/EC of 15 March 2001 (OJ 2001 L 93, p. 38).

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33 – Recitals 2, 3 and 4.

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34 – Recital 5.

35 – Recital 7.

36 – Recitals 10, 11 and 12 refer to the following acts: (i) Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (OJ 2011 L 337, p. 9; 'the Qualification Directive'); (ii) Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (OJ 2013 L 180, p. 6; 'the Procedures Directive'); and (iii) Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (OJ 2013 L 180, p. 96; 'the Reception Directive').

37 – Recitals 13 and 14.

38 – Recitals 15 and 16.

39 – Recital 19.

40 – Recital 25.

41 – Recital 32.

42 – Recital 39.

43 – See further point 88 below.

44 – Regulation of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (OJ 2009 L 243, p. 1) ('the Visa Code').

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45 – The Eurodac Regulation: see further point 43 below.

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46 – The precise meaning of this provision is at issue in Case C-670/16 *Mengesteab*, currently pending before the Court.

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47 – Article 22(3) empowers the Commission to introduce implementing acts which establish lists indicating the relevant elements of proof and circumstantial evidence which determine responsibility for examining an application for international protection pursuant to the Dublin III Regulation; see further point 44 below.

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48 – Questions concerning the interpretation of these provisions have likewise been raised in Case C-670/16 *Mengesteab* (pending before the Court).

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49 – Questions concerning the interpretation of Article 29 of the Dublin III Regulation have been raised in Case C-201/16 *Shiri* (pending before the Court).

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50 – Regulation of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office (OJ 2010 L 132, p. 11).

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51 – Regulation of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (OJ 2013 L 180, p. 1; 'the Eurodac Regulation'); see Article 1.

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52 – Regulation of 30 January 2014 amending Regulation (EC) No 1560/2003 laying down detailed rules for the application of Regulation No 343/2003 (OJ 2014 L 39, p. 1; ‘the Dublin Implementing Regulation’).

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53 – See for example the Hanseatic League, created to protect certain commercial interests and diplomatic privileges in its affiliated cities and countries, thereby both facilitating and regulating commerce-related free movement of persons. Officially founded in 1356, the League’s origins go back to the rebuilding of Lübeck in 1159 by Henry the Lion. It played a major role in shaping economies, trade and politics in the region of the North Sea and the Baltic Sea for more than 300 years.

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54 – The Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (OJ 2000 L 239, p. 19; ‘the CISA’). The convention is still in force, although it has been replaced in part by the Schengen Borders Code which repealed Articles 2 to 8. See further point 46 below.

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55 – Of the 28 EU Member States, 22 participate fully in the Schengen *acquis*, and Bulgaria, Croatia, Cyprus and Romania are in the process of becoming full participants. Pursuant to Article 4(2) of Croatia’s Act of Accession to the European Union, certain provisions of the Schengen *acquis* already apply in Croatia. The SIS II does not yet apply there, but a proposal for a Council Decision to change that position is currently on the table: Proposal for a Council Decision on the application of the Schengen *acquis* in the area of the Schengen Information System in the Republic of Croatia of 18 January 2017 (COM(2017) 17 final). Liechtenstein, Iceland, Norway and Switzerland also participate in the Schengen *acquis* pursuant to bilateral agreements with the European Union.

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56 – Under Article 4 of Protocol (No 19) on the Schengen *acquis*, integrated into the Framework of the European Union, annexed to the TEU and to the TFEU, Ireland and the United Kingdom are entitled to request to take part in some or all Schengen measures. The United Kingdom is entitled to exercise border controls on persons seeking to enter its territory as it considers necessary (Article 1 of Protocol (No 20) TFEU on the application of certain aspects of Article 26 TFEU to the United Kingdom and to Ireland, annexed to the TEU and to the TFEU). The United Kingdom has an express derogation from Article 77 TFEU (concerning the Union’s policy over internal and external border control). Thus,

the Treaties recognise that the United Kingdom controls its own borders. Pursuant to Article 1 of Protocol (No 22) on the position of Denmark, annexed to the TEU and to the TFEU, that Member State does not participate in the adoption by the Council of proposed measures under Title V, Part Three, TFEU (Union Policies and internal actions in the area of freedom, security and justice).

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57 – Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ 2006 L 105, p. 1). That regulation has since been repealed and replaced by Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 (OJ 2016 L 77, p. 1), also entitled the Schengen Borders Code. At the material time (that is, between September 2015 and March 2016) it was the earlier version of the Schengen Borders Code that was in force, as amended by Regulation (EU) No 1051/2013 of the European Parliament and of the Council of 22 October 2013 (OJ 2013 L 295, p. 1). I shall refer to that version of the Schengen Borders Code in this Opinion.

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58 – Recital 2.

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59 – Recital 4.

60– Recital 6.

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61 – Recital 7.

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62 – Recital 8.

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63 – Recital 9.

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64 – Directive of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (OJ 2004 L 158, p. 77).

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65 – Regulation of 13 June 2002 laying down a uniform format for residence permits for third-country nationals (OJ 2002 L 157, p. 1).

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66 – Article 34 of the Schengen Borders Code lists the matters which Member States must notify to the European Commission, such as residence permits and border crossing points. See point 58 below as regards visas.

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67 – The Court spoke briefly of the relationship between such visas and the Dublin III Regulation at paragraph 48 of its recent judgment of 7 March 2017, *X and X*, C-638/16 PPU, EU:C:2017:173.

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68 – Article 5(2) states that a non-exhaustive list of supporting documents which the border guard may request from the third-country national in order to verify the fulfilment of the conditions set out in paragraph 1, point c, is included in Annex I.

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69 – Article 1 of Regulation (EC) No 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II) (OJ 2006 L 381, p. 4) ('the SIS II Regulation'). That regulation replaced Articles 92 to 119 of the CISA.

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70 – Article 3(d) of the SIS II Regulation.

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71 – Article 24(1) and (2) of the SIS II Regulation. I comment in more detail on the SIS alert system in my Opinion in *Ouhrami*, C-225/16, EU:C:2017:398.

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72 – Article 24(3) of the SIS II Regulation.

73 – Regulation of 29 May 1995 laying down a uniform format for visas (OJ 1995 L 164, p. 1).

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74 – Regulation of 15 March 2001 (OJ 2001 L 81, p. 1).

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75 – Article 3 of Regulation No 539/2001.

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76 – Those categories are listed in Article 4(1): they include, for example, holders of diplomatic passports.

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77 – Decision of 8 June 2004 establishing the Visa Information System (VIS) (OJ 2004 L 213, p. 5).

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78 – Regulation of the European Parliament and of the Council of 9 July 2008 concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas (VIS Regulation) (OJ 2008 L 218, p. 60).

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79 – See Article 2(1), (2), (6) and (7) of the Visa Code respectively.

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80 – Article 31(1) and (2).

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81 – Article 31(3).

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82 – Article 31(8)(h) and (i) of the Procedures Directive.

83 – Directive of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ 2008 L 348, p. 98; ‘the Return Directive’).

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84 – Article 3(1) and (2) respectively of the Return Directive.

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85 – Case C-490/16.

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86 – Case C-646/16.

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87 – See footnote 4 above.

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88 – Article 22(3) of the Dublin III Regulation provides that whether there has been an irregular crossing of the border is established on the basis of proof or circumstantial evidence under the Dublin Implementing Regulation. The Upravno sodišče Republike Slovenije (Administrative Court of First Instance of the Republic of Slovenia) indicates that there is admittedly no formal proof of irregular entry into Croatia in the documents in Mr A.S.’s case.

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89 – See further point 99 below on attendance at the joint hearing and oral submissions.

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90 – In so far as this change (written in Slovenian only) appears to have been made by an official acting without the applicants’ knowledge or consent, it is an indication of the pressure under which border officials were working. Splitting up the family in this way would raise issues under Articles 7 and 24 of the Charter regarding the right to family life and the rights of the child. If the two sisters with their respective children *had* ended up in different Member States, issues would also potentially have arisen in relation to other Chapter III criteria laid down by the Dublin III Regulation.

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91 – See points 231 and 232 below.

92 – It is possible that this may be a reference to the Statement issued by the Heads of Police Services on 18 February 2016 (see point 16 above). It might, however, refer to the European Council Conclusions of the same date. It is unclear from the order for reference which of those documents is being relied upon.

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93 – Judgments of 7 June 2016, *Ghezelbash*, C-63/15, EU:C:2016:409, and of 7 June 2016, *Karim*, C-155/15, EU:C:2016:410.

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94 – Article 1 of the Dublin III Regulation.

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95 – See point 45 above.

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96 – 'Forum shopping' refers to the abuse of asylum procedures in the form of multiple applications for asylum submitted by the same person in several Member States with the sole aim of extending his stay in the Member States; see, for example, 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, dated 3 December 2008 (COM(2008) 820 final).

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97 – 'Secondary movements' covers the phenomenon of migrants, refugees and asylum seekers who for different reasons move from the country in which they first arrived to seek protection or permanent resettlement elsewhere (see the European Migration Network 'Asylum and Migration' Glossary).

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98 – Recitals 2, 3, 4 and 5 of the Dublin III Regulation.

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99 – Articles 8 to 11 of the Dublin III Regulation.

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100 – Articles 12, 13 and 14 of the Dublin III Regulation. Where a third-country national makes an application for international protection in the international transit area of an airport of a Member State, it is that State which is responsible for examining such a request (Article 15 of the Dublin III Regulation).

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101 – See Articles 7 and 5(1) of the Schengen Borders Code.

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102 – Article 12(1) of the Schengen Borders Code. That obligation is without prejudice to those seeking refugee status and the principle of non-refoulement. See Article 9(1) of the Procedures Directive in relation to the right to remain in a Member State pending the examination of an application for refugee status and Article 6 of the Return Directive as regards the obligations of Member States to return third-country nationals staying illegally within their territory.

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103 – In practice the Eurodac Regulation is not applied consistently; and the Commission has sent a number of administrative letters to Member States (the letter sent prior to the letter of formal notice which is the precursor to infringement proceedings under Article 258 TFEU). See COM(2015) 510 final of 14 October 2015; Communication from the Commission to the European Parliament, the European Council and the Council, 'Managing the refugee crisis: State of Play of the implementation of the priority actions under the European Agenda on Migration'.

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104 – Article 2(2)(a) of the Return Directive. Member States may decide not to apply the directive where entry is refused in accordance with Article 13 of the Schengen Borders Code or where a person is apprehended or intercepted in the course of an irregular border crossing.

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105 – See points 7 to 18 above.

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106 – Question 2 in Case C-490/16 and Question 1 in Case C-646/16.

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107 – Questions 2(a) to (d), 3(e), (f) and (g) in Case C-646/16.

108 – Question 2 in Case C-490/16 and Questions 2(e), 3(a) and 3(b) in Case C-646/16.

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109 – Question 3 in Case C-490/16 and Questions 3(a) to (h) in Case C-646/16.

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110 – Questions 1 and 5.

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111 – Question 4 in Case C-490/16.

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112 – See points 12 to 17 and 45 above.

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113 – Judgment of 6 June 2013, *MA and Others*, C-648/11, EU:C:2013:367, paragraph 50 and the case-law cited, see also judgment of 7 June 2016, *Ghezelbash*, C-63/15, EU:C:2016:409, paragraph 35.

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114 – Interinstitutional Agreement of 22 December 1998 on common guidelines for the quality of drafting of Community legislation (OJ 1999 C 73, p. 1).

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115 – See by analogy, judgment of 11 December 2007, *Skoma-Lux*, C-161/06, EU:C:2007:773, paragraph 38.

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116 – See points 142 to 153 below.

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117 – See points 62 and 63 above. 'Visa' in Article 2(m) of the Dublin III Regulation is a wider concept than in the Code.

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118 – See point 26 above.

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119 – Recital 3 of the Dublin III Regulation.

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120 – Recital 3 of the Dublin III Regulation.

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121 – See by analogy, judgment of 1 March 2016, *Kreis Warendorf and Osso*, C-443/14 and C-444/14, EU:C:2016:127, paragraphs 29 and 30.

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122 – Thus, in the explanatory memorandum to its proposal COM(2001) 447 final of 26 July 2001 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 the Commission described the proposed measure as adding 'a block to the construction of a CEAS …'. See further, by analogy, judgment of 17 March 2016, *Mirza*, C-695/15 PPU, EU:C:2016:188, paragraph 41; see also recitals 10 to 12 of the Dublin III Regulation.

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123 – See, for example, Article 2(b) and 2(d) of the Dublin III Regulation in relation to the Qualification Directive and the Procedures Directive, and Article 28 concerning the Reception Directive.

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124 – Recital 32.

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125 – Judgments of 21 December 2011, *N.S. and Others*, C-411/10 and C-493/10, EU:C:2011:865, paragraphs 78 and 79, and of 10 December 2013, *Abdullahi*, C-394/12, EU:C:2013:813, paragraph 52.

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126 – Judgment of 10 December 2013, *Abdullahi*, C-394/12, EU:C:2013:813, paragraph 53.

127 – Judgment of 21 December 2011, *N.S. and Others*, C-411/10 and C-493/10, EU:C:2011:865, paragraph 83.

128 – Judgment of 6 June 2013, *MA and Others*, C-648/11, EU:C:2013:367, paragraphs 56 to 58. See also recitals 2, 19 and 39 of the Dublin III Regulation.

129 – Judgment of 10 December 2013, *Abdullahi*, C-394/12, EU:C:2013:813, paragraph 56.

130 – Judgment of 10 December 2013, *Abdullahi*, C-394/12, EU:C:2013:813, paragraph 59.

131 – See points 117 to 120 above.

132 – Article 2(c) of the Dublin III Regulation.

133 – See the explanatory memorandum to the Commission's proposal COM(2008) 820 final. The provisions concerning 'Responsibility for processing applications for asylum' were in Articles 28 to 38 of Chapter 7 to the CISA.

134 – See, for example, Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence (OJ 2002 L 328, p. 17).

135 – See Articles 3 and 4a(1) of Protocol (No 21) annexed to the TEU and to the TFEU, and recital 41 of the Dublin III Regulation.

136 – In such cases the third-country national concerned falls within the scope of the Procedures Directive and benefits from the protection afforded by Article 9 thereof.

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137 – Judgment of 7 June 2016, C-47/15, EU:C:2016:408, paragraphs 48 and 49.

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138 – See further point 155 et seq. below.

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139 – Judgment of 10 December 2013, *Abdullahi*, C-394/12, EU:C:2013:813, paragraph 48.

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140 – The CEAS measures have the same legal basis, namely Article 78(2) TFEU (in particular the Qualification Directive, Article 78(2)(a) and (b) TFEU; the Procedures Directive, Article 78(2)(d) TFEU; and the Reception Directive, Article 78(2)(f) TFEU). The legal basis of the Dublin III Regulation is of course Article 78(2)(e) TFEU. Article 63(2)(a) and (b) EC is cited as the legal basis of Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof (OJ 2001 L 212, p. 12). That act has not yet been updated: the appropriate legal basis would now be Article 78(2)(g) since the entry into force of the Treaty of Lisbon. The legal basis of the Schengen Borders Code is Article 77 TFEU and that of the Return Directive is Article 79 TFEU.

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141 – Germany was usually the preferred destination of those interviewed in a survey conducted by REACH in its report *Migration to Europe through the Western Balkans – Serbia & the Former Yugoslav Republic of Macedonia, December 2015 to May 2016*.

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142 – Judgment of 7 March 2017, *X and X*, C-638/16 PPU, EU:C:2017:173, paragraph 39 and the case-law cited.

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143 – Annex I to Regulation No 539/2001.

144 – The same applies to Mr A.S., as Syria is listed in Annex I to Regulation No 539/2001 as a third country whose nationals must possess a visa when crossing the EU external border from a third State.

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145 – See points 62 and 63 above.

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146 – As required by, respectively, Articles 20 and 24 of the Visa Code.

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147 – Article 21 of the Visa Code; see further point 60 above.

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148 – See Article 21 of Regulation No 767/2008 and recital 31 of the Dublin III Regulation.

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149 – See points 1 to 9 above.

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150 – German and Slovenian.

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151 – English and French.

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152 – The Council of Europe differentiates between illegal migration and irregular migrant. Referring to Resolution 1509 (2006) of the Council of Europe's Parliamentary Assembly, 'illegal' is preferred when referring to a status or process, whereas 'irregular' is preferred when referring to a person. As a result of the association with criminality it is considered that the term 'illegal migration' should be avoided, as most irregular migrants are not criminals. Being in a country without the required papers is, in most countries, not a criminal offence but an administrative infringement. The Commission favoured for a long time the term 'illegal immigration', but more recently refers to 'irregular migration' as well: 'illegal' and 'irregular' seem to be used interchangeably in the Commission's

Recommendation (EU) 2017/432 of 7 March 2017 'on making returns more effective when implementing [the Return Directive]' (OJ 2017 L 66, p. 15).

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153 – Judgment of 1 March 2016, *Kreis Warendorf and Osso*, C-443/14 and C-444/14, EU:C:2016:127.

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154 – The French text also uses a different adjective: 'irrégulièrement' is used in Article 13(1) of the Dublin III Regulation. In Article 31(8)(h) of the Procedures Directive the expression 'est entré ou a prolongé son séjour illégalement' is used. The same is true for the German text which uses 'illegal' in Article 13(1) of the Dublin III Regulation and 'unrechtmäßig' in Article 31(8)(h) of the Procedures Directive.

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155 – The purpose of the lists is to ensure continuity between the Dublin Convention and the acts which replaced it: see recital 2 of the Dublin Implementing Regulation.

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156 – Article 22(4) of the Dublin III Regulation states that the requirement of proof should not exceed what is necessary for the proper application of the regulation: see also Article 22(5).

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157 – Article 1 of the Eurodac Regulation.

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158 – Article 9 of the Eurodac Regulation.

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159 – Article 14(1) of the Eurodac Regulation.

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160 – First indent of point 7 in List A in Annex II to the Dublin Implementing Regulation. Given that the Member State taking the fingerprints then becomes responsible, under Article 13(1) of the Dublin III Regulation, for determining any future application for international protection, this may in reality operate as a disincentive to the rigorous application of the Eurodac Regulation.

161 – The legal basis for the Dublin III Regulation is Article 78(2)(e) TFEU. I note that Article 78(2)(c) deals with a common system of temporary protection for displaced persons in the event of a massive inflow: see Directive 2001/55/EC. As that directive was adopted before the Treaty of Lisbon of 2009, the numbering cited in the recitals of that act refers to Article 63(a) and (b) EC.

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162 – The UNHCR states that 'the Dublin Regulation constitutes the only regional instrument that governs the allocation of responsibility for asylum-seekers, and is an important tool for asylum seekers to be reunited with their family within the EU'. The UNHCR comments on the European Commission 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(2016) 270, p. 6).

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163 – Article 3 of the ECHR is the corresponding right.

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164 – Judgment of 21 December 2011, *N.S. and Others*, C-411/10 and C-493/10, EU:C:2011:865, paragraph 94.

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165 – *The Reform of the Dublin System*, published by the European Commission Directorate-General for Migration and Home Affairs.

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166 – The Chapter III criteria concerning entry conditions, in particular what is now Article 13(1) of the Dublin III Regulation, have been developed from the same principles that were in the CISA (in particular, in what was Article 30(e)), namely the idea that, in an area within which free movement of persons is guaranteed by the Treaty, each Member State is answerable to all the others for its actions concerning the entry and residence of third-country nationals and must bear the consequences thereof in a spirit of solidarity and fair cooperation. See in relation to the Dublin II Regulation the explanatory memorandum to the Commission's proposal COM(2001) 447; see also the explanatory memorandum to the Commission's proposal COM(2008) 820. See further point 129 above as to the significance of the origins of the Dublin acts.

167 – The inflow also included people who were not nationals of those States, as well as those who were not compelled to migrate for reasons of persecution; see in particular footnote 4 and point 7 above.

168 – In accordance with the Reception Directive, Member States are required to comply with certain standards for the reception of applicants for international protection which ensure a dignified standard of living and comparable living conditions throughout the European Union. In so doing, Member States are bound by obligations under instruments of international law, such as the Geneva Convention and the ECHR.

169 – See footnote 209 below.

170 – Judgment of 21 December 2011, *N.S. and Others*, C-411/10 and C-493/10, EU:C:2011:865, paragraph 86, now codified as Article 3(2) of the Dublin III Regulation.

171 – Communication from the Commission to the European Parliament and the Council on the State of Play of Implementation of the Priority Actions under the European Agenda on Migration, COM(2016) 85 final.

172 – COM(2008) 820 final.

173 – See footnote 96 above.

174 – Mr A.S. entered Croatia from Serbia at a designated border crossing point: see point 71 above. The Jafari families entered Croatia from Serbia after having undergone certain preliminary checks to establish that they were indeed nationals of Afghanistan and therefore likely to qualify for international protection: see point 86 above.

175 – Judgment of 21 December 2011, *N.S. and Others*, C-411/10 and C-493/10, EU:C:2011:865, paragraph 94; see further points 231 to 242 below.

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176 – See points 1 and 2 above.

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177 – See further the explanatory memorandum to the Commission's proposal for a 'Dublin IV Regulation' – Proposal for a Regulation of the European Parliament and of the Council establishing 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(2016) 270 final, of 4 May 2016).

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178 – Article 3 of the Schengen Borders Code.

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179 – That is, entry for a period of no more than 90 days in any 180-day period (see the Visa Code). There are no rules for long stays in the Schengen Borders Code.

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180 – See further Article 5(1)(a) of the Schengen Borders Code.

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181 – See further Article 5(1)(b) of the Schengen Borders Code.

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182 – See further Article 5(1)(c) of the Schengen Borders Code.

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183 – See respectively Article 5(1)(d) and (e) of the Schengen Borders Code.

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184 – See point 54 above.

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185 – A person who has crossed the border 'illegally' and who has no right to stay on the territory of the Member State concerned must be apprehended and made subject to the return procedures under the Return Directive.

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186 – See Proposal for a Council Regulation establishing a Community Code on the rules governing the movement of persons across borders of 26 May 2004, COM(2004) 391 final, p. 8.

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187 – The amendment introduced by the European Parliament was considered necessary to take account of 'humanitarian concerns or emergency situations as valid reasons for derogating from the basic provisions': see European Parliament Report on the proposal for a regulation of the European Parliament and of the Council establishing a Community Code on the rules governing the movement of persons across borders, A6-0188/2005 final, pp. 71 and 74.

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188 – Opinion in *X and X*, C-638/16 PPU, EU:C:2017:93, point 130, in relation to Article 25 of the Visa Code.

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189 – Article 1(1) of Regulation No 539/2001.

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190 – Article 1(2) of Regulation No 539/2001 and Annex II. A random sample of the countries there listed includes Albania, Andorra, Brazil, Canada, Israel and Japan.

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191 – See point 59 above.

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192 – See Article 1 of and Annex I to Regulation No 539/2001 mentioned in point 59 above.

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193 – Mr A.S. does not rely upon Article 14 of the Dublin III Regulation. Nonetheless, for the sake of good order I note that the position would be the same in his case - as a

Syrian national he too is required to possess a visa in order to enter the European Union; see Annex I to Regulation No 539/2001 and see also point 194 above.

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194 – See point 16 above.

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195 – See points 10 and 11 above.

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196 – The meeting was attended by leaders representing Albania, Austria, Bulgaria, Croatia, the FYR Macedonia, Germany, Greece, Hungary, Romania, Serbia and Slovenia. The Statement is in the form of a '17-point plan of pragmatic and operational measures to ensure people are not left to fend for themselves in the rain and cold'. It was issued as Press Release IP/15/5904.

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197 – Certain measures which were considered to be acts of solidarity within the meaning of Article 80 TFEU were introduced, namely Decisions 2015/1523 and 2015/1601. However, Article 33 of the Dublin III Regulation was not triggered.

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198 – *Der Tagespiegel* (Andrea Dernbach) of 26 August 2015.

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199 – *The Financial Times* of 20 January 2016. As to the correctness or otherwise of that conclusion, see my comment in footnote 25 above.

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200 – See points 13 to 17 above.

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201 – See point 175 above concerning the assessment of Article 13(1) of the Dublin III Regulation.

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202 – See footnote 55 above.

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203 – *At the Gate of Europe*, a report on refugees on the Western Balkans Route by Senado Šelo Šabić and Sonja Borić, p. 11. Based on figures from Eurostat cited in '*The Balkan route reversed – the return of asylum seekers to Croatia under the Dublin System*', the report (dated 15 December 2016 and published by the European Council for Refugees and Exiles and the Asylum Information Database) states that the Croatian reception system and asylum procedure for third-country nationals seeking international protection were not designed with a view to responding to 'sizeable asylum seeker populations'.

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204 – See recital 5 of the Dublin III Regulation; see also Article 31(1) to (3) of the Procedures Directive.

205– The Reception Directive: see also recitals 10 to 12 of the Dublin III Regulation.

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206 – Judgment of 21 December 2011, *N.S. and Others*, C-411/10 and C-493/10, EU:C:2011:865.

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207 – Judgment of 21 December 2011, *N.S. and Others*, C-411/10 and C-493/10, EU:C:2011:865, paragraphs 84 and 85.

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208 – Judgment of 21 December 2011, *N.S. and Others*, C-411/10 and C-493/10, EU:C:2011:865, paragraph 86. That principle has now been codified in Article 3(2) of the Dublin III Regulation.

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209 – In 2015 there were 943 total Dublin requests to take charge of or take back applicants for international protection and no more than 24 transfers (Eurostat). From 1 January to 30 November 2016 Croatia received 3 793 such requests originating mainly from Austria, Germany and Switzerland. In 2015 the Croatian asylum department was staffed by only three officials. That rose to five processing Dublin cases during the worst of the crisis. See '*The Balkan route reversed – the return of asylum seekers to Croatia under the Dublin System*', cited in footnote 201, p. 27.

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210 – *At the Gate of Europe*, a report on refugees on the Western Balkans Route by Senado Šelo Šabić and Sonja Borić, pp. 14 to 16.

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211 – As many as 447 791 third-country nationals travelled through Slovenia between late 2015 and early 2016, but only 471 lodged applications for international protection there.

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212 – See, by analogy, judgment of 21 December 2011, *N.S. and Others*, C-411/10 and C-493/10, EU:C:2011:865, paragraphs 88 to 90 and the case-law cited. See more recently ECtHR, 4 November 2014, *Tarakhelv*. *Switzerland* (EC:ECHR:2014:1104JUD002921712). There is — as yet — no such finding of systemic difficulties in the asylum system in relation to Croatia or Slovenia.

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213 – In relation to Mr A.S., see points 71 and 72 above. In relation to the Jafari families, see points 85 to 88 above.

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214 – See points 186 to 189 above.

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215 – Gil Mogades, S., 'The discretion of States in the Dublin III system for determining responsibility for examining applications for asylum', *International Journal of Refugee Law*, vol. 27, No 3, pp. 433 to 456.

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216 – Judgment of 7 June 2016, C-63/15, EU:C:2016:409.

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217 – Judgment of 7 June 2016, *Ghezelbash*, C-63/15, EU:C:2016:409, paragraph 61.

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218 – See Article 18 of the Dublin III Regulation and Article 31 of the Procedures Directive.

219 – See point 187 above.

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220 – See point 187 above.