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ECLI:EU:C:2023:272

Provisional text

JUDGMENT OF THE COURT (First Chamber)

30 March 2023 (\*)

(Reference for a preliminary ruling – Regulation (EU) No 604/2013 – Determination of the Member State responsible for examining an application for international protection – Article 27 – Appeal against a decision to transfer an asylum seeker – Article 29 – Transfer time limit – Suspension of that time limit on appeal – Interim measure requested by the authorities)

In Case C-556/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Raad van State (Council of State, Netherlands), made by decision of 1 September 2021, received at the Court on 10 September 2021, in the proceedings

**Staatssecretaris van Justitie en Veiligheid**

v

**E.N.,**

**S.S.,**

**J.Y.,**

THE COURT (First Chamber),

composed of A. Arabadjiev, President of the Chamber, K. Lenaerts, President of the Court of Justice, acting as Judge of the First Chamber, L. Bay Larsen (Rapporteur), Vice-President of the Court of Justice, A. Kumin and I. Ziemele, Judges,

Advocate General: J. Richard de la Tour,

Registrar: R. Stefanova-Kamisheva, Administrator,

having regard to the written procedure and further to the hearing on 14 July 2022,

after considering the observations submitted on behalf of:

- E.N., by M.J.A. Rinkes, advocaat,
- S.S., by M.H.R. de Boer, advocaat,
- J.Y., by D.P.J. Cain, advocaat,
- the Netherlands Government, by M.K. Bulterman, M.H.S. Gijzen and P. Huurnink, acting as Agents,
- the German Government, by J. Möller and R. Kanitz, acting as Agents,
- the European Commission, by C. Cattabriga and F. Wilman, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 17 November 2022,

gives the following

## **Judgment**

1 This request for a preliminary ruling concerns the interpretation of Article 27(3) and Article 29(1) and (2) of Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (OJ 2013 L 180, p. 31) (‘the Dublin III Regulation’).

2 The request has been made in the course of proceedings between the Staatssecretaris van Justitie en Veiligheid (State Secretary for Justice and Security, Netherlands) (‘the State Secretary’), on the one hand, and, on the other hand, E.N., S.S. and J.Y., third-country nationals, concerning decisions of the State Secretary not to consider their applications for international protection and to order their transfer to other Member States.

## **Legal context**

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

‘(4) ‘The Tampere conclusions [of the European Council at its special meeting at Tampere on 15 and 16 October 1999] also stated that the [Common European Asylum System (CEAS)] should include, in the short-term, a clear and workable method for determining the Member State responsible for the examination of an asylum application.

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

4 Chapter VI of that regulation, entitled ‘Procedures for taking charge and taking back’, includes in Section IV, entitled ‘Procedural safeguards’, Article 27, entitled ‘Remedies’, which provides in paragraphs 1, 3 and 4 thereof:

‘1. The applicant ... shall have the right to an effective remedy, in the form of an appeal or a review, in fact and in law, against a transfer decision, before a court or tribunal.

...

3. For the purposes of appeals against, or reviews of, transfer decisions, Member States shall provide in their national law that:

(a) the appeal or review confers upon the person concerned the right to remain in the Member State concerned pending the outcome of the appeal or review; or

(b) the transfer is automatically suspended and such suspension lapses after a certain reasonable period of time, during which a court or a tribunal, after a close and rigorous scrutiny, shall have taken a decision whether to grant suspensive effect to an appeal or review; or

(c) the person concerned has the opportunity to request within a reasonable period of time a court or tribunal to suspend the implementation of the transfer decision pending the outcome of his or her appeal or review. Member States shall ensure that an effective remedy is in place by suspending the transfer until the decision on the first suspension request is taken. Any decision on whether to suspend the implementation of the transfer decision shall be taken within a reasonable period of time, while permitting a close and rigorous scrutiny of the suspension request. A decision not to suspend the implementation of the transfer decision shall state the reasons on which it is based.

4. Member States may provide that the competent authorities may decide, acting *ex officio*, to suspend the implementation of the transfer decision pending the outcome of the appeal or review.’

5 In Section VI of Chapter VI of that regulation, entitled ‘Transfers’, Article 29, entitled ‘Modalities and time limits’, provides in paragraphs 1 and 2 thereof:

‘1. The transfer of the applicant ... 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 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 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.’

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

6 On 12 July 2019, 7 October 2019 and 22 November 2020 respectively, the respondents in the main proceedings submitted applications for international protection in the Netherlands. The State Secretary submitted to the authorities of other Member States requests to take charge or to take back those respondents. On 27 October 2019, 20 November 2019 and 19 January 2021, those authorities accepted those requests, either explicitly or implicitly.

7 On 9 January 2020, 8 February 2020 and 16 February 2021, the State Secretary decided not to consider the applications for international protection lodged by the respondents in the main proceedings and to transfer them to the Member States which had accepted those requests.

8 The respondents in the main proceedings brought actions for annulment of those decisions before courts of first instance.

9 On 25 February 2020, 16 September 2020 and 1 April 2021, those courts annulled those decisions. Those courts also ordered the State Secretary to take fresh decisions on those applications for international protection brought by the respondents in the main proceedings.

10 The State Secretary appealed against the judgments delivered by those courts before the Raad van State (Council of State, Netherlands), which is the referring court. He attached to his appeals applications for interim relief seeking an order, first, that he not be required to take a fresh decision before decisions had been taken on the appeals and, second, that the transfer time limit be suspended. The referring court's judge hearing applications for interim measures granted those applications on 3 March 2020, 18 September 2020 and 8 April 2021.

11 The referring court is uncertain, however, whether Articles 27 and 29 of the Dublin III Regulation preclude the granting of an application for interim relief lodged by the administration, as an adjunct to its appeal against a judicial decision annulling a transfer decision, seeking to suspend the transfer time limit. If that were required to be the case, it would be for that court to find that that period has expired and that the Kingdom of the Netherlands has therefore become responsible for examining the applications for international protection lodged by the respondents in the main proceedings.

12 That court considers that the fact that Article 27(3) of that regulation evokes only interim measures ordered on the application of the person concerned and the objective of rapid determination of the Member State responsible could justify such an outcome.

13 Nevertheless, it notes that that regulation does not appear to preclude the person concerned from applying to the appeal court for suspension of implementation of the transfer decision. Were this not the case, that person might be transferred to another Member State and would have to be returned to the Netherlands in the event of his or her appeal being upheld.

14 It is therefore not impossible that it is also open to the State Secretary to apply, during the appeal proceedings, for suspension of the transfer time limit. The contrary approach would be likely to deprive the State Secretary of any concrete opportunity to appeal, in so far as the transfer time limit would not always be sufficient to allow the referring court to give a ruling on an appeal.

15 In those circumstances, the Raad van State (Council of State) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Must [Article 27(3) and Article 29] of [the Dublin III Regulation] be interpreted as not precluding, where the legal system of the Member State provides for [a second level of jurisdiction] in cases

such as that at issue here, the appellate court, during the hearing of the case, from granting, at the request of the competent authority of the Member State, an interim measure suspending the transfer time limit?’

### **Consideration of the question referred**

16 By its question, the referring court asks, in essence, whether Article 29(1) and (2) of the Dublin III Regulation, read in conjunction with Article 27(3) of that regulation, must be interpreted as precluding national legislation which allows a court or tribunal hearing an appeal at second instance against a judgment annulling a transfer decision to adopt, on the application of the competent authorities, an interim measure allowing those authorities to refrain from taking a fresh decision pending the outcome of that appeal and having the object or effect of suspending the running of the transfer time limit until that outcome.

17 Article 29(1) of the Dublin III Regulation provides that the transfer of the person concerned to the Member State responsible is to be carried out in accordance with the national law of the requesting Member State, as soon as practically possible and, at the latest, within six months of the acceptance by another Member State of the request to take charge or take back that person or of the final decision on an appeal where there is suspensive effect in accordance with Article 27(3) of that regulation.

18 According to Article 29(2) of that regulation, if the transfer is not carried out within six months, the Member State responsible for examining an application for international protection is released from its obligation to take charge or take back the person concerned and responsibility is then transferred to the requesting Member State.

19 In that regard, although it is apparent from Article 29(1) and (2) of the Dublin III Regulation that the EU legislature intended to promote the rapid implementation of transfer decisions, the fact remains that it did not intend to sacrifice the judicial protection of applicants for international protection to the requirement of expedition in the processing of their application, and that it provided, in order to guarantee that protection, that the implementation of those decisions may, in certain cases, be suspended (see, to that effect, judgments of 14 January 2021, *The International Protection Appeals Tribunal and Others*, C-322/19 and C-385/19, EU:C:2021:11, paragraph 88, and of 22 September 2022, *Bundesrepublik Deutschland (Administrative suspension of the transfer decision)*, C-245/21 and C-248/21, EU:C:2022:709, paragraphs 40 and 60).

20 Article 27(3) of that regulation thus requires Member States to provide the persons concerned with a remedy which may lead to the suspension of the implementation of the transfer decision taken against them (judgment of 22 September 2022, *Bundesrepublik Deutschland (Administrative suspension of the transfer decision)*, C-245/21 and C-248/21, EU:C:2022:709, paragraph 41).

21 In accordance with that provision, Member States must provide either, first, that an appeal against the transfer decision gives the person concerned the right to remain in the Member State which adopted that decision pending the outcome of his or her appeal or, secondly, that following the lodging of an appeal against the transfer decision the transfer is automatically suspended for a reasonable period of time during which a court is to determine whether to give suspensive effect to that appeal or, thirdly, that the person concerned has the possibility to lodge an appeal to suspend the implementation of the transfer decision pending the outcome of the appeal against that decision (judgment of 22 September 2022, *Bundesrepublik Deutschland (Administrative suspension of the transfer decision)*, C-245/21 and C-248/21, EU:C:2022:709, paragraph 42).

22 In addition, Article 27(4) of the Dublin III Regulation complements that provision by authorising the Member States to provide that the competent authorities may decide, acting *ex officio*, to suspend the implementation of the transfer decision, in cases where suspension does not result from either the effects of legislation or of a judicial decision, where the circumstances surrounding that implementation imply that the person concerned must, in order to ensure his or her effective judicial protection, be allowed to remain in the territory of the Member State which adopted the transfer decision until a final decision on the appeal brought against that decision has been taken (see, to that effect, judgment of 22 September 2022, *Bundesrepublik Deutschland (Administrative suspension of the transfer decision)*, C-245/21 and C-248/21, EU:C:2022:709, paragraphs 54 and 61).

23 Where the suspension of the implementation of the transfer decision results from the application of Article 27(3) or (4) of the Dublin III Regulation, it is apparent from Article 29(1) thereof that the transfer time limit is to run not from the acceptance of the request to take charge or to take back but, by way of derogation, from the final decision on the appeal against the transfer decision (see, to that effect, judgment of 22 September 2022, *Bundesrepublik Deutschland (Administrative suspension of the transfer decision)*, C-245/21 and C-248/21, EU:C:2022:709, paragraphs 44 and 49).

24 It is thus apparent from Article 29(1) of the Dublin III Regulation, and in particular from the use of the expression ‘final decision’, that the EU legislature envisaged that the transfer time limit would not start to run until the point at which the decision on an appeal against a transfer decision becomes final, after all remedies provided for by the legal order of the Member State concerned have been exhausted, provided that the implementation of the transfer decision has been suspended pursuant to Article 27(3) or (4) of that regulation.

25 However, it must be stated that that legislature did not specify the detailed procedural arrangements for the application of that rule in the event of an appeal at second instance and, in particular, whether the application of that rule may involve the imposition of interim measures by the court hearing that appeal.

26 It is apparent, first, from the very wording of Article 27(3) of the Dublin III Regulation that it covers procedures ‘for the purposes of appeals against, or reviews of, transfer decisions’. Therefore, the references to the ‘appeal’ and the ‘request for review’ in that provision must be understood as referring only to appeals and reviews against a transfer decision as referred to in Article 27(1) of that regulation. Those appeals and reviews must, under the latter provision, be made available to the addressee of a transfer decision, the competent authorities moreover having no interest in challenging their own decisions.

27 Therefore, Article 27(3) of the Dublin III Regulation must be interpreted as being intended to govern exclusively the interim measures which may result, automatically or on the application of the person concerned, from the lodging of an appeal or a request for review brought at first instance against such a decision. On the other hand, that provision is not intended to regulate interim measures which may be adopted in the context of an appeal at second instance brought by the competent authorities.

28 Next, although it follows from Article 27(4) of the Dublin III Regulation that the interruption or suspension of the transfer time limit may, in certain cases, be initiated by the competent authorities, that provision, as recalled in paragraph 22 of the present judgment, complements Article 27(3) of that regulation which is intended to suspend the implementation of the transfer decision.

29 It follows that Article 27(4) of the Dublin III Regulation cannot be applied in a situation, such as those at issue in the main proceedings, where the transfer decision was annulled at first instance. In such a situation there is no longer, in the context of an appeal at second instance brought by the competent authorities, any transfer decision the implementation of which could be suspended.

30 Lastly, since the Dublin III Regulation does not contain, more generally, any rule relating to the possibility of appealing the decision on the appeal brought against the transfer decision or expressly governing the system of any appeal proceedings at second instance, it must be held that the protection conferred by Article 27(1) of that regulation, read in the light of Article 18 and Article 47 of the Charter of Fundamental Rights of the European Union, is confined to the existence of a single judicial remedy and does not require the establishment of several levels of jurisdiction (see, to that effect, judgment of 26 September 2018, *Staatssecretaris van Veiligheid en Justitie (Suspensory effect of the appeal)*, C-180/17, EU:C:2018:775, paragraph 33).

31 In the light of the foregoing, in the absence of EU legislation governing the matter, it is therefore, in accordance with the principle of procedural autonomy, for the national legal order of each Member State to decide whether to introduce a second level of jurisdiction against a judgment ruling on an appeal against a transfer decision and, where appropriate, to lay down the detailed procedural rules of that second level of jurisdiction, including the granting of any interim measures, provided, however, that those rules are not, in situations covered by EU law, less favourable than in similar situations under domestic law (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by EU law (principle of effectiveness) (see, to that effect, judgments of 26 September 2018, *Staatssecretaris van Veiligheid en Justitie (Suspensory effect of the appeal)*, C-180/17, EU:C:2018:775, paragraphs 34 and 35, and of 15 April 2021, *État belge (Circumstances subsequent to a transfer decision)*, C-194/19, EU:C:2021:270, paragraph 42).

32 In that context, since, in particular, it is apparent from the order for reference that the national legislation referred to in the present request for a preliminary ruling is applicable, in the Netherlands legal order, to all administrative law appeal proceedings, such legislation may provide that the court hearing such an appeal at second instance may order interim measures at the request of the competent authorities. On the other hand, that legislation cannot derogate from Article 29(1) of the Dublin III Regulation by providing that such measures have the effect, outside the cases referred to in that provision, of postponing the running of the transfer time limit and thus of delaying its expiry.

33 As is apparent from paragraphs 23 and 24 of the present judgment, it follows from Article 29(1) of the Dublin III Regulation that the transfer time limit can begin to run from the final decision on the appeal brought against the transfer decision only in so far as the implementation of that decision has been suspended during the examination of the appeal at first instance, pursuant to Article 27(3) or (4) of that regulation.

34 Therefore, an interim measure having the effect of suspending the transfer time limit pending the outcome of an appeal at second instance can be adopted only where the implementation of the transfer decision has been suspended pending the outcome of the appeal at first instance, pursuant to those provisions.

35 In such a situation, on the one hand, extending the postponement of the running of the transfer time limit until the outcome of the appeal at second instance ensures equality of arms and the effectiveness of appeal proceedings, by guaranteeing that that time limit does not expire while implementation of the transfer decision has been made impossible by the lodging of an appeal against that decision.

36 On the other hand, the choice of rendering the extension, in an appeal at second instance, of the suspensive effect had by the appeal at first instance against the transfer decision on the running of the transfer time limit subject to the adoption of an interim measure prevents the introduction of an appeal at second instance against a judgment annulling a transfer decision from systematically leading – even when it appears that that appeal cannot reasonably succeed – to the running of that time limit being postponed. That would be liable to delay the examination of the application for international protection made by the person concerned.

37 Accordingly, such a rule is apt to further the achievement of that regulation’s objectives. Those are, as is apparent from recitals 4 and 5 thereof, to establish a clear and workable method based on objective, fair criteria both for the Member States and for the persons concerned for rapidly determining the Member State responsible for examining an application for international protection, so as to guarantee effective access to the procedures for granting international protection and not to compromise the objective of rapid processing of applications for international protection (see, to that effect, judgments of 19 March 2019, *Jawo*, C-163/17, EU:C:2019:218, paragraph 58, and of 22 September 2022, *Bundesrepublik Deutschland (Administrative suspension of the transfer decision)*, C-245/21 and C-248/21, EU:C:2022:709, paragraph 56).

38 Thus, that rule reinforces the application of the mandatory time limits through which the EU legislature provided a framework for the taking charge and taking back procedures. Those time limits make a decisive contribution to achieving the objective of rapidly processing applications for international protection, by ensuring that those procedures will be implemented without undue delay. They also testify to the particular importance which that legislature attached to the rapid determination of the Member State responsible for examining an application for international protection and to the fact that, having regard to the aim of ensuring effective access to the procedures for granting international protection and of not compromising that objective of rapid processing, it is essential that such applications are, when necessary, examined by a Member State other than that designated as being responsible pursuant to the criteria set out in Chapter III of that regulation (see, to that effect, judgment of 13 November 2018, *X and X*, C-47/17 and C-48/17, EU:C:2018:900, paragraphs 69 and 70).

39 By contrast, where, as appears to be the case in the disputes in the main proceedings, subject to verification by the referring court, the implementation of the transfer decision was not suspended pending the outcome of the appeal at first instance, the possibility of requesting in an appeal at second instance an interim measure such as that at issue in the main proceedings would in fact allow the competent authorities – which had neither considered it necessary to exercise the option offered by Article 27(4) of the Dublin III Regulation in order to ensure the effective judicial protection of the persons concerned, nor implemented the transfer decision during the examination of that appeal – to postpone the running of the transfer time limit provided for in Article 29(1) of that regulation. That would thus allow them to prevent responsibility for processing the applications of those persons from being transferred to the requesting Member State pursuant to Article 29(2) of that regulation and, in that way, to improperly delay the progress of the international protection procedure, undermining the objectives of that regulation as set out in paragraphs 37 and 38 of the present judgment.

40 In the light of the foregoing, the answer to the question referred is that Article 29(1) and (2) of the Dublin III Regulation, read in conjunction with Article 27(3) thereof, must be interpreted as not precluding national legislation which allows a national court or tribunal hearing an appeal at second instance against a judgment annulling a transfer decision to adopt, on the application of the competent authorities, an interim measure enabling those authorities to refrain from taking a fresh decision pending the outcome of that appeal and having the object or effect of suspending the

running of the transfer time limit until that outcome, provided that such a measure may be adopted only where the implementation of the transfer decision has been suspended pursuant to Article 27(3) or (4) of that regulation during the examination of the appeal at first instance.

### **Costs**

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

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

**Article 29(1) and (2) of Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, read in conjunction with Article 27(3) of that regulation,**

**must be interpreted as not precluding national legislation which allows a national court or tribunal hearing an appeal at second instance against a judgment annulling a transfer decision to adopt, on the application of the competent authorities, an interim measure enabling those authorities to refrain from taking a fresh decision pending the outcome of that appeal and having the object or effect of suspending the running of the transfer time limit until that outcome, provided that such a measure may be adopted only where the implementation of the transfer decision has been suspended pursuant to Article 27(3) or (4) of that regulation during the examination of the appeal at first instance.**

[Signatures]

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\* Language of the case: Dutch.

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