ECLI:EU:C:2017:586

Provisional text

JUDGMENT OF THE COURT (Grand Chamber)

26 July 2017 (*)

(Reference for a preliminary ruling — Regulation (EU) No 604/2013 — Determination of the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national — Arrival of an unusually large number of third-country nationals seeking international protection — Organisation of border crossing by the authorities of one Member State for the purpose of transit to another Member State — Entry authorised by way of derogation on humanitarian grounds — Article 2(m) —Definition of a 'visa' — Article 12 — Issuing of a visa — Article 13 — Irregular crossing of an external border)

In Case C-646/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Verwaltungsgerichtshof (Administrative Court, Austria), made by decision of 14 December 2016, received at the Court on 15 December 2016, in the proceedings brought by

Khadija Jafari,

Zainab Jafari

intervening parties:

Bundesamt für Fremdenwesen und Asyl,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, A. Tizzano, Vice-President, R. Silva de Lapuerta, L. Bay Larsen (Rapporteur), J.L. da Cruz Vilaça, M. Berger and A. Prechal, Presidents of

Chambers, A. Rosas, A. Arabadjiev, C. Toader, M. Safjan, D. Šváby, E. Jarašiūnas, C.G. Fernlund and S. Rodin, Judges,

Advocate General: E. Sharpston,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 28 March 2017,

after considering the observations submitted on behalf of:

– Ms Khadija Jafari and Ms Zainab Jafari, by R. Frühwirth, Rechtsanwalt,

– the Austrian Government, by G. Hesse, acting as Agent,

– the Greek Government, by T. Papadopoulou, acting as Agent,

– the French Government, by D. Colas, E. Armoët and E. de Moustier, acting as Agents,

– the Italian Government, by G. Palmieri, acting as Agent, and by L. Cordì and L. D'Ascia, avvocati dello Stato,

– the Hungarian Government, by M. Tátrai and M.Z. Fehér, acting as Agents,

– the United Kingdom Government, by C. Crane, acting as Agent, and by C. Banner, Barrister,

– the Swiss Government, by E. Bichet, acting as Agent,

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

after hearing the Opinion of the Advocate General at the sitting on 8 June 2017,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 2, 12 and 13 of Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (OJ 2013 L 180, p. 31) ('the Dublin III Regulation') and of Article 5 of 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), as amended by Regulation (EU) No 610/2013 of the European Parliament and of the Council of 26 June 2013 (OJ 2013 L 182, p. 1) ('the Schengen Borders Code').

2 The reference has been made in the course of the examination of appeals brought by Ms Khadija Jafari and Ms Zainab Jafari ('the Jafari sisters'), Afghan nationals, against the decisions taken by the Bundesamt für Fremdenwesen und Asyl (Federal Office for immigration and asylum, Austria) ('the Office') dismissing their applications for international protection as inadmissible, ordering their removal and finding that returning them to Croatia would be lawful.

Legal context

The Convention implementing the Schengen Agreement

3 Article 18(1) of 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, signed in Schengen (Luxembourg) on 19 June 1990 (OJ 2000 L 239, p. 19), as amended by Regulation No 610/2013 ('the Convention implementing the Schengen Agreement'), provides:

'Visas for stays exceeding 90 days (long-stay visas) shall be national visas issued by one of the Member States in accordance with its national law or Union law. Such visas shall be issued in the uniform format for visas as set out in (Council Regulation (EC) No 1683/95 [of 29 May 1995 laying down a uniform format for visas (OJ 1995 L 164, p. 1)] with the heading specifying the type of visa with the letter "D". ...'

Directive 2001/55/EC

4 Article 18 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) provides:

'The criteria and mechanisms for deciding which Member State is responsible for considering an asylum application shall apply. In particular, the Member State responsible for examining an asylum application submitted by a person enjoying temporary protection pursuant to this Directive, shall be the Member State which has accepted his transfer onto its territory.'

The Schengen Borders Code

5 The Schengen Borders Code was repealed and replaced by Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union

Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ 2016 L 77, p. 1). The Schengen Borders Code was therefore applicable at the time of the facts in the main proceedings.

6 Recitals 6, 27 and 28 of the Schengen Borders Code were worded as follows:

‘(6) 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. Border control 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.

…

(27) This Regulation constitutes a development of provisions of the Schengen *acquis* in which the United Kingdom does not take part ... The United Kingdom is therefore not taking part in its adoption and is not bound by it or subject to its application.

(28) This Regulation constitutes a development of provisions of the Schengen *acquis* in which Ireland does not take part ... Ireland is therefore not taking part in its adoption and is not bound by it or subject to its application.’

7 Article 4 of the Schengen Borders Code, headed ‘Crossing of external borders’, provided:

‘1. External borders may be crossed only at border crossing points and during the fixed opening hours. The opening hours shall be clearly indicated at border crossing points which are not open 24 hours a day.

…

3. Without prejudice … to their international protection obligations, Member States shall introduce penalties, in accordance with their national law, for the unauthorised crossing of external borders at places other than border crossing points or at times other than the fixed opening hours …’

8 Under the heading, ‘Entry conditions for third-country nationals’, Article 5 of the Schengen Borders Code stated as follows:

‘1. For intended stays on the territory of the Member States of a duration of no more than 90 days in any 180-day period, which entails considering the 180-day period preceding each day of stay, the entry conditions for third-country nationals shall be the following:

(a) they are in possession of a valid travel document entitling the holder to cross the border …

…

(b) they are in possession of a valid visa, if required …, except where they hold a valid residence permit or a valid long-stay visa;

(c) they justify the purpose and conditions of the intended stay, and they have sufficient means of subsistence, both for the duration of the intended stay and for the return to their country of origin or transit to a third country into which they are certain to be admitted, or are in a position to acquire such means lawfully;

(d) they are not persons for whom an alert has been issued in the [Schengen Information System (SIS)] for the purposes of refusing entry;

(e) they are not considered to be a threat to public policy, internal security, public health or the international relations of any of the Member States, in particular where no alert has been issued in Member States' national databases for the purposes of refusing entry on the same grounds.

…

4. By way of derogation from paragraph 1:

(a) third-country nationals who do not fulfil all the conditions laid down in paragraph 1 but who hold a residence permit or a long-stay visa shall be authorised to enter the territory of the other Member States for transit purposes so that they may reach the territory of the Member State which issued the residence permit or the long-stay visa, unless their names are on the national list of alerts of the Member State whose external borders they are seeking to cross and the alert is accompanied by instructions to refuse entry or transit;

(b) third-country nationals who fulfil the conditions laid down in paragraph 1, except for that laid down in point (b), and who present themselves at the border may be authorised to enter the territory of the Member States, if a visa is issued at the border …

…

(c) 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.'

9 Article 10(1) of the Schengen Borders Code specified that the travel documents of third-country nationals are to be systematically stamped on entry and exit.

10 Article 12(1) of the Schengen Borders Code provided:

'… A person who has crossed a border illegally and who has no right to stay on the territory of the Member State concerned shall be apprehended and made subject to procedures respecting 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 (OJ 2008 L 348, p. 98)].'

Directive 2008/115

11 Article 2(2) of Directive 2008/115 ('the Return Directive') states:

'Member States may decide not to apply this Directive to third-country nationals who:

(a) 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;

...'

12 Article 3 of the Return Directive, headed 'Definitions', is worded as follows:

'For the purpose of this Directive the following definitions shall apply:

…

(2) "illegal stay" means 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;

…'

Regulation (EC) No 810/2009

13 Recitals 36 and 37 of Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code) (OJ 2009 L 243, p. 1), as amended by Regulation No 610/2013 ('the Visa Code'), are worded as follows:

'(36) This Regulation constitutes a development of the provisions of the Schengen *acquis* in which the United Kingdom does not take part … The United Kingdom is therefore not taking part in its adoption and is not bound by it or subject to its application.

(37) This Regulation constitutes a development of the provisions of the Schengen *acquis* in which Ireland does not take part … Ireland is therefore not taking part in the adoption of the Regulation and is not bound by it or subject to its application.'

14 Article 1(1) of the Visa Code provides:

'This Regulation establishes the procedures and conditions for issuing visas for transit through or intended stays on the territory of the Member States not exceeding 90 days in any 180-day period.'

15 Article 25(1) of the Visa Code states as follows:

'A visa with limited territorial validity shall be issued exceptionally, in the following cases:

(a) when the Member State concerned considers it necessary on humanitarian grounds, for reasons of national interest or because of international obligations:

(i) to derogate from the principle that the entry conditions laid down in Article 5(1)(a), (c), (d) and (e) of the Schengen Borders Code must be fulfilled;

...'

16 Articles 27 to 29 of the Visa Code set out the rules on filling in the visa sticker, invalidation of a completed visa sticker and affixing a visa sticker.

17 Article 35 of the Visa Code, headed 'Visas applied for at the external border', states, in paragraph 4:

'Where the conditions laid down in Article 5(1)(a), (c), (d) and (e) of the Schengen Borders Code are not fulfilled, the authorities responsible for issuing the visa at the border may issue a visa with limited territorial validity, in accordance with Article 25(1)(a) of this Regulation, for the territory of the issuing Member State only.'

The Dublin III Regulation

18 Recitals 25 and 41 of the Dublin III Regulation are worded as follows:

'(25) 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.

…

(41) 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 this Regulation.'

19 Article 1 of the Dublin III Regulation provides:

'This 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").'

20 Article 2 of the Dublin III Regulation states as follows:

'For the purposes of this Regulation:

…

(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;

…'

21 Article 3(1) and (2) of the Dublin III Regulation provides:

'1. Member States shall 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. The application shall be examined by a single Member State, which shall be the one which the criteria set out in Chapter III indicate is responsible.

2. 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 of Fundamental Rights of the European Union, 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.

…'

22 Article 7(1) of the Dublin III Regulation is worded as follows:

'The criteria for determining the Member State responsible shall be applied in the order in which they are set out in this Chapter.'

23 Article 12 of the Dublin III Regulation, entitled 'Issue of residence documents or visas', states in paragraphs 2 to 5:

'2. Where the 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 [the Visa Code]. In such a case, the represented Member State shall be responsible for examining the application for international protection.

3. Where the applicant is in possession of more than one valid residence document or visa issued by different Member States, the responsibility for examining the application for international protection shall be assumed by the Member States in the following order:

…

(b) the Member State which issued the visa having the latest expiry date where the various visas are of the same type;

(c) where visas are of different kinds, the Member State which issued the visa having the longest period of validity or, where the periods of validity are identical, the Member State which issued the visa having the latest expiry date.

4. Where the applicant is in possession only of ... one or more visas which have expired less than six months previously and which enabled him or her actually to enter

the territory of a Member State, paragraphs 1, 2 and 3 shall apply for such time as the applicant has not left the territories of the Member States.

Where the applicant is in possession of ... one or more visas which have expired more than six months previously and enabled him or her actually to enter the territory of a Member State and where he has not left the territories of the Member States, the Member State in which the application for international protection is lodged shall be responsible.

5. The fact that the residence document or visa was issued on the basis of a false or assumed identity or on submission of forged, counterfeit or invalid documents shall not prevent responsibility being allocated to the Member State which issued it. However, the Member State issuing the residence document or visa shall not be responsible if it can establish that a fraud was committed after the document or visa had been issued.'

24 Under the heading 'Entry and/or stay', Article 13 of the Dublin III Regulation provides in paragraph 1 thereof:

'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 [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 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)], 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.'

25 Article 14(1) of the Dublin III Regulation provides:

'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.'

26 Article 17(1) of the Dublin III Regulation states:

'By way of derogation from Article 3(1), each Member State may decide to examine an application for international protection lodged with it by a third-country national or a stateless person, even if such examination is not its responsibility under the criteria laid down in this Regulation.

The Member State which decides to examine an application for international protection pursuant to this paragraph shall become the Member State responsible and shall assume the obligations associated with that responsibility. …

…'

27 Article 33 of the Dublin III Regulation establishes a mechanism for early warning, preparedness and crisis management in respect of situations in which the application of that 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.

28 Article 34 of the Dublin III Regulation provides for information exchange mechanisms between the Member States.

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

29 The Jafari sisters left Afghanistan in December 2015 with their children and then travelled through Iran, Turkey, Greece, the former Yugoslav Republic of Macedonia and Serbia. They crossed the border between Serbia and Croatia in 2016. The Croatian authorities organised transport for them by bus to the Slovenian border.

30 The Jafari sisters and their children then entered Slovenia. On 15 February 2016, the Slovenian authorities issued them with police documents stating that their travel destination was, for one of them, Germany and, for the other, Austria. On the same day, having entered Austria, the Jafari sisters lodged applications, on their own behalf and on behalf of their children, for international protection in that Member State.

31 The Office then sent the Slovenian authorities a request for information, pursuant to Article 34 of the Dublin III Regulation, referring to the police documents issued to the Jafari sisters. In reply to that request, the Slovenian authorities stated that the third-country nationals in question had not been registered in Slovenia for any purpose relevant to the application of that regulation and that they had transited through Slovenia from Croatia.

32 On 16 April 2016, the Office requested the Croatian authorities to take charge of the Jafari sisters and their children pursuant to Article 21 of the Dublin III Regulation. The Croatian authorities did not respond to that request. By letter of 18 June 2016, the Office indicated to those authorities that, pursuant to Article 22(7) of that regulation, the responsibility for examining the applications for international protection lodged by the Jafari sisters and their children now lay with the Republic of Croatia.

33 On 5 September 2016, the Office rejected that the applications for international protection lodged by the Jafari sisters as inadmissible, ordered the sisters' removal, as well as that of their children, and found that their return to Croatia would be lawful.

Those decisions were based on the fact that the third-country nationals in question had entered Greece and Croatia irregularly and that their transfer to Greece was precluded by systemic flaws in the asylum procedure in that Member State.

34 The Jafari sisters contested those decisions before the Bundesverwaltungsgericht (Federal Administrative Court, Austria). On 10 October 2016, that court dismissed their applications on the ground, in particular, that, without a visa, their entry into Croatia must be considered irregular in the light of the conditions laid down in the Schengen Borders Code and that no valid argument could be based on the fact they were admitted into Croatia in breach of those conditions.

35 The Jafari sisters brought appeals against that judgment before the referring court on the ground, inter alia, that they had been admitted into Croatia, Slovenia and Austria in accordance with Article 5(4)(c) of the Schengen Borders Code.

36 In those circumstances, the Verwaltungsgerichtshof (Upper Administrative Court, Austria) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Is it necessary, for the purpose of understanding Article 2(m) and Articles 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 (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), (c) and (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 (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

37 In its order for reference, the referring court requested that the case be determined under the expedited procedure provided for in Article 105 of the Court's Rules of Procedure.

38 By order of the President of the Court of 15 February 2017, *Jafari* (C-646/16, not published, EU:C:2017:138), the President of the Court granted that request.

Consideration of the questions referred

39 As a preliminary matter, it should be noted that, in so far as Article 2(m) and Articles 12 and 13 of the Dublin III Regulation concern aspects of border control and immigration policies which are governed by separate EU acts, it is appropriate, for the

purpose of answering the first question, to assess the relevancy of those acts separately as regards, on the one hand, the interpretation of Article 2(m) and Article 12 of the Dublin III Regulation and, on the other hand, the interpretation of Article 13 of that regulation.

Questions 1, 2(a) and 3(d)

40 By questions 1, 2(a) and 3(d), which it is appropriate to consider together, the referring court asks, in essence, whether Article 12 of the Dublin III Regulation, read in conjunction with Article 2(m) thereof and, if relevant, with the provisions of the Visa Code, must be interpreted as meaning that the fact that the authorities of one Member State, faced with the arrival of an unusually large number of third-country nationals seeking transit through that Member State in order to lodge an application for international protection in another Member State, tolerate the entry into its territory of such nationals who do not fulfil the entry conditions generally imposed in the first Member State, is tantamount to the issuing of a 'visa' within the meaning of Article 12 of the Dublin III Regulation.

41 It follows, in particular, from Article 3(1) and Article 7(1) of the Dublin III Regulation that the Member State responsible for examining an application for international protection is, in principle, the Member State indicated by the criteria set out in Chapter III of the regulation (see, to that effect, judgment of 7 June 2016, *Ghezelbash*, C-63/15, EU:C:2016:409, paragraph 42).

42 Article 12 of the Dublin III Regulation, which is in Chapter III thereof, provides that, where an applicant for international protection is in possession of a valid visa or a visa which has expired, the Member State which issued the visa is, subject to certain conditions, to be responsible for examining the application for international protection.

43 Article 2(m) of the Dublin III Regulation provides a general definition of the term 'visa' and stipulates that the nature of the visa is to be determined in accordance with more specific definitions relating to long-stay visas, short-stay visas and airport transit visas, respectively.

44 It follows from that provision that the concept of a 'visa', within the meaning of the Dublin III Regulation, covers not only short-stay visas and airport transit visas, the procedures and issuing conditions for which are harmonised by the Visa Code, but also long-stay visas, which do not fall within the scope of that code and may, given the current absence of general measures adopted by the EU legislature on the basis of Article 79(2)(a) TFEU, be issued in accordance with national legislation (see, to that effect, judgment of 7 March 2017, *X and X*, C-638/16 PPU, EU:C:2017:173, paragraphs 41 and 44).

45 In addition, as stated in recitals 36 and 37 of the Visa Code and recital 41 of the Dublin III Regulation, certain Member States which are not bound by that code are nevertheless bound by the regulation. It follows that short-stay or transit visas issued by those Member States without adhering to the rules laid down by that code must

nevertheless be regarded as ‘visas’, within the meaning of Article 2(m) and Article 12 of the Dublin III Regulation.

46 Furthermore, it should be noted that the EU legislature has provided a definition of the term ‘visa’ in Article 2(m) of the Dublin III Regulation, without referring to the Visa Code or any other EU act specifically governing visas, even though it directly referred to various EU acts in the definitions provided in Article 2(a), (b), (d), (e) and (f) of the Dublin III Regulation.

47 In those circumstances, although the EU acts adopted in the field of visas form part of context to be taken into account in interpreting Article 2(m) and Article 12 of the Dublin III Regulation, the fact remains that the concept of a ‘visa’, within the meaning of that regulation, cannot be inferred directly from those acts and must be construed on the basis of the specific definition found in Article 2(m) and the general scheme of the regulation.

48 In that regard, that definition stipulates that a visa is the ‘authorisation or decision of a Member State’ which is ‘required for transit or entry’ into the territory of that Member State or several Member States. It therefore follows from the actual wording which the EU legislature adopted that, first, the term ‘visa’ refers to an act formally adopted by a national authority, not to mere tolerance, and, second, a visa is not to be confused with admission to the territory of a Member State, since a visa is required precisely for the purposes of enabling such admission.

49 That conclusion is corroborated by the distinction drawn in Article 2(m) of the Dublin III Regulation between the various categories of visa. Those categories, generally identified by indications on the visa sticker, may be distinguished from one another as the visas falling within those categories are required for the purposes of authorising entry into the territory of a Member State in connection with various types of stay or transit.

50 The context of which Article 12 of the Dublin III Regulation forms part confirms that analysis. Thus, the issuing of a visa — the subject matter of that article along with the issuing of a residence document — is distinguished from actual entry and stay, which form the subject matter of Article 13 of that regulation. In addition, the criterion referred to in Article 14 of the Dublin III Regulation, namely entry without a visa, is indicative of the fact that the EU legislature distinguished entry from the visa itself.

51 That distinction is, moreover, consistent with the overall structure of EU legislation in the fields in question. Whereas provision was made for the rules governing admission into the territory of the Member States, at the time of the facts in the main proceedings, in the Schengen Borders Code, the conditions for issuing visas are set out in separate acts, such as, with respect to short-stay visas, the Visa Code.

52 Furthermore, within the framework established by that legislation, the Member States taking part in its adoption are required to issue visas in a uniform format, in the form of a sticker, both as regards short-stay visas, in accordance with Articles 27 to 29 of

the Visa Code, and long-stay visas, in accordance with Article 18(1) of the Convention implementing the Schengen Agreement. The issuing of a visa for the purposes of that legislation therefore takes a form different from that for the grant of leave to enter, which, in accordance with Article 10(1) of the Schengen Borders Code, takes the form of a stamp on a travel document.

53 In the light of all the foregoing, it must be held that admission to the territory of a Member State, which may merely be tolerated by the authorities of Member State concerned, does not constitute a 'visa' within the meaning of Article 12 of the Dublin III Regulation, read in conjunction with Article 2(m) thereof.

54 The fact that admission to the territory of the Member State concerned occurs in a situation characterised by the arrival of an unusually large number of third-country nationals seeking international protection does not alter that conclusion.

55 First, there is nothing in the Dublin III Regulation to suggest that the term 'visa' should be interpreted differently in such a situation.

56 Second, it should be noted that, while the EU legislature envisaged that measures relating to admission to the territory of a Member State and the issuing of visas may be based on humanitarian grounds, it maintained, in that context, a clear distinction between the two types of measure.

57 Thus, it made a clear distinction between the power to authorise entry into the territory of a Member State on humanitarian grounds, laid down in Article 5(4)(c) of the Schengen Borders Code, and the power to issue, on the same grounds, a visa with limited territorial validity, laid down in Article 25(1)(a) of the Visa Code. While Article 35(4) of the Visa Code does indeed, subject to certain conditions, allow such a visa to be issued at the border, entry into the territory must therefore, in certain cases, be authorised on the basis of Article 5(4)(b) of the Schengen Borders Code, not on the basis of Article 5(4)(c) of that code. In the present case, it is common ground that Article 5(4)(b) of the Schengen Borders Code does not apply.

58 It follows from all the foregoing considerations that the answer to Questions 1, 2(a) and 3(d) is that Article 12 of the Dublin III Regulation, read in conjunction with Article 2(m) of that regulation, must be interpreted as meaning that the fact that the authorities of one Member State, faced with the arrival of an unusually large number of third-country nationals seeking transit through that Member State in order to lodge an application for international protection in another Member State, tolerate the entry into its territory of such nationals who do not fulfil the entry conditions generally imposed in the first Member State, is not tantamount to the issuing of a 'visa' within the meaning of Article 12 of the Dublin III Regulation.

Questions 1, 2(e) and 3(a) to (c) and (h)

59 By questions 1, 2(e) and 3(a) to (c) and (h), which it is appropriate to consider together, the referring court asks, in essence, whether Article 13(1) of the Dublin III Regulation, read, if relevant, in conjunction with the provisions of the Schengen Borders Code and the Return Directive, must be interpreted as meaning that a third-country national whose entry was tolerated by the authorities of one Member State faced with the arrival of an unusually large number of third-country nationals seeking transit through that Member State in order to lodge an application for international protection in another Member State, without fulfilling the entry conditions generally imposed in the first Member State, must be regarded as having 'irregularly crossed' the border of the first Member State within the meaning of that provision.

60 Article 13(1) of the Dublin III Regulation, which is in Chapter III thereof, headed 'Criteria for determining the Member State responsible', provides, inter alia, that, where an applicant for international protection has irregularly crossed the border into a Member State having come from a third country, the Member State thus entered is to be responsible for examining the application for international protection.

61 The concept of an 'irregular crossing' of the border into a Member State is not defined in the Dublin III Regulation.

62 Nor does such a definition appear in other EU acts in force at the time of the facts in the main proceedings relating to border or immigration control.

63 As regards, in particular, the acts mentioned by the referring court, it should be noted, in the first place, that the Return Directive provides, in Article 3(2) thereof, a definition only of the concept of 'illegal stay', which is not to be confused with that of 'illegal entry' (see, to that effect, judgment of 7 June 2016, *Affum*, C-47/15, EU:C:2016:408, paragraph 60).

64 Similarly, the concept of an 'irregular crossing' of the border of a Member State cannot be construed in the same way as that of an 'illegal stay'.

65 Furthermore, although Article 2(2) of the Return Directive mentions third-country nationals apprehended or intercepted in connection with the 'irregular crossing' of the external border of a Member State, the directive does not provide any indication as to the exact meaning of that concept.

66 In the second place, as the Advocate General noted in point 127 of her Opinion, the Schengen Borders Code does not provide a definition of an 'irregular crossing' of the border of a Member State either.

67 Although the Schengen Borders Code does indeed provide, in Article 4(3) thereof, for the introduction of penalties for the unauthorised crossing of external borders at places other than border crossing points or at times other than the fixed opening hours, that provision addresses a very specific situation which cannot encompass all cases of irregular border crossings.

68 Similarly, while the second sentence of Article 12(1) of the Schengen Borders Code lays down a rule applicable to 'a person who has crossed a border illegally', the code does not provide any clarification as to the definition of an 'irregular crossing' and does not clarify, in particular, whether there is an illegal border crossing where there is infringement of the rules governing external border crossing laid down in Article 4 the Schengen Borders Code, those imposing entry conditions set out in Article 5 thereof, or those relating to external border control which form the subject matter of Chapter II of Title II of the code.

69 In addition, the concept of an 'irregular crossing' of a border is used, in Article 13(1) of the Dublin III Regulation, in connection with the specific purpose of that regulation, namely to determine the Member State responsible for examining an application for international protection. There is no connection between that purpose and the second sentence of Article 12(1) of the Schengen Borders Code, since that sentence explains the relationship between border surveillance and the implementation of the return procedures provided for in the Return Directive.

70 Furthermore, it should be noted that, as stated in recitals 27 and 28 of the Schengen Borders Code and recital 41 of the Dublin III Regulation, certain Member States which were not bound by that code are, on the other hand, bound by the regulation. It follows that crossing the borders of those Member States must, as the case may be, be regarded as 'regular' or 'irregular' for the purpose of Article 13(1) of the Dublin III Regulation, even though admission to the territory of those Member States is not governed by the rules on border crossing and entry laid down in the Schengen Borders Code.

71 Lastly, it should be noted that the EU legislature chose not to mention, in Article 13(1) of the Dublin III Regulation, the Return Directive or the Schengen Borders Code, whilst expressly referring to Regulation No 603/2013.

72 In those circumstances, although the EU acts adopted in the fields of border control and immigration form part of the context to be taken into account in interpreting Article 13(1) of the Dublin III Regulation, the fact remains that the scope of the concept of an 'irregular crossing' of the border into a Member State within the meaning of that regulation cannot, in principle, be inferred directly from those acts.

73 Consequently, since the Dublin III Regulation does not define that concept, its meaning and scope must, as the Court has consistently held, be determined by considering its usual meaning, while also taking into account the context in which it occurs and the purposes of the rules of which it is part (see, to that effect, judgment of 30 January 2014, *Diakité*, C-285/12, EU:C:2014:39, paragraph 27 and the case-law cited).

74 In the light of the usual meaning of the concept of an 'irregular crossing' of a border, it must be concluded that the crossing of a border without fulfilling the conditions imposed by the legislation applicable in the Member State in question must necessarily

be considered ‘irregular’, within the meaning of Article 13(1) of the Dublin III Regulation.

75 It follows that, where the border crossed is that of a Member State bound by the Schengen Borders Code, whether the crossing is irregular must be determined by taking into account, inter alia, the rules laid down by that code.

76 That is so in the case in the main proceedings since, apart from the first sentence of Article 1, Article 5(4)(a), Title III and the provisions of Title II of the Schengen Borders Code, and its annexes which refer to the Schengen Information System, the provisions of that code apply to the Republic of Croatia, by virtue of Article 4(1) and (2) of the Act concerning the conditions of accession of the Republic of Croatia and the adjustments to the Treaty on European Union, the Treaty on the Functioning of the European Union and the Treaty establishing the European Atomic Energy Community (OJ 2012 L 112, p. 21), read in conjunction with paragraph 8 of Annex II thereof.

77 However, the finding in paragraph 74 above is not sufficient for the purpose of providing an exhaustive definition of the concept of an ‘irregular crossing’ within the meaning of Article 13(1) of the Dublin III Regulation.

78 Regard must therefore be had to the fact that the rules on external border crossing may grant the competent national authorities the power to derogate, on humanitarian grounds, from the entry conditions generally imposed on third-country nationals in order to ensure that their future stay in the Member States is lawful.

79 A power of that nature is provided for, inter alia, in Article 5(4)(c) of the Schengen Borders Code, which allows the Member States taking part in that code to authorise, by way of derogation, third-country nationals who do not fulfil one or more of the entry conditions generally imposed on those nationals to enter their territory on humanitarian grounds, on grounds of national interest or because of international obligations.

80 That said, it should be noted, first of all, that Article 5(4)(c) of the Schengen Borders Code stipulates, unlike Article 5(4)(b) of that code, that such authorisation is valid only in respect of the territory of the Member State concerned, not the territory ‘of the Member States’ as a whole. Consequently, the former provision cannot have the effect of regularising the crossing of a border by a third-country national, admitted by the authorities of a Member State for the sole purpose of enabling the transit of that national to another Member State in order to lodge an application for international protection there.

81 Next, and in any event, in the light of the answer to Questions 1, 2(a) and 3(d), the exercise of a power such as that provided for in Article 5(4)(c) of the Schengen Borders Code cannot be construed as the issuing of a visa within the meaning of Article 12 of the Dublin III Regulation.

82 Similarly, since the exercise of such a power has no bearing on the fact that the third-country national concerned may need to have a visa, an entry authorised in that context cannot be regarded as an entry into the territory of a Member State in which the need for the person concerned to have a visa is waived, for the purposes of Article 14 of the Dublin III Regulation.

83 Consequently, if it were accepted that the entry of a third-country national authorised by a Member State on humanitarian grounds by way of derogation from the entry conditions generally imposed on third-country nationals is not an irregular crossing of the border into that Member State within the meaning of Article 13(1) of the Dublin III Regulation, that would imply that that Member State, by exercising such a power, is not responsible for examining the application for international protection lodged by that national in another Member State.

84 However, such a conclusion would be inconsistent with the general scheme and objectives of the Dublin III Regulation.

85 Recital 25 of the Dublin III Regulation thus refers, inter alia, to the direct link between the responsibility criteria established in a spirit of solidarity and common efforts towards the management of external borders, which are undertaken, as stated in recital 6 of the Schengen Borders Code, in the interest not only of the Member State at whose external borders the border control is carried out but also of all Member States which have abolished internal border control.

86 In that context, it is apparent from the relationship between Articles 12 and 14 of the Dublin III Regulation that those articles cover, in principle, all the situations entailing lawful entry into the territory of the Member States, since, in the normal course of events, the lawful entry of a third-country national into that territory is based either on a visa or residence permit, or on waiver of the need to obtain a visa.

87 The application of the various criteria laid down in those articles, and in Article 13 of the Dublin III Regulation, should, as a general rule, enable the responsibility for examining an application for international protection that may be lodged by a third-country national to be allocated to the Member State which that national first entered or stayed in upon entering in the territory of the Member States.

88 In that regard, it is to be noted that that idea is expressly set out in the explanatory memorandum to Commission Proposal (COM(2008) 820 final) of 3 December 2008, which led to the adoption of the Dublin III Regulation and which reproduces, in that regard, what had previously been stated in the explanatory memorandum to Commission Proposal (COM(2001) 447 final), which led to the adoption of Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (OJ 2003 L 50, p. 1). The latter explanatory memorandum also specified that the criteria established by Regulation No 343/2003, which included the irregular crossing of the border of a Member State,

were based, inter alia, on the idea that each Member State is answerable to all the other Member States 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.

89 In the light of the foregoing, the criteria laid down in Articles 12 to 14 of the Dublin III Regulation cannot, without calling into question the overall scheme of that regulation, be interpreted to the effect that a Member State is absolved of its responsibility where it has decided to authorise, on humanitarian grounds, the entry into its territory of a third-country national who does not have a visa and is not entitled to waiver of a visa.

90 Furthermore, the fact that, as in the present case, the third-country national in question entered the territory of the Member States under the watch of the competent authorities without in any way evading border control is not decisive for the application of Article 13(1) of the Dublin III Regulation.

91 The purpose of the responsibility criteria set out in Articles 12 to 14 of the Dublin III Regulation is not to penalise unlawful conduct on the part of the third-country national in question but to determine the Member State responsible by taking into account the role played by that Member State when that national entered the territory of the Member States.

92 It follows that a third-country national admitted into the territory of one Member State, without fulfilling the entry conditions generally imposed in that Member State, for the purpose of transit to another Member State in order to lodge an application for international protection there, must be regarded as having ‘irregularly crossed’ the border of that first Member State within the meaning of Article 13(1) of the Dublin III Regulation, irrespective of whether that crossing was tolerated or authorised in breach of the applicable rules or whether it was authorised on humanitarian grounds by way of derogation from the entry conditions generally imposed on third-country nationals.

93 The fact that the border crossing occurred in a situation characterised by the arrival of an unusually large number of third-country nationals seeking international protection cannot affect the interpretation or application of Article 13(1) of the Dublin III Regulation.

94 It should be noted, in the first place, that the EU legislature has taken account of the risk that such a situation may occur and therefore provided the Member States with means intended to be capable of responding to that situation appropriately, without, however, providing for the application, in that case, of a specific body of rules for determining the Member State responsible.

95 Thus, Article 33 of the Dublin III Regulation establishes a mechanism for early warning, preparedness and crisis management designed to implement preventive action plans in order, inter alia, to prevent the application of that regulation being jeopardised

due to a substantiated risk of particular pressure being placed on a Member State's asylum system.

96 In parallel, Article 3(1) of the Dublin III Regulation provides for the application of the procedure established by that regulation to any application for international protection by a third-country national or a stateless person on the territory of any one of the Member States, without precluding applications which are lodged in a situation characterised by the arrival of an unusually large number of third-country nationals seeking international protection.

97 In the second place, that type of situation is specifically governed by Directive 2001/55, Article 18 of which states that, in the event of a mass influx of displaced persons, the criteria and mechanisms for deciding which Member State is responsible are to apply.

98 In the third place, Article 78(3) TFEU empowers the Council of the European Union, on a proposal from the European Commission and after consulting the European Parliament, to adopt provisional measures for the benefit of one or more Member State confronted by an emergency situation characterised by a sudden inflow of third-country nationals.

99 Accordingly, the Council has previously adopted, on the basis of Article 78(3) TFEU, Council Decisions (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) and (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).

100 In the fourth place, irrespective of whether such measures are adopted, the taking charge in a Member State of an unusually large number of third-country nationals seeking international protection may also be facilitated by the exercise by other Member States — unilaterally or bilaterally with the Member State concerned in a spirit of solidarity, which, in accordance with Article 80 TFEU, underlies the Dublin III Regulation — of the power provided for in Article 17(1) of that regulation, to decide to examine applications for international protection lodged with them, even if such examination is not their responsibility under the criteria laid down in that regulation.

101 In any event, it should be noted that, under the second subparagraph of Article 3(2) of the Dublin III Regulation and Article 4 of the Charter of Fundamental Rights of the European Union, an applicant for international protection must not be transferred to the Member State responsible where that transfer entails a genuine risk that the person concerned may suffer inhuman or degrading treatment within the meaning of Article 4 of the Charter (see, to that effect, judgment of 16 February 2017, *C. K. and Others*, C-578/16 PPU, EU:C:2017:127, paragraph 65). Such an applicant cannot therefore be transferred if, following the arrival of an unusually large number of third-country

nationals seeking international protection, such a risk existed in the Member State responsible.

102 It follows from all the foregoing considerations that the answer to Questions 1, 2(e) and 3(a) to (c) and (h) is that Article 13(1) of the Dublin III Regulation must be interpreted as meaning that a third-country national whose entry was tolerated by the authorities of one Member State faced with the arrival of an unusually large number of third-country nationals seeking transit through that Member State in order to lodge an application for international protection in another Member State, without fulfilling the entry conditions generally imposed in the first Member State, must be regarded as having 'irregularly crossed' the border of the first Member State within the meaning of that provision.

Questions 2(b) to (d) and 3(e) to (g)

103 In the light of the answer to the other questions, it is not necessary to answer Questions 2(b) to (d) or 3(e) to (g).

Costs

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

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

1. **Article 12 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 2(m) of that regulation, must be interpreted as meaning that the fact that the authorities of one Member State, faced with the arrival of an unusually large number of third-country nationals seeking transit through that Member State in order to lodge an application for international protection in another Member State, tolerate the entry into its territory of such nationals who do not fulfil the entry conditions generally imposed in the first Member State, is not tantamount to the issuing of a 'visa' within the meaning of Article 12 of Regulation No 604/2013.**

2. **Article 13(1) of Regulation No 604/2013 must be interpreted as meaning that a third-country national whose entry was tolerated by the authorities of one Member State faced with the arrival of an unusually large number of third-country nationals seeking transit through that Member State in order to lodge an application for international protection in another Member State, without fulfilling the entry conditions generally imposed in the first Member State, must be regarded as having**

‘irregularly crossed’ the border of the first Member State within the meaning of that provision.

[Signatures]

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* Language of the case: German.