ECLI:EU:C:2023:113

Provisional text

JUDGMENT OF THE COURT (Tenth Chamber)

16 February 2023 (*)

(Reference for a preliminary ruling – Asylum policy – Regulation (EU) No 604/2013 – Criteria and mechanisms for determining the Member State responsible for examining an application for international protection – Article 6(1) – Best interests of the child – Article 16(1) – Dependent person – Article 17(1) – Discretionary clauses – Implementation by a Member State – Third-country national pregnant at the time of lodging her application for international protection – Marriage – Spouse beneficiary of international protection in the Member State concerned – Decision refusing to process the application and to transfer the applicant to another Member State deemed to be responsible for the application)

In Case C-745/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Rechtbank Den Haag (District Court, The Hague, Netherlands), made by decision of 29 November 2021, received at the Court on 2 December 2021, in the proceedings

L.G.

v

Staatssecretaris van Justitie en Veiligheid,

THE COURT (Tenth Chamber),

composed of D. Gratsias, President of the Chamber, E. Regan (Rapporteur), President of the Fifth Chamber, and Z. Csehi, Judge,

Advocate General: T. Ćapeta,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– L.G., by F. van Dijk and A. Khalaf, advocaten,

– the Netherlands Government, by M.K. Bulterman and H.S. Gijzen, acting as Agents,

– the European Commission, by L. Grønfeldt and F. Wilman, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 16(1) 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 proceedings between a third-country national and the staatssecretaris van Justitie en Veiligheid (State Secretary for Justice and Security, Netherlands) ('the State Secretary') concerning the latter's decision to refuse to process the application for international protection lodged by that national and to transfer her to the Republic of Lithuania on the ground that that other Member State is responsible for examining that application.

Legal context

European Union law

Regulation (EC) No 343/2003

3 Article 15 of Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (OJ 2003 L 50, p. 1) ('the Dublin II Regulation'), contained in Chapter IV of that regulation, entitled 'Humanitarian clause', provided in paragraph 2:

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

4 The Dublin II Regulation was repealed and replaced by the Dublin III Regulation on 19 July 2013.

The Dublin III Regulation

5 In Chapter I of the Dublin III Regulation, entitled ‘Subject matter and definitions’, Article 2 thereof, entitled ‘Definitions’, is worded as follows:

‘For the purposes of this Regulation:

…

(g) “family members” means, in so far as the family already existed in the country of origin, the following members of the applicant’s family who are present on the territory of the Member States:

– the spouse of the applicant or his or her unmarried partner in a stable relationship, where the law or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to third-country nationals,

…’

6 In Chapter II of that regulation, entitled ‘General principles and safeguards’, Article 3(1), under the title ‘Access to the procedure for examining an application for international protection’, provides:

‘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.’

7 Article 6 of that regulation, entitled ‘Guarantees for minors’, provides:

‘1. The best interests of the child shall be a primary consideration for Member States with respect to all procedures provided for in this Regulation.

…

3. In assessing the best interests of the child, Member States shall closely cooperate with each other and shall, in particular, take due account of the following factors:

(a) family reunification possibilities;

…’

8 Chapter III of the Dublin III Regulation, entitled ‘Criteria for determining the Member State responsible’, contains Articles 7 to 15.

9 Under Article 9 of that regulation, entitled ‘Family members who are beneficiaries of international protection’:

‘Where the applicant has a family member, regardless of whether the family was previously formed in the country of origin, who has been allowed to reside as a beneficiary of international protection in a Member State, that Member State shall be responsible for examining the application for international protection, provided that the persons concerned expressed their desire in writing.’

10 Article 12 of that regulation, entitled ‘Issue of residence documents or visas’, provides in paragraphs 2 and 3:

‘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 …

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:

(a) the Member State which issued the residence document conferring the right to the longest period of residency or, where the periods of validity are identical, the Member State which issued the residence document having the latest expiry date;

(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.’

11 In Chapter IV of the Dublin III Regulation, entitled ‘Dependent persons and discretionary clauses’, Article 16 thereof, entitled ‘Dependent persons’, provides in paragraph 1:

‘Where, on account of pregnancy, a new-born child, serious illness, severe disability or old age, an applicant is dependent on the assistance of his or her child, sibling or parent legally resident in one of the Member States, or his or her child, sibling or parent legally resident in one of the Member States is dependent on the assistance of the applicant, Member States shall normally keep or bring together the applicant with that child, sibling or parent, provided that family ties existed in the country of origin, that the child, sibling or parent or the applicant is able to take care of the dependent person and that the persons concerned expressed their desire in writing.’

12 In the same chapter, the first subparagraph of Article 17(1) of that regulation, under the title ‘Discretionary clauses’, provides:

‘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.’

13 In Section 1 of Chapter VI of that regulation, entitled ‘Procedures for taking charge and taking back’, Article 20(3) thereof, under the title ‘Start of the procedure’, provides:

‘For the purposes of this Regulation, the situation of a minor who is accompanying the applicant and meets the definition of family member shall be indissociable from that of his or her family member and shall be a matter for the Member State responsible for examining the application for international protection of that family member, even if the minor is not individually an applicant, provided that it is in the minor’s best interests. The same treatment shall be applied to children born after the applicant arrives on the territory of the Member States, without the need to initiate a new procedure for taking charge of them.’

Netherlands law

14 Under Article 2 of Book I of the Burgerlijk Wetboek (Netherlands Civil Code), a child with which a woman is pregnant shall be deemed to be already born when the child's best interests so require.

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

15 The applicant in the main proceedings, a Syrian national, was issued with a visa valid from 10 August 2016 to 9 November 2017 by the Representation of the Republic of Lithuania in Belarus.

16 In July 2017, she left Syria and, after crossing, inter alia, Türkiye, Greece, Lithuania and Poland, reached the Netherlands on 27 September 2017.

17 On 28 September 2017, the applicant in the main proceedings lodged an application for asylum in the Netherlands.

18 On 10 October 2017, the applicant married a third-country national who had already been granted asylum by that Member State and in which he has resided since 2011. The applicant and her husband knew each other before their marriage but were not living together at that time.

19 On 12 October 2017, the Netherlands authorities requested the Lithuanian authorities to take charge of the applicant in the main proceedings, on the ground that the Republic of Lithuania had to be deemed to be responsible for examining the asylum application, under Article 12(2) or (3) of the Dublin III Regulation.

20 On 12 December 2017, the Lithuanian authorities agreed to take charge of the applicant.

21 As the State Secretary had issued, on 2 February 2018, a draft decision to transfer the applicant in the main proceedings to Lithuania, the applicant submitted her observations on that draft, declaring and proving, on 16 February 2018, that she was pregnant.

22 By decision of 12 March 2018, the State Secretary decided not to examine the application for a temporary residence permit for an asylum seeker lodged by the applicant in the main proceedings on the ground that the Republic of Lithuania was responsible for processing that application ('the decision at issue').

23 On 20 June 2018, the applicant in the main proceedings gave birth to a daughter in the Netherlands. A report of 3 August 2018, produced by the applicant in the main proceedings and prepared by two experts, concluded, on the basis of a comparison of genetic material, that her spouse is, with a level of probability bordering on certainty, the father of that child. He is equally so by automatic operation of the law in the Netherlands, since the child was born during the marriage.

24 The State Secretary thereupon granted the daughter of the applicant in the main proceedings a fixed-term legal residence permit, subject to the restriction that the child was to reside 'with the [father]'.

25 The applicant in the main proceedings brought an action before the Rechtbank Den Haag (District Court, The Hague, Netherlands), which is the referring court, seeking annulment of the decision at issue. In support of that action, she alleged infringement of Article 9, Article 16(1) and Article 17(1) respectively of the Dublin III Regulation, read in the light of the best interests of the child that was unborn at the time her application was lodged.

26 As regards, first of all, Article 9 of the Dublin III Regulation, the referring court states that it rejected the argument alleging infringement of that provision in an interlocutory decision of 4 April 2018. It is accordingly bound by that assessment in the absence of an overriding reason to reconsider it.

27 As regards, next, Article 17(1) of that regulation, that court points out that if, in the light of that provision, it considered, in that same interlocutory decision, that the examination carried out by the State Secretary in the decision at issue was too limited, that assessment could not be upheld. In the judgment of 23 January 2019, *M.A. and Others* (C-661/17, EU:C:2019:53, paragraph 71), the Court held, in the meantime, that considerations relating to the best interests of the child cannot require a Member State to make use of Article 17(1) and therefore examine an application which is not its responsibility. That interpretation of EU law by the Court constitutes an overriding reason for departing from the assessment made in the interlocutory decision.

28 As regards, lastly, Article 16(1) of that regulation, the referring court observes that, according to the applicant in the main proceedings, that provision should be interpreted broadly, like the interpretation of the similar provision which preceded it, contained in Article 15(2) of the Dublin II Regulation and applied by the Court in the judgment of 6 November 2012, *K* (C-245/11, EU:C:2012:685), since, having regard to the best interests of the child, it is irrelevant that the familial link between the father and the unborn child did not exist in the mother's country of origin.

29 The State Secretary contends, by contrast, that Article 2 of Book I of the Netherlands Civil Code concerns only civil rights and not rights relating to residence or responsibility for examining an application for international protection. Moreover, Article 24 of the Charter of Fundamental Rights of the European Union does not concern the protection of an unborn child. Furthermore, Article 16 of the Dublin III Regulation does not cover the dependency link between an applicant for international protection and his or her partner. The interpretation provided by the Court in the judgment of 6 November 2012, *K* (C-245/11, EU:C:2012:685) is, in that regard, outdated, except in so far as that judgment underlines the requirement of an existing family tie in the country of origin. Lastly, that regulation is no longer liable to apply to the daughter of the applicant in the main proceedings, since that daughter has in the meantime obtained a temporary residence permit authorising her to remain with her father. Moreover, in so far as that would serve the best interests of the child, it would be possible to have a family life with both parents in Lithuania.

30 The referring court considers that, given the date on which the applicant in the main proceedings gave birth, she had been pregnant since around mid-September 2017, that is to say, before she lodged her application for international protection. Under Article 2 of Book I of the Netherlands Civil Code, there is an obligation to treat the child with which the applicant in the main proceedings was pregnant as if it were already born when that is in the best interests of that child.

31 The question thus arises as to whether EU law precludes the interests of an unborn child from being taken into account independently in the determination of the Member State responsible for examining the asylum application and when a transfer decision is taken. In that regard, the Court has already held, in the judgment of 23 January 2019, *M.A. and Others* (C-661/17, EU:C:2019:53), that it follows from Article 20(3) of the Dublin III Regulation that preservation of the unity of the family group is presumed to be in the best interests of the child. That provision, moreover, expressly grants the same status to a child who is born after the arrival of the asylum seeker in the territory of a Member State as it does to a child accompanying the asylum seeker. It would also be wrong to consider that that unity could be achieved whilst the asylum application was being examined in Lithuania, since the child's father does not have a right of residence in that Member State.

32 A further question is whether the application of Article 16(1) of the Dublin III Regulation is precluded. According to its wording, that provision covers only the applicant's children, siblings or parents, but not his or her spouse. However, in the judgment of 6 November 2012, *K* (C-245/11, EU:C:2012:685), the Court gave a broad interpretation to the similar provision which preceded Article 16(1), namely Article 15(2) of the Dublin II Regulation.

33 Should Article 16(1) be applicable, the question also arises whether the pregnancy of the applicant in the main proceedings has given rise to a situation of dependency in relation to her husband within the meaning of that provision. In that regard, it is necessary to take into consideration the fact that the applicant has no family or other relations in Lithuania, that she does not know the language of that Member State and that she has no means of subsistence. There is, in principle, a dependency link between a very young child and each of its parents.

34 Lastly, assuming that EU law does not preclude the interests of the child from being taken into account, the referring court asks whether the interests of such a child mean that the Netherlands authorities were required, under Article 16(1) of the Dublin III Regulation, to ensure, save in exceptional circumstances, that that child could remain with her father during the examination of the application for international protection.

35 In those circumstances, the Rechtbank Den Haag (District Court, The Hague, Netherlands) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Does EU law preclude, in the determination by the Member State responsible for examining an asylum application, the attribution of an independent significance, pursuant to a provision of national law, to the interests of a child with which the applicant was pregnant at the time the application was made?

(2) (a) Does Article 16(1) of [the Dublin III Regulation] preclude the application of this provision where the applicant's spouse is legally resident in the Member State to which the application is made?

(b) If that is not the case, did the applicant's pregnancy entail dependence, within the meaning of that provision, on the husband by whom she was pregnant?

(3) If EU law does not preclude, in the determination by the Member State responsible for examining an asylum application, the attribution of an independent significance, pursuant to a provision of national law, to the interests of an unborn child, can Article 16(1) of [the Dublin III Regulation] apply to the relationship between the unborn child and the father of that unborn child who is legally resident in the Member State to which the application is made?'

Consideration of the questions referred

The second and third questions

36 By its second and third questions, which it is appropriate to examine together and in the first place, the referring court asks, in essence, whether Article 16(1) of the Dublin III Regulation must be interpreted as applying where there is a dependency link either between an applicant for international protection and that applicant's spouse who is legally resident in the Member State in which the application for such protection was lodged, or between the unborn child of that applicant and that spouse who is also the father of that child.

37 In that regard, it should be borne in mind that, under that provision, Member States are normally to keep or bring together the applicant and, respectively, 'his or her child, sibling or parent' legally resident in a Member State, where there is a dependency link between them, provided that family ties existed in the country of origin, that the child, sibling or parent or the applicant, as the case may be, is able to take care of the dependent person and that the persons concerned expressed their desire in writing.

38 It is clear from that wording that Article 16(1) of the Dublin III Regulation does not apply in the case of a dependency link between an applicant for international protection and his or her spouse, since such a dependency link is not covered by that provision.

39 As correctly observed by the Netherlands Government and the European Commission, the interpretation adopted by the Court, in paragraphs 38 to 43 of the judgment of 6 November 2012, *K* C-245/11, EU:C:2012:685), of the expression 'another relative', used in Article 15(2) of the Dublin II Regulation, which preceded Article 16(1) of the Dublin III Regulation, is irrelevant in that regard, since that latter provision replaced that expression with an exhaustive list of persons that does not include the spouse or life partner, even though they are 'family members' as those members are defined in Article 2(g) of the Dublin III Regulation.

40 It is also equally clear from the wording of Article 16(1) of the Dublin III Regulation that that provision applies only in the case of a dependency link involving the applicant for international protection, whether that person is dependent on the persons listed in that provision, or that, conversely, those persons are dependent on the applicant.

41 It follows that that provision does not apply in the case of a dependency link between the child of such an applicant and one of those persons, such as, in the present case, the father of that child who is also the spouse of the applicant for international protection at issue in the main proceedings.

42 In the light of the foregoing considerations, the answer to the second and third questions is that Article 16(1) of the Dublin III Regulation must be interpreted as not applying where there is a dependency link either between an applicant for international protection and that applicant's spouse who is legally resident in the Member State in which the application for such protection was lodged, or between the unborn child of that applicant and that spouse who is also the father of that child.

The first question

43 Since the referring court does not refer, by its first question, to any specific provision of EU law, it should be noted that, according to the Court's settled case-law, in the context of the procedure established by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to determine the case before it. Thus, if necessary, the Court may have to reformulate the question referred to it. To that end, the Court may extract from all the information provided by the national court, in particular from the grounds of the order for reference, the points of EU law which require interpretation in view of the subject matter of the dispute in the main proceedings (judgment of 20 October 2022, *Koalitsia 'Demokratichna Bulgaria – Obedinenie'*, C-306/21, EU:C:2022:813, paragraphs 43 and 44 and the case-law cited).

44 In the present case, it is apparent from the request for a preliminary ruling that, as stated in paragraph 27 of the present judgment, the referring court initially held, in an interlocutory decision given in the context of the main proceedings, that, in the decision at issue, the State Secretary had

not examined to the requisite legal standard the effect of Article 17(1) of the Dublin III Regulation. However, that court seems to have subsequently revised that assessment following the delivery of the judgment of 23 January 2019, *M.A. and Others* (C-661/17, EU:C:2019:53).

45 In those circumstances, it must be held that, by its first question, the referring court asks, in essence, whether Article 17(1) of the Dublin III Regulation must be interpreted as precluding the legislation of a Member State from requiring the competent national authorities, on the sole ground of the best interests of the child, to examine an application for international protection lodged by a third-country national where she was pregnant at the time her application was lodged, even though the criteria set out in Articles 7 to 15 of that regulation indicate that another Member State is responsible for that application.

46 In that regard, it should be recalled that, under Article 3(1) of the Dublin III Regulation, an application for international protection is to be examined by a single Member State, which is to be the one which the criteria set out in Chapter III of that regulation, which contains Articles 7 to 15, indicate is responsible.

47 However, by way of derogation from Article 3(1), Article 17(1) of the Dublin III Regulation provides that 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 such criteria.

48 It is true, as observed by the Netherlands Government, that in paragraph 72 of the judgment of 23 January 2019, *M.A. and Others* (C-661/17, EU:C:2019:53), the Court held, in essence, that Article 6(1) of the Dublin III Regulation does not require a Member State which is not responsible, under the criteria laid down in Chapter III of that regulation, for examining an application for international protection to take into account the best interests of the child and to examine that application itself, pursuant to Article 17(1) of that regulation.

49 However, it must be noted that it follows just as much from that judgment that there is nothing preventing a Member State from examining such an application on the ground that such an examination is in the best interests of the child.

50 Indeed, the Court also held in that judgment that it is clear from the very wording of Article 17(1) of the Dublin III Regulation that that provision, which seeks to preserve the prerogatives of the Member States in the exercise of the right to grant international protection by allowing each Member State to decide, in its absolute discretion on the basis of political, humanitarian or practical considerations, to agree to examine an application for international protection, even if that examination is not its responsibility under the criteria defined by that regulation, leaves it to their discretion whether to proceed with such an examination, the exercise of that option not being, moreover, subject to any particular condition. It is therefore for the Member State concerned, in the light of the extent of the discretion thus conferred by that regulation, to determine the circumstances in which it wishes to make use of the power conferred by Article 17(1) and to decide itself to examine an application for international protection for which it is not responsible under the criteria laid down in that regulation (see, to that effect, judgment of 23 January 2019, *M.A. and Others*, C-661/17, EU:C:2019:53, paragraphs 58 to 60 and 71).

51 In the present case, it is apparent from the request for a preliminary ruling that, according to the referring court, the provision of the Netherlands Civil Code under which an unborn child must be deemed to already have been born where that is in his or her interest, by reason of the particular importance that provision attaches to the best interests of the child, on that ground alone requires

the national authorities to examine an application for international protection lodged by a third-country national where she was pregnant at the time that application was lodged, even if the other criteria laid down in Chapter III of the Dublin III Regulation indicate that another Member State is responsible for that application.

52 Thus, according to that court, that provision of national law requires the Netherlands authorities, in such circumstances, to exercise the option permitted under the discretionary clause provided for in Article 17(1) of that regulation.

53 That said, it is for the referring court to examine whether, in the case in the main proceedings, the competent national authorities infringed national law by rejecting the application for international protection lodged by the applicant in the main proceedings, even though she was pregnant at the time that application was lodged.

54 In the light of the foregoing considerations, the answer to the first question is that Article 17(1) of the Dublin III Regulation must be interpreted as not precluding the legislation of a Member State from requiring the competent national authorities, on the sole ground of the best interests of the child, to examine an application for international protection lodged by a third-country national where she was pregnant at the time her application was lodged, even though the criteria set out in Articles 7 to 15 of that regulation indicate that another Member State is responsible for that application.

Costs

55 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 (Tenth Chamber) hereby rules:

1. **Article 16(1) 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**

must be interpreted as not applying where there is a dependency link either between an applicant for international protection and that applicant's spouse who is legally resident in the Member State in which the application for such protection was lodged, or between the unborn child of that applicant and that spouse who is also the father of that child.

2. **Article 17(1) of Directive 604/2013**

must be interpreted as not precluding the legislation of a Member State from requiring the competent national authorities, on the sole ground of the best interests of the child, to examine an application for international protection lodged by a third-country national where she was pregnant at the time her application was lodged, even though the criteria set out in Articles 7 to 15 of that regulation indicate that another Member State is responsible for that application.

[Signatures]

* Language of the case: Dutch.