JUDGMENT OF THE COURT (Fourth Chamber)

30 May 2013 (*)

(Asylum – Regulation (EC) No 343/2003 – Determination of the Member State responsible for examining an application for asylum lodged in one of the Member States by a third-country national – Article 3(2) – Discretion of the Member States – Role of the Office of the United Nations High Commissioner for Refugees – Obligation of Member States to request that Office to present its views – None)

In Case C-528/11,

REQUEST for a preliminary ruling under Article 267 TFEU from the Administrativen sad Sofia-grad (Bulgaria), made by decision of 12 October 2011, received at the Court on 18 October 2011, in the proceedings

Zuheyr Frayeh Halaf

v

Darzhavna agentsia za bezhantsite pri Ministerskia savet,

THE COURT (Fourth Chamber),

composed of L. Bay Larsen (Rapporteur), President of the Chamber, J. Malenovský, U. Lõhmus, M. Safjan and A. Prechal, Judges,

Advocate General: N. Wahl,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the German Government, by T. Henze and N. Graf Vitzthum, acting as Agents,

– the Italian Government, by G. Palmieri, acting as Agent, and F. Urbani Neri, avvocato dello Stato,

– the Netherlands Government, by J. Langer and C. Wissels, acting as Agents,

– the United Kingdom Government, by C. Murrell, acting as Agent, and R. Palmer, Barrister,

– the Swiss Government, by D. Klingele, acting as Agent,

– the European Commission, by M. Condou-Durande and V. Savov, 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 3(2) 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 Regulation') and Articles 18, 41 and 47 of the Charter of Fundamental Rights of the European Union ('the Charter').

2 The request has been made in proceedings between Mr Halaf, an Iraqi national, and the Darzhavna agentsia za bezhantsite pri Ministerskia savet (State Agency for Refugees at the Council of Ministers, 'the DAB') concerning that agency's decision refusing to commence a procedure for granting refugee status to him and authorising his transfer to Greece.

Legal context

The Geneva Convention

3 The Convention relating to the Status of Refugees, signed in Geneva on 28 July 1951 (*United Nations Treaty Series*, Vol. 189, p. 150, No 2545 (1954), 'the Geneva Convention'), entered into force on 22 April 1954.

4 All the Member States are contracting parties to the Geneva Convention, as are the Republic of Iceland, the Principality of Liechtenstein, the Kingdom of Norway and the Swiss Confederation. The European Union is not a contracting party to the Geneva Convention, but Article 78(1) TFEU and Article 18 of the Charter refer to that convention.

5 The preamble to that convention notes that the Office of the United Nations High Commissioner for Refugees ('the UNHCR') is charged with the task of supervising international conventions providing for the protection of refugees, and recognises that the effective coordination of measures taken to deal with this problem will depend upon the cooperation of States with the UNHCR.

6 Article 35(1) of the convention is worded as follows:

'The Contracting States undertake to co-operate with the [UNHCR], or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention.'

European Union law

The Regulation

7 Recital 12 in the preamble to the Regulation states that, with respect to the treatment of persons falling within the scope of the Regulation, Member States are bound by obligations under instruments of international law to which they are party.

8 Article 2 of the Regulation states inter alia:

'For the purposes of this Regulation:

…

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

…'

9 Article 3(1) and (2) of the Regulation state:

'1. Member States shall examine the application of any third-country national who applies at the border or in their territory to any one of them for asylum. The application shall be examined by a single Member State, which shall be the one which the criteria set out in Chapter III indicate is responsible.

2. By way of derogation from paragraph 1, each Member State may examine an application for asylum lodged with it by a third-country national,

even if such examination is not its responsibility under the criteria laid down in this Regulation. In such an event, that Member State shall become the Member State responsible within the meaning of this Regulation and shall assume the obligations associated with that responsibility. …'

10 In order to determine the 'Member State responsible' within the meaning of Article 3(1) of the Regulation, Articles 6 to 14, which are in Chapter III of that regulation, set out a list of objective criteria in hierarchical order.

11 Article 15 of the Regulation, which is the only article in Chapter IV, entitled 'Humanitarian clause' states:

'1. Any Member State, even where it is not responsible under the criteria set out in this Regulation, may bring together family members, as well as other dependent relatives, on humanitarian grounds based in particular on family or cultural considerations. …

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.

…'

12 Chapter V of the Regulation, entitled 'Taking charge and taking back', includes Article 16(1), which states as follows:

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

…

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

…'

13 Article 20 of the Regulation provides:

'1. An asylum seeker shall be taken back in accordance with Article 4(5) and Article 16(1)(c), (d) and (e) as follows:

…

(b) the Member State called upon to take back the applicant shall be obliged to make the necessary checks and reply to the request addressed to it as quickly as possible and under no circumstances exceeding a period of one month from the referral. When the request is based on data obtained from the Eurodac system, this time limit is reduced to two weeks;

(c) where the requested Member State does not communicate its decision within the one month period or the two weeks period mentioned in subparagraph (b), it shall be considered to have agreed to take back the asylum seeker;

…'

Directive 2005/85/EC

14 Recital 29 in the preamble to Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (OJ 2005 L 326, p. 13) states that that directive does not deal with procedures governed by the Regulation.

15 Article 8(2) of the directive states:

'Member States shall ensure that decisions by the determining authority on applications for asylum are taken after an appropriate examination. To that end, Member States shall ensure that:

…

(b) precise and up-to-date information is obtained from various sources, such as the [UNHCR], as to the general situation prevailing in the countries of origin of applicants for asylum and, where necessary, in countries through which they have transited, and that such information is made available to the personnel responsible for examining applications and taking decisions;

…'

16 Article 21 of the directive, entitled 'The role of UNHCR', states:

'1. Member States shall allow the UNHCR:

…

(c) to present its views, in the exercise of its supervisory responsibilities under Article 35 of the Geneva Convention, to any competent authorities

regarding individual applications for asylum at any stage of the procedure.

…’

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

17 Mr Halaf is an Iraqi national who on 1 June 2010 applied for asylum in Bulgaria.

18 A search in the Eurodac system having revealed that he had already made an application for asylum in Greece on 6 August 2008, the DAB on 6 July 2010 requested the Greek authorities to take him back, in accordance with Article 16(1)(c) of the Regulation.

19 On account of the failure to reply to that request within the two-week time-limit set by the second sentence of Article 20(1)(b) of the Regulation, the DAB considered, on the basis of Article 20(1)(c) of the Regulation, that the Hellenic Republic had agreed to take Mr Halaf back.

20 By decision of 21 July 2010, the DAB therefore refused to commence a procedure for granting refugee status to Mr Halaf and authorised his transfer to Greece.

21 On 1 December 2010, Mr Halaf brought an action before the referring court seeking annulment of that decision of the DAB and requesting the court to order the DAB to commence a procedure for granting refugee status. He based his action inter alia on the fact that the UNHCR had called on European governments to refrain from sending asylum seekers back to Greece.

22 The referring court questions whether it is possible to apply Article 3(2) of the Regulation in such a case, taking account of the fact that, in Mr Halaf’s case, no circumstances exist to establish the applicability of Article 15 of the Regulation.

23 In those circumstances, the Administrativen sad Sofia-grad (Administrative Court, Sofia), by decision of 12 October 2011, decided to stay the proceedings and to refer six questions to the Court of Justice for a preliminary ruling.

24 By letter of 21 December 2011, the Registrar of the Court sent the referring court the judgment in Joined Cases C-411/10 and C-493/10 *N.S. and Others* [2011] ECR I-0000, requesting that court to inform it whether, in the light of that judgment, it wished to maintain the reference.

25 By decision of 24 January 2012, received at the Court on 25 January 2012, the Administrativen sad Sofia-grad withdrew its first and third questions, retaining only the following four questions submitted for a preliminary ruling:

‘1. Is Article 3(2) of [the Regulation] to be interpreted as meaning that it permits a Member State to assume responsibility for examining an application for asylum where no personal circumstances exist in relation to the asylum seeker which establish the applicability of the humanitarian clause in Article 15 of [the Regulation] and where the Member State responsible pursuant to Article 3(1) of [the Regulation] has not responded to a request to take back the applicant pursuant to Article 20(1) of [the Regulation], given that that regulation does not contain any provisions concerning compliance with the principle of solidarity pursuant to Article 80 TFEU?

2. What is the content of the right to asylum under Article 18 of the Charter ... in conjunction with Article 53 of that Charter and in conjunction with the definition in Article 2(c) of and recital 12 in the preamble to [the Regulation]?

3. Is Article 3(2) of [the Regulation], in relation to the obligation under Article 78(1) TFEU to comply with instruments under international law on asylum, to be interpreted as meaning that in the procedure for determining the Member State responsible pursuant to [the Regulation], the Member States are obliged to request the [UNHCR] to present its views, where facts and conclusions therefrom are set out in documents of that Office to the effect that the Member State responsible pursuant to Article 3(1) of [the Regulation] is in breach of provisions of European Union law on asylum?

[4.] If [the third] question is answered in the affirmative, … [i]f such a request is not made to the [UNHCR] to present its views, does this constitute a substantial infringement of the procedure for determining the Member State responsible pursuant to Article 3 of [the Regulation] and an infringement of the right to good administration and the right to an effective legal remedy pursuant to Articles 41 and 47 of the Charter …, specifically also in the light of Article 21 of Directive [2005/85], which provides that that Office has the right to present its views when individual applications for asylum are examined?’

Consideration of the questions referred

Admissibility

26 The United Kingdom Government, without expressly raising a plea of inadmissibility, claims that the questions referred for a preliminary ruling are academic.

27 It considers that it is apparent from the judgment in *N.S. and Others* that the transfer of an asylum seeker to Greece gives rise to a real risk of breach of Article 4 of the Charter and that the relevant Bulgarian authorities must therefore now be able to identify the Member State responsible for examination of the application for asylum on the basis of that judgment.

28 In that regard, it should be recalled that, according to settled case-law, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of European Union law, the Court is in principle bound to give a ruling (Case C-169/07 *Hartlauer* [2009] ECR I-1721, paragraph 24, and Case C-470/11 *Garkalns* [2012] ECR I-0000, paragraph 17).

29 It follows that questions concerning European Union law enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court for a preliminary ruling only where it is quite obvious that the interpretation of European Union law that is sought is unrelated to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (Joined Cases C-570/07 and C-571/07 *Blanco Pérez and Chao Gómez* [2010] ECR I-4629, paragraph 36, and Case C-509/10 *Geistbeck* [2012] ECR I-0000, paragraph 48).

30 It must be held that the referring court raises questions of the interpretation of provisions of European Union law. The mere fact that the Court has already given an interpretation of some of those provisions in *N.S. and Others* does not mean that those questions are now academic or hypothetical.

31 In those circumstances, it is not obvious that the interpretation of European Union law that is sought is unrelated to the actual facts of the main action or its purpose. The argument put forward by the United Kingdom Government is not therefore enough to rebut the presumption of relevance recalled at paragraph 29 above.

32 The referring court’s questions must therefore be declared admissible.

The first question

33 By its first question the referring court asks, in essence, whether Article 3(2) of the Regulation must be interpreted as permitting a Member State, which is not indicated as responsible by the criteria in Chapter III of the Regulation, to examine an application for asylum where no circumstances exist which establish the applicability of the humanitarian clause in Article 15 of the Regulation, given that the Member State responsible under those criteria has not responded to a request to take back the asylum seeker concerned.

34 In this respect, it should be noted that Article 3(1) of the Regulation states that an application for asylum is to be examined by a single Member State, which is to be the one which the criteria set out in Chapter III of the Regulation indicate as responsible.

35 However, Article 3(2) of the Regulation expressly provides that, by way of derogation from Article 3(1), each Member State may examine an application for asylum lodged with it by a third-country national, even if such examination is not its responsibility under the criteria laid down in the Regulation.

36 It is thus apparent from the very wording of Article 3(2) of the Regulation that the exercise of that option is not subject to any particular condition.

37 That conclusion is also corroborated by the preparatory documents for the Regulation. The Commission proposal that led to the adoption of the Regulation (COM(2001) 447 final) states that the rule in Article 3(2) of the Regulation was introduced in order to allow each Member State to decide sovereignly, for political, humanitarian or practical considerations, to agree to examine an application for asylum even if it is not responsible under the criteria in the Regulation.

38 Therefore, with regard to the extent of the discretion thus conferred on each Member State, whether or not the Member State responsible under the criteria set out in Chapter III of the Regulation has responded to a request to take back the asylum seeker has no bearing on the possibility of another Member State examining an application for asylum on the basis of Article 3(2) of the Regulation.

39 In the light of the foregoing, the answer to the first question is that Article 3(2) of the Regulation must be interpreted as permitting a Member State, which is not indicated as responsible by the criteria in Chapter III of the Regulation, to examine an application for asylum even though no circumstances exist which establish the applicability of the humanitarian clause in Article 15 of the Regulation. That possibility is not conditional on

the Member State responsible under those criteria having failed to respond to a request to take back the asylum seeker concerned.

The second question

40 By its second question the referring court asks what is the content of the right to asylum under Article 18 of the Charter in conjunction with Article 53 of the Charter and in conjunction with the definition in Article 2(c) of and recital 12 in the preamble to the Regulation.

41 It is apparent from the order for reference that that second question is based on the premise that, when the humanitarian clause in Article 15 of the Regulation is not applicable, a Member State may examine an application for asylum on the basis of Article 3(2) of the Regulation only if it is shown that the right granted to asylum seekers by Article 18 of the Charter is not respected by the Member State responsible under the criteria set out in Chapter III of the Regulation.

42 As it is already apparent from the answer to the first question that the exercise of the option conferred on Member States by Article 3(2) of the Regulation is not subject to any particular condition, there is no need to answer the second question.

The third question

43 By its third question the referring court asks, in essence, whether the Member State in which the asylum seeker is present is obliged, during the process of determining the Member State responsible, to request the UNHCR to present its views where it is apparent from the documents of that Office that the Member State indicated as responsible by the criteria in Chapter III of the Regulation is in breach of the rules of European Union law on asylum.

44 As a preliminary point, it should be recalled that documents from the UNHCR are among the instruments likely to enable the Member States to assess the functioning of the asylum system in the Member State indicated as responsible by the criteria in Chapter III of the Regulation, and therefore to evaluate the risks to which the asylum seeker would actually be exposed were he to be transferred to that Member State (see, to that effect, *N.S. and Others*, paragraphs 90 and 91). Those documents are particularly relevant in that assessment in the light of the role conferred on the UNHCR by the Geneva Convention, in consistency with which the rules of European Union law dealing with asylum must be interpreted (see, to that effect, *N.S. and Others*, paragraph 75, and Case C-364/11 *Abed El Karem El Kott and Others* [2012] ECR I-0000, paragraph 43).

45 None the less, although Articles 8(2)(b) and 21 of Directive 2005/85 provide for various forms of cooperation between the UNHCR and the Member States during the latter's examination of an application for asylum, those rules do not apply during the process of determining the Member State responsible governed by the Regulation, as specified in recital 29 in the preamble to Directive 2005/85.

46 In this respect, it is important to note that there is nothing to prevent a Member State from requesting the UNHCR to present its views if it deems it appropriate, particularly in a situation such as that at issue in the main proceedings.

47 In the light of the foregoing, the answer to the third question is that the Member State in which the asylum seeker is present is not obliged, during the process of determining the Member State responsible, to request the UNHCR to present its views where it is apparent from the documents of that Office that the Member State indicated as responsible by the criteria in Chapter III of the Regulation is in breach of the rules of European Union law on asylum.

The fourth question

48 In the light of the answer given to the third question, there is no need to answer the fourth question.

Costs

49 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 (Fourth Chamber) hereby rules:

1. **Article 3(2) 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 must be interpreted as permitting a Member State, which is not indicated as responsible by the criteria in Chapter III of that regulation, to examine an application for asylum even though no circumstances exist which establish the applicability of the humanitarian clause in Article 15 of that regulation. That possibility is not conditional on the Member State responsible under those**

criteria having failed to respond to a request to take back the asylum seeker concerned.

2. **The Member State in which the asylum seeker is present is not obliged, during the process of determining the Member State responsible, to request the Office of the United Nations High Commissioner for Refugees to present its views where it is apparent from the documents of that Office that the Member State indicated as responsible by the criteria in Chapter III of Regulation No 343/2003 is in breach of the rules of European Union law on asylum.**

[Signatures]