OPINION OF ADVOCATE GENERAL

Sharpston

delivered on 15 May 2012 (1)

Case C-179/11

CIMADE

Groupe d'information et de soutien des immigrés (GISTI)

v

Ministre de l'intérieur, de l'outre-mer, des collectivités territoriales et de l'immigration

(Reference for a preliminary ruling from the Conseil d'État (France))

(Visas, asylum, immigration – Directive 2003/9/EC – Regulation (EC) No 343/2003 – Obligation to guarantee minimum reception conditions to asylum seekers prior to their being taken in charge or taken back by the responsible Member State – Period during which the host Member State is responsible for the provision of such conditions – Liability for the cost of providing those conditions)

1. This reference for a preliminary ruling by the French Conseil d'État (Council of State) seeks guidance on the interpretation of Directive 2003/9 (2) ('the Reception Conditions Directive') laying down minimum standards for the reception of asylum seekers ('the reception conditions'), when read in conjunction with Regulation No 343/2003 ('the Dublin II Regulation'). (3)

2. By virtue of the 'taking back' and 'taking charge' rules laid down under that regulation, (4) an asylum seeker may find that the Member State which is responsible for examining his application ('the responsible Member State') is not the one in which he is present at the relevant time ('the host Member State'). The Court is asked, first, whether the reception conditions apply to such an asylum seeker at all, then, if so, (a) at what point the responsibility of the host Member

State to guarantee those conditions terminates in the event of a ‘taking back’ or a ‘taking charge’ order being made under the Dublin II Regulation and (b) whether the responsible Member State or the host Member State is liable for the cost of making those conditions available during the period in question.

Legal background

European Union (EU) law

The conclusions of the Tampere European Council

3. On 15 and 16 October 1999, the Tampere European Council adopted a series of measures (‘the Tampere Conclusions’) with a view to the establishment of a ‘genuine area of freedom, security and justice within the European Union’. (5) Those measures included provisions relating to a Common European Asylum System, to be based on the full and inclusive application of the Geneva Convention relating to the status of refugees. (6) In so far as is relevant, paragraph 14 of the Tampere Conclusions reads as follows:

> ‘This system should include, in the short term, a clear and workable determination of the State responsible for the examination of an asylum application [and] common minimum conditions of reception of asylum seekers … The European Council stresses the importance of consulting UNHCR [(7)] and other international organisations.’

The Reception Conditions Directive

4. As is clear from its title, recital 7 in the preamble and Article 1, the Reception Conditions Directive was adopted in order to lay down the ‘common minimum conditions of reception of asylum seekers’ provided for in paragraph 14 of the Tampere Conclusions.

5. According to recital 5 in the preamble, the directive ‘respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union’. In particular, it ‘seeks to ensure full respect for human dignity and to promote the application of Articles 1 and 18 of the said Charter’.

6. Article 2(c) defines ‘applicant’ and ‘asylum seeker’ as ‘a third country national or a stateless person who has made an application for asylum in respect of which a final decision has not yet been taken’.

7. Under Article 2(i), ‘reception conditions’ are the measures that Member States grant to asylum seekers in accordance with the directive; under Article 2(j),

‘material reception conditions’ include ‘housing, food and clothing, provided in kind, or as financial allowances or in vouchers, and a daily expenses allowance’.

8. Article 3 is entitled ‘Scope’. Article 3(1) states: ‘This Directive shall apply to all third-country nationals and stateless persons who make an application for asylum at the border or in the territory of a Member State as long as they are allowed to remain on the territory as asylum seekers, as well as to family members, if they are covered by such application for asylum according to the national law’.

9. Article 6(1) obliges Member States to ensure that, within three days of an application being lodged with the competent authority, the applicant is provided with a document issued in his own name certifying his status as an asylum seeker or testifying that he is allowed to stay in the territory of the Member State while his application is pending or being examined.

10. Article 13 requires Member States in particular to (1) ‘ensure that material reception conditions are available to applicants when they make their application for asylum’ and (2) ‘make provisions on material reception conditions to ensure a standard of living adequate for the health of applicants and capable of ensuring their subsistence’.

The Dublin II Regulation

11. The Dublin II Regulation seeks to lay down a ‘clear and workable determination of the State responsible for the examination of an asylum application’, as provided for in paragraph 14 of the Tampere Conclusions.

12. According to recital 15 in the preamble, the regulation ‘observes the fundamental rights and principles which are acknowledged in particular in the Charter of Fundamental Rights of the European Union. In particular, it seeks to ensure full observance of the right to asylum guaranteed by Article 18’.

13. Article 2 defines ‘applicant’ and ‘asylum seeker’ in terms that are, for the purposes of this Opinion, identical to those in Article 2 of the Reception Conditions Directive. (8)

14. Article 3(1) provides for Member States to 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 is to be examined by the single Member State identified as responsible in accordance with a hierarchy of criteria set out in Chapter III. (9) By virtue of Article 5(2), that determination is to be made on the basis of the situation obtaining when the asylum seeker first lodged his application with a Member State.

15. Chapter V, entitled ‘Taking Charge and Taking Back’, concerns the circumstances in which a Member State may be obliged either to take charge of an asylum seeker or to take back such a person. Each procedure is governed by its own mechanism and time scales. I shall refer in overview to those time scales below; a more detailed description is set out in the annex.

16. The taking charge procedure comes into play where the host Member State concludes, by reference to the criteria in Chapter III, that another Member State is responsible for examining the application. Article 16(1)(a) provides that the Member States are obliged to take charge, under the conditions laid down in Articles 17 to 19, of an asylum seeker who has made an application in a different Member State. The Member State in which the application has been made may, within three months of the date of the application, call upon the Member State it considers responsible for examining the application (‘the requested Member State’) to take charge of the asylum seeker. (10) That Member State then has two months from the date on which it received the request to make the necessary checks and to give a decision. (11) Where the requested Member State accepts that it should take charge of an applicant, the Member State in which the application was made must notify the applicant of the obligation to transfer him to the requested Member State, which will then be responsible for processing the application. The applicant must then be transferred within six months of acceptance of the request or of the decision on an appeal or review where there is a suspensive effect. (12)

17. The taking back procedure applies where a Member State:

– has started to examine an application and the applicant is in another Member State without permission (Article 16(1)(c)),

– has started to examine an application which the applicant has subsequently withdrawn, the applicant having made an application in another Member State (Article 16(1)(d)), or

– has rejected the application of a third-country national and the person concerned is in the territory of another Member State without permission (Article 16(1)(e)).

18. The taking back procedure is governed by Article 20. The host Member State may call upon another Member State to take an asylum seeker back, at the same time providing sufficient information to enable the requested Member State to check that it is responsible. There is no time-limit for such a request. The requested Member State must make the necessary checks and reply to the request not more than one month from the request being made. (13) The Member State which agrees to take back an applicant is obliged to readmit that person. The applicant must be transferred within six months of acceptance of the request or of the decision on an appeal or review where there is a suspensive effect. (14)

19. The regulation provides that a decision that an applicant for asylum should be taken charge of or taken back may be subject to appeal or review in the Member State taking the decision in question. Such appeal or review does not suspend implementation of the transfer unless the courts or competent bodies in the host Member State so decide on a case-by-case basis, if national legislation allows for that. (15)

The Charter of Fundamental Rights of the European Union

20. The Charter of Fundamental Rights of the European Union ('the Charter') was signed at Nice on 7 December 2000. (16) Article 1 provides:

> 'Human dignity is inviolable. It must be respected and protected.'

21. Article 18 states:

> 'The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the functioning of the European Union …'.

National law and administrative provisions

Provisions concerning the entry of an asylum seeker to French territory

22. Article L.741-4 of the Code de l'entrée et du séjour des étrangers et du droit d'asile (Code on the Entry and Residence of Foreign Nationals and the Right of Asylum, 'the CESEDA') applies to a foreign national who is on French territory and has applied for asylum there. It provides that the competent authority may refuse the foreign national permission to enter France if examination of the application is the responsibility of another State by virtue of the Dublin II Regulation.

23. Article L.742-1 of the CESEDA provides that, where an asylum seeker is authorised to reside in France on the basis of Article L.741, he is to be provided with a provisional residence document allowing him to lodge an application for asylum with the Office français de protection des refugiés et apatrides (French office for the protection of refugees and stateless persons) ('OFPRA').

24. Under Article L.723-1 of the CESEDA, OFPRA is not competent to consider an application presented by a party whose application to stay on French territory has been refused on the basis of Article L.741-4.

Provisions transposing the Reception Conditions Directive

25. Implementing Article 14 of the Reception Conditions Directive, Article 348-1 of the Code de l'action sociale et des familles (Family and social action code) provides that asylum seekers in possession of a residence document under Article L.742-1 of the CESEDA are entitled to be accommodated in a reception centre.

26. As regards financial support, Article L.5423-8 of the French Code du travail (Employment Code) provides for a temporary tideover allowance to be paid to 'foreign nationals in possession of a residence permit or an acknowledgment of receipt of their residence permit application which refers to the fact that they have sought asylum in France …'.

27. Those provisions do not permit an asylum seeker whose application is subject to preliminary analysis under the taking charge or taking back provisions of the Dublin II Regulation to benefit from the reception conditions laid down under them. That is because he will not be in possession of the provisional residence document mentioned in Article L.742-1 of the CESEDA and thus, pursuant to Article L.723-1 thereof, cannot have his application considered by OFPRA.

28. On 3 November 2009, the Ministre de l'immigration et de l'intégration (Minister for Immigration and Integration) and the Ministre de l'économie et des finances (Minister for Economy and Finance) published an inter-ministerial circular ('the Tideover Circular'), under which applicants for asylum whose application may be subject to the taking charge or taking back provisions in the Dublin II Regulation are not entitled to the tideover allowance.

Facts, procedure and questions referred

29. CIMADE (17) and GISTI, the applicants in the main proceedings, are non-profit-making organisations whose objects include the protection of asylum seekers' rights. They have jointly presented an application for the annulment of the Tideover Circular before the referring court. They argue, in particular, that the provisions of national law and of the Tideover Circular are incompatible with the Reception Conditions Directive.

30. The Conseil d'État has referred the following questions to the Court for a preliminary ruling:

> '1. Does [the Reception Conditions Directive] guarantee the minimum reception conditions to which it refers to applicants in respect of whom a Member State in receipt of an application for asylum decides, under [the Dublin II Regulation], to refer a request to another Member State which it deems to have jurisdiction to examine that asylum application, throughout the duration of the procedure for taking charge of them or for taking them back by that other Member State?

2. If the answer to that question is in the affirmative:

(a) Does the obligation, incumbent on the first Member State, [(18)] to guarantee the minimum reception conditions cease at the moment of the acceptance decision by the State to which the referral was made, upon the actual taking charge or taking back of the asylum seeker, or at some other date?

(b) Which Member State should thus assume the financial burden of providing the minimum reception conditions during that period?'

31. Written observations have been submitted by CIMADE and GISTI, (19) by the Czech Republic, France, Greece, Italy, Poland and Switzerland (20) and by the European Commission. At the hearing on 8 March 2011, oral submissions were made by CIMADE and GISTI, France, Italy and the Commission.

Analysis

Question 1

32. The referring court asks whether the Reception Conditions Directive guarantees the reception conditions to asylum seekers who have made an application in a Member State, where that Member State has decided, under the Dublin II Regulation, to refer the application to another Member State which it considers should be responsible for examining the application. (21)

33. It also raises an issue as to the timing of the host Member State's obligations. That issue is more appropriately addressed at the same time as Question 2(a), and I shall consider it there.

34. Apart from France, all of the Member States which have intervened, together with the Commission, contend (with some variations in their precise approach) that the main question should essentially be answered in the affirmative.

35. France argues that both the wording of the Reception Conditions Directive and its objectives dictate a negative response.

The wording of the Reception Conditions Directive

36. The Reception Conditions Directive lays down minimum standards for the reception of asylum seekers in Member States.

37. Article 2(c) defines 'asylum seeker' as a third-country national or stateless person 'who has made an application for asylum in respect of which a final decision has not yet been taken'. There must accordingly be an application for asylum, in relation to which a final decision remains to be taken.

38. Article 3(1) states that the directive is to apply to all third-country nationals and stateless persons '*who make an application for asylum* at the border or in the territory of a Member State *as long as they are allowed to remain on the territory as asylum seekers*…'. Article 3(2) and (3) lays down a series of exceptions; these are relatively technical in nature and none of them is pertinent to the essential point at issue in the present reference.

39. As regards the point at which the material reception conditions (22) are to be made available to applicants, this is specified in Article 13(1) as starting when asylum seekers '*make their application for asylum*'.

40. It is thus clear that the trigger for the application of the directive, and for receipt of the material reception conditions, is that the third country national should 'make an application for asylum'. But what do those (ostensibly simple) words mean? Is it enough that the asylum seeker should have sought asylum (irrespective of whether, in the end, that Member State or another Member State is responsible for the substantive consideration of that application)? Or is an application for asylum only 'made' as and when the Member State accepts that it is indeed the responsible Member State and accordingly permits the application formally to be 'lodged' under national law?

41. It seems to me that the obvious and natural reading of the texts I have cited is that the words 'make an application for asylum' mean what they say. Once the third-country national unequivocally and plainly indicates, either at the border or within the territory of a Member State, that he wishes to seek asylum, the competent authorities will begin to examine that application. One of the early steps in the process may be to raise the question whether a different Member State is (or may be) the responsible Member State under the Dublin II Regulation for the substantive examination of that application. But the application for asylum has already been 'made', thus triggering rights under the Reception Conditions Directive.

42. All of the above leads me to conclude that the Reception Conditions Directive applies to all asylum seekers who have applied for asylum in the host Member State, notwithstanding that that State may have decided, under the Dublin II Regulation, to refer the application to another Member State which it considers should be responsible for examining the application.

43. France disagrees. It submits that a narrower reading is required, excluding *all* applicants for asylum whose application may be subject to the taking charge or taking back provisions in the Dublin II Regulation from the scope of the Reception Conditions Directive. It refers first to the definition of 'asylum seeker' in Article 2(c) of the directive, then to Article 5(1), which obliges Member States to provide asylum seekers with certain information 'within a reasonable time not exceeding 15 days after they have made their application for asylum with the

competent authority' and, lastly, to the obligation under Article 13(1) to ensure that material reception conditions are available to applicants when they make their application for asylum. From that, it argues, the provisions of the directive are triggered by the formal lodging of a request for asylum with the competent authority of the Member State which is responsible for examining the application. Asylum seekers whose applications are subject to the Dublin II Regulation cannot be regarded as having lodged such an application.

44. I can see no basis for such an interpretation. As already indicated, I do not consider that the definition set out in Article 2(c) of the Reception Conditions Directive excludes the asylum seekers in question from its scope. As I mentioned in point 40 above, the trigger for the application of the directive is the making of an *application* for asylum. As regards the obligation to provide information under Article 5(1), I cannot see that it can exclude applicants for asylum whose application may be subject to the taking charge or taking back provisions in the Dublin II Regulation from the reception conditions laid down under the directive. And Article 13(1) appears to me to require an interpretation that is the direct opposite of that proposed by France.

45. France's argument – that the combined effect of those provisions is to exclude from the scope of the directive applicants who may be subject to the taking charge or taking back provisions in the Dublin II Regulation – appears to assume that since, by virtue of the Dublin II Regulation, such asylum seekers may not have their application examined by the host Member State, the Reception Conditions Directive cannot apply to them. I cannot see that such a conclusion is justified by the wording of the directive. According to Article 2(c) of the directive and Article 2(d) of the regulation, an asylum seeker is an asylum seeker as long as a final decision has not been taken on his application. Any determination concerning the procedures initiated by the host Member State under the Dublin II Regulation is thus irrelevant.

46. Indeed, for France's argument to succeed, it would be necessary for the legislation to have established, expressly or by implication, a discrete category of 'pre-asylum seekers' – that is to say, asylum seekers in the territory of the host Member State who fall to be treated differently from other asylum seekers because that State has yet to provide them with an appropriate residence document. The legislation makes no such provision in that regard. On the contrary, Article 6(1) of the Reception Conditions Directive obliges Member States to ensure that an asylum seeker is given, within three days of his making his application, a document certifying his status as an asylum seeker and testifying that he is allowed to stay in the territory of that State while his examination is pending or being examined. Not only does France appear to me to misconstrue the directive, it seems also to misapply it.

47. Furthermore, as the UNHCR points out, (23) the Dublin II Regulation was enacted after the adoption of the Reception Conditions Directive. It would have been an easy matter for the Community legislature, had it wished to do so, to incorporate an express exclusion of the directive in the body of the regulation. There is no such exclusion.

48. Before turning to the objectives of the legislation at issue, I should refer briefly to a point made by Greece, which has raised the question of the applicability of the Reception Conditions Directive to persons falling within Article 16(1)(c) and 16(1)(e) of the Dublin II Regulation – that is to say, persons subject to a potential taking back obligation who are present in the host Member State without permission, having made their application in another Member State. Greece suggests that persons in that category may not qualify under the directive, since they will not have made an application for asylum 'at the border or in the territory of [the host Member State]' for the purposes of Article 3(1) of the directive.

49. While that question raises interesting issues concerning the status of the persons concerned by those provisions, it falls outwith the question put by the referring court in its order for reference, which presupposes that an application *has been made in the territory of the host Member State*. I therefore do not consider it further.

The objectives of the Reception Conditions Directive and the Dublin II Regulation

50. The Reception Conditions Directive and the Dublin II Regulation must be understood in the context in which they were enacted. (24)

51. Thus, the preambles to both (25) refer to the Tampere Conclusions and the Common European Asylum System. The definitions of 'application for asylum', on the one hand, and 'applicant' and 'asylum seeker', on the other, (26) are also – for the purposes of this Opinion – identical in both. Their purpose, for obvious reasons, differs. The regulation serves to establish criteria and mechanisms for determining the Member State responsible for examining an application for asylum made in one of the Member States. (27) The obligations it lays down are accordingly 'horizontal': they exist as between the Member States.

52. The directive, by contrast, was enacted in order to establish common minimum standards on the reception of asylum seekers. It thus imposes a series of 'vertical' obligations concerning the provision of reception conditions by the host Member State for the benefit of an individual asylum seeker. That being so, it seems to me that the fact that asylum seekers falling within a particular category – that is to say, those asylum seekers with which the referring court's question is concerned – should find themselves the subject of the series of communications which the regulation requires the Member States to undertake in order to determine

where, precisely, their application is to be examined is of no relevance whatever as regards their entitlement to the reception conditions.

53. France argues that applicants for asylum who may be subject to the taking charge or taking back provisions in the Dublin II Regulation should be subject not to the Reception Conditions Directive but to national law – which, in this case, appears to be less favourable.

54. It cannot, in my view, be permissible to provide the asylum seekers in question with a reduced level of benefits.

55. Recital 5 in the preamble to the directive narrates that the directive respects the fundamental rights and observes the principles recognised, in particular, by the Charter, and seeks both to ensure full respect for human dignity and to promote the application of Articles 1 and 18 of that document. Recital 7 refers to standards for the reception of asylum seekers that will normally suffice to ensure them a dignified standard of living and comparable living standards in all Member States. Those standards are *minima* that should apply throughout the Union in order to reflect the requirements of, inter alia, Article 1 of the Charter that human dignity be respected and protected. (28)

56. It is also worth noting, as the UNHCR points out, (29) that denial of reception conditions may also infringe other rights, in particular the right for an asylum seeker to submit and argue an asylum claim in a fair and efficient asylum procedure. (30) Such denial may also undermine the applicant's ability to pursue and substantiate his claim even after the Member State responsible for the examination of his claim has been determined. (31) As the UNHCR goes on to note, (32) denial of reception conditions may also have a material effect on the applicant's ability to exercise his right of challenge to the transfer decision laid down by Article 19(2) or Article 20(1)(e) of the Dublin II Regulation. Failure to make those rights available may risk undermining the principle enshrined in Article 18 of the Charter that the right to asylum is to be protected in accordance with the provisions of the Treaties.

57. France's remaining arguments may be dealt with briefly. It maintains, first, that the procedures for the substantive examination of an application for asylum may be lengthy, thereby justifying the application of the reception conditions. Conversely, procedures for the determination of the responsible Member State under the Dublin II Regulation are intended to be rapid. That being so (as I understand the argument), there is no need in practice for the reception conditions to apply.

58. The Dublin II Regulation does indeed aim to achieve a swift determination of the Member State responsible for the examination of an application for asylum. (33) None the less, the periods involved may be lengthy – easily over 12

months if the asylum seeker chooses to exercise his right of appeal and is permitted by the host Member State to remain there pending its resolution. (34) Indeed, it may be that the result of the application of the procedure laid down under the Dublin II Regulation in a particular case will be that the asylum seeker will never transfer to the requested Member State but will instead remain where he is. That being so, I can see no justification for France's argument.

59. Second, France contends that the Dublin II Regulation is based on the premiss that the responsible Member State must assume the burden of the asylum seeker being in the territory of the Union. To require the host Member State to provide the reception conditions would be contrary to the logic of that allocation of responsibilities.

60. Since the asylum seeker will, during the relevant period, be in the territory of the host Member State and not of the responsible Member State and since only the former can, on any practical basis, provide the conditions in question, (35) such an argument cannot, in my view, succeed.

61. Third, France contends that one of the objectives of both the Reception Conditions Directive (36) and the Dublin II Regulation is to limit secondary movements of asylum seekers. It would be contrary to that objective if asylum seekers could move among the Member States and benefit from the same level of reception conditions in each of them.

62. Since it is one of the directive's objectives that asylum seekers should indeed benefit from the same level of protection throughout the Union, (37) I can, once again, see no force in that argument.

63. Fourth, France calls in aid Directive 2005/85. (38) Since recital 29 in the preamble to that directive makes it clear that applications that are subject to the Dublin II Regulation are excluded from its scope, the right given to an asylum seeker by Article 7(1) to remain in the Member State for the purpose of the examination procedure cannot, it argues, apply to asylum seekers whose application may be subject to the taking charge or taking back procedures in the Dublin II Regulation.

64. That argument seems to me to be without merit. Directive 2005/85 exists to lay down procedures governing the granting and withdrawing of refugee status. It has no bearing on the provision of reception conditions to the asylum seekers at issue in this case. As far as those applicants are concerned, there is no need to consider Directive 2005/85. That they may legitimately be present in the host Member State is clear from Article 6(1) of the Reception Conditions Directive itself. It is not necessary to look any further.

65. Lastly, France emphasises that, when applying the Dublin II Regulation, the Member States are bound to observe the provisions of Article 1 of the Charter. There is thus no difficulty in allowing national law to govern the reception conditions of asylum seekers whose applications are subject to that regulation.

66. I cannot agree.

67. Since the Reception Conditions Directive lays down minimum reception standards for asylum seekers, it is those standards which a Member State must apply while the asylum seeker in question is on its territory. I accept the point made at the hearing that, particularly where checks concerning the asylum seeker's status have to be made, it may take a little time to ensure that the reception conditions are made available in a given case, although the verification process should not be allowed to delay matters longer than absolutely necessary. It is certainly no justification for not providing the reception conditions at all.

68. For all of the above reasons, I consider that the Reception Conditions Directive guarantees the minimum reception conditions to which it refers to applicants in respect of whom a Member State in receipt of an application for asylum decides, under the Dublin II Regulation, to refer a request to another Member State which it deems to have jurisdiction to examine that asylum application.

Question 2

69. By its second question, the referring court seeks clarification as to (a) the point at which the obligation of the host Member State to provide benefits to asylum seekers will cease in the event of those asylum seekers being transferred to another Member State and (b) the financial liability for providing those benefits.

(a) duration of the obligation to provide the reception conditions

70. The referring court offers three suggestions as to the point at which the obligation to provide the reception conditions might cease: at the moment of the acceptance decision by the Member State to which the referral was made; at the actual taking charge or taking back of the asylum seeker; or at some other date.

71. The Commission and, essentially, CIMADE and GISTI, the Czech Republic, Greece, Poland and Switzerland submit that the second of these is correct.

72. France essentially agrees with that approach. (39) They add, however, the qualification that, should an asylum seeker fail to comply with conditions lawfully imposed by the host Member State concerning his transfer to the requested

Member State, such failure should result in his losing the benefit of the reception conditions.

73. Italy submits that reception conditions should be made available for a period which, in the normal case, should not exceed six months from the date on which the application for asylum was made. It appears that, after that period, the applicable Italian legislation provides that, should the asylum seeker in question still be on the territory of that Member State, he is entitled to enter the employment market there. (40)

74. I have set out the periods which the regulation lays down for the taking charge and taking back provisions in points 16 and 18 above and, in greater detail, in the Annex. On either basis, those periods may be lengthy when aggregated, at least from the point of view of the asylum seeker. This may *a fortiori* be the case, given that (a) no time-limit is currently imposed on the host Member State to initiate the procedure in cases of taking back (41) and (b) although the legislation provides that an appeal need not have suspensive effect, the host Member State may adopt a different practice – as, according to the Commission, is often the case. It is not difficult to contemplate the transfer procedure in such cases lasting well over a year.

75. Ordinarily, an asylum seeker will be present in the host Member State throughout the period necessary to determine which Member State is responsible for examination of his application. He may also be present there for the period of any appeal. Under Regulation No 1560/2003, (42) which lays down detailed rules for the implementation of the Dublin II Regulation, that State must ensure that the applicant is put in a position, in practice, to transfer to the responsible Member State. (43) I have already indicated that I consider that asylum seekers who make their application in the territory of the host Member State are entitled to the benefit of the reception conditions notwithstanding that their application is subject to the Dublin II Regulation. (44) There seems no possible basis on which such an applicant could be provided with those benefits by the *requested* Member State during the period necessary for the arrangements concerning his transfer to be put in place. Such a situation would be quite unworkable in practice. Nor is it inevitable that, if the procedures under the regulation are initiated by the host Member State, the asylum seeker will, in fact, be taken in charge or taken back by another Member State. Those procedures may determine that he should remain where he is. (45)

76. As the Commission observes, it would be contrary to the objectives of the Reception Conditions Directive to deprive an asylum seeker of the benefit of the reception conditions otherwise than as a result of his own conduct. It clearly follows, in my view, that the obligation to make those conditions available lies with the host Member State until the point, if any, at which the asylum seeker is transferred to the requested Member State.

77. The above assumes that the procedures under the Dublin II Regulation are applied in the ordinary way. It is however possible, for example, that the asylum seeker will abscond and thus not be available for transfer at the appointed time.

78. In such a case, the host Member State cannot make the material reception conditions available for so long as it is unaware where the asylum seeker is located. Indeed, Article 16(1)(a) of the Reception Conditions Directive allows a Member State to withdraw the reception conditions where, inter alia, an asylum seeker abandons the place of residence determined by the competent authority without informing it, or without permission where permission is required, or fails to comply with reporting duties. As CIMADE and GISTI point out in their observations, where the asylum seeker is traced or voluntarily reports to the competent authority, the final subparagraph of Article 16(1)(a) will allow a Member State to decide whether it is appropriate to reinstate some or all of the reception conditions.

79. Furthermore, the Member State concerned may also reduce or withdraw the reception conditions in any of the other circumstances contemplated in Article 16 of the Reception Conditions Directive.

80. I accordingly consider that the obligation to guarantee the minimum reception conditions ceases upon the actual taking charge or taking back of the asylum seeker, or (if earlier) upon the Member State becoming entitled to reduce or withdraw those conditions pursuant to Article 16 of the Reception Conditions Directive.

(b) liability for the cost of providing the reception conditions

81. Both the Reception Conditions Directive and the regulation are silent on this point, although Switzerland notes that Article 29 of the proposed new regulation (46) would expressly make the host State liable for the costs of any transfer, a point which it considers represents current practice.

82. Of the parties who have submitted observations, those making the most substantive contribution to the discussion take the view that a system whereby the costs should fall to the requested State would be unworkable in practice and would be liable to lead to expensive and unnecessary litigation. In the absence of any other indications, it is difficult to take issue with such a view.

83. More fundamentally, it seems to me that the whole system of providing protection for asylum seekers and refugees is predicated on the burden lying where it falls. Such an approach seems to me to reflect the reality of the situation. The presence of asylum seekers in the territory of the Union does not result from the implementation of planned policy measures which can be legislated for in advance. In an ideal world, the problem would not arise. Each Member State must address

the issues that the presence of asylum seekers on its territory gives rise to, subject to compliance with its obligations under Union law. (47)

84. That rule is of course subject to any specific provisions that may be adopted in order to provide relief or to remedy obvious discrepancies from time to time. In that regard, the Commission notes that, by virtue of Article 3(1)(a) of Decision No 573/2007, (48) financial assistance may be made available to Member States in respect, inter alia, of reception conditions and asylum procedures. (49) Financial assistance given through the Union budget is evidence of the spirit of cooperation between Member States on which the system set up by the Dublin II Regulation is predicated. However, subject to any derogations of the kind I have just mentioned, I am of the view that the overriding principle must be that the financial burden in this instance should lie with the host Member State.

85. I accordingly consider that the financial burden of providing the reception conditions to an asylum seeker whose application is subject to the Dublin II Regulation should, for so long as that person is entitled to the benefit of those conditions by virtue of the Reception Conditions Directive, lie with the host Member State for the purposes of that directive.

Conclusion

86. I am therefore of the opinion that the Court should answer the questions referred by the Conseil d'État as follows:

(1) Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers guarantees the minimum reception conditions to which it refers to applicants in respect of whom a Member State in receipt of an application for asylum decides, under 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 made in one of the Member States by a third-country national, to refer a request to another Member State which it deems to have jurisdiction to examine that asylum application.

(2)(a) The obligation to guarantee the minimum reception conditions ceases upon the actual taking charge or taking back of the asylum seeker, or (if earlier) upon the Member State becoming entitled to reduce or withdraw those conditions pursuant to Article 16 of Directive 2003/9.

(2)(b) The financial burden of providing the reception conditions to an asylum seeker whose application is subject to Regulation No 343/2003 should, for so long as the person in question is entitled to the benefit of those conditions by virtue of Directive 2003/9, lie with the host Member State for the purposes of that directive.

ANNEX

TABLE OF TIMESCALES LAID DOWN BY THE DUBLIN II REGULATION

I – REFERRAL BY THE HOME STATE TO THE REQUESTED STATE

A – *Taking charge*

Period: The request must be sent within **three months** of registration of the application for asylum.

Source: Article 17(1)

Comments: Failure to satisfy the deadline will result in the host State becoming responsible for the examination of the application (Article 17(1)).

B – *Taking back*

Period: No time-limit is imposed on the making of a request for taking back. (50)

Source: Article 20

II – POSITIVE RESPONSE OR NO RESPONSE FROM THE REQUESTED STATE

A – *Taking charge*

Period: The requested State must respond within **two months** of reception of the request or, in cases of urgency declared by the home State, within a period of a minimum of one week and a maximum of one month.

Source: Article 18(1) (see Article 17(2) and Article 18(6) as regards cases of urgency)

Comments: Failure to respond within this period is considered to be acceptance (Article 18(7)).

B – *Taking back*

Period: The requested State has **one month** to respond, save where the request is based on data obtained via Eurodac when the period is one of two weeks.

Source: Article 20(1)(b)

Comments: Failure to respond within the relevant period is considered to be acceptance (Article 20(1)(c)).

III – **TRANSFER OF THE ASYLUM SEEKER FROM THE HOME STATE TO THE REQUESTED STATE**

Taking charge and taking back

Period: The transfer period **starts with the explicit or implicit response from the requested State.** There is a period of **six months** for the transfer, save where the asylum seeker is in prison, when the period is extended to 12 months, and where he has absconded, when the period is extended to 18 months.

Source: Article 19(3) and (4) (for taking charge) and Article 20(1)(d) and Article 20(2) for taking back)

Comments: If there is no transfer within the relevant period, responsibility for examining the application for asylum falls to the host Member State. Article 19(2) (for taking charge) and Article 20(1)(e) (for taking back) allow an appeal to be brought by the asylum seeker. The appeal need not have suspensive effect, but may do so in certain cases.

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1 – Original language: English.

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2 – Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (OJ 2003 L 31, p. 18).

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3 – 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). There are proposals for the replacement of the directive and the regulation (respectively, COM(2011) 320 final and COM(2008) 820 final).

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4 – See Chapter V, Articles 16 to 20, of the regulation.

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5 – See the Conclusions of the Tampere European Council at www.cvce.eu.

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6 – Paragraph 13. See the Geneva Convention relating to the status of refugees of 28 July 1951, as amended by the Protocol signed in New York on 31 January 1967, a number of whose provisions also apply to asylum seekers (see point 4.1.2 of the document referred to in footnote 19 below). The preamble to the convention narrates the concern of the United Nations to assure the widest possible exercise by refugees of fundamental rights and freedoms.

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7 – The Office of the United Nations High Commissioner for Refugees.

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8 – The definition in the regulation omits the reference to stateless persons which is included in the directive. Nothing turns on that for the purposes of this Opinion.

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9 – Those criteria are largely based on the presence of family members of the applicant in a particular Member State and the documentation held by the asylum seeker when he makes his application.

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10 – Article 17(1). Shorter time scales apply where the Member State issuing the request seeks an urgent reply.

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11 – Article 18(1).

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12 – Article 19(1) and (3).

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13 – Where the request is based on Eurodac data, the period is two weeks. See Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of ‘Eurodac’ for the comparison of fingerprints for the effective application of the Dublin Convention (OJ 2000 L 316, p. 1).

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14 – Article 20(1)(b) and (d).

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15 – See Article 19(2) as regards taking charge and Article 20(1)(e) as regards taking back.

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16 – Following the entry into force of the Treaty of Lisbon, with effect from 1 December 2009 the Charter has the force of primary law (Article 6(1) TEU).

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17 – The acronym stands for ‘Comité inter mouvements auprès des évacués’.

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18 – That is to say, the host Member State.

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19 – CIMADE and GISTI annex to their observations a document entitled ‘UNHCR Statement on the reception conditions of asylum seekers under the Dublin procedure’ (‘the UNHCR statement’). That document was issued by the UNHCR specifically in order to address the issues raised by this case. It can be inspected at www.unhcr.org/refworld/docid/4e37b5902.html.

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20 – By virtue of Article 5(2) of the Agreement between the European Community and the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland (OJ 2008 L 53, p. 5), Switzerland may submit written observations to the Court in preliminary ruling procedures concerning the interpretation of, inter alia, the Dublin II Regulation (but not the Reception Conditions Directive). That country’s observations are therefore limited to Questions 2(a) and (b).

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21 – To give the question some context: CIMADE stated at the hearing, without being contradicted, that in 2011 some 8% of applications in France involved the procedure under the Dublin II Regulation, thus generating 4 450 requests to other Member States. Of those requests, approximately 75% resulted in transfers being made under the regulation, while some 25% were refused.

22 – See the definition set out in Article 2(j) of the directive cited in point 7 above.

23 – See point 4.2.5 of the UNHCR Statement.

24 – See, to that effect, Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08 *Salahin Abdulla and Others* [2010] ECR I-1493, paragraph 53.

25 – At recitals 1 to 3 in each case.

26 – See points 6 and 13 above.

27 – See Recital 16.

28 – See, in that regard, *Salahadin Abdulla and Others*, cited in footnote 24 above, paragraph 54. Member States may of course apply *more* favourable provisions (Article 4 of the Reception Conditions Directive).

29 – See point 4.2.7 of the UNHCR Statement.

30 – To which he is entitled by virtue of Article 47 of the Charter.

31 – In its proposal for the directive which became the Reception Conditions Directive (COM(2001) 181 final), the Commission noted that ‘the reduction or withdrawal of reception conditions can affect the standard of living of applicants and their ability to effectively pursue procedural guarantees’.

32 – See, to that effect, point 4.2.8 of the UNHCR Statement.

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33 – See, for example, recital 4 in the preamble to the Dublin II Regulation, according to which the procedures laid down under the regulation should make it possible ‘to determine rapidly’ the Member State which is responsible.

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34 – See further points 16 and 18 above.

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35 – The ‘material reception conditions’ defined in Article 2(j) of the directive include various benefits in kind, such as housing, food and clothing. Although it is true that an equivalent can be provided ‘as financial allowances or in vouchers’, the administrative ramifications would be very considerable.

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36 – See recital 8 in the preamble to the Reception Conditions Directive.

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37 – See, in particular, recital 7 in the preamble to the Reception Conditions Directive.

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38 – 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).

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39 – The latter presents its observations regarding Question 2 in the alternative, in the event that the Court should decide to give an affirmative answer to Question 1.

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40 – In her reply at the hearing, counsel for Italy was at pains to emphasise that those arrangements did not mean that the asylum seeker in question ceased to be entitled to the reception conditions at that point. Such a position seems to conflict, or is at least difficult to reconcile, with Italy’s written observations. Since, in any event, I do not agree with Italy’s position, I do not explore the point further.

41 – Under the proposed new regulation (see footnote 3 above), a Member State would be required to submit an application to the requested Member State within three months of the date on which the application for asylum (there termed ‘international protection’) was lodged or within three months of becoming aware that another Member State may be responsible for the person concerned. Where Eurodac data are used, the period is reduced to two months.

42 – Commission Regulation (EC) No 1560/2003 of 2 September 2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (OJ 2003 L 222, p. 3).

43 – See, for example, Article 7(3) (making available of the applicant’s documents) and Article 8(2) (obligation to arrange for transport).

44 – See point 68 above.

45 – See point 58 above.

46 – See footnote 3 above.

47 – See, in that regard, point 3.1 of the Commission’s explanatory memorandum in its proposal for the Dublin II Regulation (COM(2001) 447 final), according to which ‘each Member State is answerable to all the others for its actions concerning the entry and residence of third-country nationals and must bear the consequences thereof in a spirit of solidarity and fair cooperation’.

48 – Decision No 573/2007/EC of the European Parliament and of the Council of 23 May 2007 establishing the European Refugee Fund for the period 2008 to 2013 as part of the General programme Solidarity and Management of Migration Flows

and repealing Council Decision 2004/904/EC (OJ 2007 L 144, p. 1). Article 3(1)(a) defines ‘reception conditions and asylum procedures’ as actions that are eligible for support from the fund. Article 12(1) establishes a financial envelope for the implementation of the decision of EUR 628 million for the period from 1 January 2008 to 31 December 2013.

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49 – At the hearing, the Commission confirmed that, while the amount might vary as between Member States, depending on the terms of their funding application and the number of asylum seekers in their territory, all Member States would qualify for assistance under the decision. Such assistance would not, however, meet all the costs incurred by Member States in providing the reception conditions.

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50 – See footnote 41 above as regards the period specified under the proposed new regulation.