OPINION OF ADVOCATE GENERAL

JÄÄSKINEN

delivered on 18 April 2013 (1)

Case C-4/11

Bundesrepublik Deutschland

v

Kaveh Puid

(Reference for a preliminary ruling from the Hessischer Verwaltungsgerichtshof (Germany))

(Common European Asylum System – Procedures for its judicial enforcement – Council Regulation No 343/2003 – Determination of the Member State responsible for the examination of an asylum application presented by a third country national – Article 3(2) – Rights of asylum seekers – Exceptional situations as defined in Joined Cases C-411/10 and C-493/10 N.S. and Others – Article 19(2) – Suspension of transfer of asylum seekers)

I – **Introduction**

1. The European Union has harmonised both the procedures (2) and substantive rules of refugee law, (3) thereby establishing a complete body of rules law within the Common European Asylum System. It is founded on respect for relevant rules of international law, including the principle of non-refoulement. It restricts examination of an asylum application to a single Member State, and provides for transfer of the asylum seeker to the Member State responsible for processing an asylum application if asylum is sought elsewhere in the European Union. Identification of this Member State is governed by 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. (4)

2. This preliminary reference seeks clarification of the position of asylum seekers who lodge an application for asylum in a Member State other than the Member State of first entry into the European Union, but whose transfer to the Member State of first entry is excluded because of systemic deficiencies in that Member State's asylum procedure and in its reception conditions.

3. The case to hand builds on the ruling of the Court of Justice in Joined Cases C-411/10 and C-493/10 *N.S. and Others* [2011] ECR I-0000. There it was established that European Union ('EU') law precludes the application of a conclusive presumption that the Member State indicated by Article 3(1) of Regulation No 343/2003 as responsible to examine an asylum application observes the fundamental rights of the European Union. (5) In essence,

the Court is asked to rule on the impact of this finding on the operation of the so called 'sovereignty clause' contained in Article 3(2) of the regulation.

4. In *N.S.* the Court held, inter alia, that Article 4 of the Charter of Fundamental Rights stops Member States, including their courts, from transferring an asylum seeker to the 'Member State responsible' within the meaning of Regulation No 343/2003, even though they would be otherwise entitled to do so, where they '*cannot be unaware* that *systemic deficiencies* [my emphasis] in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman and degrading treatment within the meaning of that provision.' (6)

5. In this case the Hessischer Verwaltungsgerichtshof (Higher Administrative Court of Hesse) wonders whether there is a judicially enforceable claim, in the hands of asylum seekers, to compel a Member State to examine their applications for asylum based on a duty of that Member State to exercise its competence pursuant to the first sentence of Article 3(2) Regulation No 343/2003, in circumstances similar to those described in the *N.S.* judgment. This is the fourth of four questions in the preliminary reference sent by the Hessischer Verwaltungsgerichtshof, that court having withdrawn the three other questions after the delivery of the judgment of the Court in *NS*. These three questions concerned the impact of the circumstances described in paragraph 4 for the application of Regulation No 343/2003.

II – **Legal framework**

A – *International law*

6. Article 33(1) of 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') (7) headed 'Prohibition of expulsion or return ("refoulement")', provides:

'No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.'

B – *EU law*

Regulation No 343/2003

7. Recitals 3, 4, 12 and 15 of Regulation No 343/2003 state:

'(3) The Tampere [European Council] conclusions also stated that this [European Asylum System] should include, in the short term, a clear and workable method for determining the Member State responsible for the examination of an asylum application.

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

…

(12) With respect to the treatment of persons falling within the scope of this Regulation, Member States are bound by obligations under instruments of international law to which they are party.

…

(15) 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.'

8. Article 1 of Regulation No 343/2003 states:

'This Regulation lays down the criteria and mechanisms for determining the Member State responsible for examining an application for asylum lodged in one of the Member States by a third-country national.'

9. Article 3(1) to (3) of Regulation No 343/2003 states:

'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. Where appropriate, it shall inform the Member State previously responsible, the Member State conducting a procedure for determining the Member State responsible or the Member State which has been requested to take charge of or take back the applicant.

3. Any Member State shall retain the right, pursuant to its national laws, to send an asylum seeker to a third country, in compliance with the provisions of the Geneva Convention.'

10. Chapter III of Regulation No 343/2003 consists of 10 articles establishing a hierarchy of criteria for determining the Member State responsible to process an asylum application. Article 5, in Chapter III of Regulation No 343/2003 states:

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

2. The Member State responsible in accordance with the criteria shall be determined on the basis of the situation obtaining when the asylum seeker first lodged his application with a Member State.'

11. Article 10(1) of Regulation No 343/2003 states:

‘Where it is established, on the basis of proof or circumstantial evidence as described in the two lists mentioned in Article 18(3), including the data referred to in Chapter III of Regulation (EC) No 2725/2000, that an asylum seeker has irregularly crossed the border into a Member State by land, sea or air having come from a third country, the Member State thus entered shall be responsible for examining the application for asylum. This responsibility shall cease 12 months after the date on which the irregular border crossing took place.’

12. Article 13 of Regulation No 343/2003 states:

‘Where no Member State responsible for examining the application for asylum can be designated on the basis of the criteria listed in this Regulation, the first Member State with which the application for asylum was lodged shall be responsible for examining it.’

13. Article 15(1) of Regulation No 343/2003 states:

‘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. In this case that Member State shall, at the request of another Member State, examine the application for asylum of the person concerned. The persons concerned must consent.’

14. Article 16(1) of Regulation No 343/2003 states:

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

…

(b) complete the examination of the application for asylum;

…’

15. Article 17(1) of Regulation No 343/2003 states:

‘Where a Member State with which an application for asylum has been lodged considers that another Member State is responsible for examining the application, it may, as quickly as possible and in any case within three months of the date on which the application was lodged within the meaning of Article 4(2), call upon the other Member State to take charge of the applicant.

…’

16. Article 19(1) and (2) of Regulation No 343/2003 states:

‘1. Where the requested Member State accepts that it should take charge of an applicant, the Member State in which the application for asylum was lodged shall notify the applicant of the decision not to examine the application, and of the obligation to transfer the applicant to the responsible Member State.

2. The decision referred to in paragraph 1 shall set out the grounds on which it is based. It shall contain details of the time limit for carrying out the transfer and shall, if necessary, contain information on the place and date at which the applicant should appear, if he is travelling to the Member State responsible by his own means. This decision may be subject to an appeal or a review. Appeal or review concerning this decision shall not suspend the implementation of the transfer unless the courts or competent bodies so decide on a case by case basis if national legislation allows for this.'

17. Article 13 of Directive 2004/83 states:

'Granting of refugee status

Member States shall grant refugee status to a third country national or a stateless person who qualifies as a refugee in accordance with Chapters II and III.'

18. Article 25(1) of Directive 2005/85 states:

'Inadmissible applications

1. In addition to cases in which an application is not examined in accordance with Regulation (EC) No 343/2003, Member States are not required to examine whether the applicant qualifies as a refugee in accordance with Directive 2004/83/EC where an application is considered inadmissible pursuant to this Article.'

19. Article 39(1) and (2) of Directive 2005/85 states:

'The right to an effective remedy

1. Member States shall ensure that applicants for asylum have the right to an effective remedy before a court or tribunal, against the following:

(a) a decision taken on their application for asylum, including a decision:

(i) to consider an application inadmissible pursuant to Article 25(2),

…

2. Member States shall provide for time-limits and other necessary rules for the applicant to exercise his/her right to an effective remedy pursuant to paragraph 1.'

C – *National legislation*

20. Paragraph 16a(1) and (2) of the Grundgesetz (Basic Law) provide as follows:

'Persons persecuted on political grounds shall have the right of asylum.

Paragraph (1) of this Article may not be invoked by a person who enters the federal territory from a member state of the European Communities or from another third state in which the application of the Convention Relating to the Status of Refugees and of the Convention for the Protection of Human Rights and Fundamental Freedoms is assured. The states outside the

European Communities to which the criteria of the first sentence of this paragraph apply shall be specified by a law requiring the consent of the Bundesrat (Federal Council). In the cases specified in the first sentence of this paragraph, measures to terminate an applicant's stay may be implemented without regard to any legal challenge that may have been instituted against them.'

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

21. Mr Kaveh Puid (the asylum seeker) is an Iranian citizen who, on 20 October 2007, flew from Teheran to Athens. After staying for four days in Athens, he travelled to Frankfurt am Main. On arrival at passport control there he declared himself to be an asylum seeker, and was arrested and detained awaiting removal. He had travelled both legs of the journey with a forged travel document.

22. On 15 November 2007 the asylum seeker asked the Verwaltungsgericht Frankfurt am Main (Administrative Court, Frankfurt am Main) to, inter alia, oblige the Federal Republic of Germany to authorise his entry, and to refer him to the body responsible for declaring the Member State responsible under Article 3(2) of Regulation No 343/2003. The Verwaltungsgericht Frankfurt am Main ordered the Federal Republic of Germany to tell the competent police presence at Frankfurt airport that the refoulement of the asylum seeker to Greece was provisionally forbidden until 16 January 2008 at the latest.

23. The Bundesamt für Migration und Flüchtlinge (German Federal Office for Migration and Refugees; 'the Federal Office') determined by decision of 14 December 2007 that the asylum application was inadmissible and ordered that the asylum seeker be removed to Greece. Its main grounds for arriving at that decision were that, under Regulation No 343/2003, Greece was responsible for processing the asylum application because of the time-limits set by Articles 17(2) and 18(4) and (7) of Regulation No 343/2003, and that there were no extraordinary humanitarian grounds justifying the assumption of responsibility of the Federal Republic of Germany under Article 3(2) of Regulation No 343/2003. The Federal Office took the view that Greece was a safe third country for the purposes of Article 16a(2) of the Basic Law, and the European Commission, which is in charge of ensuring minimum standards, had not thus far called on the Member States to refrain from transferring persons to Greece. That being so, on 23 January 2008 the asylum seeker was removed to Athens.

24. However, by 25 December 2007 the asylum seeker had already brought an action before the Verwaltungsgericht seeking the annulment of the decision of the Federal Office of 14 December 2007, and an order that the Federal Republic of Germany be declared responsible for the processing of his application for asylum due to Article 3(2) of Regulation No 343/2003.

25. The Verwaltungsgericht ordered that the asylum seeker be present in person at the hearing. To that end he was authorised to travel to Germany.

26. By judgment of 8 July 2009 the Verwaltungsgericht annulled the decision of the Federal Office of 14 December 2007 and determined that the enforcement of the removal order against the asylum seeker was unlawful. The Federal Office was required to annul the removal order of 14 December 2007 and to restore the status quo.

27. The Verwaltungsgericht reasoned, in essence, that the Federal Office was required to assume responsibility for the asylum application by exercising the right to that effect under Article 3(2) of Regulation No 343/2003. The discretion of the Federal Office was reduced to zero once it had become apparent that the minimum standards for the reception of asylum seekers and the carrying out of the asylum procedure were not respected in Greece, and that the asylum seeker's procedural rights had been seriously infringed, along with the conditions for his reception during his period of residence in Greece. This went against the very purpose and content of the relevant directives. In addition, the Verwaltungsgericht ordered the Federal Office to grant the applicant a temporary residence permit until the judgment had become final.

28. The judgment of the Verwaltungsgericht was appealed to the Hessischer Verwaltungsgerichtshof on the basis that the point of law on which the judgment was based, namely that Germany was required to exercise its right to assume responsibility under Article 3(2) of Regulation No 343/2003, was not convincing. The Federal Republic, represented by the Federal Office, argued, inter alia, that the fact that the Member State assuming responsibility had not acted in accordance with the directives on the reception of asylum seekers and on minimum standards for asylum procedures was not to be taken into account, above and beyond serious infringements of the European Convention of Human Rights, when deciding on whether to exercise the right to assume responsibility. The Federal Office contended that shortcomings in the accommodation and maintenance of asylum seekers did not relieve a Member State of its responsibility to carry out the procedure. Otherwise asylum seekers would end up with the right to be transferred to any Member State to which they have travelled.

29. The Hessischer Verwaltungsgerichtshof considered it necessary to refer four preliminary questions to the Court of Justice, and decided to do so on 22 December 2010. The first three questions were then withdrawn, because they were answered, in substance, in the judgment delivered in *N.S.* on 21 December 2011.

30. In addition to this, the Federal Office, by a decision of 20 January 2011, annulled its decision of 14 December 2007, and decided to use its competence to examine the application under Article 3(2) of Regulation No 343/2003. By a decision of 18 May 2011 the Federal Office rejected the asylum seeker's application for asylum under Article 16(a) of the Basic Law, but recognised him as qualifying as a refugee (Flüchtlingseigenschaft).

31. According to the national court, the preliminary reference is not deprived of legal pertinence because, under German law, the asylum seeker has a legal interest in requiring review of the legality of the decision 14 December 2007 of the Federal Office by the Hessischer Verwaltungsgerichtshof, the developments described above notwithstanding. This is so because he was unlawfully detained by being sent back to Greece, has meanwhile sought a declaration that the decision of 14 December 2007 was illegal, and sought compensation.

32. The national court has also confirmed that there still exists a divergence of views as to the answer to the remaining fourth preliminary question. It is worded as follows:

'Does an enforceable personal right on the part of the asylum seeker to force a Member State to assume responsibility result from the duty of the Member States to exercise their right under the first sentence of Article 3(2) of Regulation No 343/2003?'

33. Written observations were received in the light of the original four questions sent by the Hessischer Verwaltungsgerichtshof by Mr Puid, Germany, Belgium, Ireland, Greece, France, Italy, Poland, the United Kingdom of Great Britain and Northern Ireland, Switzerland and the Commission. Of these, the written submission of Italy provided no observations concerning question 4, and Belgium did not address it directly. Representatives of Mr Puid, Ireland, Greece and the Commission participated at the hearing of 22 January 2013.

IV – **Analysis**

A – *Preliminary observations*

1. Background to the Common European Asylum System

34. The European Council meeting in Strasbourg on 8 and 9 December 1989 fixed as an objective the harmonisation of the asylum policies of the Member States.

35. The Member States signed in Dublin on 15 June 1990 a Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities ('the Dublin Convention'). (8)

36. The Maastricht Treaty declared, in Article K1(1) TEU, asylum policy as a matter of common interest. Article 63 EC, adopted by the Amsterdam Treaty, obliged the Council to define within a period of five years after the entry into force the Amsterdam Treaty, inter alia, measures in accordance with the Geneva Convention, concerning determination of the Member state responsible for considering an application for asylum submitted by a national of a third country in one of the Member States, minimum standards on the reception of asylum seekers, minimum standards with respect to qualification of nationals of third countries as refugees and minimum standards on procedures in Member States for granting or withdrawing refugee status. This provision is now included in Article 78 TFEU.

37. The European Council, meeting at Tampere on 15 and 16 October 1999 envisaged the establishment of a Common European Asylum System. This system has been implemented, inter alia, by Regulation No 343/2003 replacing the Dublin Convention, and Directives 2003/9, 2004/83 and 2005/85.

38. Article 18 of the Charter of Fundamental rights of the European Union ('the Charter') as well as Article 78 TFEU provide that the right to asylum is to be guaranteed with due respect for the Geneva Convention. According to Article 4 of the Charter no one shall be subjected to torture or other inhuman or degrading treatment or punishment. Article 19(2) of the Charter forbids removal, expulsion or extradition to a State where there is a serious risk of inhuman or degrading treatment. Article 47 of the Charter guarantees a right to an effective remedy and to a fair trial before a tribunal to everyone whose rights and freedoms guaranteed by the law of the Union are violated.

2. The findings of the Court in *N.S.*

39. I find it helpful to briefly summarise the issues considered by the Court in the *N.S.* case, and its findings, before proceeding to answering the remaining preliminary question. *N.S.* addressed the following issues that are relevant to the case to hand.

40. The circumstances considered by the Court were similar to those in the main proceedings. N.S, an Afghan national, arrived in the United Kingdom and applied for asylum on the same day. Before arriving in the United Kingdom he had travelled through several European countries, including Greece, where he had not made an asylum application, but where he had been held for four days. The Secretary of State for the Home Department made a request to Greece to take charge of N.S. in order to examine his asylum application. Greece failed to respond, and was accordingly deemed to have accepted responsibility for examining the appellant's claim.

41. NS resisted his removal to Greece from the United Kingdom on the basis that there was a risk that his fundamental rights under EU law, the European Convention of Human Rights and/or the Geneva Convention would be breached if he were returned to Greece. The dispute made its way to the United Kingdom Court of Appeal, which referred seven preliminary questions to the Court.

42. As I have already mentioned, the Court held that EU law precludes the operation of a conclusive presumption that the responsible Member State to which a Member State proposes to transfer an asylum seeker will observe the asylum seekers fundamental rights under EU law.

43. This was so because, inter alia, the 'Common European Asylum System is based on the full and inclusive application of the Geneva Convention and the guarantee that nobody will be sent back to a place where they again risk being persecuted' and the fact that 'Article 18 of the Charter and Article 78 TFEU provide that the rules of the Geneva Convention and the 1967 Protocol are to be respected'. (9) It was held that 'if there are substantial grounds for believing that there are systemic flaws in the asylum procedure and reception conditions for asylum applicants in the Member State responsible, resulting in inhuman or degrading treatment, within the meaning of Article 4 of the Charter, of asylum seekers transferred to the territory of that Member State, the transfer would be incompatible with that provision'. (10)

44. This was held to be applicable when a Member State where an asylum seeker is located 'cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers' in the 'Member State responsible' under Regulation No 343/2003 'amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter'. (11)

45. In addition, the Court held that a Member State that finds itself in this situation, and in possession of this threshold of knowledge, will be bound by further obligations. They were described as follows:

'Subject to the right itself to examine the application referred to in Article 3(2) of Regulation No 343/2003, the finding that it is impossible to transfer an applicant to another Member State, where that State is identified as the Member State responsible in accordance with the criteria set out in Chapter III of that regulation, entails that the Member State which should carry out that transfer must continue to examine the criteria set out in that chapter in order to establish whether one of the following criteria enables another Member State to be identified as responsible for the examination of the asylum application.

The Member State in which the asylum seeker is present must, however, ensure that it does not worsen a situation where the fundamental rights of that applicant have been infringed by using a procedure for determining the Member State responsible which takes an unreasonable length of time. If necessary, the first mentioned Member State must itself examine the application in accordance with the procedure laid down in Article 3(2) of Regulation No 343/2003.' (12)

3. The question referred by the Hessischer Verwaltungsgerichtshof

46. It is first necessary to bring some clarity to the question referred. This is because of the link between the remaining preliminary question with the three withdrawn preliminary questions, and more particularly the third withdrawn question which was worded as follows:

'Is there a duty on the part of the Member State to exercise its right under the first sentence of Article 3(2) of Regulation No 343/2003 in view of the guarantees laid down in the Charter of Fundamental Rights referred to above at any rate if, in the Member State assuming responsibility, particularly serious deficiencies exist which could fundamentally compromise the procedural guarantees for asylum seekers or pose a threat to the existence or the physical integrity of the transferred asylum seeker?'

47. In my opinion the essence of the remaining preliminary question relates to the legal position of an asylum seeker in the Member State where the asylum application has been lodged, when the conditions in the Member State responsible under the rules of Regulation No 343/2003 are as described in *NS*. More particularly, the question concerns the responsibilities of the former Member State, and especially its courts, along with the rights of the asylum seeker and the available remedies. It is in this sense that I intend to analyse the preliminary question.

B – *The answer to the preliminary question*

1. Fundamental principles of EU asylum law

48. The fundamental principle of the Geneva convention is the principle of non-refoulement which protects a refugee against being expelled or returned to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

49. The principle of non-refoulement forms the essence of the fundamental right to asylum guaranteed in Article 18 of the Charter and Article 78(1) TFEU. These provisions do not create for the asylum seekers a subjective substantive right to be granted asylum, (13) but a right to fair and effective examination of the application for asylum, together with the right not to be transferred to countries or territories in breach of the principle of non-refoulement.

50. However, a subjective right to refugee status is provided in EU law in the light of the harmonisation of the conditions for granting of refugee status under Directive 2004/83, for persons fulfilling the criteria set out therein. This applies without prejudice to EU law provisions relating to transfer of asylum seekers to safe third countries.

51. The grant and withdrawal of refugee status has also been harmonised with respect to procedure. More particularly, Directive 2005/85 sets out minimal standards in this regard, including the right to an effective remedy in appeals procedures.

52. However, the application of Directive 2005/85, and in consequence Directive 2004/83, is only the second step in the handling of an application for asylum lodged by a third country national or a stateless person. As a first step it is necessary to determine the Member State responsible for examination of the application.

53. This takes place in accordance with Regulation No 343/2003 on the basis of objective criteria set out in hierarchical order, and which result in a single Member State being responsible for examination of the application. However, the regulation also vests Member States with discretion to take the responsibility for examination of the application, either on the humanitarian grounds specified in Article 15 of Regulation No 343/2003, or as a result of their own choice pursuant to Article 3(2) of Regulation No 343/2003.

54. The principle of non-refoulement also underpins the system created by Regulation No 343/2003, which seeks to organise and give structure to the examination of applications for asylum within the European Union and combat forum shopping. The Member States are in any case bound by the Geneva Convention and the European Convention of Human Rights. Therefore they cannot transfer asylum seekers to other Member States unless there are guarantees that this principle will be observed. Hence, the system established by the Dublin Convention and Regulation No 343/2003 is based on mutual trust between the Member States. In other words, Regulation No 343/2003 relies on the assumption that all the Member States of the European Union can be considered to be safe countries for asylum seekers, and that Member States observe the principle of non-refoulement in relation to third countries.

55. In order to answer the question referred by the Hessicher Verwaltungsgerichtshof, it is first necessary to analyse the interpretation of Regulation No 343/2003 that is applicable under normal circumstances. This makes it possible to then consider its interpretation in a situation such as that described in *NS*, where the basic presumption of the capacity of the Member State prima facie responsible for examination of the application for asylum to fulfil its obligations under the Common European Asylum System no longer holds true.

2. Interpretation of Regulation No 343/2003

56. The conclusions of the Tampere European Council state that a Common European Asylum System should include a ‘clear and workable determination of the State responsible for the examination of an asylum application’. (14) In my opinion this is the touchstone against which the answer to the preliminary question needs to be guided. An answer that was inconsistent with the goals of clarity and workability would be contrary to both the purpose of Regulation No 343/2003 and the objectives of the Common European Asylum System. It must be borne in mind that, according to settled case-law, in interpreting a provision of EU law it is necessary to consider not only its wording, but also the context in which it occurs and the objective pursued by the rules of which it is part. (15)

57. Regulation No 343/2003 is committed to both speed in the processing of asylum applications, and the prevention of forum shopping. For example recital 4 of Regulation No 343/2003 states that the ‘objective of the rapid processing of asylum applications’ is not to be compromised, (16) while strict timetables for either taking charge of an asylum application,

or returning the asylum seeker to the Member State responsible, are set by Chapter V of Regulation No 343/2003. (17) The goal of the prevention of forum shopping is reflected in Articles 9 to 12, which provide that the Member State having issued the necessary travel documents, or that of first entry, be it legal or illegal, shall be responsible for examining the application for asylum, subject only to certain specific exceptions. (18) It is true that Article 15 (the so-called humanitarian clause) and Article 3(2) (the so-called sovereignty clause) provide scope for the exercise of discretion, but this is vested in the Member States and not asylum seekers. (19)

58. Moreover, as stated in recital 16 and in Article 1, the objective of Regulation No 343/2003 is 'the establishment of criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States'. In other words, Regulation No 343/2003 is not directed at vesting individuals with rights, but with organising relations between Member States (20) even though it contains some elements that are not irrelevant to the rights of asylum seekers. All this, coupled with the fact that Article 3(2) of Regulation No 343/2003 is a discretionary measure, points away from an interpretation that would vest asylum seekers with any individual rights relating to the application of that provision. As the Court has consistently held, while regulations generally have immediate effect in the national legal systems of the Member States without it being necessary for the national authorities to adopt measures of application, or without it being necessary for the EU legislature to adopt supplementary legislation, some of the provisions of a regulation may, however, necessitate, for their implementation, the adoption of measures of application either by the Member States or by the EU legislature itself. (21)

59. Further measures are plainly required when a Member State is vested with discretion. Therefore, under normal circumstances asylum seekers cannot derive any right from the provisions of Regulation No 343/2003 to the effect that they could require a Member State other than the one responsible in accordance therewith to examine their application for asylum. As pointed out in the written observations of the Commission, for a provision of EU law to produce direct effects in relations between individuals and Member States, there must be a clear and unconditional obligation imposed on Member States, the execution or effects of which are not subject to intervention by an act of the Member States or the Commission. Article 3(2) of Regulation No 343/2003 does not correspond to these criteria. (22)

3. Application of Regulation No 343/2003 in exceptional situations

60. However, the preliminary question does not relate to normal application of Regulation No 343/2003 but to exceptional situations where the Member State prima facie responsible for examination of the application for asylum has failed to apply the Common European Asylum System, and to such a degree that applicants for asylum cannot be transferred there. My conclusion here will be that, in such circumstances, it is ultimately for the national courts to safeguard the principles established by the Court in *NS*, all the more so because of the well established positive obligation on Member States to ensure compliance with the prohibition on inhuman or degrading treatment.

61. In the paragraphs that follow, I shall define *exceptional situations* as those that fulfil both the substantive and the evidential threshold set out by the Court in *NS*. The substantial condition was held by the Court to be a situation where there are *systemic flaws* in the asylum procedure and reception conditions for asylum applicants in the Member State responsible for examination of the application for asylum under Regulation No 343/2003, resulting in

inhuman or degrading treatment. The Court set the *evidential condition* at the point at which the Member State that would normally transfer the asylum seeker cannot be *unaware of systemic deficiencies* in the asylum procedure and in the reception conditions of asylum seeker in that other Member State, so that there are substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment. In fact, the evidential standard is set out to the point where it has become notorious that asylum seekers cannot be transferred to the Member State concerned. (23)

62. It is evident that, with these qualifications, the Court has aimed at establishing a high barrier against the setting aside of the principle of mutual trust underlying Regulation No 343/2003. This means that the principle of mutual trust may not be placed under question through systematic examination, in each procedure entailing an application for asylum, of the compliance of other Member States with their obligations under the Common European Asylum System. A contrary interpretation would be inconsistent with the primary objectives of Regulation No 343/2003, which is to organise responsibilities among the Member States, ensure speed in the processing of asylum applications, and prevent forum shopping.

63. Therefore, when a Member State in which the asylum application has been lodged cannot be unaware of systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers leading to a real risk of inhuman or degrading treatment in the Member State which would otherwise be responsible under Regulation No 343/2003, their competent authorities should desist from transferring asylum applicants to that Member State of their own motion. They should do so without being compelled by the national courts, or by request of the asylum seeker concerned. Even though Article 3 (2), as a discretionary measure, does not vest individuals with rights, this in no way attenuates the positive obligation on Member States, including their courts, to refrain from taking action that would expose asylum seekers to inhuman and degrading treatment as prescribed in *NS*. Indeed, the *NS* case itself established that the Charter is applicable in the context of exercise of discretion. With respect to EU asylum law, *NS* obligations are triggered once the Member State agency concerned, be it a court or otherwise, has determined that the *NS* threshold conditions, described above, exist in the otherwise 'responsible' Member State.

64. That said, answering the preliminary question requires examination of the following: (i) the position of the Member State in the exceptional situation of exposing an asylum seeker to inhuman and degrading treatment if transfer is effected; and (ii) the rights of the asylum seeker and the available remedies.

a) The position of a Member State in the exceptional situation

65. As to the position of the Member State that finds itself in the above described exceptional situation, it follows clearly from *N.S.* that it is precluded from transferring the applicant for asylum to the Member State that is prima facie responsible under Regulation No 343/2003. In other words, the principle of non-refoulement becomes applicable between these Member States.

66. In fact, in *N.S.* the Court held that the Member State where the application has been lodged should continue to examine the criteria set out in Chapter III to establish whether another Member State can be identified as responsible. However, if an unreasonable length of time is taken, the Member State where the asylum application has been lodged must, if

necessary, itself examine the application in accordance with the procedure laid down in Article 3(2) of Regulation No 343/2003. (24)

67. Thus, in an exceptional situation the Member State where the asylum application is lodged is *not* faced with an unconditional duty to examine the application itself. It may, within a reasonable period of time, to try to find another Member State responsible. If this fails, however, it seems that the Member State is *then* obliged to examine the application itself.

68. Nevertheless, in my opinion this does not amount to an obligation of the Member State to exercise the competence under the first sentence of Article 3(2) of Regulation No 343/2003. On proper construction of Regulation No 343/2003, once the conditions described in the *N.S.* case have been established, the Member State in which those conditions subsist simply ceases to be the Member State responsible in the meaning of Article 3(1) of Regulation. This was acknowledged by the Commission at the hearing. The Member State where the application for asylum has been lodged becomes the Member State responsible, provided it cannot find another Member State responsible. (25)

69. At this point Article 13 of Regulation No 343/2003 becomes operative because, as is stated in its text, 'no Member State responsible for examining the application for asylum can be designated on the basis of the criteria listed in this Regulation'. Article 13 goes on to say that 'the first Member State with which the application for asylum was lodged shall be responsible for examining it'. In the case of Mr Puid, the Federal Republic of Germany is therefore the 'first Member State' of his application for asylum. As such it is responsible for completing examination of the application for asylum in accordance with Article 16(1)(b) of Regulation No 343/2003.

70. Nevertheless, it is important to emphasise that a substantive obligation on the Member State in which the application for asylum was first lodged cannot be derived from the first sentence of Article 3(2). This provision clearly aims at permitting *any* Member State with which an application for asylum has been lodged (26) to take the position of the Member State responsible in accordance with its sovereign discretion. This might be done, for example, for political, practical or humanitarian reasons. (27) In other words, this provision authorises, but does not compel, the Member States to examine asylum applications.

71. It must be underscored that Regulation No 343/2003 never obliges a Member State to refuse to examine an application for asylum, but merely organises in an orderly manner, within the European Union, the state practice most of them would have followed in any case; namely that of refusing international protection to asylum seekers arriving through safe countries. In other words, Regulation No 343/2003 shares out among the Member States the responsibility, but not the normative competence, (28) for examining applications for asylum.

b) The rights of the asylum seeker and available remedies in the exceptional situation

72. With regard to the rights of asylum seekers and remedies in the exceptional situation as define in *NS*, it is important to make a distinction between two different types of decision. They are the decisions that are made regarding *responsibility for examination of the application* and decisions that are made concerning *transfer of the applicant* to the Member State responsible.

73. The examination decision is made by the requested Member State (i.e. the Member which another Member State has requested to examine the application for asylum) in accordance with Article 18 of Regulation No 343/2003. Nothing in Regulation No 343/2003, as interpreted in accordance with the objectives of the Common European Asylum System, vests asylum seekers with any subjective right to compel an identified Member State to examine an application for asylum. (29) This applies both to the requested Member State and the requesting Member State.

74. The transfer decision to the Member State responsible is regulated by Article 19 of Regulation No 343/2003. It provides that where 'the requested Member State accepts that it should take charge of an applicant, the Member State in which the application for asylum was lodged shall notify the applicant of the decision *not to examine the application*, and of the obligation to *transfer the applicant* to the Member State responsible' (my emphasis).

75. The transfer decision shall, according to Article 19(2) of Regulation No 343/2003, set out the grounds on which it is based. It shall contain details of the time-limit for carrying out the transfer and shall, if necessary, contain information on the place and date at which the applicant should appear, if he is travelling to the Member State responsible by his own means.

76. The decision not to examine the application and to transfer the applicant may be subject to an appeal or a review. (30) Appeal or review concerning this decision shall not suspend the implementation of the transfer unless the courts or competent bodies so decide on a case-by-case basis, and if national legislation allows for this. (31)

77. It is in the course of these proceedings that the national court, as a consequence of its duties to provide effective legal protection under Article 19(1) TEU, is bound to consider whether the exceptional circumstances of the *N.S.* case have arisen and are applicable in any given case, and alter the obligations of the Member State in which asylum is being sought. It almost goes without saying that, as part of the primary law of the EU, (32) national courts are bound to secure protection of the rights contained in the Charter in these same proceedings; and all the more so when EU legislation specifically refers to observance of fundamental rights and the Charter, as is the case with respect to Regulation No 343/2003, in recital (15) thereof. (33)

78. In accordance with Article 19(2) of Regulation No 343/2003, an appeal against the decision not to examine an asylum application and to transfer the asylum seeker, does not suspend the implementation of transfer *unless* the courts or competent bodies so decided on a case-by-case basis, and provided national legislation allows for this. The reasons for this were explained in the Commission proposal for Regulation No 343/2003. A transfer to another Member State is not likely to cause the person concerned serious loss that is hard to make good. (34) It is evident that this assumption is not valid in the exceptional circumstances defined in the *N.S.* judgment.

79. In my opinion a national court that cannot be unaware that systemic deficiencies in the asylum procedure, and in the reception conditions of asylum seekers in the Member State responsible under Article 3(1) of Regulation No 343/2003, amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter, is obliged to suspend transfer of asylum seekers to such a Member State, and if necessary, to set aside any national

provision that would exclude such a decision. This follows from general EU law principles concerning provision of effective remedies and protection of fundamental rights. (35) As I have already noted, the competent authorities have a similar obligation in the context of administration of asylum procedures.

80. I observe that, in the current Commission proposal to recast Regulation No 343/2003, in Article 26, entitled 'Remedies', it is proposed, inter alia, that in 'the event of an appeal or review concerning the transfer decision … the authority … shall, acting ex officio, decide, as soon as possible, and in any case no later than seven working days from the lodging of an appeal or of a review, whether or not the person concerned may remain on the territory of the Member State concerned pending the outcome of his/her appeal or review'. (36)

81. In conclusion, even in the exceptional situations as defined in the *N.S.* judgment, asylum seekers do not have an enforceable claim, based on Regulation No 343/2003, to compel an identified Member State to examine their application for asylum. However, a national court that cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in the Member State responsible under Regulation No 343/2003 amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment, within the meaning of Article 4 of the Charter, is obliged to suspend the transfer of that asylum seeker to that Member State.

V – **Conclusion**

82. I therefore propose the following answer to the question referred by the Hessischer Verwaltungsgerichtshof:

Asylum seekers do not have an enforceable claim to compel an identified Member State to examine their applications for asylum in accordance with the first sentence 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. However, a national court that cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in the Member State responsible under Regulation No 343/2003 amount to substantial grounds for believing that asylum seekers would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental rights of the European Union is, within the context of application of Article 19(2) of that regulation, obliged to suspend the transfer of asylum seekers to that Member State.

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1 – Original language: English.

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2 – 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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3 – Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ 2004 L 304, p. 12). Council Directive 2004/83 is repealed with effect from 21 December 2013 by Article 40 of Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (OJ 2011 L 337, p. 9). Reception conditions are harmonised by Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for reception of asylum seekers (OJ 2003 L 31, p. 18).

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4 – OJ 2003 L 50, p. 1.

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5 – Paragraph 104.

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6 – Paragraph 106.

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7 – All the Member States are contracting parties to the Geneva Convention and the 1967 Protocol. The European Union is not a contracting party to the Geneva Convention or to the 1967 Protocol.

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8 – OJ 1997 C 254, p. 1

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9 – Paragraph 75, citing Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08 *Salahadin Abdulla and Others* [2010] ECR I-1493, paragraph 53, and Case C-31/09 *Bolbol* [2010] ECR I-5539, paragraph 38.

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10 – Paragraph 86. The Court also relied on the relevant European Court of Human Rights case-law on exposure to conditions of detention amounting to inhuman and degrading treatment by citing, at paragraphs 88 and 90, *MSS v Belgium and Greece*, judgment of 21 January 2011, not yet published in the *Reports of Judgments and Decisions*,

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11 – Paragraph 94.

12 – Paragraphs 107 to 108.

13 – The Government of Germany refers in its written observations to the drafting history of Article 18 of the Charter and to the fact that at that time the national provisions on granting refugee status were not harmonised. Hence, in my opinion Article 18 of the Charter does not go further than the Geneva Convention and the acquis communautaire in terms of the rights of asylum seekers.

14 – Proposal for a Council Regulation 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 COM(2001) 447 final; page 2, paragraph 1. See also recital (3) of Regulation No 343/2003.

15 – Case C-19/08 *Petrosian* [2009] ECR I-495, paragraph 34 and case law cited.

16 – See also Case C-245/11 *K* [2012] ECR I-0000, paragraph 48, where the Court held that 'the competent national authorities are under an obligation to ensure that the implementation of Regulation No 343/2003 is carried out in a manner which guarantees effective access to the procedures for determining refugee status and which does not compromise the objective of the rapid processing of an asylum application'.

17 – For a table of the timescales laid down by Regulation 343/2003 see the Annex to the Opinion of Advocate General Sharpston in Case C-179/11 *Cimade* [2012] ECR I-0000.

18 – See also the Opinion of Advocate General Trstenjak in *N.S.*, where she observed at point 94 that Regulation No 343/2003 is 'also intended to prevent forum shopping by asylum seekers', as evidenced by the rule that 'responsibility for examining an asylum application lodged in the European Union rests with a single Member State, which is determined on the basis of objective criteria'.

19 – Here I would draw an analogy with the findings of the Court in Case C-396/11 *Radu* [2013] ECR I-0000, where the Court observed, at paragraph 34, that 'Framework Decision 2002/584 thus seeks, by the establishment of a new simplified and more effective system for the surrender of persons convicted or suspected of having infringed criminal law, to facilitate

and accelerate judicial cooperation with a view to contributing to the objective set for the European Union to become an area of freedom, security and justice by basing itself on the high degree of confidence which should exist between the Member States'. This was a factor that led the Court to decline an invitation to supplement the avenues for challenging a European Arrest Warrant before the executing judicial authority with a requirement that the accused person had been heard by the issuing Member State before the arrest warrant was issued. Given that the aim of the Common European Asylum System is equally aimed at the establishment of a 'new simplified and more effective system', based on 'a high degree of confidence which should exist between the Member States' in my opinion the same circumspection must necessarily apply in vesting asylum seekers with rights additional to those laid down by the EU legislator. See more recently Case C-399/11 *Melloni* [2013] ECR I-0000, paragraph 37.

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20 – Here I would refer to the Opinion of Advocate General Trstenjak in Case C-620/10 *Kastrati* [2012] ECR I-0000, where the Advocate General observed at point 29 that 'the objective of Regulation No 343/2003 is not to create procedural safeguards for asylum seekers in terms of the determination of conditions for the acceptance or rejection of their asylum applications. Rather, that regulation primarily governs the allocation of the duties and tasks of the Member States amongst themselves. Against that background, the provisions of Regulation No 343/2003, which concern the duties of Member States in regard to asylum seekers subject to the Dublin procedure, relate in principle only to the conduct of the procedures concerning the relationship of Member States amongst themselves or are aimed at guaranteeing conformity with other instruments of asylum law legislation.'

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21 – Case C-367/09 *Belgisch Interventie-en Restitutiebureau* [2010] ECR I-10761, paragraphs 32 and 33, and case-law cited.

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22 – The Commission relies to this effect on classical case-law of the Court of Justice, namely Case 26/62 *van Gend en Loos* [1963] ECR 1; Case 6/64 *Costa* v *Enel* [1964] ECR 585; Case 57/65 *Lütticke* [1966] ECR 205.

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23 – In my opinion the existence of such a situation can be concluded on the basis of information provided by the UNCHR, the International Red Cross and the Commission and the case-law of the European Court of Human Rights and the Court. Moreover, Member State asylum authorities exchange information between themselves on reception conditions of asylum seekers. As the exceptional situation as described in *N.S.* does not relate to the characteristics of an individual asylum seeker, Member States are obliged to take exceptional situations into account on a general basis and not as a matter of evidence provided within the context of assessing the admissibility of an individual application.

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24 – Paragraphs 107 and 108.

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25 – In this sense see Case C-245/11 *K* [2012] I - 0000, paragraph 47, where the Court held that where ‘the conditions stated in Article 15 (2) are satisfied, the Member States which, on the humanitarian grounds referred to in that provision, is obliged to take charge of an asylum seeker becomes the Member State responsible for the examination of the application for asylum.’

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26 – It is perfectly possible that an asylum seeker has lodged an application with several Member States. Under circumstances where he cannot be transferred to the Member State of first entry, Article 13 of Regulation No 343/2003 would ultimately render the Member State of first application as responsible. Without that provision, the obligation to provide international protection would obviously be based on international law, and concern, as the case may be, either the Member State where the applicant is present or the first safe Member State of entry. This example shows the difficulties of reading into the regulation an objective duty of a Member State to exercise its competence under Article 3(2).

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27 – See the Opinion of Advocate General Trstenjak in C-245/11, *K*, points 27 to 31, and COM(2001) 447 final, op. cit., p. 10.

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28 – The competence of a state to examine an application for asylum and to provide international protection is vested in its sovereignty. Therefore Directive 2004/83 does not prevent the Member States from applying more favourable standards with respect to determining who qualifies as a refugee (see Article 3).

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29 – Exceptionally, in Articles 7 and 8 of Regulation 343/2003 relating to family members, the desire of the persons concerned has legal relevance.

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30 – This provision did not figure in the Dublin Convention. For a discussion of the differences between Article 19 and the equivalent provisions in the Dublin Convention see COM(2001) 447 final, op. cit., pages 17 and 18.

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31 – However, Article 39 of Directive 2005/85 on the right to effective remedy is not applicable to this decision. See Article 39(1)(a)(i) read together with Article 25(1) of that directive.

32 – See e.g. the Opinion of Advocate General Sharpston in *Radu*, point 52.

33 – I would note that in Case C-400/10 PPU *McB* [2010] ECR I-8965, at paragraphs 60 and 61, the Court considered whether the interpretation of Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (OJ 2003 L 338, p. 1) complied with Article 24 of the Charter and the rights of the child, even though this formed no part of the question referred by the national court. The Court took this approach partly because of commitments appearing in recital 33 of Regulation No 2201/2003.

34 – See COM(2001) 447 final, op. cit., p. 19.

35 – See generally Case C-279/09 *DEB* [2010] ECR I-13849.

36 – Proposal for a Regulation of the European Parliament and of the Council 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 (Recast) COM(2008) 820 final, p. 47.