

JUDGMENT OF THE COURT (Fourth Chamber)

6 June 2013 (*)

(Regulation (EC) No 343/2003 – Determining the Member State responsible – Unaccompanied minor – Successive applications for asylum lodged in two Member States – Absence of a member of the family of the minor in the territory of a Member State – Second paragraph of Article 6 of Regulation No 343/2003 – Transfer of the minor to the Member State in which he lodged his first application – Compatibility – Child’s best interests – Article 24(2) of the Charter)

In Case C-648/11,

REQUEST for a preliminary ruling under Article 267 TFEU from the Court of Appeal (England and Wales) (Civil Division) (United Kingdom), made by decision of 14 December 2011, received at the Court on 19 December 2011, in the proceedings

The Queen, on the application of:

MA,

BT,

DA

v

Secretary of State for the Home Department,

intervener

The AIRE Centre (Advice on Individual Rights in Europe) (UK),

THE COURT (Fourth Chamber),

composed of L. Bay Larsen (Rapporteur), President of the Chamber, K. Lenaerts, Vice-President of the Court, acting as Judge of the Fourth Chamber, U. Lõhmus, M. Safjan and A. Prechal, Judges,

Advocate General: P. Cruz Villalón,

Registrar: A. Impellizzeri, Administrator,

having regard to the written procedure and further to the hearing on 5 November 2012,

after considering the observations submitted on behalf of:

- MA and BT, by S. Knafler QC, K. Cronin, Barrister, and L. Barratt, Solicitor,
- DA, by S. Knafler QC, B. Poynor, Barrister, and D. Sheahan, Solicitor,
- The AIRE Centre (Advice on Individual Rights in Europe) (UK), by D. Das, Solicitor, R. Hussain QC and C. Meredith, Barrister,
- the United Kingdom Government, by C. Murrell, acting as Agent, and by S. Lee, Barrister,
- the Belgian Government, by T. Materne, acting as Agent,
- the Czech Government, by M. Smolek and J. Vláčil, acting as Agents,
- the Greek Government, by M. Michelogiannaki, acting as Agent,
- the Hungarian Government, by K. Szíjjártó, acting as Agent,
- the Netherlands Government, by C. Wissels, M. Noort and C. Schillemans, acting as Agents,
- the Swedish Government, by A. Falk, acting as Agent,
- the Swiss Government, by O. Kjelsen, acting as Agent,
- the European Commission, by M. Condou-Durande and M. Wilderspin, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 21 February 2013,

gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of the second paragraph of Article 6 of Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the

Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (OJ 2003 L 50, p. 1).

- 2 The request has been made in proceedings between MA, BT and DA, three children who are third-country nationals, and the Secretary of State for the Home Department ('the Secretary of State') concerning the Secretary of State's decision not to examine their asylum applications which had been lodged in the United Kingdom and to propose that they be transferred to the Member State in which they had first lodged an application for asylum.

Legal context

The Charter of Fundamental Rights of the European Union

- 3 Article 24 of the Charter of Fundamental Rights of the European Union ('the Charter'), which, as is apparent from the explanations relating to that provision, is based on the Convention on the Rights of the Child concluded in New York on 20 November 1989 and ratified by all the Member States, provides in paragraph 2:

'In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.'

Regulation No 343/2003

- 4 Recitals 3 and 4 in the preamble to Regulation No 343/2003 read as follows:
 - (3) The ... conclusions [of the European Council, at its special meeting in Tampere on 15 and 16 October 1999,] ... stated that [the Common 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.'
- 5 As is evident from recital 15 in the preamble to Regulation No 343/2003, read in the light of Article 6(1) TEU, that regulation observes the rights, freedoms and principles which are acknowledged in particular in the Charter. In particular, it seeks to guarantee, on the basis of Articles 1 and 18 of the

Charter, full observance of asylum seekers' human dignity and their right to asylum.

6 It is apparent from recital 17 in the preamble to Regulation No 343/2003 that, in accordance with Article 3 of Protocol No 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the EU Treaty and to the FEU Treaty, the United Kingdom of Great Britain and Northern Ireland gave notice, by letter of 30 October 2001, of its wish to take part in the adoption and application of that regulation.

7 Under Article 2(c), (d) and (h) of Regulation No 343/2003,

'(c) "application for asylum" means the application made by a third-country national which can be understood as a request for international protection from a Member State, under the ... Convention [relating to the status of refugees, signed at Geneva on 28 July 1951]. ...

(d) "applicant" or "asylum seeker" means a third country national who has made an application for asylum in respect of which a final decision has not yet been taken;

...

(h) "unaccompanied minor" means unmarried persons below the age of eighteen who arrive in the territory of the Member States unaccompanied by an adult responsible for them whether by law or by custom, and for as long as they are not effectively taken into the care of such a person ...'

8 Article 3(1) and (2) of Regulation No 343/2003, in Chapter II thereof, headed 'General Principles', 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. ...'

9 In order to determine the ‘Member State responsible’ for the purposes of Article 3(1) of Regulation No 343/2003, Articles 6 to 14, in Chapter III of that regulation, list objective criteria set out in hierarchical order.

10 Article 5 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 6 of that regulation provides:

‘Where the applicant for asylum is an unaccompanied minor, the Member State responsible for examining the application shall be that where a member of his or her family is legally present, provided that this is in the best interest of the minor.

In the absence of a family member, the Member State responsible for examining the application shall be that where the minor has lodged his or her application for asylum.’

12 Article 13 of Regulation No 343/2003 is worded as follows:

‘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.’

Directive 2005/85/EC

13 Article 25 of 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), headed ‘Inadmissible applications’, provides:

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

2. Member States may consider an application for asylum as inadmissible pursuant to this Article if:

(a) another Member State has granted refugee status;

...

(f) the applicant has lodged an identical application after a final decision;

...’

The dispute in the main proceedings

MA’s case

14 MA is an Eritrean national, born on 24 May 1993, who arrived in the United Kingdom on 25 July 2008, where she lodged an application for asylum on arrival.

15 Having established that MA had already lodged an application for asylum in Italy, the United Kingdom authorities requested the Italian authorities to take her back in accordance with the relevant provisions of Regulation No 343/2003, which, on 13 October 2008, the Italian authorities agreed to do.

16 The transfer to Italy, which was to have taken place on 26 February 2009, was not carried out. MA brought an action before the High Court of Justice of England and Wales, Queen’s Bench Division (Administrative Court) to challenge the legality of the transfer ordered.

17 On 25 March 2010 the Secretary of State decided, pursuant to Article 3(2) of Regulation No 343/2003, to examine MA’s application for asylum. MA was subsequently granted refugee status.

18 The Secretary of State invited MA to withdraw her action, which she declined to do.

BT’s case

19 BT, who was born on 20 January 1993, is also an Eritrean national. She arrived in the United Kingdom on 12 August 2009, where, on the following day, she lodged an application for asylum.

20 Having established that BT had already lodged an application for asylum in Italy, the United Kingdom authorities requested the Italian authorities to take her back, which, on 28 September 2009, they agreed to do.

- 21 On 4 December 2009 BT was transferred to Italy.
- 22 BT brought an action before the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court) to challenge the legality of her transfer to Italy. Following a decision taken by that court on 18 February 2010, BT was able to return to the United Kingdom on 26 February 2010.
- 23 On 25 March 2010 the Secretary of State decided, pursuant to Article 3(2) of Regulation No 343/2003, to examine the application for asylum lodged by BT. BT was granted refugee status, but declined to withdraw her action.

DA's case

- 24 DA, an Iraqi national, arrived in the United Kingdom on 20 November 2009, where he claimed asylum on 8 December 2009. Since DA had acknowledged that he had already lodged an asylum application in the Netherlands, the Netherlands authorities were requested to take him back, which, on 2 February 2010, they agreed to do.
- 25 On 14 July 2010 the Secretary of State ordered that DA be transferred to the Netherlands. However, after DA brought an action before the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court) on 26 July 2010, it was decided not to carry out the transfer. The Secretary of State has since agreed to examine DA's application for asylum on the basis of Article 3(2) of Regulation No 343/2003.

The main proceedings and the question referred for a preliminary ruling

- 26 The three cases were heard together before the national court.
- 27 By judgment of 21 December 2010, the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court) dismissed the claims of the claimants (now the appellants) in the main proceedings and held that, by virtue of the second paragraph of Article 6 of Regulation No 343/2003, an unaccompanied minor claiming asylum and having no family member legally present in the territory of one of the Member States is liable to be removed to the Member State where he first made an asylum application.
- 28 MA, BT and DA appealed to the Court of Appeal (England and Wales) (Civil Division) against that judgment.
- 29 In its order for reference, the referring court notes that none of the appellants in the main proceedings has a family member within the meaning of

Regulation No 343/2003 legally present in the territory of one of the Member States.

30 Their claims were heard together because all three had claimed asylum in the United Kingdom as unaccompanied minors and in each case the Secretary of State had initially certified the claim on the grounds that the two Member States to which she intended to return them were safe countries.

31 The referring court considers that there is significance in the use of the wording 'first lodged his application' in Article 5(2) of Regulation No 343/2003 not being repeated in the second paragraph of Article 6 of that regulation where the wording is simply 'has lodged his or her application'. It also points out that, in the hierarchy of criteria set out in Chapter III of that regulation, unaccompanied minors have first place.

32 As regards the admissibility of its question, the referring court states *inter alia* that there is still a live issue between the parties in the form of a claim for damages in the case of BT.

33 In those circumstances, the Court of Appeal (England and Wales) (Civil Division) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'In Regulation [No 343/2003], where an applicant for asylum who is an unaccompanied minor with no member of his or her family legally present in another Member State has lodged claims for asylum in more than one Member State, which Member State does the second paragraph of Article 6 make responsible for determining the application for asylum?'

Consideration of the question referred

Admissibility

34 The Belgian Government submits, principally, that the request for a preliminary ruling is inadmissible.

35 It claims in particular that, since the Secretary of State has agreed to examine the asylum applications lodged by the appellants in the main proceedings, there is actually no longer a dispute in the main proceedings. The question whether the criterion laid down in the second paragraph of Article 6 of Regulation No 343/2003 designates the United Kingdom or the first Member State with which the appellants in the main proceedings lodged an asylum application the 'Member State responsible' has become merely academic in respect of those appellants, and an answer would be useful only in other cases which are or which might come before the national courts.

- 36 It should be borne in mind in that regard that it has consistently been held that the procedure provided for in Article 267 TFEU is an instrument for cooperation between the Court of Justice and the national courts, by means of which the Court provides the national courts with the points of interpretation of European Union law which they need in order to decide the disputes before them (see, *inter alia*, Case C-314/96 *Djabali* [1998] ECR I-1149, paragraph 17; Case C-225/02 *García Blanco* [2005] ECR I-523, paragraph 26; and Case C-197/10 *Unió de Pagesos de Catalunya* [2011] ECR I-0000, paragraph 16).
- 37 Questions on the interpretation of European Union law referred by a national court in the factual and legislative context which that court is responsible for defining and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred for a preliminary ruling from a national court only where it is quite obvious that the interpretation of European Union law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (Case C-45/09 *Rosenbladt* [2010] ECR I-9391, paragraph 33 and the case-law cited).
- 38 In the present case it must be noted that the referring court has stated in its order for reference that it has to determine BT's claim for damages.
- 39 The award of any damages to BT would be affected by the answer to the question referred.
- 40 In the light of that claim for damages, which is an integral part of the main proceedings, the question referred for a preliminary ruling remains relevant to the outcome of the dispute before the referring court.
- 41 That being the case, the question referred is not hypothetical and the request for a preliminary ruling is therefore admissible.

Substance

- 42 By its question the referring court asks, in essence, whether the second paragraph of Article 6 of Regulation No 343/2003 must be interpreted as meaning that, where an unaccompanied minor with no member of his family legally present in the territory of a Member State has lodged asylum applications in more than one Member State, the Member State to be designated the 'Member State responsible' is that with which that minor lodged his first application, or that in which the minor is present after having lodged his most recent asylum application there.

- 43 It must be recalled at the outset that, under Article 3(1) of Regulation No 343/2003, the asylum application is to be examined by a single Member State, which is to be the one which the criteria set out in Chapter III indicate is responsible.
- 44 Article 5(1) of Regulation No 343/2003 provides that the criteria for determining the Member State responsible are to be applied in the order in which they are set out in Chapter III.
- 45 It is evident from Article 5(2) of Regulation No 343/2003 that the Member State responsible in accordance with the criteria established under Articles 6 to 14 of that regulation is to be determined on the basis of the situation obtaining when the asylum seeker first lodged his application with a Member State. Article 5(2) cannot be intended to alter the meaning of those criteria. As the Advocate General noted at point 56 of his Opinion, Article 5(2) is intended only to determine the framework in which those criteria must be applied in order to determine the Member State responsible.
- 46 The first of the criteria established in Chapter III of Regulation No 343/2003 is that laid down in Article 6, which serves to determine the Member State responsible for examining an application lodged by an unaccompanied minor within the meaning of Article 2(h) of that regulation.
- 47 As provided in the first paragraph of Article 6, the Member State responsible for examining an application lodged by an unaccompanied minor is to be that where a member of his family is legally present, provided that this is in the best interest of the minor.
- 48 In the present case it is apparent from the order for reference that no member of the families of the appellants in the main proceedings is legally present in a Member State, and the Member State responsible must therefore be designated on the basis of the second paragraph of Article 6 of Regulation No 343/2003, which provides that responsibility is to lie with the Member State ‘where the minor has lodged his or her application for asylum’.
- 49 On their own those words do not establish whether the application for asylum referred to is the first asylum application that the minor has lodged in a Member State or the most recent application that he has lodged in another Member State.
- 50 It must be borne in mind however that, according to settled case-law, in interpreting a provision of European Union law it is necessary to consider not only its wording, but also the context in which it occurs and the objectives pursued by the rules of which it is part (see, *inter alia*, Case

C-19/08 *Petrosian* [2009] ECR I-495, paragraph 34, and Case C-403/09 PPU *Detiček* [2009] ECR I-12193, paragraph 33).

- 51 With regard to the context of the second paragraph of Article 6 of Regulation No 343/2003, it must be noted that the expression ‘first lodged his application’ used in Article 5(2) of that regulation has not been repeated in the second paragraph of Article 6. Moreover, Article 6 refers to the Member State ‘where the minor has lodged his or her application for asylum’, whereas Article 13 of that regulation expressly states that ‘the first Member State with which the application for asylum was lodged shall be responsible for examining it’.
- 52 Assuming that the European Union legislature had intended to designate, in the second paragraph of Article 6 of Regulation No 343/2003, ‘the first Member State’ as responsible, that would have been expressed in the same precise terms as in Article 13 of that regulation.
- 53 Accordingly, the expression, ‘the Member State ... where the minor has lodged his or her application for asylum’, cannot be construed as meaning ‘the first Member State where the minor has lodged his or her application for asylum’.
- 54 Furthermore, the second paragraph of Article 6 of Regulation No 343/2003 must also be interpreted in the light of its objective, which is to focus particularly on unaccompanied minors, as well as in the light of the main objective of the regulation, which, as stated in recitals 3 and 4 in the preamble thereto, is to guarantee effective access to an assessment of the applicant’s refugee status.
- 55 Since unaccompanied minors form a category of particularly vulnerable persons, it is important not to prolong more than is strictly necessary the procedure for determining the Member State responsible, which means that, as a rule, unaccompanied minors should not be transferred to another Member State.
- 56 The above considerations are supported by the requirements arising from recital 15 in the preamble to Regulation No 343/2003, according to which the regulation observes the fundamental rights and principles which are acknowledged in particular in the Charter.
- 57 Those fundamental rights include, in particular, that set out in Article 24(2) of the Charter, whereby in all actions relating to children, whether taken by public authorities or private institutions, the child’s best interests are to be a primary consideration.

- 58 Thus, the second paragraph of Article 6 of Regulation No 343/2003 cannot be interpreted in such a way that it disregards that fundamental right (see, by analogy, *Detiček*, paragraphs 54 and 55, and Case C-400/10 PPU *McB*. [2010] ECR I-8965, paragraph 60).
- 59 Consequently, although express mention of the best interest of the minor is made only in the first paragraph of Article 6 of Regulation No 343/2003, the effect of Article 24(2) of the Charter, in conjunction with Article 51(1) thereof, is that the child's best interests must also be a primary consideration in all decisions adopted by the Member States on the basis of the second paragraph of Article 6 of Regulation No 343/2003.
- 60 This taking into account of the child's best interests requires, in principle, that, in circumstances such as those relating to the situation of the appellants in the main proceedings, the second paragraph of Article 6 of Regulation No 343/2003 be interpreted as designating as responsible the Member State in which the minor is present after having lodged an application there.
- 61 In the interest of unaccompanied minors, it is important, as is evident from paragraph 55 of the present judgment, not to prolong unnecessarily the procedure for determining the Member State responsible, and to ensure that unaccompanied minors have prompt access to the procedures for determining refugee status.
- 62 That method of determining the Member State responsible for examining an asylum application lodged by an unaccompanied minor having no member of his family present in the territory of a Member State is based on an objective criterion as stated in recital 4 in the preamble to Regulation No 343/2003.
- 63 Furthermore, such an interpretation of the second paragraph of Article 6 of Regulation No 343/2003, which designates as responsible the Member State in which the minor is present after having lodged an application there, does not, contrary to the Netherlands Government's contention in its written observations, mean that an unaccompanied minor whose application for asylum is substantively rejected in one Member State can subsequently compel another Member State to examine an application for asylum.
- 64 It is clear from Article 25 of Directive 2005/85 that, in addition to cases in which an application is not examined in accordance with Regulation No 343/2003, Member States are not required to examine whether the applicant is a refugee where an application is considered inadmissible because, inter alia, the asylum applicant has lodged an identical application after a final decision has been taken against him.

65 Moreover, it must be added that since the asylum application is required to be examined only by a single Member State, the Member State which, in circumstances such as those of the main proceedings, is designated as responsible by virtue of the second paragraph of Article 6 of Regulation No 343/2003 is to inform accordingly the Member State with which the first application has been lodged.

66 In the light of all the above considerations, the answer to the question referred is that the second paragraph of Article 6 of Regulation No 343/2003 must be interpreted as meaning that, in circumstances such as those of the main proceedings, where an unaccompanied minor with no member of his family legally present in the territory of a Member State has lodged asylum applications in more than one Member State, the Member State in which that minor is present after having lodged an asylum application there is to be designated the 'Member State responsible'.

Costs

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

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

The second paragraph of Article 6 of Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national must be interpreted as meaning that, in circumstances such as those of the main proceedings, where an unaccompanied minor with no member of his family legally present in the territory of a Member State has lodged asylum applications in more than one Member State, the Member State in which that minor is present after having lodged an asylum application there is to be designated the 'Member State responsible'.

[Signatures]