Reports of Cases

OPINION OF ADVOCATE GENERAL
CRUZ VILLALÓN
delivered on 21 February 2013 [1]

Case C-648/11

MA,
BT,
DA,
v
Secretary of State for the Home Department

(Reference for a preliminary ruling from the Court of Appeal (England and Wales) (Civil Division) (United Kingdom))

((Regulation (EC) No 343/2003 (Dublin II) — Determining the Member State responsible for examining asylum applications lodged by unaccompanied minors who are third-country nationals — Several applications — Best interests of the minor))

1. In the context of proceedings to determine the Member State responsible for examining each of the asylum applications lodged by three third-country nationals who, in addition to being minors, are not accompanied and do not have any relatives legally resident in the territory of the European Union, the Court of Appeal refers to the Court of Justice a novel question concerning the interpretation of the second paragraph of Article 6 of the Dublin II Regulation ('Regulation No 343/2003' or 'the Regulation'). [2]

2. The criteria laid down in Regulation No 343/2003 to determine the Member State responsible for examining an asylum application may give rise to competing considerations which, as the present case shows, are not easily resolved by reference to the literal provisions of the Regulation, and it could almost be stated that the case under consideration has not been envisaged.

3. While conscious of the difficulties of interpretation raised by the question referred, which are clearly evidenced in the conflicting views of those taking part in the present proceedings, I shall propose an all-inclusive interpretation of the second paragraph of Article 6 of Regulation No 343/2003, guided by the primary consideration of the child's best interests (Article 24(2) of the Charter of Fundamental Rights of the European Union ('the Charter')) and the objectives of clarity and speed which the Regulation advocates for the procedure for determining the Member State responsible for examining an asylum application.

1 — Original language: Spanish.

2 — 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). In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and to the Treaty establishing the European Community, the United Kingdom gave notice, by letter of 30 October 2001, of its wish to take part in the adoption and application of that regulation.

I – Legislative framework

A – *Charter of Fundamental Rights of the European Union*

4. Article 24(2) of the Charter provides that '[i]n all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration'.

B – *Regulation No 343/2003*

5. Recitals 3, 4 and 15 in the preamble to the Dublin II Regulation state as follows:

'(3) The Tampere conclusions … 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.

…

(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.'

6. In accordance with Article 1 thereof, the 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'.

7. Article 2 of the Regulation contains the following definitions relevant to the present proceedings, and provides that, for the purposes of that regulation:

'(c) "application for asylum" means the application made by a third-country national which can be understood as a request for international protection from a Member State, under the Geneva Convention. ...

(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; it includes minors who are left unaccompanied after they have entered the territory of the Member States'.

8. Article 3 of the Regulation provides:

‘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.

…’

9. In accordance with Article 4(1) of the Regulation, ‘[t]he process of determining the Member State responsible under this Regulation shall start as soon as an application for asylum is first lodged with a Member State’.

10. In Chapter III (Articles 5 to 14) of the Regulation, entitled ‘Hierarchy of criteria’, the relevant criteria for determining ‘the Member State responsible’ within the meaning of Article 3(1) of the Regulation are laid down as follows:

‘Article 5:

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.

Article 6:

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.

…

Article 13:

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.’

11. Chapter IV of the Regulation, entitled 'Humanitarian clause', contains a single provision, namely Article 15, paragraph 3 of which provides as follows:

'If the asylum seeker is an unaccompanied minor who has a relative or relatives in another Member State who can take care of him or her, Member States shall if possible unite the minor with his or her relative or relatives, unless this is not in the best interests of the minor.'

C – *Regulation (EC) No 1560/2003 ('Implementing regulation')*

12. Commission Regulation (EC) No 1560/2003 of 2 September 2003, laying down detailed rules for the application of Council Regulation (EC) No 343/2003,[3] provides in Article 12 thereof as follows:

'1. Where the decision to entrust the care of an unaccompanied minor to a relative other than the mother, father or legal guardian is likely to cause particular difficulties, particularly where the adult concerned resides outside the jurisdiction of the Member State in which the minor has applied for asylum, cooperation between the competent authorities in the Member States, in particular the authorities or courts responsible for the protection of minors, shall be facilitated and the necessary steps taken to ensure that those authorities can decide, with full knowledge of the facts, on the ability of the adult or adults concerned to take charge of the minor in a way which serves his best interests.

Options now available in the field of cooperation on judicial and civil matters shall be taken account of in this connection.

2. The fact that the duration of procedures for placing a minor may lead to a failure to observe the time limits set in Article 18(1) and (6) and Article 19(4) of Regulation (EC) No 343/2003 shall not necessarily be an obstacle to continuing the procedure for determining the Member State responsible or carrying out a transfer.'

II – Facts

13. The three joined cases in the present proceedings concern three minors, two of whom are nationals of Eritrea (MA and BT) and one an Iraqi national (of Kurdish origin (DA)).

14. All the minors having applied for asylum in the United Kingdom, the British authorities observed that, in each case, they had previously claimed asylum in other Member States, namely Italy (MA and BT) and the Netherlands (DA). Initially, in accordance with Article 3(1) of Regulation No 343/2003, it was agreed that the minors were to be transferred to the Member States referred to.

15. However, either before (MA and DA) or after (BT) the transfer was carried out, the British authorities decided that they would themselves examine the asylum applications, exercising their discretion under Article 3(2) of Regulation No 343/2003. This meant that BT, who had been transferred to Italy, could return to the United Kingdom.

16. MA and BT were invited to withdraw the proceedings that they had brought before the United Kingdom courts against the initial transfer decisions, but both declined to do so. It is not apparent, by contrast, that DA was similarly invited to withdraw his proceedings.

17. By judgment of 21 December 2010, the Administrative Court dismissed the various applications of the minors against the transfer decisions, holding that Article 6 of Regulation No 343/2003 had to be applied in the present case.

3 — OJ 2003 L 222, p. 3.

18. On appeal, the Court of Appeal (England and Wales) (Civil Division) decided to refer the present question to the Court of Justice for a preliminary ruling.

III – Question referred

19. The question referred for a preliminary ruling is a single question, which reads as follows:

'In [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 [2005 L 50,] p. l), 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?'

20. Essentially, the Court of Appeal is uncertain as to whether 'the best interests of the minor', which under Article 6 of Regulation No 343/2003 are the decisive factor in designating as the Member State responsible that where a member of the minor's family is legally present, is also the criterion which must be applied where there is no such relative. If that were the case, the Member State responsible would not automatically have to be that where the minor lodged his first asylum application. However, in the Court of Appeal's view, the wording of the second paragraph of Article 6 of Regulation No 343/2003 could mean that the minor's interests are of no relevance where there is no such relative.

21. Notwithstanding the above, the question would still arise as to whether the best interests of the minor could operate on a discretionary basis, given that under Article 3(2) of Regulation No 343/2003 each Member State may examine an application for asylum lodged with it by a third-country national, even if such examination is not its responsibility under the criteria laid down in the Regulation. Accordingly, the best interests of the minor could well be the criterion on the basis of which that Member State takes charge of the application.

IV – Procedure before the Court of Justice

22. The reference for a preliminary ruling was received by the Court Registry on 19 December 2011.

23. By order of 7 February 2012, the request to have the accelerated procedure applied was rejected.

24. Written observations have been submitted by the applicants in the main proceedings, the intervener in those proceedings, Advise on Individual Rights in Europe ('AIRE Centre'), the Belgian, Czech, Greek, Hungarian, Netherlands, Swedish, Swiss and United Kingdom Governments and the Commission.

25. At the hearing held on 5 November 2012, oral observations were presented by the applicants in the main proceedings, AIRE Centre, the Netherlands, Swedish and United Kingdom Governments and the Commission.

V – Arguments

26. The Belgian Government submits, first, that the question referred is irrelevant to the main proceedings, since the United Kingdom has finally agreed to examine the claims for asylum, so that the doubts raised by the Court of Appeal would only be of value for academic legal writings.

27. As regards the substance of the question, the applicants in the main proceedings, AIRE Centre, the Greek Government and the Commission agree that the second paragraph of Article 6 of the Dublin II Regulation must be interpreted as meaning that, in the circumstances of the present case, the Member State responsible for examining the application for asylum is the one where the *most recent* application has been lodged, namely, the Member State where the minor is present, provided always that this is in his best interests.

28. That interpretation is based, to a greater or lesser extent in each case, on a number of reasons, which may be summarised below.

29. First, the abovementioned parties take the view that it is apparent from the history and scheme of the Dublin II Regulation that the legislature intended to treat minors differently from adults, the fact that the principle of the minor's best interests is only referred to in the first paragraph of Article 6 not being decisive, since Article 24(2) of the Charter requires the Member States to have regard to that principle in any event.

30. Second, they submit that the objective of the effective access to procedures and the protection of minors must take precedence over preventing multiple applications. In their view, that conclusion is supported by the fact that unaccompanied minors come first in the hierarchy of criteria laid down by Articles 6 to 13 of the Regulation.

31. Furthermore, those parties submit that if the second paragraph of Article 6 is not to become redundant, its interpretation must have some added value in relation to the residual rule in Article 13.

32. Lastly, the parties in question submit that both the wording of the second paragraph of Article 6 and the very scheme of the Regulation must be interpreted so that the expression 'has lodged' means 'has most recently lodged' not 'has first lodged', emphasising that when the legislature intended to refer to the first application it did so expressly, as in Article 5(2) of the Regulation.

33. By contrast, the Czech, Hungarian, Netherlands, Swedish, Swiss and United Kingdom Governments – and the Belgian Government as a subsidiary argument – submit that the Member State responsible is that in which the *first* asylum application was lodged.

34. Those Member States likewise invoke a number of reasons, which may be summarised below.

35. First, they submit that, given the Regulation's emphasis on the Member State where the first application is lodged, the legislature would have specified any case in which the relevant application was the most recent one.

36. Second, the Member States submit that the combined interpretation of Articles 5 and 6 of the Regulation confirms that both provisions can refer only to the first application for asylum. In addition, since, as is apparent from Articles 3(1) and 4(1) of the Regulation, the Regulation requires only a single Member State responsible to be designated, initiating that process as soon as the first application is made cannot be reconciled with a later application to a different Member State prevailing over the original application.

37. In the view of the Member States in question, nothing in the Regulation indicates that an exception to its general scheme was intended for all unaccompanied minors, the only exception being that expressly provided for in the first paragraph of Article 6. The protection afforded to the minors referred to in the second paragraph of Article 6 introduces an exception to the principle underlying Articles 7 to 14 of the Regulation according to which the Member State responsible is that which has played the greatest part in enabling an asylum seeker to gain access to the territory of the European Union.

38. In conclusion, the governments in question agree that the interpretation propounded by them facilitates, in the interests both of minors and of the Member States, the objective of establishing 'a clear and workable method for determining the Member State responsible' and 'mak[ing] 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'. On the other hand, if the decisive criterion were the place where the most recent application for asylum was lodged, it would be impossible to determine objectively and uniformly a single Member State responsible, there would be an incentive to engage in a type of forum shopping and unaccompanied minors would be encouraged to move between Member States making successive claims for asylum.

39. As a final point, the Belgian, Czech, Hungarian, Swedish and Swiss Governments note that, without needing to distort the meaning of Article 6 of the Regulation, the Member States may have recourse to the clause in Article 3(2) thereof, which in certain circumstances may become mandatory.

VI – Assessment

A – *The admissibility of the question referred for a preliminary ruling*

40. As I have just stated, the Belgian Government contends that the question referred is inadmissible because hypothetical, given that the United Kingdom has already assumed the status of the Member State responsible under Article 3(2) of Regulation No 343/2003. To determine at this stage whether or not it was under an obligation to assume that status under Article 6 of the Regulation is, in the Belgian Government's view, a matter of interest for academic legal writings, but irrelevant to deciding the case before the Court of Appeal; the only factor that matters for that purpose is that the United Kingdom has assumed the status of the Member State responsible which it originally declined.

41. In my view, the question is admissible.

42. Indeed, the initial transfer decisions adopted by the British Government under Article 3(1) of Regulation No 343/2003 were followed by each of the decisions adopted under Article 3(2) of the Regulation, reversing what was initially agreed. As a result, the United Kingdom finally assumed the status of the Member State responsible for the purposes of Regulation No 343/2003, thereby assuming the obligations associated with that responsibility.

43. This means that the same result has been achieved in practice as that which would have been obtained by applying Regulation No 343/2003 with a different interpretation of Article 3(1) from that advocated by the British Government in the present case. It is the validity of that interpretation in terms of EU law which the Court of Justice is now asked to adjudicate upon. In short, the outcome achieved in the present case is the result of a decision which, while discretionary and taken freely on the basis of the power under Article 3(2) of Regulation No 343/2003, would have been mandatory if it had been the result of the provisions of Article 6 of that regulation.

44. The question discussed in these proceedings is precisely whether EU law requires Regulation No 343/2003 to be interpreted in such a manner that the decision taken by the United Kingdom was not discretionary but mandatory. The fact that in the present case the approach followed is in practice the same as that which would have been taken had it been understood that the United Kingdom was not entitled to take any other approach does not render the substantive issue under consideration irrelevant, since it is concerned precisely with whether, beyond its practical or material consequences, the legislative basis of the British authorities' decision was legally correct.

45. However that may be, and in any case, the fact that the United Kingdom subsequently became the Member State responsible for the purposes of Regulation No 343/2003 does not mean that the question raised by the national court is now only of interest for academic legal writings, since each of the actions against the ministerial decisions initially declining responsibility on behalf of the United Kingdom for examining the asylum applications at issue are still pending before the Court of Appeal. Notwithstanding the fact that if those actions are upheld, the subsequent decisions under Article 3(2) of the Regulation cannot in any way be undermined, it remains the case that an examination of whether the initial decisions were legally correct is essential to decide the claim for damages brought by one of the minors – the minor transferred to Italy (BT) – seeking compensation for the damage suffered as a result of her case.

46. Insofar as that claim for damages is still a live issue, as confirmed by the Court of Appeal, the question under consideration is not a potential or hypothetical one, as was true in the order in *Mohammed Imran*,[4] but rather one 'necessary for the effective resolution of a dispute'.[5]

B – *Substance*

47. The Court of Appeal asks the Court of Justice which Member State, in accordance with the second paragraph of Article 6 of Regulation No 343/2003, is responsible for examining an asylum application when successive applications for asylum have been lodged by the same person and the asylum seeker is an unaccompanied minor and third-country national with no member of his family legally resident in a Member State.

48. In the cases before the national court two successive asylum applications were made concurrently by each of the three minors in question: a first application lodged in a Member State other than the United Kingdom, followed by a second application in the United Kingdom itself.

49. The question having been framed in those terms, it is appropriate to take as the starting point Article 3(1) of Regulation No 343/2003, which makes two basic statements. First, it provides that the application for asylum 'shall be examined by a single Member State'. Second, it provides that that Member State 'shall be the one which the criteria set out in Chapter III [of this Regulation] indicate is responsible'. In other words, the issue to be considered is more particularly that of determining – before any examination of the merits takes place – which Member State must actually examine the asylum application.

50. Furthermore, Article 3(2) of Regulation No 343/2003 introduces a notable derogation from the provisions of Article 3(1), which the Court of Justice has already had occasion to consider and which, as has been seen, has been applied in the cases in the main proceedings. In accordance with Article 3(2), the provisions of Article 3(1) are operative only if the Member State with which an application for asylum has been lodged does not avail itself of the 'sovereignty clause' provided for in Article 3(2) of Regulation No 343/2003. That clause provides that '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'.[6]

4 — Case C-155/11 PPU [2011] ECR I-5095.

5 — Ibid., paragraph 21.

6 — The Court of Justice has considered the clause in Article 3(2) of Regulation No 343/2003 in Joined Cases C-411/10 and C-493/10 *N.S. and Others* [2011] ECR I-13905, paragraphs 65 to 68. The 'humanitarian clause' established in Article 15 of the Regulation, which operates as a variant of the clause provided for in Article 3(2), has been considered in Case C-245/11 *K* [2012] ECR, paragraphs 27 to 54.

51. By exercising that absolute discretion a Member State becomes, by virtue of the same provision, 'the Member State responsible within the meaning of this Regulation', assuming 'the obligations associated with that responsibility'. This is true regardless of whether there is a 'Member State previously responsible', a Member State 'conducting a procedure for determining the Member State responsible' or even a Member State 'which has been requested to take charge of or take back the applicant'. In relation to those Member States, the Member State which assumes the status of the Member State responsible pursuant to the 'sovereignty clause' is only under an obligation to inform them of its decision, which is *prima facie* discretionary, although, as is known, the rule established in *N.S.*[7] has established a principle limiting the Member States' freedom when there is a substantial risk of systematic infringement of fundamental rights in certain situations. That is not the case here.

52. It must, however, be noted at the outset that the problem of interpretation raised in relation to Article 6(2) of Regulation No 343/2003 cannot, in my view, be brought within the ambit of, or reduced to, Article 3(2) of that regulation in the sense advocated by the judgment in *N.S.* What we have here is not the relatively certain risk of systematic breaching of fundamental rights as a result of the transfer of the person concerned, but, much more generally, a core question of interpretation of Article 6, that is to say, the rule applicable to determining the Member State which must examine the asylum application lodged by a minor.

53. In addition, by way of closing provision, where no Member State responsible for examining the application 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' (Article 13 of Regulation No 343/2003).

54. It could be said that the Regulation is structured between, at the one extreme, a 'sovereignty clause' and, at the other, a residual clause. Between the two lies a range of possible solutions, chosen on the basis of several criteria for determining the Member State responsible expressly laid down in Chapter III of the Regulation.

55. It should be emphasised that, as required by Article 5(1) of the Regulation, such criteria are to be applied in the order in which they are set out in Chapter III, as the title to that chapter itself makes clear ('Hierarchy of criteria').

56. In addition, the 'criteria' in question must be applied 'on the basis of the situation obtaining when the asylum seeker *first* lodged his application with a Member State' (Article 5(2) of the Regulation).[8] The first application for asylum is, therefore, decisive in order to identify the relevant situation for the purposes of applying the criteria of the Regulation, not for designating the first Member State to receive an application as that responsible for examining it. Article 5(2) is concerned only with establishing the conditions in which the criteria of Chapter III must be applied, not with prejudging the result of applying those criteria.

57. The first of the 'criteria' laid down in Chapter III is that provided for in Article 6, which refers in fact to a specific case, that is, where the applicant is, in the simplest terms, an unaccompanied minor. The criterion applicable to that case, which I shall immediately address, must also be the first to be applied, in accordance with Article 5(1), as has been seen.

58. It should be stated, first of all, that, since it is the only provision that refers specifically to unaccompanied minors, I understand that Article 6 also contains the only criteria applicable to determining the Member State responsible for examining an application lodged by those minors. The criteria laid down in the other articles of Chapter III always encompass factual or legal situations in

7 — Paragraphs 75 to 86 and 95 to 108.

8 — Emphasis added.

which any applicant for asylum – which therefore also includes minors – might find himself. Notwithstanding that a specific criterion is set out in Article 6 for unaccompanied minors, I consider that, even though such minors may find themselves in the situations envisaged in other articles, the only situation which matters for their purposes is precisely that which defines them as 'unaccompanied minors'. As emphasised at the oral hearing by the representative of the applicants in the main proceedings, Article 6 of the Regulation constitutes a type of 'Special Code' for unaccompanied minors, which must contain the answers to all the situations in which they may find themselves.

59. Much of the debate between the parties has focused on the issue whether the application referred to in the second paragraph of Article 6 is the *first* or *most recent* of those that may be lodged by an unaccompanied minor. In my view, however, that provision refers to the application in the singular, without specifying or envisaging, in any form, the lodging of more than one application. This is apparent from both the wording of the provision ('… the Member State responsible for examining the application shall be that where the minor has lodged his or her application for asylum'), [9] and its broad logic.

60. Article 6 envisages, above all, the most straightforward situation, namely, an unaccompanied minor who lodges an application for asylum in one Member State. In accordance with Regulation No 343/2003, that Member State must determine the Member State responsible for examining the application. Disregarding the possible application of the 'sovereignty clause' (Article 3(2) of the Regulation), the Member State which has received the application will have to ascertain whether a member of the minor's family is legally resident in a Member State. If that is the case, in accordance with the first paragraph of Article 6, the Member State responsible for examining the application will be that where a member of the minor's family is resident, although the provision is qualified by an important caveat, that is, 'provided that this is in the best interest of the minor'. Otherwise, when it cannot be shown that there is a member of the minor's family in those circumstances, the Member State responsible will then be the Member State where the minor 'has lodged [the application for asylum]'. In other words, this will be the same Member State which is determining the Member State responsible, which is thereby obliged to act by reason of that safeguard clause.

61. The principal rule is therefore that, unless precluded by the minor's best interests, the responsibility for examining the asylum application lies with the Member State where relatives of the unaccompanied minor are legally resident. Failing this – either because the minor has no relatives in other Member States, or because, while having such relatives, it is not in his best interests for the Member State in which they are resident to have responsibility for examining the application for asylum – the minor's claim for asylum must be examined in the Member State in which he lodged it.

62. In accordance with that scheme, there is a principal rule (the Member State where the minor's relatives are resident has responsibility) subject to an exception (based on the minor's best interests), failing which a subsidiary rules applies (the Member State which received the application has responsibility).

63. Matters are clearly very different when, as in the present case, the unaccompanied minor has lodged successive applications in more than one Member State. In that case, the fact the minor has relatives in another (or other) Member State[s] may enable the possible alternatives to be reconciled by allocating responsibility to one of those Member States in accordance with the minor's best interests, provided that those interests do not in fact preclude that course of action. However, when either the minor's best interests preclude responsibility's being allocated to the Member State where his relatives are resident or when, quite simply, he does not have any relatives in the European Union,

9 — Other language versions of Article 6 of Regulation No 343/2003 also contain unequivocal wording: '… celui dans lequel le mineur a introduit sa demande d'asile'; '… in dem der Minderjährige seinen Asylantrag gestellt hat …'; '… in cui il minore ha presentato la domanda d'asilo'; and '… em que o menor apresentou o seu pedido de asilo'.

the present issue arises, namely, determining which of those Member States that has received an application for asylum must assume responsibility for examining the application. Ultimately, the issue is which Member State decides, and which Member State is designated as, the Member State that must adjudicate on the asylum application.

64. In those terms, a systematic interpretation of the Regulation, supplemented by an interpretation consistent with the principles of the Charter, leads me to conclude that the criterion of the minor's best interests is relevant not merely to determining whether, in the case of a single application for asylum, the Member State responsible must either be that where a relative of the minor is legally resident or that which, having received that application, is determining which Member State is responsible. For the reasons that I shall set out below, the minor's best interests must also be decisive in order to decide which Member State, of all those that have received an asylum application, is the Member State responsible.

65. The wording of Article 6 of Regulation No 343/2003 does not envisage the circumstances raised in the present proceedings. As I have observed, Article 6 starts from the premiss that there has been only a *single* application for asylum. I consider that, in those circumstances, the debate as to whether the wording of Article 6 already serves to determine whether the first application or the most recent is intended could continue indefinitely.

66. Accordingly, in my assessment, an all-inclusive interpretation of Article 6 should be attempted, whereby the scheme of Regulation No 343/2003 is integrated with the principles derived, in particular, from the Charter, thereby expressly reflecting the child's best interests in Article 24(2) of the Charter.

67. In this regard, the minor's best interests, referred to throughout the Regulation, must constitute the basis for interpreting Regulation No 343/2003 and, consequently, where a number of different applications for asylum overlap, this should in principle be resolved in favour of the most recent application, assuming that this enables the minor's best interests to be established most effectively.

68. Before continuing, it is necessary to avoid a misunderstanding. From the procedure under way for amending Regulation No 343/2003, it can be seen that, for the time being, the European Parliament has not sought to introduce a specific reference to the most recent application.[10] This had led some of the parties in the present proceedings to consider that on this matter the system must remain unchanged and that, therefore, the most recent application is not regarded as being of importance. I do not consider, however, that much weight is to be attached to this.

69. Having regard, moreover, to the objectives of clarity and speed in determining the Member State responsible, I consider, in particular, that the responsibility in question must be allocated to that Member State which is best placed to ascertain the minor's best interests, which, as I will explain below, normally means the Member State where the minor is present. That will usually be the Member State which has received the most recent application for asylum. Since that allocation of responsibility is not based directly on the criterion of the most recent application, but rather on the minor's best interests (which should indirectly lead to the most recent application, although not inevitably so), my proposal is perfectly consistent with the idea that it is not appropriate to establish in Article 6 an unconditional reference to the Member State in which the most recent application for asylum has been lodged.

10 — Commission proposal (COM(2008) 820) and European Parliament legislative resolution (A6-0284/2009).

70. Pursuing my analysis, it should be recalled, first of all, that Regulation No 343/2003 expressly states that it observes the fundamental rights and principles acknowledged in particular in the Charter of Fundamental Rights of the European Union, referring specifically to the right to asylum (recital 15). [11] Beyond that statement, it is true that, with the undisputed legal force conferred on it by Article 6(1) TEU, the Charter provides that, '[i]n all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration' (Article 24(2) of the Charter). [12]

71. That requirement, moreover, is binding on Member States when they are implementing EU law, pursuant to Article 51(1) of the Charter. Any uncertainty as to whether the national authorities are implementing EU law in a case such as the present was dispelled in *N.S. and Others*, in which it was stated that Article 3(2) of Regulation No 343/2003, to the extent that it 'forms part of the mechanisms for determining the Member State responsible for an asylum application provided for under that regulation [is] merely an element of the Common European Asylum System [and, accordingly,] a Member State which exercises the discretionary power [conferred by Article 3(2)] must be considered as implementing European Union law within the meaning of Article 51(1) of the Charter' (paragraph 68). The same must also be said, for the same reasons, of Article 6 of Regulation No 343/2003.

72. Consequently, as required by primary EU law, the minor's best interests are required to be a 'primary consideration' for those implementing EU law and, in the present context, in terms of Regulation No 343/2003 as a whole, for the national authorities called upon to determine the Member State responsible for an asylum application lodged by an unaccompanied minor with no relatives legally resident in the European Union.

73. That being the case, and notwithstanding the wording of Regulation No 343/2003, in cases where the national authorities must decide between various Member States which may be responsible concurrently, in accordance with the criteria of that regulation, for examining the application for asylum lodged by an unaccompanied minor, EU law requires the choice of one or other of those Member States always to be made in accordance with the minor's best interests.

74. This stage having been reached, it is, however, necessary to take account of another consideration. In order to determine what is in the minor's best interests, in the circumstances of each individual case, and to consider which decision best serves those interests, the minor's cooperation is necessary. [13] In that sense, the whereabouts of the minor when the Member State responsible for examining his application for asylum is determined merits particular attention, for, in principle, in order for his interests to be adequately safeguarded, any decision affecting him must be taken by the authorities which are in a position to examine his actual circumstances directly.

11 — While not referring expressly to the fundamental rights of the child set out in Article 24 of the Charter – unlike Council 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) – it may be stated of Regulation No 343/2003, as was said of Regulation No 2201/2003 in paragraph 60 of Case C-400/10 PPU *McB* [2010] ECR I-8965, that its provisions 'cannot be interpreted in such a way that they disregard that fundamental right of the child, the respect for which undeniably merges into the best interests of the child'. The general statement of observance of the rights acknowledged in the Charter has the same value, for these purposes, as the specific reference to a particular right.

12 — As pointed out in the Explanations relating to the Charter (OJ 2007 C 303, p. 17), Article 24 of the Charter is based on the New York Convention on the Rights of the Child signed on 20 November 1989 and ratified by all the Member States, Article 3 of which provides that, '[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'.

13 — Article 24(1) of the Charter itself provides that the freely expressed views of children 'shall be taken into consideration on matters which concern them in accordance with their age and maturity'. I have considered this issue in my Opinion in Case C-507/10 *X* [2011] ECR I-14241, paragraphs 46 to 49, making reference to the judgment in Case C-491/10 PPU *Aguirre Zarraga* [2010] ECR I-14247, paragraphs 64 to 67.

75. It is true that the minor applicant could always be returned to the Member State where he lodged his first application. However, I consider that neither for reasons of time nor in view of the best treatment owed to minors is it appropriate to make this type of asylum seeker engage in travel that can be avoided. It should be recalled in that connection that recital 4 to Regulation No 343/2003 emphasises that the method for determining the Member State responsible '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'.

76. It must of course be acknowledged that the solution proposed may have the undesired effect of giving rise to a type of 'forum shopping', as several parties have pointed out. That potential risk, which it is neither necessary nor appropriate to quantify here, is, however, sufficiently justified by the fact that it is only in this manner that due attention can be given to the best interests of the minor, which must, as I have repeated, be a 'primary consideration', in accordance with Article 24(2) of the Charter.

77. Questioning of the minor and the possibility of having regard to what he himself understands to be his own best interests are only an option for the authorities of the Member Sate where the minor is present when his application for asylum is being determined.[14] As a matter of course, that Member State must be the one where the most recent application was lodged, although other cases should not be ruled out; hence, the need to have regard to the particular circumstances of each case, which only the relevant national court can adjudicate upon with full knowledge of the facts.

78. In any event, the application of the rule which, in accordance with my proposal, allocates responsibility to the Member State where the most recent application has been lodged, must be liable to exception if, once again, the minor's best interests so require. While the first paragraph of Article 6 of Regulation No 343/2003 provides that allocating responsibility to the Member State where the minor's relatives are resident may be subject to exception if the minor's best interests require this, it must be understood that, when there are a number of asylum applications, allocating liability to the Member State where the most recent application was lodged must also be subject to exception if the minor's best interests again so require. In other words, the criterion of the most recent application is justified only in that it is best suited, in principle, to serve the minor's best interests, so that if, in a given case, that principle is inapplicable, the minor's interests require an exception to be made.

79. Finally, as a rule of principle that may be derived from an all-inclusive interpretation of Article 6 of Regulation No 343/2003 and Article 24(2) of the Charter, I propose to the Court of Justice that the Member State responsible for examining a claim for asylum which has been the subject of a number of applications in various Members States should, in principle, be that where the most recent application has been lodged, since this most effectively ensures that the minor's best interests receive the primary consideration which they in any event merit.

14 — In my view, Article 12(1) of Regulation No 1560/2003 also supports this idea, in that it provides that the decision to entrust the care of an unaccompanied minor to a relative other than the mother, father or legal guardian, resident in another Member State, is conditional upon the necessary steps having been taken to ensure that *the authorities of the Member State in which the relative is resident* 'can decide, with full knowledge of the facts, on the ability of the adult or adults concerned to take charge of the minor in a way which serves his best interests'.

VII – Conclusion

80. In the light of the foregoing observations, I suggest to the Court that it should answer the question referred as follows:

In 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, when 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, the Member State responsible for determining the application for asylum pursuant to the second paragraph of Article 6 of the Regulation must, in principle, having regard to the minor's best interests, and unless those interests require otherwise, be the Member State where the most recent application has been lodged.