



Reports of Cases

OPINION OF ADVOCATE GENERAL
CRUZ VILLALÓN
delivered on 11 July 2013¹

Case C-394/12

Shamso Abdullahi
v
Bundesasylamt

(Reference for a preliminary ruling from the Asylgerichtshof (Austria))

(Area of freedom, security and justice — Right to asylum — Article 18 of the Charter of Fundamental Rights of the European Union — Regulation (EC) No 343/2003 — Determination of the Member State responsible for examining an asylum application — Asylum application lodged in a Member State after the applicant has entered the European Union via two Member States in succession — Effect of charge being taken by the Member State in which the second entry took place — Right of the applicant to object to the responsibility of that Member State — Scope of the judicial review provided for in Article 19(2) of Regulation (EC) No 343/2003 — Judgment in Joined Cases C-411/10 and C-493/10 *N.S. and Others*)

1. This case offers the Court a further opportunity to refine its case-law concerning Regulation No 343/2003,² with regard primarily, on this occasion, to the scope of the appeal provided for in Article 19(2) of Regulation No 343/2003 and the application of the criterion in Regulation No 343/2003 which confers responsibility for examining an application for asylum on the Member State which the applicant entered irregularly. In addition, this is another case in which Member States find themselves in the same situation as that which gave rise to the judgment in *N.S. and Others*.³

2. I shall be proposing that the Court adopt a narrow interpretation of the scope of the appeal provided for in Article 19(2) of Regulation No 343/2003 which would make it unnecessary to answer the remaining questions, to which I shall none the less respond only in the alternative. In this way, the present case should enable the Court to establish guidelines for applying the criteria contained in that regulation in circumstances in which it is concluded that the Member State which is in principle responsible cannot be responsible for reasons connected with the guarantee of fundamental rights.

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).

3 — Joined Cases C-411/10 and C-493/10 [2011] ECR I-13905.

I – Legislative framework

A – EU law

1. Regulation No 343/2003

3. In accordance with Article 1 of the Regulation, the latter ‘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’.

4. Under Article 3(1) and (2) of Regulation No 343/2003:

‘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.’

5. Pursuant to Article 4(1) of the regulation, ‘[t]he process of determining the Member State responsible ... shall start as soon as an application for asylum is first lodged with a Member State’.

6. Chapter III (Articles 5 to 14) of Regulation No 343/2003, entitled ‘Hierarchy of criteria’, lays down the relevant criteria for determining ‘the Member State responsible’ within the meaning of Article 3(1) of that regulation.

7. Article 16, which is the first article of Chapter V of Regulation No 343/2003 (‘Taking charge and taking back’) provides, in paragraphs 1 and 3, as follows:

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

- (a) take charge, under the conditions laid down in Articles 17 to 19, of an asylum seeker who has lodged an application in a different Member State;
- (b) complete the examination of the application for asylum;
- (c) take back ... an applicant whose application is under examination and who is in the territory of another Member State without permission;
- (d) take back ... an applicant who has withdrawn the application under examination and made an application in another Member State;
- (e) take back ... a third-country national whose application it has rejected and who is in the territory of another Member State without permission.

...

3. The obligations specified in paragraph 1 shall cease where the third-country national has left the territory of the Member State for at least three months, unless the third-country national is in possession of a valid residence document issued by the Member State responsible.'

8. In accordance with Article 17(1) of the regulation, '[w]here 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 ..., call upon the other Member State to take charge of the applicant'.

9. Article 18 of Regulation No 343/2003 provides as follows:

'1. The requested Member State shall make the necessary checks, and shall give a decision on the request to take charge of an applicant within two months of the date on which the request was received.

...

7. Failure to act within the two-month period mentioned in paragraph 1 and the one-month period mentioned in paragraph 6 shall be tantamount to accepting the request, and entail the obligation to take charge of the person, including the provisions for proper arrangement for arrival.'

10. Article 19 of Regulation No 343/2003 is worded as follows:

'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.

...

4. Where the transfer does not take place within the six months' time limit, responsibility shall lie with the Member State in which the application for asylum was lodged. This time limit may be extended up to a maximum of one year if the transfer could not be carried out due to imprisonment of the asylum seeker or up to a maximum of eighteen months if the asylum seeker absconds.'

2. Directive 2005/85/EC

11. Article 39(1) of Directive 2005/85⁴ provides:

‘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 ...’.

B – *National law*

12. Article 18 of the Bundesgesetz über die Gewährung von Asyl (Federal Law on the Granting of Asylum) (‘BGA’) of 2005 provides that the Bundesasylamt (Federal Asylum Office) and the Asylgerichtshof (Asylum Court) must at all stages of the procedure ensure *ex officio* that the information relevant to the decision is provided or that incomplete information concerning the circumstances relied on in support of the application is supplemented, that the evidence to substantiate such information is specified or that the evidence offered is supplemented and, in general, that any clarifications required in support of the application are provided. If necessary, evidence must also be obtained *ex officio*.

II – Facts

13. Ms Abdullahi, a Somali national, entered Greece illegally from Turkey in July 2011. From there, with the assistance of people smugglers, she travelled, via Macedonia, Serbia and Hungary, to Austria, where she was arrested near the Hungarian border.

14. In Austria, on 29 August 2011, she lodged an application for international protection. On 7 September 2011, the Bundesasylamt requested that the Republic of Hungary take charge of the applicant in accordance with Article 10(1) of Regulation No 343/2003. The Republic of Hungary communicated its agreement to do so by letter of 29 September 2011.

15. On 30 September 2011, the Bundesasylamt dismissed the applicant’s application for asylum in Austria as inadmissible and ordered her removal to the Republic of Hungary.

16. Ms Abdullahi appealed to the Asylgerichtshof, which admitted the appeal with suspensive effect. That fact was communicated to the Republic of Hungary on 8 November 2011.

17. The Asylgerichtshof upheld the appeal by judgment of 5 December 2011, on grounds of procedural errors.

18. Following the recommencement of the administrative proceedings, on 26 January 2012, the Bundesasylamt once again dismissed the application for asylum and again ordered the applicant’s removal to Hungary, on the ground that Hungary was the State responsible under Regulation No 343/2003. The Bundesasylamt also held that the applicant’s transfer to Hungary would not infringe her rights under Article 3 of the ECHR.

19. Ms Abdullahi appealed to the Asylgerichtshof, claiming for the first time that Greece, not Hungary, was the Member State actually responsible for examining her asylum case. She also submitted that, because conditions in Greece were inhumane, Austria should take charge of her asylum case.

⁴ — 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).

20. The appeal was dismissed by judgment of 14 February 2012.

21. Ms Abdullahi appealed to the Verfassungsgerichtshof (Constitutional Court), which, on 23 March 2012, ordered that the proceedings be suspended, which fact was communicated to the Republic of Hungary on 2 April 2012.

22. By judgment of 27 June 2012, the Verfassungsgerichtshof upheld the appeal, on the ground of infringement of the applicant's constitutional right to a procedure before a judge prescribed by law.

23. The case was remitted once again to the Asylgerichtshof, which, at that point, made the present request for a preliminary ruling.

III – The questions referred for a preliminary ruling

24. The questions referred to the Court are worded as follows:

'(1) Is Article 19 in conjunction with Article 18 of Regulation No 343/2003 to be interpreted as meaning that, following the agreement of a Member State in accordance with those provisions, that Member State is the State responsible for examining the asylum application within the meaning of the introductory part of Article 16(1) of Regulation No 343/2003, or does European law oblige the national review authority[,] where, in the course of an appeal or review procedure in accordance with Article 19(2) of Regulation No 343/2003, irrespective of that agreement, it comes to the view that another State is the Member State responsible pursuant to Chapter III of Regulation No 343/2003 (even where that State has not been requested to take charge or has not given its agreement), to determine that the other Member State is responsible for the purposes of its appeal or review procedure? In that regard, does every asylum seeker have an individual right to have his application for asylum examined by a particular Member State responsible in accordance with those responsibility criteria?

(2) Is Article 10(1) of Regulation No 343/2003 to be interpreted as meaning that the Member State in which a first irregular entry takes place ("first Member State") must accept its responsibility for examining the asylum application of a third-country national if the following situation materialises:

A third-country national travels from a third country, entering the first Member State irregularly. He does not claim asylum there. He then departs for a third country. After less than three months, he travels from a third country to another EU Member State ("second Member State"), which he enters irregularly. From that second Member State, he continues immediately and directly to a third Member State, where he lodges his first asylum claim. At that point, less than 12 months have elapsed since his irregular entry into the first Member State.

(3) Irrespective of the answer to Question 2, if the "first Member State" referred to therein is a Member State whose asylum system displays systemic deficiencies equivalent to those described in the judgment of the European Court of Human Rights of 21 January 2011, *M.S.S.*, 30.696/09, is it necessary to come to a different assessment of the Member State with primary responsibility within the meaning of Regulation No 343/2003, notwithstanding the judgment in [*N.S. and Others*]? In particular, can it be assumed that a stay in such a Member State cannot from the outset constitute an event establishing responsibility within the meaning of Article 10 of Regulation No 343/2003?'

IV – Procedure before the Court of Justice

25. The request for a preliminary ruling was received by the Court Registry on 27 August 2012.

26. Citing the brevity of the national procedural time-limits, the uncertainty of Ms Abdullahi's situation, the importance of the questions raised and the large number of cases in which the same questions arise, the referring court requested that the case be dealt with under the accelerated procedure provided for in Article 104a of the Rules of Procedure, in the version of 19 June 1991. That request was rejected by order of the President of the Court of Justice of 5 October 2012, although the President ordered that the case be given priority over others in accordance with Article 55(2) of those Rules of Procedure.

27. Written observations were submitted by Ms Abdullahi, the Governments of Austria, Greece, Hungary, Italy, the United Kingdom, and the Swiss Confederation, and the Commission.

28. At the hearing on 7 May 2013, oral argument was presented by Ms Abdullahi, the Governments of France and Greece, and the Commission. At that hearing, the parties, acting on a proposal from the Court, focused their submissions on the following points: (a) the nature of the appeal provided for in Article 19(2) of Regulation No 343/2003 and the relevance of the fact that that appeal is not mentioned in Article 39 of Directive 2005/85; (b) reconciling the review of the criteria for determining responsibility with the time-limit laid down in the second subparagraph of Article 17(1) of Regulation No 343/2003, and the implementation in practice of decisions granting this; (c) the interpretation of the 12-month period provided for in Article 10(1) of Regulation No 343/2003; and (d) the relevance of Article 16(3) of Regulation No 343/2003 in determining the Member State responsible.

V – Assessment

A – *First question*

29. As the Asylgerichtshof explains in the order for reference, the first question seeks primarily to ascertain whether or not the acceptance by a Member State of its responsibility for taking charge of the examination of an application for asylum rules out the possibility of determining — as part of the appeal provided for in Article 19(2) of Regulation No 343/2003 — whether, in accordance with the criteria laid down in that regulation, responsibility *actually* lies with another Member State.

30. More specifically, the referring court wishes to know whether that appeal may be used to assert any subjective right which the applicant may have to have his application for asylum examined by the Member State which is established as being responsible in accordance with the criteria laid down in Regulation No 343/2003.

31. The Asylgerichtshof inclines to the view that acceptance by a Member State must be the determining factor when it comes to making it responsible for examining an application for asylum, the only exceptions, in its view, being cases of manifest arbitrariness or the risk of infringement of rights. In such cases, once the existence of these has been established by the appropriate procedure, the national judicial authority must make a binding declaration as to which Member State is responsible pursuant to Regulation No 343/2003.

32. In my opinion, the answer to be given to the first part of the question is clear. To that end, it is sufficient to point out that the acceptance of responsibility under Article 18 of Regulation No 343/2003 is not comparable to the assumption of responsibility under Article 3(2) of that regulation, which contains the so-called 'sovereignty clause'. While the latter provision is concerned

with the exercise of a discretionary — and, in this sense, sovereign — power⁵ not open to review by the courts, the acceptance referred to in Article 18 is a legal act which will serve as the basis for the decision by the Member State with which an application for asylum has been lodged not to examine it and to transfer the applicant to the Member State which has agreed to take charge of that examination. So it is that, as expressly provided for by Article 19(2) of Regulation No 343/2003, that dual decision ‘may be subject to an appeal or a review’.

33. In short, it is the second issue raised in the referring court’s question which is material. The question, therefore, is not whether an ‘appeal or a review’ is possible but what scope may attach to the review of a Member State’s decision not to examine an application for asylum and to transfer the applicant to the Member State which has agreed to take charge of that examination.

34. Regulation No 343/2003 contains no express provision in this regard. Article 19(2) simply provides that ‘[a]ppeal or review ... 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’. In those circumstances, the objectives pursued by Regulation No 343/2003 may serve as a guide when it comes to proposing an interpretation of Article 19(2) that makes clear the meaning to be given to the appeal for which it provides and, consequently, the scope which the review conducted through that procedural instrument is meant to have.⁶

35. The purpose of Regulation No 343/2003 is essentially to establish a procedure to make it possible ‘to determine rapidly the Member State responsible’ for examining an application for asylum, as recital 4 in the preamble to the regulation states. That, in my opinion, is the fundamental objective of the regulation, which each of its provisions is designed to serve. I am thinking in particular of the system of time-limits established in Chapter V and the set of objective criteria for determining the Member State responsible, which are intended not only to simplify the procedure but also to prevent ‘forum shopping’, thus ensuring that the Member State responsible is not determined on the whim on the applicants.⁷

36. Consequently, in line with the Opinion of Advocate-General Jääskinen in *Puid*,⁸ it may be said that the principal objective of Regulation No 343/2003 is not to ‘vest[...] individuals with rights, but [to] organis[e] relations between Member States’, although it does contain ‘some elements that are not irrelevant to the rights of asylum seekers’.⁹

37. Regulation No 343/2003 governs relations between Member States for the purpose of determining the Member State responsible for examining an application for asylum. The correct functioning of the mechanism established by the regulation for determining responsibility is therefore a matter of direct concern to the Member States, since it is the exercise of their powers as public authorities which is principally affected by the application of that rule of EU law.

38. At the same time, Member States are called upon to exercise those powers in accordance with their obligations in connection with the right to asylum, which is guaranteed by Article 18 of the Charter of Fundamental Rights of the European Union ‘with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union’.

5 — As the Court held in the judgment in Case C-528/11 *Halaf* [2013] ECR, paragraph 37, the preparatory documents for Regulation No 343/2003 corroborate the conclusion that the rule in Article 3(2) was introduced in order to allow each Member State to decide ‘sovereignly’ to agree to examine an application for asylum, without being subject to any conditions.

6 — See to that effect, inter alia, Case C-19/08 *Petrosian* [2009] ECR I-495, paragraph 34.

7 — See to that effect the Opinion of Advocate-General Jääskinen in Case C-4/11 *Puid* [2013] ECR, point 57.

8 — Point 58.

9 — In this regard, I should mention, as Advocate-General Jääskinen does too, the Opinion of Advocate-General Trstenjak in Case C-620/10 *Kastrati* [2012] ECR, point 29.

39. The fundamental right to asylum is therefore also affected, albeit obliquely or indirectly, by the application of Regulation No 343/2003. Consequently, although it is principally the Member States that have an interest in the correct application of the regulation, asylum seekers, too, have a legitimate interest in this regard. I do not, however, believe that that interest amounts to a subjective right such as to substantiate the claim that the application for asylum should be examined by a particular Member State.

40. In my opinion, in order to interpret Regulation No 343/2003 correctly, it is necessary to take account of the fact that it seeks ultimately to ensure the effective exercise of the right to asylum. Regulation No 343/2003 is a fundamental component of the normative system devised by the European Union to enable that fundamental right to be exercised. That system, informed today by recognition of the right enshrined in Article 18 of the Charter of Fundamental Rights of the European Union and the mandate to develop a common policy in this area established in Article 78(1) TFEU, comprises, in addition to the regulation at issue, the minimum rules concerning the conditions applicable to the recognition of refugee status contained in Directive 2004/83/EC¹⁰ and the minimum procedural rules contained in Directive 2005/85.

41. Regulation No 343/2003, like all the other provisions which together with it make up the system guaranteeing the fundamental right to asylum, must therefore be understood ultimately as an instrument operating in the service of that guarantee. Taking that principle into account, I take the view that the spirit of the system rests on the idea that the European Union as a whole constitutes ‘a safe territory’ for any asylum seeker. On entering the territory of the European Union, a person fleeing from the circumstances and conditions which prompted his flight, and which may constitute grounds for granting the right to asylum, enters an area in which he is assured of that protection. For the purposes of asylum, the European Union as a whole and each of the Member States constitute ‘a safe territory’, since it is that very presumption that underpins the confidence on the basis of which the Member States participate in the Common European Asylum System.¹¹ It is true, however, as we shall see presently, that this is by no means an irrebuttable presumption.¹²

42. Accordingly, the essence of the fundamental right to asylum guaranteed by Article 18 of the Charter of Fundamental Rights of the European Union is ensured upon entry into the European Union, inasmuch as the holder of that right may not be adversely affected by the fact that his application is examined by one Member State rather than another. After all, on a purely temporary basis at least, they all offer sufficient assurances as to the proper exercise of that right, which the person concerned may in any event assert, via the appeal provided for in Article 39 of Directive 2005/85, as against decisions relating to the substance of his application for asylum or matters arising in the course of its being processed, but not, significantly, as against decisions concerning the determination of the Member State responsible for examining it.

43. However, this does not in any case divest him of a legitimate interest in the correct determination of the Member State responsible for examining his application. In fact, Regulation No 343/2003 itself confers on him the right to appeal against the decision adopted in this regard. That said, since the essence of his fundamental right is not in principle adversely affected by the fact that his application is examined by a particular Member State, I take the view that the right which he may assert via the appeal provided for in Article 19(2) of Regulation No 343/2003 is of limited scope, a fact, moreover, which is perfectly consistent with the nature of Regulation No 343/2003 as a provision intended above all to organise the way in which the Member States participate in the administration of the European Union’s asylum system.

10 — 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 (O) 2004 L 304, p.12).

11 — See to this effect *N.S. and Others*, paragraphs 78 to 80.

12 — *N.S. and Others*, paragraphs 81 to 99.

44. In my opinion, the only purpose of that appeal is to enforce the regulation itself, in relation to two matters: (a) the presence of circumstances which make it possible to rebut the presumption of respect for fundamental rights on which the system of the European Union is based; and (b) the recognition by Regulation No 343/2003 of certain specific rights, ancillary to the right to asylum itself, and the guarantees associated with them.

45. With respect to the first scenario, the circumstances of the present case are the same as those in *N.S. and Others*, to which I shall return later, more specifically when I come to answer the third question. This is a scenario in which the very foundation of the system established by Regulation No 343/2003 is called in question, that is to say the confidence that Member States have in each other as regards the fulfilment in all of them of the conditions ensuring due respect for the fundamental rights of asylum seekers.¹³

46. In my opinion, the second scenario comprises the rights which Regulation No 343/2003 specifically confers on an asylum seeker in the course of the procedure for determining the Member State responsible for examining his application. Such rights include those connected with the family unit (Articles 7, 8, 14 and 15), the rights of minors (Article 6) and the rights connected with the speed of the procedure (compliance with time-limits and application of the consequences provided for in each case; thus, for example, Article 19(4)). Put simply, these are all rights which extend beyond the legal position of the Member States in the context of the relationships organised by Regulation No 343/2003, and confer on the applicant for asylum a specific and dedicated subjective right, one, moreover, which always pertains to an area protected by the guarantee of a fundamental right: the right to the protection of family life (Articles 7 and 33 of the Charter of Fundamental Rights of the European Union), the right of children to protection (Article 24 of the Charter of Fundamental Rights of the European Union) and the right to good administration (Article 41 of the Charter of Fundamental Rights of the European Union). In short, what we have in these rights is not simply the right to the proper conduct of a procedure for the resolution of matters of principal concern to the Member States, but the right to expect that, in the resolution of such matters, regard will be had to particular rights and interests protected by specific fundamental rights.

47. In conclusion, I propose that the Court's answer to the first question should be that an applicant for asylum may make use of the appeal or, where appropriate, the review provided for in Article 19(2) of Regulation No 343/2003 only in order to object to an application of the criteria laid down in the regulation which either has the effect of conferring responsibility — together with all the obligations which this entails — on a Member State which is not in a position to ensure treatment compatible with respect for the applicant's fundamental rights, or disregards the criteria for determination of the Member State based on the subjective rights specifically conferred on the applicant for asylum by the regulation itself.

48. Within the context of the circumstances of the case at issue in the main proceedings, I therefore take the view that Ms Abdullahi could object to the determination of Hungary as the Member State responsible for examining her asylum application only on the ground that her transfer to that Member State is incompatible with the protection of her fundamental rights or that the Austrian authorities have disregarded criteria for determination based on subjective rights specifically conferred on Ms Abdullahi by Regulation No 343/2003.

B – *Second question*

49. As a consequence of the foregoing, I consider that the second question raised by the Asylgerichtshof is not relevant.

¹³ — *N.S. and Others*, paragraphs 78 and 79.

50. The determination of Hungary as the Member State responsible, which is the matter at issue in the main proceedings, could be revoked by way of the appeal provided for in Article 19(2) of Regulation No 343/2003 only if it were shown that Hungary is not in a position to guarantee the protection of Ms Abdullahi's fundamental rights or if the Austrian authorities had failed to apply the criteria contained in the regulation which are based on circumstances giving rise to a subjective right on the part of the applicant for asylum, such as the status of minor or the existence of family members in other Member States.

51. It is for the referring court in any event to give a ruling on those two circumstances. The only important point to make here, however, is that, in order to give that ruling, it is not necessary to determine which country was the 'first Member State' via which the applicant for asylum entered the European Union for the purposes of Regulation No 343/2003. This is because the only Member States relevant in the context of the appeal provided for in Article 19(2) of the regulation will be Hungary, in any event (as it is the Member State determined by the decision under appeal), and, if appropriate, any other Member States in which Ms Abdullahi may have family members, or, lastly, Austria itself, if the situation provided for in Article 19(4) of the regulation should arise (that is to say, if, now that the decision has been made to transfer her to Hungary, the transfer does not take place within the time-limit laid down in that provision).

52. The identity of the Member State via which Ms Abdullahi entered the European Union is therefore irrelevant. By this I do not mean that the correct application of Regulation No 343/2003 would in any event have had the effect of excluding the criterion based on the Member State of entry. What I mean to say is, rather, that, even if — hypothetically — that were the criterion which should have been applied, the fact is that the incorrect application of the regulation would not have brought about the infringement of a right enjoyed by Ms Abdullahi which is capable of being asserted by way of the appeal provided for in Article 19(2). As I have already said, an asylum seeker does not have a subjective right to the proper application of every aspect of the regulation, but only to the correct application of those particular criteria that are based on subjective rights specifically conferred by the regulation.

53. That said, in the alternative, should the Court take the view that an answer does have to be given to the second question referred by the Asylgerichtshof, I shall address this issue in the points that follow.

54. Admittedly, as part of the appeal provided for in Article 19(2) of Regulation No 343/2003, the national court could review the merits of every aspect of the administrative decision and, consequently, itself determine the Member State responsible in accordance with the criteria laid down in the regulation. However the issue raised by the Asylgerichtshof in the circumstances of this case is the interpretation that is to be given to Article 10(1) of that regulation, which contains the criterion concerning irregular entry via a particular Member State.

55. The Asylgerichtshof is not asking the Court to rule on whether or not Ms Abdullahi entered the European Union via what it calls 'the first Member State', since its second question is premised on the assumption that the first entry did take place via that Member State. The question is rather whether that entry must be regarded as 'the relevant entry' for the purposes of the criterion laid down in Article 10(1).

56. In the view of the referring court — a view shared by the Governments of Austria, Greece and Italy, as well as by the Swiss Confederation — the only 'relevant entry' is that which took place via 'the second Member State' (Hungary). In its opinion, Ms Abdullahi's first journey to the European Union ended when she left 'the first Member State' (Greece). Her second entry via 'the second Member State' is therefore the result of a new journey — the only journey, in its view, which is relevant.

57. On the other hand, both the Commission and the United Kingdom and the Governments of France and Hungary, as well as Ms Abdullahi, argue that the relevant entry is that which took place via ‘the first Member State’, in which regard they attach particular importance to the fact that none of the time-limits provided for in Article 10(1) and Article 16(3) of Regulation No 343/2003 have expired. To my mind, this is indeed a decisive factor in the resolution of the issue raised.

58. Even though the referring court speaks of two ‘journeys’, I take the view that, in the circumstances of this case, we should be talking about a single journey.

59. What is certain is that, according to the information provided by the Asylgerichtshof, Ms Abdullahi’s journey began in April 2011 with a flight from a place unknown to Syria and ended in Austria, where she was arrested and applied for asylum on 29 August 2011. In order to reach Austria, she thus followed a route which took her from Syria to Turkey and from Turkey by sea to Greece, which she entered in July 2011, continuing her journey by road across Greece. She then left Greece, entered a third country which she crossed, together with other third countries, to enter the European Union once again via Hungary, from which she then entered Austria.

60. In my opinion, aside from its geographical discontinuity, Ms Abdullahi’s journey appears rather to have been a single and continuous one: from Somalia (her country of origin) or, on the evidence adduced, at least from Syria — without interruption — to Austria, where she did eventually lodge her application for asylum. The continuous and single nature of her journey is demonstrated, to my mind, by the time factor, since she covered the distance involved within a very short period of time, practically the same time as it would actually take to reach her destination if travelling clandestinely, which were the conditions under which Ms Abdullahi’s entire journey was carried out. Admittedly, it is by no means certain that the final destination sought by Ms Abdullahi was Austria, the country in which she was arrested when she was perhaps intending to continue her journey to another Member State. What *is* certain, in my view, is that her ‘destination’, if it can be called that, was not Greece, where she arrived in July 2011 and may have left that very same month, since it was in August that she applied for asylum in Austria after having crossed several third countries, as well as Hungary.

61. None the less, this notional continuity of Ms Abdullahi’s journey is of only relative significance. More important is the fact that Ms Abdullahi entered the territory of the European Union for the first time in Greece, as the first ‘safe territory’, and that circumstance triggered the responsibility of that Member State under Article 10(1) of Regulation No 343/2003, which responsibility does not cease until 12 months after the date of that irregular entry.

62. Two points must be made here. First, given the continuous nature of Ms Abdullahi’s journey from her place of origin to the place where she was arrested and applied for asylum, the view may be taken that, when she left Greece, she was not intending to leave the European Union but rather to continue her journey to another Member State. Greece’s geographical position may quite reasonably have meant that, for reasons of convenience and affordability, she was compelled to follow a route that passed through several third countries, and had no intention, if I may put it this way, of abandoning the European Union when she left Greece in order to cross those third countries. The legally relevant intention was rather to remain within the European Union by travelling to another Member State.

63. Secondly, even if Ms Abdullahi did ‘abandon’ the European Union when she left Greece, the fact remains that the effect of leaving the territory of the European Union is not instantaneous. This follows, in my opinion, from Article 16(3) of Regulation No 343/2003, according to which the obligations incumbent on the Member State which proves to be responsible under the regulation ‘shall cease where the third-country national has left the territory of the Member States for at least three months’. It is true that that provision refers to the obligations incumbent on the Member State responsible once the latter has been identified in accordance with the criteria laid down in Regulation

No 343/2003. However, it must also be understood as operating at the time when the competent authority is actually applying those criteria, which means that those Member States in respect of which it is established from the outset that the applicant left them for a period of three months must be excluded from the procedure for determining the Member State responsible.

64. In any event, most important here is the fact that, in accordance with Regulation No 343/2003, *physically leaving* the territory of the European Union does not automatically bring with it a *severing of legal connections* with it, with the result that the rights and expectations which an applicant for asylum may have acquired on entering the European Union are maintained for three months after he has left it and will be reinstated if he re-enters the European Union before that time-limit has expired. In the case at issue, the applicant for asylum did not leave the European Union for longer than a month after entering it via Greece, which means that that Member State was still responsible when Ms Abdullahi entered Hungary.

65. I therefore take the view that the effects of a first entry into the European Union persist for three months after departure from the territory of the Member States and that, consequently, in the circumstances of this case, responsibility lies with ‘the first Member State’.

C – Third question

66. By the third question, the national court, with reference to the judgment in *N.S. and Others*, asks to what extent the situation in ‘a Member State whose asylum system displays systemic deficiencies’ means that it must be excluded as the Member State responsible, despite the fact that it is responsible in accordance with Article 10(1) of the regulation.

67. Notwithstanding a degree of difficulty in interpretation resulting from the way in which the third question is worded, I consider that, taking into account the explanations provided by the national court in its order for reference, it is reasonable to conclude that what is actually being asked is whether a Member State which displays such deficiencies must automatically be excluded in principle as a potential Member State responsible or whether, on the contrary, once that State has been identified as the Member State responsible under Regulation No 343/2003, another Member State must then be identified as being responsible in accordance with the remaining criteria laid down in the regulation.

68. In essence, therefore, the question is what procedure must be followed in the event that, pursuant to the rule in *N.S. and Others*, it is indeed necessary to exclude a Member State from the process of determining the Member State responsible for examining an application for asylum.

69. The next question is how another Member State must be determined as being responsible once the Member State which should be responsible on the basis of the criteria laid down in Regulation No 343/2003 has been excluded in accordance with the rule in *N.S. and Others*.

70. In accordance with paragraph 107 of the judgment in *N.S. and Others*, ‘[s]ubject 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’.¹⁴

¹⁴ — Emphasis added.

71. The qualifier ‘following’ is the operative term here, since Article 5(1) of Regulation No 343/2003 itself provides that ‘[t]he criteria for determining the Member State responsible shall be applied *in the order in which they are set out* in this Chapter’.¹⁵

72. If the Austrian authorities took the view that the first criterion to be applied was that contained in Article 10 of Regulation No 343/2003 (irregular entry into the territory of the European Union), it is because they ruled out the application of the previous criteria (being a minor, existence of family members, possession of a residence document). It being impossible for them to use that criterion, they are obliged to examine the possibility of applying one of the criteria that follow in the order set out in the regulation and, ultimately, to implement the residual clause contained in Article 13, which confers responsibility on the Member State in which the application for asylum was lodged.

73. In principle, each criterion is exhausted on its application, since each one will ordinarily identify a single Member State responsible. It would therefore make no sense to re-apply the criterion that led to the determination of the Member State to which the applicant for asylum cannot in the end be transferred because the application of that criterion would inevitably lead to the Member State which had been excluded. By the same token, it would be unthinkable even to consider applying one of the previous criteria, the application of which was ruled out as soon as it was concluded that the correct criterion was one of the following ones.

74. If that logic is applied to the present case, this means that the only criteria still applicable are those contained in Article 11 (entry into a Member State in which the need for Ms Abdullahi to have a visa is waived) and Article 12 (application for asylum made in a transit area of an airport of a Member State). If none of those criteria is applicable, which is a matter for the referring court to determine, the only remaining option will be the residual clause contained in Article 13, the effect of which would be to confer responsibility on the Austrian authorities. All of the foregoing is of course without prejudice to the applicability of the sovereignty and humanitarian clauses contained in Article 3(2) and Article 15(1) respectively of Regulation No 343/2003.

VI – Conclusion

75. In the light of the foregoing considerations, I propose to the Court that it should answer the questions raised as follows:

- (1) An applicant for asylum may make use of the appeal or, where appropriate, the review provided for in Article 19(2) of Regulation No 343/2003 in order to challenge either an application of the criteria laid down in the regulation which leads to the determination of a Member State which is not in a position to afford the applicant for asylum treatment compatible with respect for fundamental rights, or the failure to apply criteria for determination of the Member State based on subjective rights specifically conferred on the applicant for asylum by the regulation itself.

In the alternative, should the Court take the view that the appeal provided for in Article 19(2) of Regulation No 343/2003 permits a challenge based on any infringement of that regulation:

- (2) Article 10(1) of Regulation No 343/2003 must be interpreted as meaning that, in the circumstances of the case at issue in the main proceedings, responsibility for examining the application for asylum lies with the Member State in which the first irregular entry took place.
- (3) A finding by the national court of systemic deficiencies in the asylum procedure and in the conditions for the reception of asylum seekers in a particular Member State does not mean that that Member State must be excluded from the system established by Regulation No 343/2003,

¹⁵ — Emphasis added.

with the result that that Member State is a priori excluded from its scope. Such a finding means only that it must be excluded from any responsibility which may fall to it on the application of the criteria laid down in that regulation, the consequence of this being that it will then be necessary to identify another Member State as responsible by applying the criteria which follow that which was applied initially.