Reports of Cases

OPINION OF ADVOCATE GENERAL
SHARPSTON
delivered on 20 July 2017 [1]

Case C-201/16

Majid (also known as Madzhdi) Shiri
joined parties:
Bundesamt für Fremdenwesen und Asyl

(Request for a preliminary ruling from the Verwaltungsgerichtshof (Supreme Administrative Court) (Austria))

(Area of freedom, security and justice — Interpretation of Regulation (EU) No 604/2013 — Article 27(1) right to an effective remedy — Article 29 arrangements and time limits for the transfer of an individual from the requesting Member State to the requested Member State — Point at which the time limit in Article 29(1) starts to run)

1. In this reference the Court is asked yet again to give guidance as to the scope of the right to an effective remedy provided in Article 27(1) of the Dublin III Regulation. [2] The Verwaltungsgerichtshof (Supreme Administrative Court, Austria) seeks to ascertain whether an applicant for international protection can rely upon the failure of Member State 'A' (the requesting State) to implement its decision to transfer him to Member State 'B' (the requested State) within the period of time laid down in Article 29(1) of the Dublin III Regulation by invoking his rights under Article 27(1) thereof. If the transfer does not take place within the period specified, how do the rules in Article 29(2) which govern the position between the requesting State and the requested State then apply?

The Dublin III Regulation

2. Recital 5 states, inter alia, that it should be possible to determine rapidly the Member State responsible, so as to guarantee effective access to the procedures for granting international protection and not to compromise the objective of the rapid processing of such applications. Recital 19 explains that 'in order to guarantee effective protection of the rights of the persons concerned, legal safeguards and the right to an effective remedy in respect of decisions regarding transfers to the Member State responsible should be established, in accordance, in particular, with Article 47 of [the Charter [3]]. In order to ensure that international law is respected, an effective remedy against such decisions should cover both the examination of the application of this Regulation and of the legal and factual situation in the Member State to which the applicant is transferred.'

1 Original language: English.

2 Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (OJ 2013 L 180, p. 31; 'the Dublin III Regulation'). See point 29 below for earlier cases and footnote 12 below for three pending cases concerning that regulation.

3 Charter of Fundamental Rights of the European Union (OJ 2010 C 83, p. 389 ('the Charter')).

3. Recital 32 recalls that in relation to applicants for international protection, 'Member States are bound by their obligations under instruments of international law, including the relevant case-law of the European Court of Human Rights'. Recital 39 states that the Dublin III Regulation respects fundamental rights and observes the principles protected by the Charter.

4. In accordance with Article 1, the Dublin III Regulation lays down the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person. [4]

5. Pursuant to Article 3(1) the general principle enshrined in the Dublin III Regulation is that Member States must examine an application for international protection by a third-country national or a stateless person who applies on the territory of any one of them. Any such application is to be examined by a single Member State, which will be the one which the criteria set out in Chapter III indicate is responsible. [5]

6. Applicants for international protection have been granted certain rights during the process of determining the Member State responsible for examining an application. Thus, Article 4(1) provides applicants with a right to information including details relating to the possibility of challenging a transfer decision and, where applicable, of applying for the transfer to be suspended. Under Article 5(1), applicants also have the right to a personal interview.

7. Chapter III is entitled 'Criteria for determining the Member State responsible'. Article 7(1) states that the criteria are to be applied in accordance with the hierarchy set out in that chapter. The Member State responsible is determined on the basis of the situation obtaining when the applicant first lodged his application for international protection (Article 7(2)). First place in the hierarchy is given to the criteria concerning minors (Article 8) and family members (Articles 9, 10 and 11). The criterion that is most frequently applied is that in Article 13(1) relating to applicants who have irregularly crossed the border into a Member State from a third country. In such cases, the Member State of first entry into the territory of the European Union is responsible for examining the application for international protection.

8. The obligations of the Member State responsible are set out in Chapter V. These include an obligation to take back an applicant whose application is under examination and who has made an application in another Member State (Article 18(1)(b)). [6]

9. The procedures for making take back requests are laid down in Section III of Chapter VI. Article 23(1) provides that where a Member State with which a person has lodged a new application for international protection considers that another Member State is responsible, it may request that other Member State to take back the person concerned. Article 25(1) provides that the requested Member State must decide on any such request as quickly as possible. [7] Failure to act within the time limit laid down is construed as acceptance of the take back request (Article 25(2)).

4 The Dublin III Regulation applies to Switzerland pursuant to the Agreement and the Protocol with the Swiss Confederation and the Principality of Liechtenstein which came into effect on 1 March 2008 (OJ 2008 L 53, p. 5). It was approved by Council Decision 2008/147/EC of 28 January 2008 (OJ 2008 L 53, p. 3) and Council Decision 2009/487/EC of 24 October 2008 (OJ 2009 L 161, p. 6). Iceland and Norway apply the Dublin system by virtue of bilateral agreements with the European Union which were approved by Council Decision 2001/258/EC of 15 March 2001 (OJ 2001 L 93, p. 38). See further point 23 and footnote 32 of my Opinion in *A.S. and Jafari*, C-490/16 and C-646/16, EU:C:2017:443.

5 The second subparagraph of Article 3(2) provides for an exception to the general principle laid down in Article 3(1) where it is impossible to transfer an applicant to the Member State primarily designated as responsible because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter.

6 The obligations in Article 18(1) cease where the Member State responsible can establish that the person concerned has left the EU territory for at least three months (Article 19(2)).

7 When a take back request is based on data obtained from the Eurodac system that time limit is reduced to two weeks.

10. Section IV of Chapter VI sets out certain procedural safeguards for applicants. Article 26(1) provides that Member States must notify transfer decisions to applicants. That notification must contain information on the legal remedies available, including the right to apply for suspensive effect and the applicable time limits for seeking such remedies and for carrying out the transfer (Article 26(2)).

11. Article 27(1) states that an applicant must 'have the right to an effective remedy, in the form of an appeal or a review, in fact and in law, against a transfer decision, before a court or tribunal'. Pursuant to Article 27(3), Member States must make provision for the purposes of appeals against or reviews of transfer decisions to protect the position of an applicant pending the outcome of a challenge to a transfer decision by allowing the person concerned to remain in the Member State pending the outcome of such proceedings (option (a)); automatically suspending the transfer (option (b)); or ensuring that the applicant has an opportunity to request a court or tribunal to suspend implementation of the transfer decision while the appeal or review is undetermined (option (c)).

12. Section VI is entitled 'Transfers'. Article 29 states:

'1. The transfer of the applicant or of another person as referred to in Article 18(1)(c) or (d) from the requesting Member State to the Member State responsible shall be carried out in accordance with the national law of the requesting Member State, after consultation between the Member States concerned, as soon as practically possible, and at the latest within six months of acceptance of the request by another Member State to take charge or to take back the person concerned or of the final decision on an appeal or review where there is a suspensive effect in accordance with Article 27(3).

…

2. Where the transfer does not take place within the six months' time limit, the Member State responsible shall be relieved of its obligations to take charge or to take back the person concerned and responsibility shall then be transferred to the requesting Member State. 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 person concerned or up to a maximum of eighteen months if the person concerned absconds.

3. If a person has been transferred erroneously or a decision to transfer is overturned on appeal or review after the transfer has been carried out, the Member State which carried out the transfer shall promptly accept that person back.

…'

13. Specific arrangements for the effective application of the Dublin III Regulation are set out in the Implementing Regulation.[8] Article 9(2) states: 'A Member State which, for one of the reasons set out in Article 29(2) of [the Dublin III Regulation], cannot carry out the transfer within the normal time limit of six months from the date of acceptance of the request to take charge or take back the person concerned or of the final decision on an appeal or review where there is a suspensive effect, shall inform the Member State responsible before the end of that time limit. Otherwise, the responsibility for processing the application for international protection and the other obligations under [the Dublin III Regulation] falls to the requesting Member State, in accordance with Article 29(2) of that Regulation.'

8 Commission Implementing Regulation (EU) No 118/2014 of 30 January 2014 amending Regulation (EC) No 1560/2003 laying down detailed rules for the application of Regulation No 343/2003 (OJ 2014 L 39, p. 1; the two Commission implementing regulations together comprise 'the Dublin Implementing Regulation').

Facts, procedure and the questions referred

14. Mr Majid (also known as Madzhdi) Shiri is an Iranian national. There are no details as to exactly when he left Iran: it appears to have been around the end of 2014. He travelled to the European Union via Turkey. Mr Shiri arrived in Bulgaria and applied for international protection in that Member State on 19 February 2015. He subsequently went to Austria and on 7 March 2015 applied for international protection there.

15. On 9 March 2015 the Austrian authorities asked their Bulgarian counterparts to take back Mr Shiri pursuant to Article 18(1)(b) of the Dublin III Regulation. On 23 March 2015 Bulgaria gave its express agreement to that take back request.

16. On 2 July 2015 the Bundesamt für Fremdenwesen und Asyl (the Austrian Federal Office for immigration and asylum; 'the BFA') refused Mr Shiri's application for international protection on the ground that it was inadmissible. The BFA also ordered Mr Shiri's deportation and confirmed that he could be transferred to Bulgaria ('the first BFA decision'). Mr Shiri appealed against that decision to the Bundesverwaltungsgericht (Federal Administrative Court, Austria) and applied for the transfer decision to be suspended. By order of 20 July 2015, that court allowed Mr Shiri's appeal, annulled the first BFA decision and remitted the matter to the BFA for a new decision. It did not rule on the application for the transfer decision to be suspended. When remitting Mr Shiri's case to the competent authorities the national courts asked the BFA to consider in particular whether Mr Shiri was vulnerable as concerns had been raised regarding his health. The national courts wished to ensure that any decision relating to his transfer complied with the Convention for the Protection of Human Rights and Fundamental Freedoms.[9]

17. By a further decision dated 3 September 2015 the BFA once again rejected Mr Shiri's application for international protection on the ground that it was inadmissible ('the second BFA decision'). It took the view that Bulgaria was the Member State responsible for examining Mr Shiri's application for international protection and again ordered his deportation and transfer to Bulgaria.

18. On 17 September 2015 Mr Shiri appealed against that decision to the Bundesverwaltungsgericht (Federal Administrative Court), which made no ruling on the application for suspensive effect lodged with that appeal. Basing himself on the first BFA decision, Mr Shiri submitted that responsibility for examining his application for international protection had transferred to Austria, because the six month transfer period laid down in Article 29(1) of the Dublin III Regulation had expired without his transfer to Bulgaria having been implemented. He argued that the period for implementing the transfer began on 23 March 2015 (the date when Bulgaria agreed to the take back request made by Austria) and that the time limit of six months expired on 23 September 2015, since the national court had not ruled that his appeal against the first BFA transfer decision had suspensive effect.

19. On 30 September 2015 Mr Shiri's appeal was dismissed. The Bundesverwaltungsgericht (Federal Administrative Court) took the view that the legal effects of the annulment of the first BFA decision and the remission of Mr Shiri's case for a second BFA decision were that he could not be sent back to Bulgaria before the BFA reconsidered his case. Thus, its ruling of 20 July 2015 amounted to suspension of the transfer decision for the purposes of Article 27(3) read together with Article 29(1) of the Dublin III Regulation.

9 Signed in Rome on 4 November 1950.

20. By an application dated 4 October 2015 Mr Shiri challenged that decision before the referring court.[10] He argues that the transfer decision is not automatically suspended under Austrian law, because Austria chose to implement Article 27(3) of the Dublin III Regulation by allowing applicants the opportunity to request a suspension of the implementation of the transfer decision under Article 27(3)(c).[11]

21. The referring court seeks guidance as to whether, as a matter of principle, an applicant for international protection is entitled to an effective remedy in the form of an appeal against or a review of a transfer decision within the meaning of Article 27(1) of the Dublin III Regulation on the grounds that responsibility for examining his application for international protection lies with the requesting Member State because the six-month transfer period under Article 29(2) read in conjunction with Article 29(1) of the Dublin III Regulation has expired.

22. Accordingly, the referring court asks:

'(1) Are the provisions of [the Dublin III Regulation] that confer the right to an effective remedy against a transfer decision, in particular Article 27(1), to be interpreted as meaning that an applicant for [international protection] is entitled to claim that responsibility has been transferred to the requesting Member State on the ground that the six month transfer period has expired (Article 29(2) in conjunction with Article 29(1) of [the Dublin III Regulation] in light of recital 19)?

If the answer to Question 1 is in the affirmative:

(2) Does the transfer of responsibility under the first sentence of Article 29(2) of [the Dublin III Regulation] occur by the fact of the expiry of the transfer period without any order or, for responsibility to be transferred because the period has expired, is it also necessary that the obligation to take charge of, or to take back, the person concerned has been refused by the responsible Member State?'

23. Written observations were submitted by Mr Shiri, Austria, the Czech Republic, Switzerland, the United Kingdom and the European Commission. At the hearing on 14 March 2017, apart from the Czech Republic and Switzerland those parties made oral observations.

Assessment

Preliminary remarks

24. As the referring court points out, the important issue of principle raised in Mr Shiri's case is whether a Member State's failure to comply with the time limits for implementing a decision laid down in the Dublin III Regulation to transfer an applicant seeking international protection from Member State 'A' to Member State 'B' should be subject to judicial scrutiny.[12]

10 From my own research of the national file I can confirm that the appeal was signed by Mr Shiri's legal advisers on that date, although it appears to have been lodged on 6 October 2015.

11 The order for reference is unclear as to whether Austria has chosen to implement the requirement to provide that the position of an applicant is protected pending the outcome of a challenge to a transfer decision by introducing measures under Article 27(3)(b) or (c) of the Dublin III Regulation. The referring court states in paragraph 9 of the order for reference that Austria has implemented Article 27(3)(b) (which provides that a transfer is automatically suspended). However, it goes on to state that an appeal '… against a transfer decision does not automatically have suspensive effect: instead, the Bundesverwaltungsgericht has to decide, after a close and rigorous scrutiny, whether suspensive effect is to be granted'. That description fits the wording of Article 27(3)(c) and suggests that Austria has chosen that option. See further points 52 to 68 below.

12 See my Opinions in Cases *A.S. and Jafari*, C-490/16 and C-646/16, EU:C:2017:443; and *Mengesteab*, C-670/16, EU:C:2017:480, judgments pending; see also *Hasan*, C-360/16, pending.

25. Mr Shiri invites the Court, in its determination of that issue of principle, also to examine wider issues, such as whether the Dublin III Regulation is compatible with the fundamental rights enshrined in the Charter. That is a matter which goes to the core of the validity of the regulation itself. However, given that the referring court has not raised that particular question, it falls outside the scope of the present request for a preliminary ruling. Nor, is it necessary to determine that matter in order to reply to the actual questions posed.

Question 1

26. By Question 1 the referring court asks whether the provisions of the Dublin III Regulation which provide for a right to an effective remedy against a transfer decision, in particular Article 27(1), should be interpreted as meaning that an applicant is entitled to claim that responsibility for examining his application for international protection lies with the requesting Member State (here, Austria) on the ground that the six month period for implementing the transfer decision laid down in Article 29(1) of that regulation has expired.

27. Mr Shiri, Austria, the Czech Republic and Switzerland all submit that an appeal against or review of a transfer decision based on such a ground falls within the scope of Article 27(1). In its written observations the Commission also adopted that view. However, during the course of the hearing the Commission changed its position and now supports the stance of the United Kingdom, which takes the contrary view to that of the other parties to these proceedings.

28. I accept that the Dublin III Regulation does not expressly delineate the right to an effective remedy in Article 27(1). That said, it seems to me that the purpose, scheme and context of the regulation support the view that that provision should be interpreted as covering a Member State's failure to comply with the time limits laid down, in particular the six month period for implementing a transfer decision specified in Article 29(1).[13]

29. In my view, as a result of the changes introduced by the Dublin III Regulation (the third iteration of the rules establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged by an applicant in one of the Member States),[14] the Court's ruling in *Abdullahi*[15] concerning the interpretation of the Dublin II Regulation[16] has been superseded. That view is confirmed by the subsequent judgments of the Grand Chamber in *Ghezelbash*[17] and *Karim*.[18]

30. The Court ruled in *Abdullahi* that an agreement between Member States concerning a take charge request on the basis that the Member State of first entry into the European Union would assume responsibility for examining the application for international protection of the person concerned could only be challenged if the applicant pleads systemic deficiencies in the conditions for the reception of applicants in that Member State, which provide substantial grounds for believing that he would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter if he were sent to that Member State.[19]

13 See points 244 to 247 of my Opinion in *A.S. and Jafari*, C-490/16 and C-646/16, EU:C:2017:443; and points 77 to 110 of my Opinion in *Mengesteab*, C-670/16, EU:C:2017:480.

14 For a more detailed description, see my recent Opinion in *Mengesteab*, C-670/16, EU:C:2017:480, at point 79.

15 Judgment of 10 December 2013, C-394/12, EU:C:2013:813.

16 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) ('the Dublin II Regulation' — that regulation was in turn replaced by the Dublin III Regulation). *Abdullahi* concerned the interpretation of Article 19(2) of the Dublin II Regulation which provided for a right of appeal against or review of a transfer decision based upon the requested Member State's acceptance that it should take charge of an applicant for international protection under that regulation.

17 Judgment of 7 June 2016, C-63/15, EU:C:2016:409.

18 Judgment of 7 June 2016, C-155/15, EU:C:2016:410.

19 Judgment of 10 December 2013, C-394/12, EU:C:2013:813, paragraph 62.

31. The Court reviewed *Abdullahi*[20] in the light of the changes to the rules in the Dublin II Regulation introduced by the Dublin III Regulation when interpreting Article 27(1) of the latter regulation in *Ghezelbash*. The Court there stated that: (i) the legal remedy provided in Article 27(1) must be effective and that that remedy covers questions of both fact and law; (ii) there is no limitation as to the arguments that an applicant for international protection may raise under that provision; (iii) there is no specific link between the right to an appeal against or review of a transfer decision and Article 3(2) of the Dublin III Regulation; and (iv) it is made clear in recital 19 of the Dublin III Regulation that the right to an effective remedy should cover both examination of the application of that regulation and the legal and factual situation in the Member State to which the asylum seeker is to be transferred.[21]

32. Those general principles apply equally here.

33. The issue in *Ghezelbash* was whether the relevant Chapter III criteria for determining the Member State responsible had been applied correctly.[22] The reasoning in *Ghezelbash* was applied in *Karim*, which concerned whether an applicant for international protection could invoke a failure to apply Article 19(2) of the Dublin III Regulation correctly in determining the Member State responsible.[23] The Court there stated that Article 19(2) of the Dublin III Regulation establishes the framework within which the assessment of the Chapter III criteria to apply must be conducted.[24]

34. It is true that both *Ghezelbash* and *Karim* concerned elements of the process under the Dublin III Regulation which apply *before* a Member State's authorities issue a transfer decision. Mr Shiri's case is different, in so far as it concerns the process *after* such a decision has been issued.[25] However, that does not imply, in my view, that the right to an effective remedy ceases to apply.

35. Such a difference does not alter the point of principle, namely that the right to an effective remedy encompasses the right to challenge a failure to apply the Dublin III Regulation properly. That view is fully consistent with the Court's case-law.[26]

36. A number of changes were wrought by the Dublin III Regulation to the previous regime governed by the Dublin II Regulation. Recital 19 highlights one of the notable modifications that were introduced by the EU legislature to grant enhanced protection to individual applicants.[27] Thus, the Dublin III Regulation differs to a significant degree from the Dublin II Regulation.

20 Judgment of 10 December 2013, C-394/12, EU:C:2013:813.

21 Judgment of 7 June 2016, C-63/15, EU:C:2016:409, see respectively paragraphs 36, 37 and 38.

22 Those criteria which concern the issuance of visas are set out in Article 12(1) and (4) of the Dublin III Regulation.

23 Article 19 of the Dublin III Regulation lays down the rules which apply where a Member State issues a residence document to an applicant and becomes the Member state responsible for examining his application for international protection (Article 19(1)). That responsibility will cease if the Member State so designated can establish that the person concerned has left the territory of the Member States for at least three months unless the person concerned is in possession of a valid residence document issued by the Member State responsible (Article 19(2)).

24 Judgment of 7 June 2016, *Karim*, C-155/15, EU:C:2016:410, paragraph 23.

25 See point 57 below.

26 Judgment of 7 June 2016, *Ghezelbash*, C-63/15, EU:C:2016:409, paragraphs 40 to 44.

27 Judgment of 7 June 2016, *Ghezelbash*, C-63/15, EU:C:2016:409, paragraphs 45 to 52. See further the Commission's proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, dated 3 December 2008 (COM(2008) 820 final), at pages 6 and 7.

37. It is moreover necessary to give effect to the aims of the Dublin III Regulation by ensuring that it is applied in a manner which enables Member States to act consistently with their obligations under international law.[28] The regulation also serves to guarantee that fundamental rights are observed.[29] The rights to good administration and to an effective remedy (Articles 41 and 47 of the Charter) provide standards which are particularly relevant to the correct interpretation of Article 27(1) of the Dublin III Regulation.[30]

38. The United Kingdom puts forward a number of arguments to support the contrary interpretation. First, it stresses that a purposive approach should be applied in interpreting the Dublin III Regulation. The key objective is that one Member State should be responsible for examining any application for international protection as set out in Article 3(1).[31] I agree with that submission; but I do not consider that allowing judicial scrutiny of a Member State's failure to comply with the time limits set out in the Dublin III Regulation contradicts that fundamental principle of the Dublin system.

39. Second, the United Kingdom expresses the concern that if applicants can challenge transfer decisions on the grounds that the period for implementing such decisions has expired, that is incompatible with the avowed aim of the Dublin III Regulation to prevent 'forum shopping'. However, in so far as that expression connotes multiple applications for international protection made in a number of Member of States by the same applicant,[32] the Dublin III Regulation itself makes specific provision to deal with that issue.[33]

40. Article 29(2) of the Dublin III Regulation provides that if a requesting Member State fails to comply with the six month period for implementing a transfer, the consequence is that it is itself responsible for examining the application for international protection. Thus, the person concerned would remain in the requesting Member State. That consequence arises from the operation of the rules in the Dublin III Regulation itself. The purpose of Article 29(2) of the Dublin III Regulation is to provide an incentive for the requesting Member State to respect the common objective of complying with the prescribed time limits in order to ensure that applications are processed swiftly and to avoid creating a situation where an applicant for international protection is left 'in orbit' with no Member State designated as responsible for examining his application for international protection.[34] If an applicant in Mr Shiri's position applies for international protection in more than one Member State, the EU legislature has deliberately chosen to provide an incentive for the requesting Member State to implement the transfer swiftly. If the requesting Member State fails to meet that key objective, the consequence is that the applicant remains in the requesting Member State. That is precisely how the legislation is designed to work. That is neither the same as nor equivalent to 'forum shopping'.

41. Third, although the distinction which the United Kingdom seeks to draw between substantive and procedural issues is at first sight attractive, it does not withstand closer scrutiny. That distinction does not resolve the matter at issue. The time limits laid down in the Dublin III Regulation certainly cover procedural matters, but they also have substantive implications for both applicants and the Member

28 Recital 32.

29 Recital 39.

30 See point 104 and footnote 97 of my Opinion in *Mengesteab*, C-670/16, EU:C:2017:480.

31 In Mr Shiri's case the rules that designate the Member State responsible are those in Article 29 of the Dublin III Regulation. The application of the Chapter III criteria is not at issue: see point 34 above.

32 I understand the concept of 'forum shopping' to refer to the abuse of asylum procedures in the form of multiple applications for asylum submitted by the same person in several Member States with the sole aim of extending his stay in the Member States: see COM(2008) 820 final dated 3 December 2008, p. 4. The term is also used in a wider sense to cover third-country nationals who wish to lodge their application for international protection in a particular Member State. However, I am not using 'forum shopping' in that sense in this Opinion. As I have indicated in point 69 and footnote 66 in my Opinion in *Mengesteab* (C-670/16, EU:C:2017:480), the latter use of the expression 'forum shopping' has been criticised as being misleading and inappropriate: see 'The reform of the Dublin III Regulation' study for the LIBE Committee commissioned by the European Parliament's policy department for citizens' rights and constitutional affairs, p. 21.

33 Articles 23 to 25 of the Dublin III Regulation.

34 Recital 5 of the Dublin III Regulation.

States concerned. For applicants, the time limits provide a degree of certainty and also have substantive implications as to which Member State will examine the application for international protection. The substantive and procedural aspects of the time limits laid down are likewise intertwined as regards the Member States.

42. Fourth, it seems to me that the United Kingdom's concerns relating to national procedural autonomy are misplaced. The issue of principle that the Court has to decide does not concern the operation of national procedural rules as such.

43. Finally, it does not follow from an applicant's right to appeal against or to seek review of a transfer decision on the ground that the six month period for implementing that decision has expired that all such applications will inevitably be successful. Rather, it seems to me that national courts can and should assess the merits of any such appeal or review. In so doing it is necessary to take into account the purpose of the provisions at issue. The period of six months to implement the transfer decision was originally fixed in order to enable Member States to establish the practical details to effect the transfer.[35] As I have already stated, an objective of both the time limit and the incentive encouraging Member States to respect it is to ensure that applicants are not left in a situation where no Member State takes responsibility for examining their applications for international protection. In determining whether Article 29(2) should apply in any particular case it will also be necessary to establish whether the person concerned has been, or is likely to be, at risk in that respect.[36]

44. I am therefore of the view that Article 27(1) of the Dublin III Regulation should be interpreted as meaning that in principle an applicant for international protection is able to call into question a transfer decision on the ground that the requesting Member State has failed to implement the transfer within the six month period laid down in Article 29(1) of that regulation.

Question 2

45. By Question 2 the referring court seeks guidance as to the interpretation of Article 29(2) of the Dublin III Regulation.[37] In circumstances where the requesting Member State fails to implement a transfer decision within the six month period laid down in Article 29(1), is the requested Member State relieved of its responsibility to consider the application for international protection of the person concerned solely because that period has expired? Or is there an additional condition that applies before responsibility for examining the application for international protection is placed on the requesting Member State, namely, must the requested Member State notify the requesting Member State that it now refuses to take back the applicant for international protection?

46. With the exception of the United Kingdom, all those who lodged written observations in these proceedings agree that Article 29(2) of the Dublin III Regulation should not be construed as imposing such an additional condition. The United Kingdom submits, on the contrary, that the expiry of a time limit is not sufficient of itself to render the requesting Member State responsible and that the requested Member State retains a discretion to examine the application for international protection of the person concerned.

47. I do not share the United Kingdom's view.

35 Judgment of 29 January 2009, *Petrosian and Others*, C-19/08, EU:C:2009:41, paragraphs 40 and 41.

36 See further points 96 to 98 of my Opinion in *Mengesteab*, C-670/16, EU:C:2017:480.

37 See also points 248 to 257 of my Opinion in *A.S. and Jafari*, C-490/16 and C-646/16, EU:C:2017:443.

48. The text of Article 29(2) of the Dublin III Regulation ('where the transfer does not take place within the six months' time limit, the Member State responsible shall be relieved of its obligations to take charge or to take back the person concerned and responsibility shall then be transferred to the requesting Member State ...') contains no words indicating that the legislature introduced an additional condition into the process between the requesting Member State and the requested Member State. The United Kingdom relies on the words 'responsibility shall then be transferred to the requesting Member State' as showing that the requested Member State must take positive action before it is relieved of its obligations. However, I read those words as meaning simply that responsibility is placed with the requesting Member State after the six month period has expired. The text does not indicate that there is a subsequent (unspecified) step in the process in addition to the expiry of the six month period laid down in Article 29(1) that must be fulfilled in order for responsibility for examining the application for international protection to lie with the requesting Member State. That transfer of responsibility results from the application of Article 29(2) itself. [38]

49. That view is entirely consistent with the purpose of the provision. [39] Inserting an additional condition into the process between the requesting and requested Member States is incompatible with the aim of determining swiftly the Member State responsible. It would also be inconsistent with a key aim of the Dublin system, namely ensuring that an applicant is not left in a position where no State accepts responsibility for examining his application for international protection.

50. I also note that the legislative scheme of the Dublin III Regulation provides that responsibility reverts to the requesting Member State when that State fails to comply with the time limits laid down for take charge requests (Article 22(7)) and take back requests (Article 25(2)). There is no additional condition in either of those instances. It would be inconsistent with that scheme to introduce such a condition where the requesting Member State fails to comply with the time limit for implementing a transfer decision (Article 29(1) and (2)). Finally, as Austria, the Czech Republic and Switzerland point out, the wider scheme of the Dublin system shows that there is no such additional condition to the inter-State process. Nothing of the kind is to be found in Article 9(2) of the Dublin Implementing Regulation. [40]

51. I consider therefore that Article 29(2) of the Dublin III Regulation should be interpreted as meaning that, in relation to the arrangements between the requesting Member State and the requested Member State relating to the transfer, the expiry of the six month period laid down in Article 29(1) is sufficient of itself for the requesting State to become responsible for examining the application for international protection of the person concerned.

Mr Shiri's case

52. Mr Shiri's case raises the difficult question as to how the rules governing an applicant's right to an effective remedy in Article 27(1) of the Dublin III Regulation should be interpreted in conjunction with Article 29 which concerns the arrangements and time limits for implementing transfer decisions.

53. Mr Shiri submits that the time limit for implementing the transfer decision in his case started to run on 23 March 2015, when the Bulgarian authorities accepted the take back request made by their Austrian counterparts. He considers that that period expired six months later on 23 September 2015. It follows, pursuant to Article 29(2) of the Dublin III Regulation, that he cannot be transferred to

38 Whilst the text of Article 9(2) of the Dublin Implementing Regulation (see point 13 above) suggests that time can be extended provided that the requesting Member State duly informs the requested Member State that it cannot carry out the transfer within six months, that possibility is expressly limited to the particular circumstances enunciated in Article 29(2) of the Dublin III Regulation. If it does not do so, the requesting Member State becomes responsible under the normal six month rule for examining the substantive application.

39 See point 40 above.

40 See further footnote 38 above.

Bulgaria: that Member State has been relieved of its obligations to take him back, because the transfer was not implemented during the prescribed six month period. In short, Mr Shiri argues that it is now too late to implement the transfer decision. He adds that the Bundesverwaltungsgericht (Federal Administrative Court) did not rule on his application for suspending the transfer decision.

54. In my view the position is not as straightforward as Mr Shiri submits.

55. In examining the particular circumstances of his case it is first necessary to draw a distinction between the rules in Article 27(3), which govern suspending the implementation of transfer decisions, and the provisions concerning the arrangements and time limits for implementing such decisions in Article 29 of the Dublin III Regulation, before examining how those rules might be read together.

56. Article 27(3) states that Member States must make provision for the implementation of transfer decisions to be suspended. Member States may choose to: (i) confer upon the person concerned the right to remain in the country concerned pending the outcome of his appeal or application for review;[41] (ii) provide that the transfer decision is automatically suspended;[42] or (iii) ensure that the person concerned has the opportunity to request a court or tribunal to suspend implementation of the transfer decision while the appeal or review proceedings remain outstanding.[43] The legislator's objective behind allowing Member States' competent authorities to decide whether to suspend enforcement of a transfer decision was to strengthen the legal safeguards afforded to applicants for international protection and to enable them better to defend their rights.[44]

57. The wording of Article 27(1) and (3) and the general aims of those provisions do not extend to regulating the operation of the time limits laid down in Article 29 of the Dublin III Regulation. However, where a transfer decision is challenged (as in Mr Shiri's case) it is necessary to read both sets of provisions in a manner which is consistent and coherent with the legislative scheme. In general, where an applicant for international protection challenges a transfer decision on the ground that the Member State concerned failed to respect the six month period laid down in Article 29(1) of the Dublin III Regulation I understand the rules to operate as follows. It should be borne in mind that such a challenge is being brought *after* the decision determining the Member State responsible has been made in accordance with the Chapter III criteria. The Member State responsible (in Mr Shiri's case, Bulgaria) is obliged to take the applicant back.[45]

58. It may be that in Austria transfer decisions become enforceable as soon as they are issued by the competent authorities: whether that is so is a matter of national law.

59. Article 29(1) states that the transfer of the applicant from the requesting Member State (here, Austria) to the Member State responsible (here, Bulgaria) must be carried out in accordance with the national law of the requesting Member State as soon as practically possible, and at the latest within six months of acceptance of the request by another Member State to take charge or to take back the person concerned ('the first condition') or of the final decision on an appeal or review where there is a suspensive effect in accordance with Article 27(3) ('the second condition'). The first condition is based on the premiss that only the practical details of the implementation remain to be determined, including setting the date thereof.[46] The second condition is based on the premiss that the Member State concerned implements the procedure for suspending the enforcement of transfer decisions in Article 27(3) of the Dublin III Regulation.

41 Article 27(3)(a) of the Dublin III Regulation.

42 Article 27(3)(b) of the Dublin III Regulation.

43 Article 27(3)(c) of the Dublin III Regulation; see further point 20 and footnote 11 above.

44 COM(2008) 820 final, 3 December 2008, p. 7.

45 Pursuant to Article 18(1)(b), Bulgaria (the requested Member State) is obliged to take Mr Shiri back under the conditions laid down in Articles 23, 24, 25 and 29 of the Dublin III Regulation.

46 Judgment of 29 January 2009, *Petrosian and Others*, C-19/08, EU:C:2009:41.

60. I add that Article 29(3) provides that where a person is transferred in error or if a decision to transfer is overturned on appeal or review after it has been executed, the Member State which carried out the transfer must accept that person back promptly. Where a transfer decision is suspended pending the outcome of legal proceedings, recourse to Article 29(3) will naturally be avoided.[47] Notwithstanding that the transfer decision was *not* suspended in relation to Mr Shiri, he in fact remained in Austria. Thus, Article 29(3) is not in point.

61. Mr Shiri's case does not fit neatly within either the first or the second condition set out in Article 29(1). However, the referring court will have to grapple with the complex issue of how the rules in the Dublin III Regulation and the relevant provisions of national law interlink and apply in order to decide Mr Shiri's application contesting the BFA's transfer decision. I offer the following comments.

62. In relation to the first BFA decision, whilst Austria has implemented Article 27(3) of the Dublin III Regulation in so far as it provides that applicants are able to request a court or tribunal to suspend implementation of a transfer decision, it is common ground that there was no such ruling in Mr Shiri's case. However, the de facto position was that he was allowed to stay in Austria. The time limit for implementing the transfer under Article 29(1) of the Dublin III Regulation began to run on 23 March 2015. That period stopped when the first BFA decision was annulled on 20 July 2015. From that point onwards, there was no transfer decision to enforce: the national court remitted Mr Shiri's case to the BFA for a new decision.[48] Whether the annulment of the first BFA decision is a ruling *ex nunc* (invalid from 20 July 2015 – the date of the ruling) or *ex tunc* (treated as though the first BFA decision of 2 July 2015 had not been issued) is not governed by the Dublin III Regulation. That is purely a matter of Austrian law.

63. Thus, as there was no transfer decision (at least) with effect from 20 July 2015, neither the first or second condition in Article 29(1) was fulfilled at that point. Accordingly, it does not follow by operation of Article 29(2) that Bulgaria was relieved of its obligations to take him back.

64. In relation to the second BFA decision, which was issued before 23 September 2015 (the end of the six month period), the referring court states that there has been no further communication from the Bulgarian authorities. That is not surprising as there is nothing in the regulation that requires Bulgaria to confirm its acceptance.

65. However, Mr Shiri's case is still not consistent with the premiss behind either the first or the second condition in Article 29(1) of the Dublin III Regulation. That provision does not indicate when the time limit for implementing a transfer decision begins to run in such circumstances. It follows from the wording of that provision that the basis of the first condition is that it applies in circumstances where there is no appeal or review under Article 27(1). Thus, subject to the practical details being established the transfer decision is in effect certain.[49] That is plainly not the position in Mr Shiri's case where there have been sequential sets of legal proceedings and the second BFA decision is currently subject to challenge. The merits in relation to that decision are yet to be determined. Mr Shiri's case does not therefore fall within that condition.

47 Whilst it is undoubtedly appropriate to have a provision which enables the competent authorities to put right mistakes, I consider that Article 29(3) should be used as the exception rather than the rule, as it is not consistent with the aim that transfers should be conducted with full respect for human rights and human dignity (see recital 24 and the second subparagraph of Article 29(1) of the Dublin III Regulation) for applicants routinely to be sent to and fro between Member States.

48 See point 16 above.

49 See point 59 above.

66. Mr Shiri has appealed the second BFA decision. There is no suspensive effect *de jure* as the national courts have omitted to rule on the application that he made under the national rules that implement Article 27(3) of the Dublin III Regulation. Thus, the requirements of the second condition in Article 29(1) are also not met in Mr Shiri's case.[50] That may be because the simple fact of lodging an appeal against a transfer decision is sufficient to ensure that the person concerned will not be transferred to another Member State under the rules of Austrian law; or there may be a general practice in Austria of not ruling on applications for suspensive effect (as Mr Shiri alleges). Mr Shiri's case reveals that there may be a gap in the legislation as operated in Austria.[51]

67. In my opinion, Article 29(1) envisages that the period for carrying out the transfer will begin to run once the future implementation of the transfer is, in principle, agreed upon and certain and only the practical details remain to be determined.[52] That is *a fortiori* the position where the national court hearing the appeal against the transfer decision has not yet ruled on the merits and proceedings are stayed because a reference to this Court has been made. Any implementation of the transfer decision cannot be certain until such proceedings are resolved.

68. I therefore conclude that in the particular circumstances of Mr Shiri's case, the period for carrying out the transfer may begin to run only as from the time the future implementation of the transfer is, in principle, agreed upon and certain and only the practical details remain to be determined. That will be a matter for the competent national authorities to establish in accordance with the national law of the requesting Member State. Any such transfer of an applicant for international protection from the requesting Member State to the requested Member State should be implemented as soon as possible and no later than six months after a ruling on the merits of an appeal, or review of a transfer decision, becomes certain.

Conclusion

69. In the light of all the above considerations I propose that the Court should answer the questions raised by the Verwaltungsgerichtshof (Supreme Administrative Court, Austria) as follows:

– Pursuant to Article 27(1) of Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person an applicant for international protection is in principle able to call into question a transfer decision on the ground that the requesting Member State has failed to implement such a decision within the six month period laid down in Article 29(1) of that regulation.

– Under Article 29(2) of Regulation No 604/2013 the expiry of the six month period laid down in Article 29(1) thereof is sufficient of itself for the requesting Member State to become responsible for examining the application for international protection of the person concerned.

50 In spite of the absence of a legal ruling for the purposes of Article 27(3)(c) of the Dublin III Regulation, Mr Shiri has in fact been allowed to remain in Austria.

51 It is for the Commission to assess whether there is a practice which is, to some degree, of a consistent and general nature and whether it should bring an action for failure to fulfil obligations pursuant to Article 258 TFEU: see by analogy, judgment of 26 April 2005, *Commission* v *Ireland*, C-494/01, EU:C:2005:250, paragraph 28; see also the Opinion of Advocate General Geelhoed in *Commission* v *Ireland*, C-494/01, EU:C:2004:546, point 48.

52 Judgment of 29 January 2009, *Petrosian and Others*, C-19/08, EU:C:2009:41, paragraph 45.