Reports of Cases

OPINION OF ADVOCATE GENERAL
BOT
delivered on 7 September 2017 [1]

Case C-360/16

Bundesrepublik Deutschland
v
Aziz Hasan

(Request for a preliminary ruling from
the Bundesverwaltungsgericht (Federal Administrative Court, Germany))

(Reference for a preliminary ruling — Asylum policy — 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 — Detailed rules and time limits applicable to the transfer of a third-country national to the Member State where the first asylum application was made — Starting point of the time limit for transferring an asylum applicant)

I. Introduction

1. In the present case, the Court is asked to interpret the provisions of Articles 18, 23, 24, 27 and 29 of Regulation (EU) No 604/2013 [2] with a view to ascertaining, first, the finality of the determination of the Member State responsible for examining an application for international protection, secondly, the scope of the judicial review of transfer decisions and, finally, the detailed rules, procedures and time limits applicable in the case where an applicant for international protection who has already been transferred to the Member State responsible for examining his application has illegally returned to the territory of the first requesting Member State, in which an appeal against the transfer decision is pending.

2. The provisions of the Dublin III Regulation do not govern the situation, albeit common, in which an applicant for international protection who has been transferred to the Member State responsible for examining his asylum application returns to the first requesting Member State. The referring court is therefore considering circumstances for which the EU legislature made no express provision.

1 Original language: French.

2 Regulation 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'.

3. While the answers to the questions thus raised by the referring court do not follow directly from a reading of the Dublin III Regulation, they can nevertheless be inferred from the general scheme of that legislation and the relevant case-law of the Court, although they will call for a reconciliation of the various objectives pursued by the EU legislature in the context of the Common European Asylum System ('CEAS') based on Article 78 TFEU. [3]

4. The rationale underpinning the CEAS may lead to the conclusion that the system established at European level is ill equipped to deal with the realities on the ground. That system can give rise to an imbalance between the Member States when it comes to taking charge of applicants for international protection. It can also have the effect of compelling the individuals concerned to reside in a single Member State, that is to say the one determined as being responsible for examining their application for international protection.

5. Nonetheless, the system currently in force does not allow the Member States to release themselves from the responsibility they have under that legislation to process such applications effectively, in particular by not carrying out checks on and retaining applicants for whom they are responsible in their territory. Nor, conversely, does it allow applicants for international protection to choose the Member State that will be responsible for processing their application by engaging in secondary movements and lodging multiple asylum applications in different Member States.

6. The outcome of my analysis will therefore be to propose that the Court give a ruling to the effect that the transfer of an applicant for international protection does not have the effect of finally determining the Member State responsible for the asylum application.

7. I shall also explain that, in a situation such as that at issue in the main proceedings, it must be possible for a judicial review of the decision to transfer an asylum applicant to take into account circumstances subsequent to the implementation of that measure.

8. Lastly, I shall set out the reasons why I take the view that, if an asylum applicant illegally returns to the territory of the first requesting Member State, the latter Member State must initiate a new transfer procedure that includes a new take back request and must be completed within new time limits to be calculated in accordance with the provisions of the Dublin III Regulation.

II. Legal context

A. EU law

1. The Dublin III Regulation

9. Recitals 4, 5, 19 and 21 of that regulation state:

'(4) … the CEAS should include, in the short-term, a clear and workable method for determining the Member State responsible for the examination of an asylum application.

3 That is to say, not only to provide for an effective system for determining the Member State responsible for examining an application for international protection, to ensure that such applications are processed quickly and to avoid forum shopping, secondary movement and abuse consisting in the submission of multiple applications, but also to safeguard the rights of the applicants and to strike a balance between the responsibility and solidarity of the Member States in such a way as to avoid the incidence of 'refugees in orbit' [see to that effect, in particular, Opinion of Advocate General Sharpston in *Ghezelbash* (C-63/15, EU:C:2016:186, point 37), citing the judgment of 21 December 2011, *N. S. and Others* (C-411/10 and C-493/10, EU:C:2011:865, paragraphs 78 and 79)].

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

…

(19) 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 of Fundamental Rights of the European Union. [4]

…

(21) Deficiencies in, or the collapse of, asylum systems, often aggravated or contributed to by particular pressures on them, can jeopardise the smooth functioning of the system put in place under this Regulation, which could lead to a risk of a violation of the rights of applicants as set out in the Union asylum acquis and the [Charter], other international human rights and refugee rights.'

10. Article 2 of that regulation defines the following terms:

'…

(c) "applicant" means a third-country national or a stateless person who has made an application for international protection in respect of which a final decision has not yet been taken;

(d) "examination of an application for international protection" means any examination of, or decision or ruling concerning, an application for international protection by the competent authorities in accordance with Directive 2013/32/EU [5] and Directive 2011/95/EU, [6] except for procedures for determining the Member State responsible in accordance with this Regulation …'

11. Article 3 of the Dublin III Regulation provides:

'1. Member States shall examine any application for international protection by a third-country national or a stateless person who applies on the territory of any one of them, including at the border or in the transit zones. 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. Where no Member State responsible can be designated on the basis of the criteria listed in this Regulation, the first Member State in which the application for international protection was lodged shall be responsible for examining it.

4 'The Charter'.

5 Directive of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (OJ 2013 L 180, p. 60.

6 Directive of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (OJ 2011 L 337, p. 9).

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], the determining Member State shall continue to examine the criteria set out in Chapter III in order to establish whether another Member State can be designated as responsible.

Where the transfer cannot be made pursuant to this paragraph to any Member State designated on the basis of the criteria set out in Chapter III or to the first Member State with which the application was lodged, the determining Member State shall become the Member State responsible.

3. Any Member State shall retain the right to send an applicant to a safe third country, subject to the rules and safeguards laid down in Directive 2013/32 …'

12. Article 7 of that regulation provides:

'…

2. The Member State responsible in accordance with the criteria set out in this Chapter shall be determined on the basis of the situation obtaining when the applicant first lodged his or her application for international protection with a Member State.

3. In view of the application of the criteria referred to in Articles 8, 10 and 16, Member States shall take into consideration any available evidence regarding the presence, on the territory of a Member State, of family members, relatives or any other family relations of the applicant, on condition that such evidence is produced before another Member State accepts the request to take charge or take back the person concerned, pursuant to Articles 22 and 25 respectively, and that the previous applications for international protection of the applicant have not yet been the subject of a first decision regarding the substance.'

13. Article 18 of that regulation, entitled 'Obligations of the Member State responsible', provides:

'1. The Member State responsible under this Regulation shall be obliged to:

…

(b) take back, under the conditions laid down in Articles 23, 24, 25 and 29, an applicant whose application is under examination and who made an application in another Member State or who is on the territory of another Member State without a residence document;

(c) take back, under the conditions laid down in Articles 23, 24, 25 and 29, a third-country national or a stateless person who has withdrawn the application under examination and made an application in another Member State or who is on the territory of another Member State without a residence document;

(d) take back, under the conditions laid down in Articles 23, 24, 25 and 29, a third-country national or a stateless person whose application has been rejected and who made an application in another Member State or who is on the territory of another Member State without a residence document.

2. In the cases falling within the scope of paragraph 1(a) and (b), the Member State responsible shall examine or complete the examination of the application for international protection made by the applicant.

In the cases falling within the scope of paragraph 1(c), when the Member State responsible had discontinued the examination of an application following its withdrawal by the applicant before a decision on the substance has been taken at first instance, that Member State shall ensure that the applicant is entitled to request that the examination of his or her application be completed or to lodge a new application for international protection, which shall not be treated as a subsequent application as provided for in Directive 2013/32 … . In such cases, Member States shall ensure that the examination of the application is completed.

In the cases falling within the scope of paragraph 1(d), where the application has been rejected at first instance only, the Member State responsible shall ensure that the person concerned has or has had the opportunity to seek an effective remedy pursuant to Article 46 of Directive 2013/32 …'

14. The second subparagraph of Article 19(3) of the Dublin III Regulation reads as follows:

'An application lodged after an effective removal has taken place shall be regarded as a new application giving rise to a new procedure for determining the Member State responsible.'

15. Article 20 of that regulation, entitled 'Start of the procedure', provides:

'1. The process of determining the Member State responsible shall start as soon as an application for international protection is first lodged with a Member State.

…

4. Where an application for international protection is lodged with the competent authorities of a Member State by an applicant who is on the territory of another Member State, the determination of the Member State responsible shall be made by the Member State in whose territory the applicant is present. The latter Member State shall be informed without delay by the Member State which received the application and shall then, for the purposes of this Regulation, be regarded as the Member State with which the application for international protection was lodged.

…

5. An applicant who is present in another Member State without a residence document or who there lodges an application for international protection after withdrawing his or her first application made in a different Member State during the process of determining the Member State responsible shall be taken back, under the conditions laid down in Articles 23, 24, 25 and 29, by the Member State with which that application for international protection was first lodged, with a view to completing the process of determining the Member State responsible.

…'

16. Article 22(1) and (2) of that regulation provides:

'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 receipt of the request.

2. In the procedure for determining the Member State responsible[,] elements of proof and circumstantial evidence shall be used.'

17. Article 23 of that provision, entitled ‘Submitting a take back request when a new application has been lodged in the requesting Member State’, provides:

‘1. Where a Member State with which a person as referred to in Article 18(1)(b), (c) or (d) has lodged a new application for international protection considers that another Member State is responsible in accordance with Article 20(5) and Article 18(1)(b), (c) or (d), it may request that other Member State to take back that person.

2. A take back request shall be made as quickly as possible and in any event within two months of receiving the Eurodac hit, pursuant to Article 9(5) of Regulation (EU) No 603/2013. [7]

…

3. Where the take back request is not made within the periods laid down in paragraph 2, responsibility for examining the application for international protection shall lie with the Member State in which the new application was lodged.

…’

18. Article 24 of the Dublin III Regulation, entitled ‘Submitting a take back request when no new application has been lodged in the requesting Member State’, reads as follows:

‘1. Where a Member State on whose territory a person as referred to in Article 18(1)(b), (c) or (d) is staying without a residence document and with which no new application for international protection has been lodged considers that another Member State is responsible in accordance with Article 20(5) and Article 18(1)(b), (c) or (d), it may request that other Member State to take back that person.

2. By way of derogation from Article 6(2) of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, [8] where a Member State on whose territory a person is staying without a residence document decides to search the Eurodac system in accordance with Article 17 of Regulation (EU) No 603/2013, the request to take back a person as referred to in Article 18(1)(b) or (c) of this Regulation, or a person as referred to in its Article 18(1)(d) whose application for international protection has not been rejected by a final decision, shall be made as quickly as possible and in any event within two months of receipt of the Eurodac hit, pursuant to Article 17(5) of Regulation … No 603/2013.

If the take back request is based on evidence other than data obtained from the Eurodac system, it shall be sent to the requested Member State within three months of the date on which the requesting Member State becomes aware that another Member State may be responsible for the person concerned.

3. Where the take back request is not made within the periods laid down in paragraph 2, the Member State on whose territory the person concerned is staying without a residence document shall give that person the opportunity to lodge a new application.

7 Regulation of the European Parliament and of the Council of 26 June 2013 on the establishment of Eurodac for the comparison of fingerprints for the effective application of [the Dublin III] Regulation … 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 and on requests for the comparison with Eurodac data by Member States’ law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (OJ 2013 L 180, p. 1).

8 OJ 2008 L 348, p. 98.

4. Where a person as referred to in Article 18(1)(d) of this Regulation whose application for international protection has been rejected by a final decision in one Member State is on the territory of another Member State without a residence document, the latter Member State may either request the former Member State to take back the person concerned or carry out a return procedure in accordance with Directive 2008/115 …

When the latter Member State decides to request the former Member State to take back the person concerned, the rules laid down in Directive 2008/115 … shall not apply.

…'

19. Article 25 of that regulation, entitled 'Replying to a take back request', provides:

'1. The requested Member State shall make the necessary checks and shall give a decision on the request to take back the person concerned as quickly as possible and in any event no later than one month from the date on which the request was received. When the request is based on data obtained from the Eurodac system, that time limit shall be reduced to two weeks.

2. Failure to act within the one month period or the two weeks period mentioned in paragraph 1 shall be tantamount to accepting the request, and shall entail the obligation to take back the person concerned, including the obligation to provide for proper arrangements for arrival.'

20. Article 27 of that regulation, entitled 'Remedies', reads as follows:

'1. The applicant or another person as referred to in Article 18(1)(c) or (d) shall 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.

…

3. For the purposes of appeals against, or reviews of, transfer decisions, Member States shall provide in their national law that:

(a) the appeal or review confers upon the person concerned the right to remain in the Member State concerned pending the outcome of the appeal or review; or

(b) the transfer is automatically suspended and such suspension lapses after a certain reasonable period of time, during which a court or a tribunal, after a close and rigorous scrutiny, shall have taken a decision whether to grant suspensive effect to an appeal or review; or

(c) the person concerned has the opportunity to request within a reasonable period of time a court or tribunal to suspend the implementation of the transfer decision pending the outcome of his or her appeal or review. Member States shall ensure that an effective remedy is in place by suspending the transfer until the decision on the first suspension request is taken. Any decision on whether to suspend the implementation of the transfer decision shall be taken within a reasonable period of time, while permitting a close and rigorous scrutiny of the suspension request. A decision not to suspend the implementation of the transfer decision shall state the reasons on which it is based.

4. Member States may provide that the competent authorities may decide, acting *ex officio*, to suspend the implementation of the transfer decision pending the outcome of the appeal or review.

…'

21. The third subparagraph of Article 28(3) of the Dublin III Regulation provides:

‘Where a person is detained pursuant to this Article, the transfer of that person from the requesting Member State to the Member State responsible shall be carried out as soon as practically possible, and at the latest within six weeks of the implicit or explicit acceptance of the request by another Member State to take charge or to take back the person concerned or of the moment when the appeal or review no longer has a suspensive effect in accordance with Article 27(3).’

21. Article 29 of that regulation, entitled ‘Modalities and time limits’, provides:

‘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.

…’

2. *Directive 2013/32*

22. Recitals 13, 18, 25 and 36 of that directive read as follows:

‘(13) The approximation of rules on the procedures for granting and withdrawing international protection should help to limit the secondary movements of applicants for international protection between Member States, where such movements would be caused by differences in legal frameworks, and to create equivalent conditions for the application of Directive 2011/95… in Member States.

…

(18) It is in the interests of both Member States and applicants for international protection that a decision is made as soon as possible on applications for international protection, without prejudice to an adequate and complete examination being carried out.

…

(25) In the interests of a correct recognition of those persons in need of protection as refugees within the meaning of Article 1 of the Geneva Convention [9] or as persons eligible for subsidiary protection, every applicant should have an effective access to procedures, the opportunity to cooperate and properly communicate with the competent authorities so as to present the relevant facts of his or her case and sufficient procedural guarantees to pursue his or her case throughout all stages of the procedure. Moreover, the procedure in which an application for international protection is examined should normally provide an applicant at least with: the right to stay pending a decision by the determining authority; …

…

(36) Where an applicant makes a subsequent application without presenting new evidence or arguments, it would be disproportionate to oblige Member States to carry out a new full examination procedure. In those cases, Member States should be able to dismiss an application as inadmissible in accordance with the *res judicata* principle.'

23. Article 9(1) of that directive, entitled 'Right to remain in the Member State pending the examination of the application', provides:

'Applicants shall be allowed to remain in the Member State, for the sole purpose of the procedure, until the determining authority has made a decision in accordance with the procedures at first instance set out in Chapter III. That right to remain shall not constitute an entitlement to a residence permit.'

24. Article 31(3) of Directive 2013/32, entitled 'Examination procedure', states:

'3. Member States shall ensure that the examination procedure is concluded within six months of the lodging of the application.

Where an application is subject to the procedure laid down in [the Dublin III] Regulation …, the time limit of six months shall start to run from the moment the Member State responsible for its examination is determined in accordance with that Regulation, the applicant is on the territory of that Member State and has been taken in charge by the competent authority.Member States may extend the time limit of six months set out in this paragraph for a period not exceeding a further nine months, where:

…

(c) the delay can clearly be attributed to the failure of the applicant to comply with his or her obligations under Article 13.

…'

25. Article 33 of that directive, entitled 'Inadmissible applications' provides:

'1. In addition to cases in which an application is not examined in accordance with [the Dublin III] Regulation …, Member States are not required to examine whether the applicant qualifies for international protection in accordance with Directive 2011/95 … where an application is considered inadmissible pursuant to this Article.

9 Convention relating to the Status of Refugees, signed at Geneva on 28 July 1951.

2. Member States may consider an application for international protection as inadmissible only if:

…

(d) the application is a subsequent application, where no new elements or findings relating to the examination of whether the applicant qualifies as a beneficiary of international protection by virtue of Directive 2011/95 … have arisen or have been presented by the applicant …'

26. Article 40 of that directive, entitled 'Subsequent application', provides:

'1. Where a person who has applied for international protection in a Member State makes further representations or a subsequent application in the same Member State, that Member State shall examine these further representations or the elements of the subsequent application in the framework of the examination of the previous application or in the framework of the examination of the decision under review or appeal, insofar as the competent authorities can take into account and consider all the elements underlying the further representations or subsequent application within this framework.

2. For the purpose of taking a decision on the admissibility of an application for international protection pursuant to Article 33(2)(d), a subsequent application for international protection shall be subject first to a preliminary examination as to whether new elements or findings have arisen or have been presented by the applicant which relate to the examination of whether the applicant qualifies as a beneficiary of international protection by virtue of Directive 2011/95 …

…

5. When a subsequent application is not further examined pursuant to this Article, it shall be considered inadmissible, in accordance with Article 33(2)(d).

…'

27. Article 46 of Directive 2013/32, entitled 'The right to an effective remedy', reads as follows:

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

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

…

(iv) not to conduct an examination pursuant to Article 39;

…

3. In order to comply with paragraph 1, Member States shall ensure that an effective remedy provides for a full and *ex nunc* examination of both facts and points of law, including, where applicable, an examination of the international protection needs pursuant to Directive 2011/95 …, at least in appeals procedures before a court or tribunal of first instance.

…

5. Without prejudice to paragraph 6, Member States shall allow applicants to remain in the territory until the time limit within which to exercise their right to an effective remedy has expired and, when such a right has been exercised within the time limit, pending the outcome of the remedy.

6. In the case of a decision:

…

(b) considering an application to be inadmissible pursuant to Article 33(2)(a), (b) or (d);

…

a court or tribunal shall have the power to rule whether or not the applicant may remain on the territory of the Member State, either upon the applicant's request or acting *ex officio*, if such a decision results in ending the applicant's right to remain in the Member State and where in such cases the right to remain in the Member State pending the outcome of the remedy is not provided for in national law.

…'

3. *Implementing Regulation (EU) No 118/2014*[10]

28. Article 1(4) of that regulation, amending Regulation (EC) No 1560/2003,[11] inserted a new paragraph into Article 9, worded as follows :

'1a. Where a transfer has been delayed at the request of the transferring Member State, the transferring and the responsible Member States must resume communication in order to allow for a new transfer to be organised as soon as possible, in accordance with Article 8, and no later than two weeks from the moment the authorities become aware of the cessation of the circumstances that caused the delay or postponement. In such a case, an updated standard form for the transfer of the data before a transfer is carried out as set out in Annex VI shall be sent prior to the transfer.'

29. Article 1(5) of Implementing Regulation No 118/2014 replaced Article 9(2) of Regulation No 1560/2003 with the following provisions:

'2. 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.'

10 Commission Regulation of 30 January 2014 amending Regulation (EC) No 1560/2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 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 2014 L 39, p. 1).

11 Commission Regulation of 2 September 2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 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 222, p. 3).

B. German law

30. Paragraph 27a of the Asylgesetz (Law on asylum), in the version of 2 September 2008 as amended,[12] provides:

'An asylum application shall be inadmissible if, under the provisions of EU law or an international treaty, another State is responsible for implementing the asylum procedure.'

31. Paragraph 34a of that Law states:

'(1) If the foreign national is to be removed to a safe third country (Paragraph 26a) or to a country responsible for implementing the asylum procedure (Paragraph 27a), the Bundesamt (Federal Office) shall order his removal to that country as soon as it is established that the removal can be carried out …

(2) Applications as provided for in Paragraph 80(5) of the Verwaltungsgerichtsordnung [(Rules of Procedure of the Administrative Courts[13])] which are directed against a removal order shall be lodged within one week of the latter's notification. If such an application is lodged in time, removal shall not be permissible until the court has delivered its decision …'

32. Paragraph 77(1) of that Law provides:

'In disputes falling within the scope of this Law, the court shall take into account the situation of fact and of law obtaining at the time of the last hearing; if judgment is given without a hearing, the relevant point in time shall be that at which judgment is given …'

33. Article 2(1) and (2) of the Agreement between the Government of the Federal Republic of Germany and the Government of the Italian Republic on the readmission of persons in an irregular situation, of 29 March 1991, in the version published on 9 July 1993, provides :

'(1) At the request of a Contracting Party, the Contracting Party whose external border was the point of entry for a person who does not satisfy or no longer satisfies the conditions of entry or residence applicable in the territory of the requesting Contracting Party shall readmit that person to its territory without formality.

(2) For the purposes of this Article, external border means the first border crossed which is not an internal border of the Contracting Parties to the Schengen Agreement of 14 June 1985 [between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, which was signed at Schengen (Luxembourg) on 14 June 1985 and entered into force on 26 March 1995[14]].'

III. The facts and questions referred for a preliminary ruling

34. After being arrested in Frankfurt am Main (Germany), Mr Aziz Hasan, on 29 October 2014, made an application for asylum in Germany. A Eurodac search revealed that he had already applied for international protection in Italy on 4 September 2014.

12 BGBl. 2008 I, p. 1798.
13 BGBl. 1960 I, p. 686.
14 OJ 2000 L 239, p. 13.

35. Then, on 11 November 2014, the German authorities asked the Italian authorities to take Mr Hasan back on the basis of the provisions of the Dublin III Regulation. The Italian authorities did not reply to that take back request.

36. On 30 January 2015, the German authorities rejected Mr Hasan's asylum application as inadmissible, on the ground that Italy was responsible for examining it, and ordered that he be transferred to that Member State.

37. Mr Hasan challenged that decision before the Verwaltungsgericht Trier (Administrative Court, Trier, Germany), and at the same time made an application requesting that his action be given suspensive effect. The application for suspensive effect was rejected on 12 March 2015, the action itself having been dismissed on 30 June 2015.

38. On 3 August 2015, the German authorities transferred Mr Hasan to Italy. Mr Hasan illegally returned to Germany within the same month, however.

39. Mr Hasan appealed against the judgment of the Verwaltungsgerichtshof Trier (Administrative Court, Trier) to the Oberverwaltungsgericht Rheinland-Pfalz (Higher Administrative Court, Rhineland-Palatinate Germany), which, on 3 November 2015, upheld the appeal on the ground, in particular, that, since Mr Hasan's transfer to Italy had taken place after the six-month time limit laid down in Article 29(1) of the Dublin III Regulation had expired, Germany had become responsible for examining his asylum application.

40. The Federal Republic of Germany then brought an appeal on a point of law (*Revision*) against that decision before the referring court. The Bundesverwaltungsgericht (Federal Administrative Court, Germany) takes the view that the appeal court's analysis is wrong in so far as a correct calculation of the time limit laid down in Article 29(1) of the Dublin III Regulation would mean that Mr Hasan's transfer to Italy took place before that time limit expired.

41. According to the referring court, it nonetheless cannot be definitively established that Italy was initially responsible for examining Mr Hasan's asylum application, inasmuch as Italy may have to be ruled out as being so responsible, pursuant to Article 3(2) of that regulation, if there are any systemic flaws in its asylum procedure and reception conditions for applicants for international protection.

42. The Bundesverwaltungsgericht (Federal Administrative Court) thus raises the question whether, following Mr Hasan's illegal return to the territory of the Federal Republic of Germany, responsibility for examining his asylum application may already have been transferred to Germany by the time the appeal decision was given. The referring court also asks whether a take back procedure was still an option at that time.

43. With a view to ruling on those points, the national court asks what effects follow from Mr Hasan's first transfer, what date must be taken into account when assessing the relevant facts for the purposes of examining his appeal, and whether there is any scope for him to be re-transferred to Italy.

44. In those circumstances, the Bundesverwaltungsgericht (Federal Administrative Court) decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

‘(1) In a case where a third-country national, after lodging a second asylum application in another Member State (here, Germany), was transferred to the Member State having original responsibility for the first asylum application (here, Italy) because of a court’s rejection of his application for suspension of the transfer decision under [the Dublin III Regulation] and then immediately returned illegally to the second Member State (here, Germany):

(a) According to the principles of the Dublin III Regulation, is the factual situation that is relevant for a court’s review of a transfer decision the situation that pertained at the time of the transfer, because responsibility was definitively determined by transfer within the time limit and therefore the rules in the Dublin III Regulation concerning responsibility are no longer applicable to further developments, or is it necessary to take into consideration subsequent developments in the circumstances relevant to responsibility in general, e.g. expiry of time limits for a take back or (renewed) transfer?

(b) Following determination of responsibility on the basis of the transfer decision, can further transfers be made to the Member State having original responsibility, and does that Member State remain obligated to take charge of the third-country national?

(2) If responsibility is not definitively determined by the transfer: Which of the provisions listed below applies in such a case to a person described in Article 18(1)(b), (c), or (d) of the Dublin III Regulation on account of an ongoing appeal against the already enforced transfer decision:

(a) Article 23 of the Dublin III Regulation (analogously), with the result that, in the case of a new take back request that is not submitted within the time limit, responsibility can shift in accordance with Article 23(2) and (3) of the Dublin III Regulation, or

(b) Article 24 of the Dublin III Regulation (analogously), or

(c) neither of the provisions set forth in a) and b)?

(3) In the event that neither Article 23 nor Article 24 applies (analogously) to such a person (question 2(c)): Can further transfers be made to the Member State having original responsibility (here, Italy) on the basis of the challenged transfer decision until conclusion of the appeal against such decision, and does that Member State remain obligated to take charge of the third-country national, irrespective of whether further take back requests have been submitted without complying with the time limits in Article 23(3) or Article 24(2) of the Dublin III Regulation and irrespective of the transfer time limits in Article 29(1) and (2) [of that] regulation?

(4) In the event that Article 23 [of that] [r]egulation applies (analogously) to such a person (question 2(a)): Is the new take back request tied (analogously) to a new time limit under Article 23(2) of the Dublin III Regulation? If so: Does this new time limit start to run when the responsible authority learns of re-entry, or does another event determine its commencement?

(5) In the event that Article 24 of the Dublin III Regulation applies (analogously) to such a person (question 2(b)):

(a) Is the submission of a new take back request tied (analogously) to a new time limit under Article 24(2) of the Dublin III Regulation? If so: Does this new time limit start to run when the responsible authority learns of re-entry, or does another event determine its commencement?

(b) If the other Member State (here, Germany) allows a time limit to expire that is required to be complied with (analogously) under Article 24(2) of the Dublin III Regulation: Does the lodging of a new asylum application pursuant to Article 24(3) [of that] [r]egulation directly establish the responsibility of the other Member State (here, Germany), or may it, despite the new asylum application, submit a new take back request to the Member State having original responsibility (here, Italy) without being bound by a time limit, or transfer the foreign national to that Member State without submitting a take back request?

(c) If the other Member State (here, Germany) allows a time limit to expire that is required to be complied with (analogously) under Article 24(2) of the Dublin III Regulation: Is the *lis pendens* of an asylum application lodged in the other Member State (here, Germany) prior to transfer equivalent to the lodging of a new asylum application pursuant to Article 24(3) of the Dublin III Regulation?

(d) If the other Member State (here, Germany) allows a time limit to expire that is required to be complied with (analogously) under Article 24(2) of the Dublin III Regulation and the foreign national neither lodges a new asylum application and the *lis pendens* of an asylum application lodged in the other Member State (here, Germany) prior to transfer is not equivalent to the lodging of a new asylum application pursuant to Article 24(3) of the Dublin III Regulation: Can the other Member State (here, Germany) submit a new take back request to the Member State having original responsibility (here, Italy) without being bound by a time limit, or transfer the foreign national to that Member State without submitting a take back request?'

IV. My analysis

45. By a highly interlinked series of five questions, including numerous sub-questions, the referring court is, in essence, asking the Court about three separate issues, which it raises through the presentation of different scenarios.

46. Those questions are concerned, first, with the finality of the determination of the Member State responsible by the transfer decision, secondly, with the scope of the judicial review of a transfer decision and, lastly, with the detailed rules, procedures and time limits applicable to an applicant for international protection who has already been the subject of a transfer procedure but has returned illegally to the territory of the first requesting Member State, in the case where a challenge to the initial transfer decision is still pending. [15]

47. Consequently, in order to give the referring court the clearest possible answers to the questions prompted by the dispute in the main proceedings and set out in great detail in the order for reference, the Court will have to reframe those questions and rule only on the three principal points of contention mentioned above, so as to enable the national court to resolve all of the issues raised by the dispute in the main proceedings.

A. The finality of the determination of the Member State responsible

48. The referring court is asking the Court, in essence, to give a ruling on the finality of the determination of the Member State responsible for examining the asylum application [16] as effected by the transfer decision.

15 The *Ahmed* case (C-36/17, EU:C:2017:273), the order in which was made on 5 April 2017, seeks a ruling on similar questions. The same is true, to some extent, of *Shiri*, C-201/16, pending at the time of writing.

16 The answer to this question will address the second issue raised by the national court, concerning the scope of the judicial review of transfer decisions, and must for that reason be dealt with first.

49. In its observations, the Republic of Poland, relying in particular on the principle of loyal cooperation between the Member States, the need for applications for international protection to be processed quickly and the existence of objective criteria for determining the Member State responsible, maintains that a transfer decision provides a final determination of the Member State which is responsible for examining the asylum application and to which the applicant can be transferred to have his application for international protection examined. I do not share that interpretation.

50. The other observations submitted to the Court by the Federal Republic of Germany, the Swiss Confederation and the European Commission, on the other hand, all take the view that the transfer decision does not provide a final determination of the Member State responsible for examining an asylum application. This is my preferred interpretation, which is confirmed by evidence drawn from various legislative texts and lines of case-law.

51. First, Article 27(1) of the Dublin III Regulation provides that applicants for international protection must have effective remedies to challenge transfer decisions issued against them. That right to challenge transfer must be exercised within a reasonable time and may be based on grounds calling into question the determination made by the Member State responsible.

52. In that context, it should be noted that transfer and the determination of the Member State responsible are two sides of the same coin.[17] Transfer is conceivable only if the determination of the Member State responsible had the effect of designating a Member State other than from that on whose territory the applicant is present as being responsible for examining his application.[18]

53. It is clear from the Court's case-law that the transfer decision may be contested on grounds including a challenge to the objective criteria, laid down in Chapter III of the Dublin III Regulation, for determining the Member State responsible for the asylum application.[19]

54. The fact that the transfer decision may be called into question, proactively, and in particular by challenging the determination of the Member State responsible for examining the asylum application, presupposes, by converse inference, that the determination of the Member State responsible may be considered final only if the transfer decision is no longer being contested, which is not the case here inasmuch as the appeal against Mr Hasan's transfer is still pending before the referring court.

55. Next, Article 29(2) of the Dublin III Regulation provides that, where the transfer does not take place within six months, the Member State initially deemed responsible for examining the asylum request is relieved of that responsibility, which passes to the requesting Member State. The transfer decision may therefore also be called into question by inaction on the part of the national authorities, the effect of which will be to render the determination of the Member State responsible obsolete, it being provided that responsibility is to be conferred on the defaulting Member State.

56. Article 29(3) similarly presupposes that the determination of the Member State responsible may lapse. If, after all, a person has been transferred erroneously or a decision to transfer is overturned after the transfer has been carried out, the Member State which carried out the transfer must accept that person back, in which event the latter Member State becomes responsible for examining his claim for protection.

17 Being decisions which cannot be regarded as independent.

18 To that effect, see, by analogy, Opinion of Advocate General Trstenjak in *Kastrati and Others* (C-620/10, EU:C:2012:10, point 29 et seq.), which points to two distinct stages: the determination of the Member State responsible and the actual examination of the request for international protection by the Member State with that responsibility. In this sense, the purpose of the Dublin III Regulation is not to determine the criteria for granting the protected status requested but only to identify which Member States have an obligation to examine applications for international protection.

19 See judgment of 7 June 2016, *Ghezelbash* (C-63/15, EU:C:2016:409, paragraphs 42 and 44).

57. Furthermore, Article 19 of that regulation provides for the cessation of the Member State's responsibility for various reasons such as the fact that a residence document has been issued, the person concerned is not present in the territory of the Member State (whether voluntarily or compulsorily pursuant to a removal order) or the person concerned has withdrawn his asylum application.

58. The foregoing evidence from legislation and case-law rules out the proposition that the determination of the Member State responsible may be finally fixed by a transfer decision, whether implemented or not, notwithstanding that that decision may be called into question on various grounds, whether proactively or by virtue of the passage of time and the inaction of the authorities in actually transferring the person concerned. A challenge to the transfer decision will necessarily have a bearing on the determination of the Member State responsible.

59. The determination of the Member State responsible cannot therefore be regarded as being finally fixed by the adoption of the transfer decision, particularly where, as in the present case, that decision is the subject of a challenge which has not yet been finally disposed of.

60. Lastly, given that, as I shall be proposing at length, events subsequent to the transfer decision must be taken into consideration in the context of reviewing the legality of that decision, where these relate to the initial [determination of] responsibility on which that decision is based, the determination of the Member State responsible cannot be final at the time of transfer.

61. In the light of the foregoing considerations, it is appropriate to propose that the Court's answer should be that the decision to transfer an asylum applicant does not confer finality on the determination of the Member State responsible for examining an asylum application.

B. The scope of judicial review

62. It is necessary, now, to take a view on the scope of the judicial review of transfer decisions carried out by national courts. More specifically, the referring court asks the Court, in essence, to clarify whether the judicial review of the transfer decision must be based on the factual situation obtaining at the time of transfer or on subsequent developments in the circumstances relevant to the determination of the Member State responsible, such as, for example, the expiry of the time limits for take back or retransfer.

63. As I stated in the answer to be given to the first question, the transfer decision must be regarded as being the second stage in the procedure for determining the Member State responsible. That decision is taken in the light of the determination of the Member State responsible, effected by reference to the objective criteria laid down in Chapter III of the Dublin III Regulation, and those two decisions, which cannot be viewed independently, may be called into question on different grounds and in different ways.

64. As a preliminary point, it should be recalled that decisions determining the Member State responsible, and therefore transfer decisions, are capable of adversely affecting the interests of asylum applicants,[20] who must therefore be afforded effective judicial safeguards against those decisions.

20 See, to that effect, Opinion of Advocate General Sharpston in *Ghezelbash* (C-63/15, EU:C:2016:186, point 77 et seq.), and judgment of 7 June 2016, *Ghezelbash* (C-63/15, EU:C:2016:409, paragraph 53).

65. In order to answer the question raised by the referring court, regard must be had to recital 19 and Article 27 of the Dublin III Regulation, which show that the right to a remedy which asylum applicants enjoy would necessarily be rendered ineffective if circumstances subsequent to the transfer were to be excluded from the judicial review of the legality of the transfer decision, particularly in a situation such as that in the case in the main proceedings, where the transfer was carried out but is still being contested, while at the same time the person concerned has returned to the territory of the Member State which transferred him.

66. After all, it follows from recital 19 of that regulation that, in order to guarantee effective protection for the rights of applicants for international protection, legal safeguards and a right to an effective remedy in respect of decisions regarding transfers must be established, in accordance with Article 47 of the Charter. According to that recital, the right to an effective remedy should cover the examination of both the application of the Dublin III Regulation and the legal or factual situation obtaining in the Member State to which the applicant is transferred. Although that regulation does not specify the scope of the right to a remedy thus established, the latter can nonetheless be inferred from a teleological interpretation of those provisions. Furthermore, it should be possible to apply the same form of reasoning to the expiry of time limits for take back or retransfer.

67. Although Article 7 of that regulation provides that the Member State responsible in accordance with the criteria set out in Chapter III thereof is to be determined on the basis of the factual situation obtaining at the time when the first application for international protection was made, that provision cannot, from a practical point of view, rule out an assessment of the applicant's situation subsequent to that point in time, decisive for the purposes of recognising and granting international protection, with a view to adjudicating on the legality of the transfer decision. It is true that it is the situation in which the third-country national or stateless person found himself before entering EU territory that will be decisive from the point of view of whether or not to grant him the protection he seeks. So far as concerns the assessment of which Member State is responsible for processing that application for protection, and therefore whether a transfer is necessary, however, the position is different.

68. After all, the assessment of the legality of a transfer decision is a different operation from that of granting international protection. For the purposes of the first of those operations, account should be taken of factors arising after the first application for international protection was lodged and of the facts emerging after the person concerned entered the territory [of the Member State in question], if that person is to be guaranteed effective judicial protection.

69. In that regard, it is clear from recital 21 and the second subparagraph of Article 3(2) of the Dublin III Regulation that the reception conditions for asylum applicants in the requested Member State must be taken into account in the assessment of whether a transfer is necessary, and may in some cases prevent that Member State from being deemed responsible for processing the application [for international protection], and therefore prevent the transfer from taking place, if there are systemic flaws in the asylum procedure and in the reception conditions for applicants. Those circumstances must necessarily be assessed from a practical point of view and on the date on which the court adjudicates on the challenge to the transfer decision.

70. After all, such an assessment cannot be carried out at the time when the application for international protection is lodged but must take account of developments in the factual circumstances obtaining in the Member State responsible to which the applicant is to be transferred. Moreover, where, as in the present case, a transfer has already been carried out, the factual situation obtaining in the requested Member State cannot be excluded from the judicial review of the legality of that decision. An identical approach must be taken with respect to any developments there may have been between the lodging of the application and the date on which the court adjudicates on the challenge to the transfer, such as, in particular, the expiry of the time limits for take back or retransfer.

71. In that regard, moreover, the Court has held that, as is apparent from recital 9 thereof, the Dublin III Regulation is intended, inter alia, to make the necessary improvements not only to the effectiveness of the Dublin system but also to the protection afforded applicants under that system, to be achieved, inter alia, by the effective judicial protection which asylum seekers must enjoy. [21]

72. It has also been held in this regard that, in order to satisfy itself that the transfer decision was adopted following a proper application of the criteria for determining the Member State responsible laid down in the Dublin III Regulation, the court dealing with an action must be able to conduct the broadest possible examination of the claims made by an applicant. [22] According to the Court, it is apparent from Article 22 of the Dublin III Regulation that the response to such a request must be based on an examination of the elements of proof and circumstantial evidence whereby the criteria laid down in Chapter III of the regulation are applied. [23] It also held that the EU legislature, when adopting the Dublin III Regulation, did not confine itself to introducing organisational rules simply governing relations between Member States for the purpose of determining the Member State responsible, but involved asylum seekers in that process by obliging Member States to inform them of the criteria for determining responsibility, to provide them with an opportunity to submit information relevant to the correct interpretation of those criteria, and by conferring on asylum seekers the right to an effective remedy in respect of the transfer decision. [24]

73. That right would necessarily be wiped out if the judicial review were to take into account only the factual situation obtaining on the date on which the transfer was carried out and excluded any developments subsequent to that decision. The grounds that may be relied on in order to contest a transfer decision cannot be confined to those that existed at the time when that decision was taken. Subsequent factors must be allowed to inform the judicial review of the transfer decision and its implications. To that extent, factors such as the reception conditions for asylum seekers in the requested Member State or the expiry of the time limits for take back or retransfer must be taken into consideration for the purposes of assessing the legality of the transfer, particularly given that reception conditions may vary rapidly from one Member State to another and depending on the migratory pressure prevailing at the time when the court gives its ruling.

74. Furthermore, recital 25 of Directive 2013/32 provides that, in the interests of a correct recognition of those persons in need of protection as refugees, applicants should 'have an effective access to procedures, the opportunity to cooperate and properly communicate with the competent authorities so as to present the relevant facts of his or her case and sufficient procedural guarantees to pursue his or her case throughout *all stages of the procedure*.' [25] If, as I have said, the granting of international protection is a different operation from that of determining the Member State responsible, and therefore of issuing a transfer decision, the phrase at the end [of the above quotation] necessarily includes the stage subsequent to the transfer procedure, inasmuch as that directive establishes the criteria for granting the international protection requested, which, as is clear from the Dublin III Regulation, will be assessed in a single EU Member State on the basis of the need for and feasibility of transfer.

21 See judgment of 7 June 2016, *Ghezelbash* (C-63/15, EU:C:2016:409, paragraphs 51 and 52).

22 To that effect, see, by analogy, judgment of 7 June 2016, *Karim* (C-155/15, EU:C:2016:410, paragraph 26).

23 See judgment of 7 June 2016, *Ghezelbash* (C-63/15, EU:C:2016:409, paragraphs 47 to 51), of 26 July 2017, *Mengestab* (C-670/16, EU:C:2017:587, paragraph 45).

24 See judgment of 7 June 2016, *Ghezelbash* (C-63/15, EU:C:2016:409, paragraph 51).

25 Emphasis added.

75. Furthermore, although Article 46(1) of Directive 2013/32 does not mention transfer decisions, paragraph 3 of that article gives an indication of the scope of the judicial review of decisions relating to applicants for international protection. It states that such a review must be a full and *ex nunc* examination of both facts and points of law, at least in appeals procedures before a court or tribunal of first instance. The same approach must, a fortiori, be taken in relation to transfer decisions, given their implications for the situation of the persons concerned.

76. Article 40(1) of Directive 2013/32 also serves to corroborate that interpretation, in that it provides that the Member State must, when these are submitted by the person concerned, examine the further representations or the elements of the subsequent application in the framework of the examination of the previous application or in the framework of the examination of the decision under review or appeal, insofar as the competent authorities can take into account and consider all the elements underlying the further representations or subsequent application within this framework.

77. Finally, it should be noted in addition that Article 77 of the Law on asylum, applicable to the present case, provides that the court must take as its basis the factual and legal situation obtaining at the time of the last hearing or at the time when the decision is delivered. Under German national law, therefore, factors subsequent to the contested decision which are cited by the applicant for international protection cannot be excluded from the judicial review of the transfer decision, even if the Court decides that this is a matter falling within the procedural autonomy of the Member States, an interpretation which I do not in any way endorse, however, given that the provisions contained in Article 27 of the Dublin III Regulation are mandatory.

78. In the light of all of the foregoing, I therefore take the view that it must be possible for the judicial review of a transfer decision to take into account, inter alia, matters of fact and law subsequent to the contested decision and to include any changes of circumstances relevant to determining Member States' responsibility for examining applications for international protection.

C. The detailed rules, procedures and time limits applicable

79. It is necessary, finally, to reply to the questions concerning the detailed rules, procedures and time limits applicable to a situation such as that at issue in the main proceedings, in which the applicant for international protection lodged a first asylum application in a Member State (here, Italy), then left that Member State to make a further application for asylum in another Member State (in this case, Germany), was then transferred by the second Member State (Germany) to the first Member State (Italy) following a transfer procedure under the Dublin III Regulation, and returned illegally to the second Member State (Germany) without lodging a new application for international protection, while at the same time an appeal against his transfer is still pending before the courts of the latter Member State.

80. I shall set out here the reasons why I shall be proposing that the Court's answer to the questions relating to the detailed rules, procedures and time limits should be that Member States must apply the provisions of the Dublin III Regulation in such a way that the first procedure for determining the Member State responsible for examining the asylum application does not give rise to multiple transfers and thereby run the risk of undermining the application of the rules prescribed as mandatory by that regulation.

81. It would after all be unacceptable for Member States, in a situation such as that at issue in the main proceedings, to be allowed to release themselves from the rules applicable to applicants for international protection or to deviate from the rules governing procedure and the calculation of time limits laid down by that regulation.

82. To that extent, it will be for the Court to specify the point from which the time limits laid down in that regulation start to run. I would propose that the time limit start from the point at which the first requesting Member State is aware of the presence on its territory of a person whose asylum application is being examined in another Member State which has agreed to take that person back.

83. In order to give the national court the fullest possible answer, it is appropriate, as a first step, to look at the detailed rules and procedures to be followed in this context, and then, as a second step, to spell out the method for calculating time limits.

1. Detailed rules and procedures

84. The question concerning the detailed rules and procedures applicable here is to be distinguished from the two previous questions concerning the first determination of the Member State responsible and the initial transfer.[26] The issue now is the situation of the person concerned once he has returned to the territory of the first requesting Member State after having been the subject of an initial transfer the legality of which is still being contested notwithstanding the fact of his return, as the Commission states in its observations. Drawing a distinction in this way between the two different stages of the process in the present case[27] will make readily apparent the points of contention that must be resolved.

85. It is fair to say, without challenge, that, during the first stage of the process in the case in the main proceedings, the provisions contained in the Dublin III Regulation were, rightly, applied in such a way as to give rise to the first transfer decision which is still being contested. All that the Court is being asked to do here is to specify the procedure to be followed once the person concerned has returned illegally to the territory of a Member State following a successful transfer[28] to the Member State responsible for examining his application.

86. This is what is known as a 'secondary movement' by the applicant for international protection. Such movements are fairly common and must be curbed.[29] However, that situation, although relatively frequent, was not expressly provided for in the provisions governing the CEAS. At first sight, the person at issue in the case in the main proceedings does not appear, at the stage at which the national court will have to give a ruling, to be in a situation to which the provisions of the Dublin III Regulation ordinarily apply, given his return to the territory of the first requesting Member State.[30]

26 These two stages must be separated in the manner in which the Court was invited to separate them in the Opinion of Advocate General Kokott in *Mirza* (C-695/15 PPU, EU:C:2016:146, point 42).

27 The first stage of the case in the main proceedings covers the asylum applications lodged by Mr Hasan in Italy on 4 September 2014 and then in Germany on 29 October 2014, and his transfer to Italy in August 2015. A second stage then begins at the point of his return to the territory of the Federal Republic of Germany. During that second stage, Mr Hasan did not lodge a new asylum application in Germany and his appeal of 30 January 2015 against that transfer decision is still pending.

28 Successful even though it did not actually lead to an examination by the Member State responsible for his asylum application.

29 See, in particular, judgment of 17 March 2016, *Mirza* (C-695/15 PPU, EU:C:2016:188, paragraphs 47 et seq.). See also the Communication from the Commission to the European Parliament and the Council of 6 April 2016 towards a reform of the Common European Asylum System and enhancing legal avenues in Europe [COM(2016) 197 final], which contemplates the adoption of dissuasive measures to discourage and/or penalise secondary movements. See, also, the Proposal for a Regulation of the European Parliament and of the Council of 13 July 2016 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents [COM(2016) 466 final].

30 Indeed, the referring court is asking the Court which provisions should be applied to the person concerned in the event that neither the provisions of Article 23 nor those of Article 24 of that regulation are applicable.

87. It is nonetheless clear from the provisions of that regulation that the latter is applicable to the case in the main proceedings, and that the other provisions of legislative texts governing the CEAS are therefore excluded.[31] In that regard, the fact that Mr Hasan returned illegally to Germany, the first requesting Member State, has no bearing on the law applicable to him as an applicant for international protection in an EU Member State[32] who is in an irregular situation in another Member State. If he had illegally crossed the border of another Member State, the self-same questions would arise and the same provisions would have been relied on against him.

88. In those circumstances, it should be noted that Articles 23 and 24 of the Dublin III Regulation, which are applicable to the case in the main proceedings, cover situations which should be distinguished from each other. While Article 23 concerns persons who lodge a new application in the Member State to which they travel, Article 24 must be applied to persons who do not lodge a new application in the Member State in whose territory their presence is irregular.[33]

89. It is common ground in the present case that Mr Hasan did not lodge a new application for asylum when he returned illegally to Germany. Consequently, and contrary to the expectation of the referring court, the steps to be taken in relation to Mr Hasan's presence on the territory of the Federal Republic of Germany will be determined exclusively by the provisions of Article 24 of that regulation, Article 23 of that regulation, and indeed any other legislation, therefore being inapplicable in this regard.[34]

90. After all, the provisions of Article 24 of the Dublin III Regulation have as their ultimate objective to allow asylum applicants to have the asylum application which they have lodged examined by a single Member State,[35] even if the applicant is in an irregular situation in another Member State.

91. To that extent, I propose that the Court take the view that the Member State on whose territory the applicant is illegally present must put into effect a new transfer procedure such as that provided for in the last subparagraph of Article 24(2) of that regulation. This provides that that Member State must, within three months, submit a take back request to the Member State which it considers to be responsible for handling the application. Paragraph 3 of that provision states that, if that period expires before a take back request has been sent to the requested Member State, the requesting Member State must give the person concerned the opportunity to make a new application for international protection. This does not enable a new transfer to be carried out on the basis of the former decision determining the Member State responsible, as the Commission rightly notes in its observations.

31 The provisions of Article 24(4) of the Dublin III Regulation imply that Directive 2008/115 may be applied to the person concerned only in the event that his application for asylum has been the subject of a final rejection. To the extent that, in the present case, no ruling has been given on the substance of Mr Hasan's asylum application, that directive cannot be regarded as being applicable to him. The questions raised by the national court which fall outside that assumption, therefore, cannot be examined since that regulation is the only legislation applicable. After all, in accordance with that regulation and Article 9 of Directive 2013/32, asylum seekers have the right to remain in the territory of the Member State in which they lodged their application until a decision on it has been made, at least at the first instance. Although that right to remain is not comparable to a right of residence, an applicant's presence in the territory in question nonetheless cannot be regarded as irregular while he awaits the outcome of the procedure concerning his asylum application, at least until after it has been rejected at first instance [see to that effect Opinion of Advocate General Mengozzi in *Gnandi* (C-181/16, EU:C:2017:467, points 53 to 55) and judgment of 30 May 2013, *Arslan* (C-534/11, EU:C:2013:343, paragraphs 44 to 49)]. Recital 9 of Regulation 2008/115 states, to the same effect, that a third-country national who has lodged an application for asylum should not be regarded as staying illegally on the territory of that Member State until a negative decision on the application, or a decision ending his or her right of stay as asylum seeker has entered into force [see also Opinion of Advocate General Wathelet in *Arslan* (C-534/11, EU:C:2013:52, points 62 to 64)].

32 The fact that he is in Germany, the first requesting Member State, cannot have the effect of frustrating the scrupulous monitoring of the procedure established by the provisions of the Dublin III.

33 See to that effect the order of the Court of 5 April 2017, *Ahmed* (C-36/17, EU:C:2017:273, paragraph 26).

34 The other scenarios set out by the national court with a view to obtaining clarifications on other provisions of the CEAS must be regarded as hypothetical and irrelevant to the resolution of the dispute at issue. Those provisions will have to be disregarded, even though, in other factual circumstances, they would be applicable on the same basis as that to be proposed for the application of Article 24 of the Dublin III Regulation. Moreover, the fifth question will also have to be disregarded, since it appears to be similarly irrelevant to the resolution of the dispute pending before the referring court.

35 In the present case, Mr Hasan's application was held to be inadmissible in Germany and has not yet been adjudicated upon in Italy.

92. I therefore propose that the Court should state that the provisions of Article 24 of that regulation, and those provisions alone, must be applied, once again, to the case at issue in the main proceedings, thus compelling Germany to lodge a new take back request with the Italian authorities and to comply with the procedures and time limits laid down in that provision.

2. Calculation of time limits

93. So far as concerns the calculation of time limits, an elementary clarification must be made at the outset. I shall not be looking here at the suspensive nature of an appeal brought against the first transfer decision, given that the examination of this question comes at a stage subsequent to the appeal brought by Mr Hasan against the first transfer decision, which is still pending. Nonetheless, if the future transfer decision were to be contested, then the provisions relating to the suspensive effect of such an appeal would apply and would extend accordingly the time limit for carrying out that transfer.

94. It should also be noted, as a preliminary point, that, in adopting the provisions relating to transfers of applicants for international protection, the EU legislature intended the restrictions on the rights of asylum seekers to operate within the confines of what is strictly necessary, while at the same time ensuring that the authorities of the Member States concerned be given the material wherewithal to enable them to carry out the transfer correctly.[36] Time limits must be calculated in such a way as to provide Member States with means sufficient to enable them to make the practical arrangements for transferring applicants for international protection to the Member State responsible for them.[37] To that end, the legislature provides for time to run from the point at which the future performance of the transfer is agreed upon and in place and only the practicalities of carrying out the transfer remain to be determined.

95. In that context, the EU legislature considered six weeks to be a reasonable period for making the practical arrangements for transfer. Time limits must be calculated in such a way as to allow Member States to make effective use of that objective six-week period to complete the practicalities for that transfer as soon as it can go ahead.[38]

96. Under the last subparagraph of Article 24(2) of the Dublin III Regulation, the time limit for carrying out a transfer procedure where the person concerned has not lodged a new application is three months from the point at which [the requesting Member State] becomes aware that another Member State is responsible for that person. When transposed to the case in the main proceedings, that provision implies that that time limit starts to run from the point at which the requesting Member State becomes aware that the person concerned has returned to its territory.

97. At that point, a new six-week transfer time limit must, to my mind, start to run from the point at which the requested Member State accepts the take back request[39] or, where appropriate, the point at which the appeal against the transfer decision or the review of that decision ceases to have suspensive effect, as provided for in the third subparagraph of Article 28(3) of that regulation. After all, it is not inconceivable that the applicant will lodge a new appeal against the new transfer decision. Indeed, the legislature makes it clear in Article 28 of that regulation that the transfer must be carried out '*as soon*

36 See my Opinion in *Khir Amayry* (C-60/16, EU:C:2017:147, point 37).

37 See my Opinion in *Khir Amayry* (C-60/16, EU:C:2017:147, points 43 and 54).

38 See, by analogy, my Opinion in *Khir Amayry* (C-60/16, EU:C:2017:147, point 71 et seq.).

39 See my Opinion in *Khir Amayry* (C-60/16, EU:C:2017:147, point 66) and, by analogy, judgment of 29 January 2009, *Petrosian* (C-19/08, EU:C:2009:41, paragraph 32 et seq.).

as practically possible',[40] which implies the existence of a prior, uncontested, decision establishing in principle that the applicant is to be transferred from the requesting Member State to the Member State responsible. In order for an objective time limit to start to run, the transfer must not be threatened by any further obstacles.

98. Calculating the time limits in this way does not stand in the way of the proper application of Article 31(3) of Directive 2013/32, which lays down a time limit for concluding the examination of the application for international protection of six months from the point at which the person concerned is present on the territory of the Member State responsible for that examination and has been taken in charge by the competent authority, especially since paragraph (c) of that provision provides that delays in the handling of the application can be attributed to the failure of the applicant to comply with his obligations in relation in particular to submission to the authorities competent for processing his application. Consequently, the fact that the applicant leaves the Member State responsible for examining his asylum application may exceptionally justify an overrun of the normal time limit for processing the application.

99. It should also be mentioned that the requested Member State will be regarded as being obliged to take back the person concerned, in accordance with the provisions of Article 18(1)(b), Article 18(2) and Article 20(5) of the Dublin III Regulation, if, because the time limits have expired and in the light of the new take back request, that Member State must be deemed responsible for examining the application for international protection.

100. A different interpretation from that advocated here would, to my mind, be contrary to the scope that must be given to the mandatory and directly applicable provisions of that regulation, as well as to the binding force that attaches to EU regulations. In this regard, it is important to point up the fact that Member States cannot evade the obligation to apply the relevant provisions of that regulation on the pretext that the applicant for international protection acted improperly in leaving the territory of the Member State responsible for examining his application after having been the subject of a transfer procedure the legality of which is still pending. After all, even if a third-country national abuses his rights by submitting multiple applications for international protection, the Member States concerned still have an obligation to apply the provisions of the Dublin III Regulation. That interpretation will make for the best possible reconciliation of the objectives pursued by the EU legislature.

101. It would also be contrary to those objectives to allow asylum applicants to influence the determination of the Member State responsible for examining their application by triggering effects of any kind through their secondary movements or their personal choice of country of residence.[41] Since the process of determining the Member State responsible is essentially objective, it cannot take account of the preferences or desires of the persons concerned,[42] but must nevertheless not lead to an inadequate safeguarding of their rights.

102. Moreover, the objective of the rapid processing of applications, achieved by the prompt determination of the Member State responsible, must be weighed against the fact that the prospect of new transfers, while it has the effect of slowing down the processing of applications, nonetheless operates to deter applicants and thus serves to curb secondary movements.[43]

40 Emphasis added.

41 See, to that effect, by analogy, Opinion of Advocate General Trstenjak in *Kastrati and Others* (C-620/10, EU:C:2012:10, point 44 et seq.), and judgment of 17 March 2016, *Mirza* (C-695/15 PPU, EU:C:2016:188, paragraph 47 et seq.).

42 See Opinion of Advocate General Sharpston *Ghezelbash* (C-63/15, EU:C:2016:186, point 39).

43 Regard must be had here to the provisions of Directive 2013/32, which seek to limit the risk of secondary movements, and to Annex X of Regulation No 1560/2003, which seeks to alert applicants to their obligation to remain in the territory of the Member State responsible for examining their application. In addition, it is important to recall here recital 18 of Directive 2013/32, which states that it is in the interests of the persons concerned and the Member States that applications for international protection be examined as quickly as possible. So it is that any interpretation that operates to deter applicants from engaging in secondary movements is to be promoted.

103. In this regard, responsibility must take precedence over solidarity between Member States when it comes to the processing of applications for protection, given that the provisions applicable in this sphere do not rule out the possibility that applicants for asylum may be placed in detention for as long as is strictly necessary for their application to be examined in the Member State that must assume responsibility for them.

104. In the light of all of the foregoing, the view must be taken that the Member State on whose territory the applicant is present has a period of three months in which to submit a take back request to the Member State responsible for examining the asylum application, starting from the point at which the former Member State becomes aware that the person concerned is on its territory. Once the authorities of the latter Member State have, tacitly or explicitly, given their consent, the transfer must be carried out within six weeks or, where appropriate, within six weeks of the dismissal of the appeal against the transfer decision or the rejection of its suspensive effect.

105. Taking into account the answers given to those three questions, which, in essence, form the basis of the request for a preliminary ruling made by the referring court, there is no need to comment on the other scenarios set out by the Bundesverwaltungsgericht (Federal Administrative Court) in its order for reference.

V. Conclusion

106. In the light of the foregoing considerations, I propose that the Court's answers to the questions referred for a preliminary ruling by the Bundesverwaltungsgericht (Federal Administrative Court, Germany) should be as follows:

(1) The decision to transfer an asylum applicant does not confer finality on the determination of the Member State responsible for examining an asylum application.

(2) It must be possible for the judicial review of a transfer decision to take into account, inter alia, matters of fact and law subsequent to the contested decision and to include any changes of circumstances relevant to determining the Member States' responsibility for examining applications for international protection.

(3) The provisions of Article 24 of Regulation (EU) 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 are alone applicable to the case at issue in the main proceedings, and thus compel the Federal Republic of Germany to lodge a new take back request with the Italian authorities and to comply with the procedures and time limits laid down in that provision. In that context, the Member State on whose territory the applicant is present has a period of three months in which to submit a take back request to the Member State responsible for examining the asylum application, starting from the point at which the former Member State becomes aware that the person concerned is on its territory. Once the authorities of the latter Member State have, tacitly or explicitly, given their consent, the transfer must be carried out within six weeks or, where appropriate, within six weeks of the dismissal of the appeal against the transfer decision or the rejection of its suspensive effect.