



Reports of Cases

OPINION OF ADVOCATE GENERAL
MENGOZZI
delivered on 20 December 2017¹

Case C-647/16

Adil Hassan
v
Préfet du Pas-de-Calais

(Request for a preliminary ruling from the tribunal administratif de Lille (Administrative Court, Lille, France))

(Reference for a preliminary ruling — Area of freedom, security and justice — Borders, asylum and immigration — Application for international protection — Interpretation of Article 26 of Regulation (EU) No 604/2013 — Obligation on national authorities having made a take back request not to adopt a transfer decision pending the requested State's acceptance to take the person back)

1. Is it permissible for the authorities of a Member State to adopt in respect of an applicant for international protection, and to notify to that person, an 'anticipated transfer decision', that is to say, a decision which provides for him to be transferred to the Member State which those authorities have identified as being responsible for examining his application under Regulation (EU) No 604/2013 ('the Dublin III Regulation')² before that Member State, having been duly requested by those authorities, has accepted to take charge of or take back the person concerned?
2. That is the content of the question referred to the Court by the tribunal administratif de Lille (Administrative Court, Lille, France) in the request for a preliminary ruling which forms the subject matter of this case. That question has arisen in a dispute between Mr Adil Hassan, an Iraqi national, and the Préfet du Pas-de-Calais (Prefect of Pas-de-Calais, France), concerning the validity of the decision by which the latter ordered the transfer of Mr Hassan to Germany.

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). That regulation is a recast version of Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (OJ 2003 L 50, p. 1), which in turn replaced the Dublin Convention of 15 June 1990 (OJ 1997 C 254, p. 1). A 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, of the Commission, to amend the Dublin III Regulation was submitted on 4 May 2016 ('the proposed regulation amending the Dublin III Regulation'), COM(2016) 270 final.

Legal context

EU law

3. According to Article 1 of the Dublin III Regulation, the purpose of the regulation is to lay 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 ('the Member State responsible'). Those criteria are set out in Articles 8 to 15 of Chapter III of that regulation and, according to Article 7(1) of that regulation, must be applied in the order in which they are laid down. According to Article 3(2) of that regulation, where no Member State responsible can be designated on the basis of the criteria listed in that regulation, the first Member State in which the application for international protection was lodged is to be responsible for examining it.

4. Chapter V of the Dublin III Regulation lays down the obligations of the Member State responsible. Within that chapter, Article 18(1)(b) provides that that Member State is obliged to 'take back, under the conditions laid down in Articles 23, 24, 25 and 29 [of that regulation], an applicant³ 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'. The Member State responsible is also required, under Article 18(2), to examine or complete the examination of the application for international protection made by the applicant.

5. According to the first subparagraph of Article 20(5) of the Dublin III Regulation, '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'.

6. Article 24(1) of that regulation provides that, where a Member State on whose territory a person as referred to in Article 18(1)(b), (c) or (d) of that regulation is staying without a residence document and with which no new application for international protection has been lodged ('the requesting Member State') 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.

7. According to Article 25(1) of the Dublin III Regulation, the requested Member State is to make the necessary checks and is to give a decision on the request 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, established by Regulation (EU) No 603/2013,⁴ that period is to be reduced to two weeks. Article 25(2) of the Dublin III Regulation states that failure to act within the one-month period or the two-week period mentioned in paragraph 1 will be tantamount to accepting the request, and will entail the obligation to take back the person concerned, including the obligation to provide for proper arrangements for arrival.

³ Article 2(c) of the Dublin III Regulation defines an applicant as 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.

⁴ 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 Regulation (EU) No 604/2013 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. Article 26 of the Dublin III Regulation features in Section IV of Chapter VI of that regulation, entitled ‘Procedural safeguards’. Under the title ‘Notification of a transfer decision’, paragraph 1 and the first subparagraph of paragraph 2 of that article provide as follows:

‘1. Where the requested Member State accepts to take charge of or to take back an applicant or other person as referred to in Article 18(1)(c) or (d), the requesting Member State shall notify the person concerned of the decision to transfer him or her to the Member State responsible and, where applicable, of not examining his or her application for international protection. ...

2. The decision referred to in paragraph 1 shall contain information on the legal remedies available, including on the right to apply for suspensive effect, where applicable, and on the time limits applicable for seeking such remedies and for carrying out the transfer, and shall, if necessary, contain information on the place where, and the date on which, the person concerned should appear, if that person is travelling to the Member State responsible by his or her own means.’

9. According to Article 27(1) and (2) of the Dublin III Regulation, the person to whom a transfer decision relates is to have the right to an effective remedy, within a reasonable period of time, in the form of an appeal or a review, in fact and in law, against that decision, before a court or tribunal.

10. Article 28(2), appearing in Section V of Chapter VI of the Dublin III Regulation, which is entitled ‘Detention for the purpose of transfer’, reads as follows:

‘When there is a significant risk of absconding, Member States may detain the person concerned in order to secure transfer procedures in accordance with this Regulation, on the basis of an individual assessment and only in so far as detention is proportional and other less coercive alternative measures cannot be applied effectively.’

French law

11. Article L. 742-1 of the Code de l’entrée et du séjour des étrangers et du droit d’asile (Code on the entry and residence of foreign nationals and the right to asylum; ‘Ceseda’), in the version in force at the material time, reads as follows:

‘Where the administrative authority takes the view that the examination of an asylum application falls within the competence of another State to which it intends to make a request, the foreign national is entitled to remain on French territory until the end of the procedure for determining the State responsible for examining his application and, where relevant, until his actual transfer to that State. ...’

12. Under Article L. 742-3 of that code:

‘Subject to the second paragraph of Article L. 742-1, the foreign national the examination of whose application for asylum is the responsibility of another State may be transferred to the State responsible for that examination.

Any decision to transfer shall be made by reasoned written decision taken by the administrative authority.

That decision shall be notified to the person concerned. It shall mention the remedies available and the periods within which these may be exercised, as well as the right to inform, or to have informed, that person’s consulate, an adviser or any person of his choice. Where the person concerned does not have the assistance of an adviser, the main elements of the decision shall be communicated to him in a language which he understands or which it is reasonable to believe that he understands.’

13. Pursuant to the provisions of part I of Article L. 742-4 of *Ceseda*, the period within which the judge appointed by the President of the administrative court must rule on the lawfulness of the decision to transfer the foreign national to the Member State responsible under the Dublin III Regulation is 15 days, although failure to comply with that timeframe will not result in nullity. An appeal lodged against that decision has suspensory effect.

14. The first paragraph of Article L. 551-1, concerning administrative detention, provides that, in the cases provided for in paragraphs 1 to 7 of part I of Article L. 561-2 of that code, a foreign national may, if certain conditions are met, be placed in administrative detention by the administrative authority in premises not coming under the prisons administration for a period of 48 hours. Pursuant to Article L. 561-2, part I, paragraph 1, of *Ceseda*, the administrative authority may take a decision to place under house arrest a foreign national who cannot immediately leave French territory, but whose removal remains a reasonable measure, where that foreign national ‘is the subject of a transfer decision under Article L. 742-3 [of that code]’. Article L. 742-5 of *Ceseda* states that Article L. 551-1 is applicable to a foreign national who is the subject of a transfer decision ‘from the notification of that decision’.

The dispute in the main proceedings, the question referred for a preliminary ruling and the procedure before the Court

15. Mr Hassan, who was born on 5 January 1991 in Shingal (Iraq), was arrested by the Police de l’air et des frontières du Pas-de-Calais (Pas-de-Calais Air and Border Police) on 26 November 2016 while in the restricted access area of the Port of Calais ferry terminal. Consultation of the Eurodac file revealed that his fingerprints had been taken by the German authorities on 7 November 2015 and 14 December 2015 as an asylum seeker.⁵

16. On the day on which that arrest and consultation of the Eurodac file took place, the Prefect of Pas-de-Calais sent a take back request to the German authorities. At the same time, he decided to transfer Mr Hassan to Germany and to place him in administrative detention.

17. Mr Hassan, to whom that decision was notified on the same day, first, challenged his administrative detention before the juge des libertés et de la détention (judge responsible for matters relating to liberty and detention) at the tribunal de grande instance de Lille (Regional Court, Lille, France) and, secondly, applied to the referring court for annulment of the decision of 26 November 2016 (‘the decision contested in the main proceedings’)⁶ in so far as it orders his transfer to Germany.

18. By decision of 29 November 2016, the judge responsible for matters relating to liberty and detention at the tribunal de grande instance de Lille (Regional Court, Lille) ordered the lifting of the detention measure relating to Mr Hassan.

19. In the context of his action for annulment, Mr Hassan contends, *inter alia*, that the decision contested in the main proceedings infringes Article 26 of the Dublin III Regulation, since that decision was taken and notified to him before the requested Member State, *in casu* Germany, expressly or implicitly replied to the request submitted by the French authorities. In his defence, the

⁵ It is apparent from the file that the reference number assigned to Mr Hassan’s fingerprints indicates the category to which the fingerprints relate, in this case category 1: ‘asylum seeker’.

⁶ That decision states that ‘the [German] authorities today received a take back request and have not yet indicated, acting under their sovereign powers, their agreement, the date and the arrangements for the possible readmission of the person concerned to their territory’. Article 1 of the decision states that ‘Mr Hassan, an Iraqi national illegally present in France, must be transferred to the German authorities’. The transfer measure was adopted on the basis of Article L. 742-3 of *Ceseda*. Adoption of the administrative detention measure is justified by the Prefect of Pas-de-Calais on the ground that the person concerned ‘does not offer effective assurances as to subsequent appearance that will prevent the risk of his evading the ... removal order and cannot immediately leave French territory due to the need to obtain agreement from the authorities of the requested Member State’. That measure is adopted on the basis of Articles L. 511-1, III(3) and L. 551-1 of *Ceseda*, although the decision also states that there is a risk of the person concerned absconding, having regard to Article 28 of the Dublin III Regulation.

Prefect of Pas-de-Calais contends that neither Article 26 of the Dublin III Regulation nor Article L. 742-3 of *Ceseda* precludes him from taking a transfer decision as soon as detention takes place and from notifying that decision to the person concerned, who is in a position to exercise the remedies available to him, in accordance with Article 27 of that regulation. He argues that in any event the transfer cannot be carried out until the requested Member State has accepted to take charge or take back the person concerned.

20. The referring court observes that the legal basis relied on in the decision contested in the main proceedings for the purpose of ordering Mr Hassan's detention is not Article 28 of the Dublin III Regulation but Articles L. 551-1 and L. 561-2 of *Ceseda*, and that the Prefect of Pas-de-Calais took the view that, under the applicable national law, in order to be able to proceed with Mr Hassan's detention he was obliged to take a transfer decision beforehand, without waiting for the reply of the requested Member State. That approach, he pointed out, is common practice among the competent French authorities.

21. The referring court also states that divergent judicial decisions have been taken regarding the validity of such a practice. Whilst some administrative courts called upon to rule on the lawfulness of anticipated transfer decisions have annulled them on grounds of infringement of Article 26 of the Dublin III Regulation,⁷ others have held that that article does not preclude the French authorities from taking a decision and notifying it to the person concerned prior to the requested Member State's reply to the request made by those authorities to take charge of or take back a person.⁸

22. Lastly, the referring court holds that, although both a literal and a teleological reading of Article 26 of the Dublin III Regulation tend towards an interpretation according to which a transfer decision can be taken by the requesting Member State's authorities and notified to the person concerned only after acceptance, express or implicit, on the part of the requested Member State, the adoption and notification to the person concerned of such a decision does not prevent that person from effectively challenging that decision before the competent court, in accordance with the provisions of Article 27 of that regulation. It points out that, in any event, that decision cannot be implemented until a reply has been given by the requested Member State and will be annulled if that Member State declines to take charge of the applicant or to take him back.

23. The order for reference states that Mr Hassan did not lodge an application for asylum in France.

24. In those circumstances, the tribunal administratif de Lille (Administrative Court, Lille) decided to stay the proceedings in respect of Mr Hassan's application and to refer the following question to the Court of Justice for a preliminary ruling:

'Do the provisions of Article 26 of the [Dublin III] Regulation preclude the competent authorities of the Member State which has submitted, to a Member State which it, by application of the criteria set out in [that] regulation, considers to be the State responsible, a request to take charge or take back a third-country national or a stateless person who has submitted an application for international protection in respect of which a final decision has not yet been taken, or another person referred to in Article 18(1)(c) or (d) of [that] regulation, from taking a transfer decision and notifying it to the person concerned before the requested State has accepted that request to take charge or to take the person back?'

⁷ The referring court gives the example of the judgment of the tribunal administratif de Rouen (Administrative Court, Rouen, France) of 23 September 2016, No 1603104. It also refers to an order of the judge responsible for matters relating to liberty and detention at the tribunal de grande instance de Lille (Administrative Court, Lille) of 10 November 2016.

⁸ The referring court cites, *inter alia*, the judgments of the tribunal administratif de Rouen (Administrative Court, Rouen) of 5 October 2016, No 1603199, and of 19 November 2016, No 1603674, and the judgments of the tribunal administratif de Lille (Administrative Court, Lille) of 26 August 2016, No 1606297, or 23 September 2016, No 1607048.

25. The French Republic, Hungary and the European Commission have submitted written observations.

Analysis

Preliminary observations

26. Before considering the question referred for a preliminary ruling, there are two points which I should like to clarify regarding the factual and legal context of the case in the main proceedings.

27. First, I note that, although Mr Hassan appears on the Eurodac database as an asylum seeker in Germany, it is apparent from reading the file in the main proceedings lodged at the Court Registry that the procedure whereby he could formally be considered to be an asylum seeker in that Member State was not completed.⁹

28. Article 20(2) of the Dublin III Regulation lays down a very broad criterion for determining the point in time at which an application for international protection is deemed to have been lodged in a Member State for the purposes of the application of paragraph 1 of that article.¹⁰ It is therefore sufficient for that purpose that ‘a form submitted by the applicant or a report prepared by the authorities has reached the competent authorities of the Member State concerned’. Moreover, in the case of Mr Hassan, it is reasonable to presume that those conditions are met, even if he failed to lodge a formal application for asylum in Germany,¹¹ in view inter alia of the fact that he was identified on the Eurodac database as an asylum seeker in that Member State.¹² However, neither the order for reference nor the decision contested in the main proceedings establishes which subparagraph of Article 18(1) of the Dublin III Regulation formed the basis of the request made to Germany to take Mr Hassan back.¹³

29. In those circumstances, and in view of the fact that the referring court is in no doubt that the Dublin III Regulation applies in Mr Hassan’s case and it has not questioned the Court in that regard, I shall assume, for the purposes of the present Opinion, that Mr Hassan’s situation comes under Article 18(1)(b) of the Dublin III Regulation (applicant whose application is under examination and who is on the territory of another Member State without a residence document) and that the take back request made to Germany by the French authorities was lodged under Article 24 of that regulation (submitting a take back request when no new application has been lodged in the requesting Member State).

⁹ In his application to the referring court, Mr Hassan stated that he ‘[wanted] to apply for asylum in Germany but [he had] never had an interview regarding the grounds for his application’. In another passage in that application he states that the Prefect of Pas-de-Calais had not demonstrated that [the Federal Republic of Germany] was the first Member State in which asylum had been sought.

¹⁰ Article 20(1) of the Dublin III Regulation provides that ‘the process of determining the Member State responsible must start as soon as an application for international protection is first lodged with a Member State’.

¹¹ I refer in this regard to paragraphs 75 to 103 of the judgment of 26 July 2017, *Mengesteab* (C-670/16, EU:C:2017:587), in which the Court already had the opportunity to rule on the interpretation of Article 20 of the Dublin III Regulation with regard to the procedure for lodging applications for asylum in Germany.

¹² Article 9(1) of Regulation No 603/2013 provides that ‘each Member State shall promptly take the fingerprints of all fingers of every applicant for international protection of at least 14 years of age and shall, as soon as possible and no later than 72 hours after the lodging of his or her application for international protection, as defined by Article 20(2) of the [Dublin III] Regulation, transmit them together with the data referred to in Article 11(b) to (g) of this Regulation to the Central System’.

¹³ In this regard, the referring court merely rejects as unfounded Mr Hassan’s plea that the decision contested in the main proceedings is inadequately reasoned on the ground that it does not state which subparagraph of Article 18(1) of the Dublin III Regulation Mr Hassan’s situation comes under.

30. Secondly, I would point out that, after the request for a preliminary ruling had been lodged in the present case, the cour d'appel de Douai (Court of Appeal, Douai, France), hearing an appeal against a judgment of the tribunal administratif de Lille (Administrative Court, Lille) annulling an anticipated transfer decision taken by the Prefect of Pas-de-Calais in circumstances similar to those of the case in the main proceedings, raised with the Conseil d'État (Council of State, France) a number of questions concerning, among other things, the lawfulness of that type of decision with regard to Articles L. 742-2 and L. 742-3 of Ceseda. The Conseil d'État (Council of State) delivered its opinion on 19 July 2017,¹⁴ stating in that connection that a decision to transfer an asylum seeker to the Member State responsible 'cannot be taken, nor *a fortiori* be notified to the person concerned, until after acceptance on the part of the requested State to take charge of him'. The intervention by the Conseil d'État (Council of State) should therefore put an end to the administrative practice at issue in the main proceedings,¹⁵ and to the divergent judicial decisions mentioned by the referring court.

31. One last preliminary point should be made, which does not this time relate to the circumstances of the case in the main proceedings.

32. If the reform of the Dublin system envisaged by the Commission in its proposal for a regulation amending the Dublin III Regulation¹⁶ were to be adopted, the question raised by the tribunal administratif de Lille (Administrative Court, Lille) would cease to be of interest as regards take back procedures. Article 26 of that proposal provides for the replacement of take back requests by 'take back notifications', which do not require a reply on the part of the requested Member State but merely an acknowledgement of receipt. Article 27 of that proposal therefore amends Article 26(1) of the Dublin III Regulation, the wording of which remains, for the rest, substantially unchanged, limiting its scope merely to take charge procedures. On the other hand, with regard to take back procedures, Article 27(2) of that proposal provides that 'the Member State where the person concerned is present shall notify the person concerned in writing without undue delay of the decision to transfer him or her to the Member State responsible'.

Consideration of the question referred

33. By the question which it has referred for a preliminary ruling, the tribunal administratif de Lille (Administrative Court, Lille) asks the Court in essence whether Article 26(1) of the Dublin III Regulation precludes the competent authority of a Member State from adopting and notifying to an applicant for international protection a decision providing for his transfer to the Member State which it considers to be responsible for examining his application under the provisions of the Dublin III Regulation before the latter State has given its express or implicit agreement to take charge of that applicant or to take him back.

34. All the interested parties which have lodged observations before the Court take the view that the literal interpretation of the first sentence of Article 26(1) of the Dublin III Regulation leads to the conclusion that the decision to transfer a person to the Member State responsible cannot be notified to the person concerned until after that State has accepted, expressly or implicitly, to take charge of him or to take him back.

¹⁴ Opinion No 408919 (ECLI:FR:CECHR:2017:408919.20170719).

¹⁵ In its written observations, the French Republic stresses that, although that practice is common among some prefectural authorities it does not extend to the French central administrative authority.

¹⁶ Cited in footnote 2 above.

35. I share that view. The wording of that provision is clear. In practically all of the language versions the use of a conjunction introducing a conditional or temporal adverbial clause¹⁷ unambiguously establishes a precise procedural and chronological order between acceptance by the requested Member State, on the one hand, and notification of the transfer to the person concerned, on the other hand. The requesting Member State makes such notification only *if* (and, therefore necessarily *after*) the Member State responsible has replied favourably to the request to take charge or to take back or if the period for such a reply has expired, giving rise to implicit agreement.

36. The wording of the first sentence of Article 26(1) of the Dublin III Regulation reflects, moreover, the EU legislature's intention as it appears from the preparatory material for that regulation. Thus, the initial Commission proposal for a recast version of Regulation No 343/2003 ('the Dublin II Regulation'),¹⁸ which led to the adoption of the Dublin III Regulation¹⁹ ('the Commission proposal for a regulation'), referred to the need to 'further specify' the procedure for notifying the transfer decision to the person concerned. The Commission staff document accompanying that proposal stated that the further specification should concern the '*time, form and content of such notifications*'.²⁰ Following that guidance, Article 25(1) of that proposal laid down a single notification procedure — applying both as regards the procedure for taking charge of an applicant for international protection and as regards the procedure for taking back such an applicant²¹ —, the subject of which is the 'decision to transfer' the person concerned to the Member State responsible.²² That article was drafted in practically the same words as the first sentence of Article 26(1) of the Dublin III Regulation, and underwent only minor amendments during the legislative process.²³

37. Despite the absence of any ambiguity in the wording of the first sentence of Article 26(1) of the Dublin III Regulation, in its written observations the Commission proposes that the Court's answer to the question referred should be that that provision does not preclude the adoption and notification of an anticipated transfer decision. Such an outcome is, in its view, consistent with the main objective of the Dublin III Regulation — which is to establish an efficient method of speedily determining the Member State responsible and preventing secondary movements of asylum seekers — and does not infringe the rights of the persons concerned.

17 This conjunction, the meaning of which corresponds, as appropriate, to French 'lorsque', 'quand', 'dans le cas où', 'si', 'dans la mesure où', is used in the following language versions: Bulgarian ('kòraro'), Spanish ('cuando'), Czech ('pokud'), Danish ('når'), Estonian ('kui'), Greek ('όταν'), English ('where'), Irish ('i gcás ina'), Croatian ('kada'), Italian ('quando'), Latvian ('Ja'), Lithuanian ('Jei'), Hungarian ('amennyiben'), Maltese ('meta'), Dutch ('wanneer'), Polish ('w przypadku gdy'), Portuguese ('caso'), Romanian ('atunci când'), Slovak ('keď'), Slovene ('kadar se'), Finnish ('jos') and Swedish ('om'). In the German version it is the construction of the sentence which conveys the temporal sequence between the two acts.

18 Cited in footnote 2 above.

19 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 (Recast), COM(2008) 820 final.

20 SEC(2008) 2962 of 3 December 2008, available only in English, see point 1 of the section entitled '*Effective right to remedy*', which refers, in each of the options provided for, to the requirement to '*further specify the procedure for notification of transfer decisions to asylum-seekers, in particular as regards the time, form and content of such notifications*'. To that effect see also judgment of 7 June 2016, *Ghezelbash* (C-63/15, EU:C:2016:409, paragraph 49).

21 To that effect, Article 25(1) of the Commission proposal was intended to replace Article 19(1) (as regards taking charge) and Article 20(1)(e) (as regards taking back) of the Dublin II Regulation.

22 The term 'transfer decision' does not appear in the Dublin II Regulation, Article 19(1) of which provided that, following acceptance by the requested Member State, the Member State in which the application for asylum had been lodged was to notify the applicant of 'the decision not to examine the application, and of the obligation to transfer the applicant to the responsible Member State'. Article 20(1)(e) of the same regulation provided that the requesting Member State was to 'notify the asylum seeker of the decision concerning his being taken back by the Member State responsible', without giving any details as to the point in time when such notification was to be made.

23 See the report of the European Parliament on the Commission proposal, A6-0284/2009 of 29 April 2009, p. 18.

38. In that regard, I note first of all that, although the question that it was considering did not relate to the interpretation of that provision, in a recent judgment, delivered after the end of the written procedure in the case which forms the subject of the present Opinion, the Court recognised that, pursuant to Article 26(1) of the Dublin III Regulation, the person concerned *may be notified* of the transfer decision *only* after the requested Member State has agreed to take charge of or to take back that person.²⁴ The interpretation proposed by the Commission would therefore appear to have been rejected already by the Court.

39. Irrespective of this, that interpretation does not, in any event, convince me, primarily from a methodological standpoint.

40. It is, admittedly, true that, as the Commission recalls, according to the settled case-law of the Court, the interpretation of a provision of EU law must take into account not only its wording, but also the context in which it occurs and the objectives pursued by the rules of which it is part.²⁵ However, I doubt that the use of arguments of a systematic or teleological nature would result in such a provision being assigned a meaning that is radically different, or indeed opposite, to the one that emerges from its clear wording, even if such an operation were, for example, to lead to a result that was consistent with the objectives of the act in which that provision appears.

41. Next, contrary to what the Commission maintains, I am of the view that a systematic and teleological analysis supports the interpretation which emerges from the unambiguous wording of the first sentence of Article 26(1) of the Dublin III Regulation.

42. In the first place, although it follows from Article 20(5) of the Dublin III Regulation that the process of determining the Member State responsible is not completed until the applicant is transferred to that State, Sections II and III of Chapter VI of that regulation lay down, respectively, the procedures for ‘take charge requests’ and ‘take back requests’, which appear as internal stages within that process. Those procedures begin with the submission — by the Member State with which an application for international protection has been lodged (Article 21) or by the 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 (Article 23) or on whose territory that person is staying (Article 24) — of a take charge or a take back request addressed to the Member State considered to be responsible and ends only with the explicit or implicit reply of that State. It is not until those procedures have been completed that it is possible to move on to the final stage of the process of determining the Member State responsible, namely the transfer of the person concerned (Article 29), which cannot start until a final decision on the appeal against, or review of, the transfer decision has been taken, if suspensive effect is granted. Section IV of Chapter VI of the Dublin III Regulation, which contains Article 26, appears after the sections devoted to the procedures described above and before Section VI. Under that chapter, notification of the transfer decision (Article 26) and exercise of the right to an effective remedy (Article 27) are (possible) stages in the process of determining the Member State responsible, which take place only *where* and *if* the procedures described in Sections II and III of that chapter end with the explicit or implicit agreement of the requested Member State.

43. In the second place, such a systematic reading is confirmed by an analysis of the words used by the EU legislature. Whilst Articles 22 and 25 use the wording ‘requested Member State’ to indicate the Member State to which a take charge or a take back request has been made and no reply has yet been received, Article 26 uses the words ‘Member State responsible’ to indicate the Member State to which the transfer of the person concerned is proposed. That terminological divergence marks clearly the

²⁴ Judgment of 26 July 2017, A.S. (C-490/16, EU:C:2017:585, paragraphs 33 and 60).

²⁵ See to that effect, *inter alia*, judgment of 15 March 2017, *Al Chodor* (C-528/15, EU:C:2017:213, paragraph 30).

transition to a procedural stage in the process of determining the subsequent Member State responsible in relation to those described in Sections II and III of Chapter VI of the Dublin III Regulation, a transition which takes place where the requested Member State accepts to take charge of or to take back the person concerned.

44. In the third place, I note that the first subparagraph of Article 26(2) of the Dublin III Regulation states that the transfer decision referred to in paragraph 1 of that article is to contain information on, *inter alia*, ‘the time limits applicable ... for carrying out the transfer, and ..., if necessary, contain information on the place where, and the date on which, the person concerned should appear, if that person is travelling to the Member State responsible by his or her own means’. Since such information depends, first, on the date on which the requested Member State gave its implicit or explicit consent to take charge of or take back the person concerned and, secondly, the content of that reply (where it is explicit), the clarification contained in the first subparagraph of Article 26(2) of the Dublin III Regulation supports an interpretation of paragraph 1 of that article whereby notification of the transfer decision is not made until the requesting Member State has received the agreement of the requested Member State.

45. In the fourth place, Article 27(3) of the Dublin III Regulation provides that Member States must adopt one of the three options set out in subparagraphs (a) to (c) of that provision in order either to ensure automatic suspensive effect of an appeal against the transfer decision or an application for its review, or to give the person concerned the opportunity to request suspension of the implementation of such a decision. Paragraph 4 of that article gives Member States the option to provide that the competent authorities may, acting *ex officio*, decide on such suspension. Those provisions presuppose that the transfer decision is immediately enforceable, which is not so in the case of an anticipated transfer decision.²⁶

46. In the fifth place, although the fact of notifying the transfer decision before the requested Member State has consented to the taking charge or taking back of the person concerned does not prevent that person from lodging an appeal (or an application for review) against that decision under Article 27(1) of the Dublin III Regulation, the question arises nonetheless as to whether such a circumstance would not result in restricting the scope of that remedy, as is made clear in recital 19 of that regulation, according to which the remedy should ensure review of the proper application of the regulation.²⁷

47. In that connection, it should be noted that the Court has warned against a restrictive interpretation of the scope of the right to a remedy as provided for in Article 27(1) of the Dublin III Regulation. Such an interpretation might thwart the attainment of the objective of improving the protection afforded applicants under the Dublin system, as set out in recital 9 of that regulation.²⁸ To require the person concerned to seek a remedy against a decision that does not contain all the information showing whether the provisions of the Dublin III Regulation have been properly applied in order for the transfer to take place would mean that the scope of his right to a remedy is in fact being restricted.

²⁶ Although the Dublin III Regulation does not expressly prohibit the transfer of a third-country national to the requested Member State before the latter has given its consent to taking charge of or to taking back the person concerned, to allow Member States to make such a transfer would defeat the clarity and effectiveness of the scheme put in place by the Dublin III Regulation. As the Court has held, the application of that regulation is based essentially on the conduct of a process for determining the Member State responsible as designated by the criteria listed in Chapter III of that regulation (judgments of 7 June 2016, *Ghezelbash*, C-63/15, EU:C:2016:409, paragraph 41, and of 7 June 2016, *Karim*, C-155/15, EU:C:2016:410, paragraph 23). In the context of such a process, the take charge and take back procedures ‘must necessarily be carried out in accordance with the rules laid down, *inter alia*, in Chapter VI of that regulation’ (judgment of 26 July 2017, *Mengesteab* (C-670/16, EU:C:2017:587, paragraph 49). Those rules, which set out a procedure comprising various successive stages, cannot, however, be reconciled with a transfer which takes place *before* the earlier procedural stages have been completed. That was the approach taken by the Court, moreover, in the judgment of 26 July 2017, *A.S.* (C-490/16, EU:C:2017:585), in paragraph 50 of which it held that Article 29(2) of the Dublin III Regulation ‘relates to the enforcement of the transfer decision and may be applied only once the principle of transfer has been established, that is to say, at the earliest when the requested Member State has accepted the request to take charge or take back’.

²⁷ See judgments of 7 June 2016, *Ghezelbash* (C-63/15, EU:C:2016:409, paragraph 40), and of 26 July 2017, *Mengesteab* (C-670/16, EU:C:2017:587, paragraph 43). See, also, judgment of 7 June 2016, *Karim*, C-155/15, EU:C:2016:410, paragraph 22.

²⁸ See judgment of 7 June 2016, *Ghezelbash* (C-63/15, EU:C:2016:409, paragraph 53).

48. More particularly, if one were to consider, contrary to the clear wording of the first sentence of Article 26(1) of the Dublin III Regulation, that the concept of a ‘transfer decision’ for the purposes of applying that provision includes anticipated transfer decisions, this would mean that the notification requirement imposed on the requesting Member State does not necessarily include information such as the date or content of the reply given by the requested Member State, where that reply is explicit. Such information might therefore never be communicated to the person concerned. In that case, as where such information is communicated after a decision has been taken on an appeal or an application for review — which might often be the case, given the very short time limits for those types of procedure —, the person concerned would have no opportunity to challenge any information contained in the requested Member State’s reply regarding the reasons that led it to accept the take charge or take back request,²⁹ or to check whether, where suspensive effect is not granted, his transfer is being carried out in accordance with the provisions of the Dublin III Regulation. Lastly, the person concerned would also not be in a position to check whether his transfer is being carried out within the time limits laid down, as appropriate, by the third subparagraph of Article 28(3) or by the first subparagraph of Article 29(1) of the Dublin III Regulation³⁰ and, therefore, whether the Member State to which he is being transferred is still responsible for examining his application for international protection according to the rule laid down in the fourth subparagraph of Article 28(3) or in Article 29(2) of that regulation, respectively. Although in different circumstances from those in the case in the main proceedings here, in the judgment of 25 October 2017, *Shiri* (C-201/16, EU:C:2017:805, paragraph 44), the Court held that the applicant for international protection must have an effective and rapid remedy available to him which enables him to rely on the expiry of the six-month period as defined in Article 29(1) and (2) of the Dublin III Regulation.³¹ No such right, however, is guaranteed in the circumstances described above.

49. In the sixth place, although, as the Commission notes, allowing the requesting Member State to notify the transfer decision without waiting for the requested Member State’s reply is undoubtedly consistent with the objective of the rapid processing of asylum applications mentioned in recital 5 of the Dublin III Regulation, I would point out that the Court has already held, in the context of the Dublin II Regulation, that the EU legislature did not intend that judicial protection for asylum seekers should be sacrificed to such a requirement of expedition.³² That finding applies, according to the Court, *a fortiori*, with regard to the Dublin III Regulation, as the EU legislature significantly enhanced, by that regulation, the procedural safeguards granted to asylum seekers under the Dublin system.³³ It should be noted, moreover, that, according to Articles 22 and 25 of the Dublin III Regulation, the obligation to await the explicit or implicit agreement of the requested Member State entails, at most, a two-month delay in notification of the transfer decision in the case of a take charge request and a one-month delay in the case of a take back request.

²⁹ Such information — which should be communicated to the person to whom the transfer decision relates in order to ensure his right to an effective remedy — is, admittedly, more likely to be contained in a reply to a take charge request than in a reply to a take back request, that is to say, in situations that are different from that at issue in the main proceedings. In the processing of the first type of request, the requested Member State is required to check exhaustively and objectively whether its responsibility for examining the application for asylum is established, on the basis of all information directly or indirectly available to it, and thus also information which is not known to the requesting Member State (see Commission Regulation (EC) No 1560/2003 of 2 September 2003 laying down detailed rules for the application of Regulation No 343/2003). However, it is not possible in my view to envisage adopting a different interpretation of the first sentence of Article 26(1) of the Dublin III Regulation and of the extent of the obligation to notify for which it provides depending on the type of request, whether it is a take charge or a take back request, which has been made by the Member State seeking to determine the Member State responsible.

³⁰ That time limit is six weeks from the implicit or explicit acceptance by the requested Member State of the request to take charge of or to take back the person or from the moment at which the appeal or review no longer has a suspensive effect where the person concerned is already detained when one of the two events takes place (third subparagraph of Article 28(3) of the Dublin III Regulation, as interpreted by the judgment of 13 September 2017, *Khair Amayry*, C-60/16, EU:C:2017:675, paragraphs 39 and 54). In other cases that time limit is six months from one of the events mentioned.

³¹ I note, incidentally, that the proposal to amend the Dublin III Regulation provides for removal of the system whereby responsibility is transferred to the requesting State in the event of the latter’s failure to comply with the time limits for making the transfer.

³² See, to that effect, judgment of 29 January 2009, *Petrosian*, C-19/08, EU:C:2009:41, paragraph 48.

³³ See judgment of 7 June 2016, *Ghezelbash* (C-63/15, EU:C:2016:409, paragraph 57).

50. For all the reasons set out above, I take the view that the first sentence of Article 26(1) of the Dublin III Regulation should be interpreted as meaning that it precludes the requesting Member State from notifying the person concerned of the decision to transfer him to the requested Member State before the latter has given its agreement, explicitly or implicitly, to such a transfer.

51. Once the possibility of such ‘anticipated notification’ has been excluded, the question as to whether a transfer decision may be *adopted* before the agreement of the requested Member State has been given necessarily ceases to be of any practical interest. Since the time limits for exercising the remedy provided for in Article 27(1) of the Dublin III Regulation do not start to run until the moment at which that decision is notified to the person concerned, its ‘anticipated’ adoption would not lead to any significant reduction in the time involved in taking charge or taking back procedures and would therefore have a neutral effect as regards the objective of the rapid processing of applications for international protection put forward by the Commission.

52. That said, I note that, although Article 26(1) of the Dublin III Regulation refers expressly only to notification of the transfer decision and not to its adoption, Article 5(2)(b) and 5(3) of the Dublin III Regulation identifies Article 26(1) of that regulation as being the provision on the basis of which the decision is *taken* to transfer an applicant to the Member State responsible.³⁴ Systematic arguments that are the same in substance as those contained in points 42 to 45 of the present Opinion lead one to preclude interpretation of that provision as allowing Member States to *decide* on a transfer before the requested Member State has consented to take charge of or to take back the person concerned. On the contrary, those arguments lead one to take the view that, before the requested Member State agrees to take charge of or take back the person concerned, not all the information is available enabling the requesting Member State to adopt a decision to make a transfer to that Member State according to the procedures laid down in the Dublin III Regulation.

53. I therefore take the view that Article 26(1) of the Dublin III Regulation does not allow either the notification or the adoption of a decision to transfer a person to the requested Member State until the latter State has given its implicit or explicit agreement to take charge of or to take back the person concerned.

54. Before concluding, it remains to be said, having regard to the reasons underlying the French authorities’ practice of adopting anticipated transfer decisions, that Article 28 of the Dublin III Regulation does not preclude the person concerned from being held in detention before his transfer is decided upon, where all the conditions laid down in that provision in order for such a measure to be taken are met.³⁵ The prohibition on taking detention measures before a transfer decision is adopted therefore stems from French law alone and not from EU law.³⁶

³⁴ I note, incidentally, that the proposal for amendment of the Dublin III Regulation envisages amending the abovementioned paragraphs of Article 5 of that regulation, removing any reference to the transfer decision.

³⁵ The proposal for a regulation amending the Dublin III Regulation envisaged that detention would be applied only from the moment at which a decision of transfer to the responsible Member State had been notified to the person concerned (Article 27(4)), but that provision was amended during the procedure for the adoption of the Dublin III Regulation.

³⁶ In this regard, I note that, in its opinion of 19 July 2017, cited in point 30 above, the Conseil d’État (Council of State) confirmed that Article L. 742-2 of *Ceseda* does not permit the adoption of an administrative detention order under Article L. 551-1 of *Ceseda* until a transfer decision has been adopted (and notified).

Conclusion

55. In the light of all the foregoing considerations, I propose that the Court answer the question referred for a preliminary ruling by the tribunal administratif de Lille (Administrative Court, Lille, France) as follows:

Article 26(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 precludes a Member State which has submitted to the Member State that it considers to be responsible for such examination a request to take charge of or to take back a person under Articles 21, 23 and 24 of that regulation from adopting and notifying to the person concerned the decision to transfer him to the requested Member State before the latter has accepted to take charge of or to take back that person.