



Reports of Cases

Case C-490/16

A.S.

v

Républika Slovenija

(Request for a preliminary ruling from the Vrhovno sodišče)

(Reference for a preliminary ruling — Regulation (EU) No 604/2013 — Determination of the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national — Arrival of an exceptionally large number of third-country nationals wishing to obtain international protection — Organisation by the authorities of a Member State of the crossing of the border for the purpose of transit to another Member State — Entry authorised by way of derogation for humanitarian reasons — Article 13 — Irregular crossing of an external border — Period of 12 months from the crossing of the border — Article 27 — Remedy — Scope of judicial review — Article 29 — Period of six months for the purpose of effecting the transfer — Running of the periods — Use of an appeal — Suspensory effect)

Summary — Judgment of the Court (Grand Chamber), 26 July 2017

- Border controls, asylum and immigration — Asylum policy — Criteria and mechanisms for determining the Member State responsible for examining an application for international protection — Regulation No 604/2013 — Appeal brought against a decision to transfer an applicant for international protection — Entitlement to plead incorrect application of the criterion for determining responsibility relating to the irregular crossing of the border*

(European Parliament and Council Regulation No 604/2013, Recital 19 and Arts 13(1) and 27(1))
- Border controls, asylum and immigration — Asylum policy — Criteria and mechanisms for determining the Member State responsible for examining an application for international protection — Regulation No 604/2013 — Entry and/or stay — Admission of third country nationals to the territory of a Member State for the purpose of transit to another Member State to lodge an application for international protection in that State — Situation regarded as an irregular crossing of an external border — Arrival of an exceptionally large number of third-country nationals wishing to obtain international protection — Irrelevant*

(European Parliament and Council Regulation No 604/2013, Art. 13(1))
- Border controls, asylum and immigration — Asylum policy — Criteria and mechanisms for determining the Member State responsible for examining an application for international protection — Regulation No 604/2013 — Appeal brought against a decision to transfer an*

applicant for international protection — No effect on the period for application of the criterion for determining responsibility relating to the irregular crossing of an external border — Effect on the commencement of the period for enforcement of the transfer decision

(European Parliament and Council Regulation No 604/2013, Arts 7(2), 13(1), 27(3) and 29(1) and (2))

1. On a proper construction of Article 27(1) of Regulation 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, read in the light of recital 19 of that regulation, an applicant for international protection is entitled, in an appeal against a decision to transfer him, to plead incorrect application of the criterion for determining responsibility relating to the irregular crossing of the border of a Member State, laid down in Article 13(1) of that regulation.

In that regard, the Court held in paragraph 61 of the judgment of 7 June 2016, *Ghezelbash* (C-63/15, EU:C:2016:409) that, in the context of an appeal against a transfer decision, the applicant for international protection was entitled to plead the incorrect application of one of the criteria for determining responsibility for the examination of the application for international protection laid down in Chapter III of the Dublin III Regulation. It is true that only the criterion set out in Article 12 of that regulation was directly at issue in the case giving rise to that judgment. However, the reasons given by the Court in the same judgment also apply, *mutatis mutandis*, to the criterion set out in Article 13(1) of the same regulation.

As regards the fact, highlighted by the referring court, that in the case in the main proceedings another Member State had already accepted responsibility for the examination of the application for international protection concerned, it should be stressed 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. In those circumstances, that fact does not mean that judicial review of the transfer decision regarding the application of the criteria set out in Chapter III of that regulation is excluded, for otherwise Article 27(1) of that regulation would be deprived of most of its practical effect.

(see paras 27, 29, 30, 33-35, operative part 1)

2. On a proper construction of Article 13(1) of Regulation No 604/2013, a third-country national whose entry has been tolerated by the authorities of a first Member State faced with the arrival of an exceptionally large number of third-country nationals wishing to transit through that Member State in order to lodge an application for international protection in another Member State, without satisfying the entry conditions in principle required in that first Member State, must be regarded as having ‘irregularly crossed’ the border of that first Member State, within the meaning of that provision.

However, it must be noted that, pursuant to Article 3(2) of the Dublin III Regulation and Article 4 of the Charter of Fundamental Rights of the European Union, an applicant for international protection must not be transferred to the Member State responsible if that transfer entails a real risk of the person concerned suffering inhuman or degrading treatment, within the meaning of that Article 4 (see, to that effect, judgment of 16 February 2017, *C.K and Others*, C-578/16 PPU, EU:C:2017:127, paragraph 65). A transfer might, therefore, not be effected if, following the arrival of an exceptionally large number of third-country nationals wishing to obtain international protection, such a risk existed in the Member State responsible.

(see paras 41, 42, operative part 2)

3. On a proper construction of Article 13(1), second sentence, of Regulation No 604/2013, read together with Article 7(2) of that regulation, the lodging of an appeal against a transfer decision has no effect on the running of the period laid down in Article 13(1).

On a proper construction of Article 29(1) and (2) of that regulation, the lodging of such an appeal means that the period laid down by those provisions does not start to run until the final decision on that appeal, including when the court hearing the appeal has decided to request a preliminary ruling from the Court of Justice, as long as that appeal had suspensory effect in accordance with Article 27(3) of that regulation.

As regards, in the first place, the time limit laid down by Article 13(1) of the Dublin III Regulation, it must be noted that Article 7(2) of that regulation states that the Member State responsible is to be determined in accordance with the criteria set out in Chapter III of that regulation on the basis of the situation obtaining when the applicant first lodged his or her application for international protection with a Member State. Therefore, the last sentence of Article 13(1) of that regulation must be interpreted as meaning that the Member State whose external border has been irregularly crossed by a third-country national can no longer be held responsible, on the basis of that provision, if the period of 12 months following the irregular crossing of that border has already expired on the date when the applicant first lodged his or her application for international protection with a Member State.

In those circumstances, the lodging of an appeal against a transfer decision, which necessarily postdates the notification of that decision and therefore the lodging of an application for international protection, cannot, by its very nature, have any effect on the running of the period laid down in Article 13(1) of the Dublin III Regulation.

As regards, in the second place, the time limit laid down in Article 29(2) of the Dublin III Regulation, it follows, on the one hand, from the relationship between the various paragraphs of that article and, on the other, from the lack of any clarification in that provision as to the time from which that period starts to run, that that provision specifies only the consequences of the expiry of the period for effecting the transfer, laid down in Article 29(1) of that regulation (see, by analogy, judgment of 29 January 2009, *Petrosian*, C-19/08, EU:C:2009:41, paragraph 50). Article 29(1) of the Dublin III Regulation allows for the consequences of the possible lodging of an appeal by providing that the period of six months for effecting the transfer runs from the final decision on an appeal or review when suspensory effect is granted in accordance with Article 27(3) of that regulation. Consequently, the lodging of an appeal which, like that at issue in the case in the main proceedings, has been granted suspensory effect, implies that the period for effecting the transfer will not, in principle, expire until six months after the intervention of a final decision on that appeal.

Accordingly, the time limit referred to in Article 13(1) of the Dublin III Regulation constitutes a condition for the application of the criterion laid down by that provision and it must be ensured that it is observed in the procedure for determining the Member State responsible, after which a transfer decision may, if appropriate, be taken. On the other hand, Article 29(2) of that 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.

(see paras 49, 50, 52-54, 56-60, operative part 3)