

**Request for a preliminary ruling from the Verwaltungsgerichtshof (Austria) lodged on 15 December 2016 — Khadija Jafari, Zainab Jafari**

**(Case C-646/16)**

(2017/C 053/30)

*Language of the case: German*

**Referring court**

Verwaltungsgerichtshof

**Parties to the main proceedings**

*Appellants on a point of law:* Khadija Jafari, Zainab Jafari

*Respondent authority:* Bundesamt für Fremdenwesen und Asyl

**Questions referred**

1. Is it necessary, for the purpose of understanding Articles 2(m), 12 and 13 of Regulation (EU) No 604/2013<sup>(1)</sup> 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 (recast) ('the Dublin III Regulation'), for other acts, linked to the Dublin III Regulation, to be taken into account, or are those provisions to be interpreted independently of such acts?

2. *In the event that the provisions of the Dublin III Regulation are to be interpreted independently of other acts*

- (a) In the circumstances of the cases in the main proceedings, which are characterised by the fact that they fall within a period in which the national authorities of the States principally involved were faced with an unusually large number of people demanding transit through their territory, is the entry into the territory of a Member State, where such entry is de facto tolerated by that Member State and was intended to be solely for the purpose of transit through that Member State and the lodging of an application for international protection in another Member State, to be regarded as a 'visa' within the meaning of Article 2(m) and Article 12 of the Dublin III Regulation?

*If question 2(a) is answered in the affirmative:*

- (b) Must it be assumed, in the light of the fact that entry is de facto tolerated for the purpose of transit, that the 'visa' ceased to be valid upon departure from the Member State concerned?
- (c) Must it be assumed, in the light of the fact that entry is de facto tolerated for the purpose of transit, that the 'visa' continues to be valid if departure from the Member State concerned has not yet taken place, or does the 'visa' cease to be valid, notwithstanding non-departure, at the point at which an applicant finally abandons his plan to travel to another Member State?
- (d) Does the applicant's abandonment of his plan to travel to the Member State which he originally envisaged as being his destination mean that a fraud can be said to have been committed after the 'visa' had been issued, within the meaning of Article 12(5) of the Dublin III Regulation, so that the Member State issuing the 'visa' is not to be responsible?

*If question 2(a) is answered in the negative:*

- (e) Is the expression used in Article 13(1) of the Dublin III Regulation, 'has irregularly crossed the border into a Member State by land, sea or air having come from a third country', to be interpreted as meaning that, in the special circumstances of the cases in the main proceedings referred to, an irregular crossing of the external border is to be regarded as not having taken place?

3. *In the event that the provisions of the Dublin III Regulation are to be interpreted taking other acts into account:*

- (a) In assessing whether, for the purposes of Article 13(1) of the Dublin III Regulation, there has been an ‘irregular crossing’ of the border, must regard be had in particular to the question whether the entry conditions under the Schengen Borders Code — notably under Article 5 of Regulation (EC) No 562/2006 <sup>(2)</sup> of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders, which is particularly relevant to the cases in the main proceedings, given the timing of the entry — have been fulfilled?

*If question 3(a) is answered in the negative:*

- (b) Of which provisions of EU law is particular account to be taken when assessing whether there has been an ‘irregular crossing’ of the border for the purposes of Article 13(1) of the Dublin III Regulation?

*If question 3(a) is answered in the affirmative:*

- (c) In the circumstances of the cases in the main proceedings, which are characterised by the fact that they fall within a period in which the national authorities of the States principally involved were faced with an unusually large number of people demanding transit through their territory, is the entry into the territory of a Member State, where such entry is, without any assessment of the circumstances of individual cases, de facto tolerated by that Member State and was intended to be solely for the purpose of transit through that Member State and the lodging of an application for international protection in another Member State, to be regarded as authorisation to enter within the meaning of Article 5(4)(c) of the Schengen Borders Code?

*If questions 3(a) and 3(c) are answered in the affirmative:*

- (d) Does authorisation to enter pursuant to Article 5(4)(c) of the Schengen Borders Code mean that an authorisation comparable to a visa within the meaning of Article 5(1)(b) of the Schengen Borders Code, and thus a ‘visa’ under Article 2(m) of the Dublin III Regulation, must be deemed to exist, so that, when applying the provisions for establishing the Member State responsible under the Dublin III Regulation, regard must be had also to Article 12 of that regulation?

*If questions 3(a), 3(c) and 3(d) are answered in the affirmative:*

- (e) Must it be assumed, in the light of the fact that entry is de facto tolerated for the purpose of transit, that the ‘visa’ ceased to be valid upon departure from the Member State concerned?
- (f) Must it be assumed, in the light of the fact that entry is de facto tolerated for the purpose of transit, that the ‘visa’ continues to be valid if departure from the Member State concerned has not yet taken place, or does the ‘visa’ cease to be valid, notwithstanding non-departure, at the point at which an applicant finally abandons his plan to travel to another Member State?
- (g) Does the applicant’s abandonment of his plan to travel to the Member State which he originally envisaged as being his destination mean that a fraud can be said to have been committed after the ‘visa’ had been issued, within the meaning of Article 12(5) of the Dublin III Regulation, so that the Member State issuing the ‘visa’ is not to be responsible?

*If questions 3(a) and 3(c) are answered in the affirmative, but question 3(d) is answered in the negative:*

- (h) Is the expression used in Article 13(1) of the Dublin III Regulation, ‘has irregularly crossed the border into a Member State by land, sea or air having come from a third country’, to be interpreted as meaning that, in the special circumstances of the cases in the main proceedings referred to, a border crossing which is to be categorised as authorised entry for the purposes of Article 5(4)(c) of the Schengen Borders Code is not to be regarded as an irregular crossing of the external border?

<sup>(1)</sup> OJ L 180, p. 31.

<sup>(2)</sup> Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ L 105, 13.4.2006, p. 1).