



## Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

20 October 2022\*

(Reference for a preliminary ruling – Border controls, asylum and immigration – Asylum policy – Residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate irregular immigration, who cooperate with the competent authorities – Directive 2004/81/EC – Article 6 – Scope – Third-country national claiming to be the victim of an offence related to the trafficking in human beings – Entitlement to the reflection period provided for in Article 6(1) of that directive – Prohibition on enforcing an expulsion measure – Definition – Scope – Calculation of that reflection period – Regulation (EU) No 604/2013 – 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 – Transfer to the Member State responsible for examining that application for international protection)

In Case C-66/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Rechtbank Den Haag (District Court, The Hague, Netherlands), made by decision of 28 January 2021, received at the Court on 29 January 2021, in the proceedings

**O.T.E.**

v

**Staatssecretaris van Justitie en Veiligheid,**

THE COURT (Fourth Chamber),

composed of C. Lycourgos, President of the Chamber, L.S. Rossi (Rapporteur), J.-C. Bonichot, S. Rodin and O. Spineanu-Matei, Judges,

Advocate General: J. Richard de la Tour,

Registrar: A. Calot Escobar,

having regard to the written procedure,

\* Language of the case: Dutch.

after considering the observations submitted on behalf of:

- the Netherlands Government, by M.K. Bulterman and P. Huurnink, acting as Agents,
- the Czech Government, by M. Smolek and J. Vláčil, acting as Agents,
- the German Government, by J. Möller and R. Kanitz, acting as Agents,
- the European Commission, by C. Cattabriga and F. Wilman, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 2 June 2022,

gives the following

### **Judgment**

- 1 This request for a preliminary ruling concerns the interpretation of Article 6 of Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities (OJ 2004 L 261, p. 19).
- 2 The request has been made in proceedings between O.T.E., a Nigerian national, and the Staatssecretaris van Justitie en Veiligheid (State Secretary for Justice and Security, Netherlands) ('the State Secretary') concerning the latter's rejection of the application for a temporary asylum residence permit, made by the applicant in the main proceedings, on the ground that the Italian Republic was the Member State responsible for examining that application.

### **Legal context**

#### ***European Union law***

##### *Directive 2004/81*

- 3 Recitals 2, 4 and 9 to 11 of Directive 2004/81 are worded as follows:

'(2) At its special meeting in Tampere on 15 and 16 October 1999, the European Council expressed its determination to tackle illegal immigration at source, for example by targeting those who engage in trafficking of human beings and the economic exploitation of migrants. It called on the Member States to concentrate their efforts on detecting and dismantling criminal networks while protecting the rights of victims.

...

- (4) This Directive is without prejudice to the protection granted to refugees, to beneficiaries of subsidiary protection and persons seeking international protection under international refugee law and without prejudice to other human rights instruments.

...

- (9) This Directive introduces a residence permit intended for victims of trafficking in human beings or, if a Member State decides to extend the scope of this Directive, to third-country nationals who have been the subject of an action to facilitate illegal immigration to whom the residence permit offers a sufficient incentive to cooperate with the competent authorities while including certain conditions to safeguard against abuse.
- (10) To this end, it is necessary to lay down the criteria for issuing a residence permit, the conditions of stay and the grounds for non-renewal and withdrawal. The right to stay under this Directive is subject to conditions and is of provisional nature.
- (11) The third country nationals concerned should be informed of the possibility of obtaining this residence permit and be given a period in which to reflect on their position. This should help put them in a position to reach a well-informed decision as to whether or not to cooperate with the competent authorities, which may be the police, prosecution and judicial authorities (in view of the risks this may entail), so that they cooperate freely and hence more effectively.'

4 Article 1 of that directive provides:

'The purpose of this Directive is to define the conditions for granting residence permits of limited duration, linked to the length of the relevant national proceedings, to third-country nationals who cooperate in the fight against trafficking in human beings or against action to facilitate illegal immigration.'

5 Article 2 of that directive provides:

'For the purposes of this Directive:

...

- (d) "measure to enforce an expulsion order" means any measure taken by a Member State to enforce the decision of the competent authorities ordering the expulsion of a third-country national;
- (e) "residence permit" means any authorisation issued by a Member State, allowing a third-country national who fulfils the conditions set by this Directive to stay legally on its territory[;]

...'

6 Article 3(1) of that directive provides:

'Member States shall apply this Directive to the third-country nationals who are, or have been victims of offences related to the trafficking in human beings, even if they have illegally entered the territory of the Member States.'

7 The first paragraph of Article 5 of Directive 2004/81 is worded as follows:

‘When the competent authorities of the Member States take the view that a third-country national may fall into the scope of this Directive, they shall inform the person concerned of the possibilities offered under this Directive.’

8 Article 6 of that directive, entitled ‘Reflection period’, provides:

‘(1) Member States shall ensure that the third-country nationals concerned are granted a reflection period allowing them to recover and escape the influence of the perpetrators of the offences so that they can take an informed decision as to whether to cooperate with the competent authorities.

The duration and starting point of the period referred to in the first subparagraph shall be determined according to national law.

(2) During the reflection period and while awaiting the decision of the competent authorities, the third-country nationals concerned shall have access to the treatment referred to in Article 7 and it shall not be possible to enforce any expulsion order against them.

(3) The reflection period shall not create any entitlement to residence under this Directive.

(4) The Member State may at any time terminate the reflection period if the competent authorities have established that the person concerned has actively, voluntarily and on his/her own initiative renewed contact with the perpetrators of the offences referred to in Article 2(b) and (c) or for reasons relating to public policy and to the protection of national security.’

9 Article 7 of that directive, entitled ‘Treatment granted before the issue of the residence permit’, provides:

‘(1) Member States shall ensure that the third-country nationals concerned who do not have sufficient resources are granted standards of living capable of ensuring their subsistence and access to emergency medical treatment. They shall attend to the special needs of the most vulnerable, including, where appropriate and if provided by national law, psychological assistance.

(2) Member States shall take due account of the safety and protection needs of the third-country nationals concerned when applying this Directive, in accordance with national law.

...’

10 Article 8 of that directive, entitled ‘Issue and renewal of the residence permit’ states, in paragraph 1 thereof:

‘After the expiry of the reflection period, or earlier if the competent authorities are of the view that the third-country national concerned has already fulfilled the criterion set out in subparagraph (b), Member States shall consider:

(a) the opportunity presented by prolonging his/her stay on its territory for the investigations or the judicial proceedings, and

- (b) whether he/she has shown a clear intention to cooperate and
- (c) whether he/she has severed all relations with those suspected of acts that might be included among the offences referred to in Article 2(b) and (c).'

*The Dublin III Regulation*

11 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) was repealed and replaced, with effect from 18 July 2013, by Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (OJ 2013 L 180, p. 31) ('the Dublin III Regulation').

12 Article 1 of the Dublin III Regulation states:

'This Regulation lays down the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person ("the Member State responsible").'

13 Article 21 of that regulation, entitled 'Submitting a take charge request', provides, in paragraph 1 thereof:

'Where a Member State with which an application for international protection has been lodged considers that another Member State is responsible for examining the application, it may, as quickly as possible and in any event within three months of the date on which the application was lodged within the meaning of Article 20(2), request that other Member State to take charge of the applicant.

Notwithstanding the first subparagraph, in the case of a Eurodac hit with data recorded pursuant to Article 14 of Regulation (EU) No 603/2013 [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 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)], the request shall be sent within two months of receiving that hit pursuant to Article 15(2) of that Regulation.

Where the request to take charge of an applicant is not made within the periods laid down in the first and second subparagraphs, responsibility for examining the application for international protection shall lie with the Member State in which the application was lodged.'

14 The first sentence of Article 26(1) of the Dublin III Regulation provides:

'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.’

15 Article 27 of that regulation, under the heading ‘Remedies’, provides:

‘(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.

(2) Member States shall provide for a reasonable period of time within which the person concerned may exercise his or her right to an effective remedy pursuant to paragraph 1.

(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. ...’

16 Article 29 of the regulation states:

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

...

(2) Where the transfer does not take place within the six months’ time limit, the Member State responsible shall be relieved of its obligations to take charge or to take back the person concerned and responsibility shall then be transferred to the requesting Member State. This time limit may be extended up to a maximum of one year if the transfer could not be carried out due to imprisonment of the person concerned or up to a maximum of eighteen months if the person concerned absconds.

...’

*Directive 2001/40/EC*

- 17 Article 1(1) of Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third country nationals (OJ 2001 L 149, p. 34) provides:

‘Without prejudice to the obligations arising from Article 23 and to the application of Article 96 of the Convention implementing 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 (OJ 2000 L 239, p. 19)], signed at Schengen on 19 June 1990 ... the purpose of this Directive is to make possible the recognition of an expulsion decision issued by a competent authority in one Member State, hereinafter referred to as the “issuing Member State”, against a third country national present within the territory of another Member State, hereinafter referred to as the “enforcing Member State”.’

- 18 Article 2 of that directive provides:

‘For the purposes of this Directive:

...

(b) “expulsion decision” shall mean any decision which orders an expulsion taken by a competent administrative authority of an issuing Member State;

...’

*Directive 2004/38/EC*

- 19 Article 28(1) and (2) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77, and corrigenda OJ 2004 L 229, p. 35 and OJ 2005 L 197, p. 34), provides:

‘(1) Before taking an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin.

(2) The host Member State may not take an expulsion decision against Union citizens or their family members, irrespective of nationality, who have the right of permanent residence on its territory, except on serious grounds of public policy or public security.’

### *Netherlands law*

- 20 Article 8 of the *Wet tot algehele herziening van de Vreemdelingenwet 2000* (Law on the general revision of the Law on foreign nationals (Law on foreign nationals 2000)) of 23 November 2000 (Stb. 2000, No 496), in the version applicable to the dispute in the main proceedings ('Law on foreign nationals'), provides:

'A foreign national is lawfully resident in the Netherlands only:

...

(k) for the period during which the minister provides that person with an opportunity to report an infringement of Article 273f of the *Wetboek van Strafrecht* (Netherlands criminal code) [, on trafficking in human beings]'.

- 21 Article 30(1) of the Law on foreign nationals states that an application for a fixed-term residence permit is not to be examined if it has been established, under the Dublin III Regulation, that a different Member State is responsible for examining that application.

- 22 Section B8/3.1 of the *Vreemdelingencirculaire 2000* (Circular on Foreign Nationals 2000), in the version applicable to the dispute in the main proceedings ('the Circular on Foreign Nationals'), reads, *inter alia*, as follows:

'The commander of the Koninklijke Marechaussee (National Gendarmerie, Netherlands; 'the KMar') shall have the same powers as the head of the national police where there are indications of the trafficking in human beings in relation to a foreign national. ...

The Immigratie- en Naturalisatiedienst (Immigration and Naturalisation Service, Netherlands, 'the IND') identifies three different scenarios for residence permits in relation to the temporary right of residence of victims of trafficking in human beings and whistle-blowers who report it:

1. the reflection period for victims of trafficking in human beings;
2. the residence permit for victims of trafficking in human beings; and
3. the residence permit for whistle-blowers who report trafficking in human beings.

#### (1) The reflection period

Under Article 8(k) of the Law on foreign nationals, presumed victims of trafficking in human beings shall be granted a reflection period of a maximum of three months, in which they must decide whether they wish to report trafficking in human beings or otherwise cooperate in police or judicial criminal investigations relating to a person suspected of trafficking in human beings or in the trial on the merits of that person, or whether they do not wish to do so.

The police or KMar shall offer the presumed victim a reflection period as soon as there is any indication that the matter involves trafficking in human beings and/or at the request of the *Inspectie Sociale Zaken en Werkgelegenheid* (Social Affairs and Employment Inspectorate, Netherlands) ...



During the reflection period, the IND shall suspend the transfer from the Netherlands of the presumed victim of trafficking in human beings.

The reflection period shall only be granted once and may not be extended.

The reflection period is available only for foreign nationals who are staying in the Netherlands illegally and who:

- are or have been engaged in a situation involving an offence under Article 273f of the criminal code;
- have not yet been engaged in the Netherlands in a situation involving an offence under Article 273f of the criminal code but may be victims of trafficking in human beings; or
- have not entered the Netherlands but may be victims of trafficking in human beings, on the premiss that, for the avoidance of doubt, the KMar, where necessary acting together with the Public Prosecutor's Office, shall offer the reflection period where there is any indication of trafficking in human beings.

The benefit of the reflection period is not available to whistle-blowers who report trafficking in human beings.

The IND shall grant the reflection period to foreign nationals detained exclusively with the consent of the Public Prosecutor's Office and the police or the KMar.

During the reflection period the presumed victim must attend the allocated regional unit of the police or of the KMar once a month.

The reflection period shall end when:

- the police or the KMar determine that, during the reflection period, the presumed victim has left "for an unknown destination";
- the presumed victim states, during the reflection period, that he or she declines to lodge a complaint or otherwise cooperate in police or judicial criminal investigations relating to a person suspected of trafficking in human beings or in the trial on the merits of that person;
- the presumed victim has lodged a complaint for trafficking in human beings and signed the police report, or has cooperated in police or judicial criminal investigations relating to a person suspected of trafficking in human beings or in the trial on the merits of that person; or
- the presumed victim lodges an application for a residence permit (on grounds other than that under this section).

When the reflection period ends, the IND shall lift the suspension of the transfer.'

### **The facts of the dispute in the main proceedings and the questions referred for a preliminary ruling**

- 23 After having lodged three applications for asylum in Italy and an additional application for asylum in Belgium, the applicant in the main proceedings, who is a Nigerian national, applied for asylum in the Netherlands on 26 April 2019.
- 24 On 3 June 2019, the Kingdom of the Netherlands submitted a take back request to the Italian Republic, within the meaning of Article 18(1)(d) of the Dublin III Regulation. The Italian Republic accepted that take back request on 13 June 2019.
- 25 On 18 July 2019, the State Secretary informed the applicant in the main proceedings of his intention to reject the latter's asylum application, without any examination, given that the Italian Republic was the Member State responsible for examining his application, pursuant to the Dublin III Regulation.
- 26 On 30 July 2019, the applicant in the main proceedings stated that he had been a victim of trafficking in human beings in Italy and had recognised one of the perpetrators of that offence at a reception centre in the Netherlands. He was heard on that matter by the immigration authorities.
- 27 By decision of 12 August 2019, the State Secretary refused to examine the application made by the applicant in the main proceedings for the issue of a temporary asylum residence permit, on the ground that the Italian Republic was the Member State responsible under the Dublin III Regulation. By that decision, the State Secretary ordered the transfer of the applicant in the main proceedings to Italy.
- 28 On 3 October 2019, the applicant in the main proceedings lodged a complaint with the Netherlands authorities on the ground that he had been a victim of human trafficking.
- 29 According to the information submitted to the Court, the Public Prosecutor's Office found, further to an examination of the case, that there was no evidence in the Netherlands to substantiate the complaint made by the applicant in the main proceedings. As the cooperation of the applicant in the main proceedings in a criminal investigation in the Netherlands was not necessary, it was decided that no further action would be taken in respect of his complaint.
- 30 The applicant in the main proceedings brought an action before the referring court against the decision of 12 August 2019. He claims, in particular, that that decision is unlawful in so far as, pursuant to Article 6 of Directive 2004/81, a reflection period should have been granted to him.
- 31 According to the referring court, the questions which arise are whether, at any time from 30 July 2019, the applicant in the main proceedings should have been granted the reflection period provided for in Article 6(1) of Directive 2004/81 and, if so, whether the State Secretary was permitted, when that reflection period was not granted, to take measures to prepare for the expulsion of the applicant in the main proceedings from the territory of the Netherlands and, following on from that question, whether the decision of 12 August 2019 constitutes an expulsion order within the meaning of Article 6(2) of that directive. Furthermore, the referring court is uncertain as to the consequences to be drawn from the fact that, apart from the

information set out in the Circular on Foreign Nationals, Netherlands law determines neither the duration nor the starting point of that reflection period and that, accordingly, Article 6(1) of Directive 2004/81 has not been transposed into that national law.

32 In those circumstances, the Rechtbank Den Haag (District Court, The Hague, Netherlands) decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

- ‘(1) (a) Since the Kingdom of the Netherlands has failed to specify in national law when the reflection period guaranteed in Article 6(1) of [Directive 2004/81] commences, must that provision be interpreted as meaning that the reflection period commences by operation of law when the third-country national notifies (communicates) the trafficking in human beings to the Netherlands authorities?
- (b) Since the Kingdom of the Netherlands has failed to specify in national law the duration of the reflection period guaranteed in Article 6(1) of [Directive 2004/81], must that provision be interpreted as meaning that the reflection period ends by operation of law once the trafficking in human beings has been reported or the third-country national concerned indicates that he or she does not wish to report such trafficking?
- (2) Are “expulsion orders” within the meaning of Article 6(2) of [Directive 2004/81] to be understood to include orders for the removal of a third-country national from the territory of one Member State to the territory of another Member State?
- (3) (a) Does Article 6(2) of [Directive 2004/81] preclude the adoption of a transfer decision during the reflection period guaranteed in the first paragraph of that article?
- (b) Does Article 6(2) of [Directive 2004/81] preclude, during the reflection period guaranteed in the first paragraph of that article, the enforcement of a transfer decision which has already been taken, or the preparations for such enforcement?’

### **The reference for a preliminary ruling**

#### *Admissibility*

33 The Netherlands and Czech Governments doubt whether the questions referred for a preliminary ruling are relevant to the resolution of the dispute in the main proceedings.

34 According to the Czech Government, the interpretation of Article 6 of Directive 2004/81 sought by the referring court is manifestly unconnected to the situation of the applicant in the main proceedings. It is argued, first, that he merely claims to have been the victim of offences related to the trafficking in human beings, whereas, according to Article 3 of Directive 2004/81, that directive applies only to third-country nationals ‘who are or have been’ victims of such offences. Second, the Czech Government points out that it is not apparent from the request for a preliminary ruling that the competent authorities examined the question whether the applicant in the main proceedings fell within the scope of Directive 2004/81, pursuant to the first paragraph of Article 5 of that directive.

- 35 For its part, the Netherlands Government submits that Article 6 of that directive is not applicable to a third-country national who, as is the case with the applicant in the main proceedings, is lawfully resident in the territory of the Member State concerned as an applicant for international protection.
- 36 In that regard, it should be recalled that, according to the settled case-law of the Court, questions relating to EU law enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court for a preliminary ruling only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgments of 15 December 1995, *Bosman*, C-415/93, EU:C:1995:463, paragraphs 59 and 61, and of 25 November 2021, *État luxembourgeois (Information on a group of taxpayers)*, C-437/19, EU:C:2021:953, paragraph 81).
- 37 The need to provide an interpretation of EU law which will be of use to the referring court requires, moreover, that that court define the factual and legislative context of the questions it is asking or, at the very least, to explain the factual circumstances on which those questions are based. The order for reference must also set out the precise reasons why the national court is unsure as to the interpretation of EU law and considers it necessary to refer a question to the Court for a preliminary ruling (judgment of 10 March 2022, *Commissioners for Her Majesty's Revenue and Customs (Comprehensive sickness insurance cover)*, C-247/20, EU:C:2022:177, paragraph 75 and the case-law cited).
- 38 In the present case, the request for a preliminary ruling essentially concerns the question whether, from the time when the applicant in the main proceedings, a Nigerian national who made an application for international protection in the Netherlands, after having done so in Italy and Belgium, declared to the Netherlands authorities that he had been the victim of offences related to the trafficking of human beings both in Italy and in the Netherlands, those authorities should have granted him the reflection period provided for in Article 6(1) of Directive 2004/81 before the decision of 12 August 2019 to transfer the person concerned to the territory of the Italian Republic could lawfully have been adopted, pursuant to the Dublin III Regulation; the referring court is also uncertain as to whether that decision is to be classified as an 'expulsion order' within the meaning of Article 6(1) of Directive 2004/81.
- 39 Consequently, since the referring court is called upon to rule on the question whether, in the dispute in the main proceedings, the Netherlands authorities infringed Article 6 of Directive 2004/81 by refusing the applicant in the main proceedings the guarantees under that article, it is not at all apparent that the interpretation of EU law sought is manifestly unconnected to the actual facts or the subject matter of the dispute in the main proceedings.
- 40 In those circumstances, the objection raised by the Netherlands and Czech Governments, claiming that Article 6 of Directive 2004/81 does not apply to the dispute in the main proceedings, does not relate to the admissibility of the request for a preliminary ruling but rather concerns the substantive examination of the questions (see, to that effect, judgments of 19 March 2020, '*Agro In 2001*', C-234/18, EU:C:2020:221, paragraph 44, and of 28 October 2021, *Komisia za protivodeystvie na koruptsiyata i za otnemane na nezakonno pridobitoto imushtestvo*, C-319/19, EU:C:2021:883, paragraph 25).
- 41 Consequently, the request for a preliminary ruling is admissible.

## *Substance*

42 As regards the order in which the questions referred in the request for a preliminary ruling are to be examined, it is necessary, first, to answer the second question, which concerns the interpretation of the concept of ‘expulsion order’ within the meaning of Article 6(2) of Directive 2004/81 and whether that concept covers a decision by way of which a Member State transfers a third-country national to another Member State pursuant to the Dublin III Regulation. Next, it is necessary to answer the third question, by way of which the referring court seeks to ascertain the scope of the prohibition referred to in Article 6(2) of Directive 2004/81. Finally, it is appropriate to examine the first question, by way of which the referring court seeks to ascertain the calculation rules applicable to the reflection period provided for in Article 6(1) of that directive.

### *The second question*

#### *– Preliminary observations*

43 Before examining the second question, it is appropriate to answer, in the first place, the argument put forward by the Czech Government, referred to in paragraph 34 of the present judgment, that, in essence, the reflection period established by Article 6 of Directive 2004/81 should not benefit a third-country national who merely claims to have been the victim of offences related to the trafficking in human beings.

44 In that regard, it should be recalled that, in accordance with Article 1 of Directive 2004/81, the purpose of that directive is to define the conditions for granting residence permits of limited duration to third-country nationals who cooperate in the fight against trafficking in human beings or against action to facilitate illegal immigration.

45 Pursuant to Article 3(1) of that directive, Member States are to apply the latter to third-country nationals who are, or have been victims of offences related to the trafficking in human beings, even if they have illegally entered the territory of the Member States.

46 The first paragraph of Article 5 of that directive establishes an obligation for the competent national authorities to inform every third-country national of the guarantees offered under that directive when they consider that they ‘may fall into the scope’ of the directive. Those guarantees include, under recital 11 of Directive 2004/81, the right to the reflection period provided for in Article 6(1) thereof.

47 The purpose of that reflection period is, in accordance with Article 6(1) of that directive, to ensure that the third-country nationals concerned are allowed to recover and escape the influence of the perpetrators of the offences of which they are or have been victim, so that those nationals can take an informed decision as to whether to cooperate with the competent authorities in that regard.

48 Pursuant to Article 6(2) of that directive, during the reflection period and while awaiting the decision of the competent authorities, the third-country nationals concerned are to have access to the treatment referred to in Article 7 of that directive, and it is not possible to enforce any expulsion order against them.

- 49 In stating that the measures enjoyed by those third-country nationals during the reflection period apply ‘while awaiting the decision of the competent authorities’, Article 6(2) of Directive 2004/81 refers implicitly to Article 8 of that directive, pursuant to which a residence permit may be granted, under certain conditions, to those third-country nationals at the end of the reflection period or earlier. It follows from Article 8(1) of that directive, in particular point (c) thereof, that the grant of such a right of residence does not require proof that those nationals are or have been victims of offences related to the trafficking in human beings. It follows a fortiori that the same nationals may benefit from the reflection period laid down in Article 6 of that directive, even where it has not been established that they are or have been victims of such offences. In that connection, it is apparent from a combined reading of Articles 5 and 6 of Directive 2004/81 that such a reflection period must be recognised for any third-country national as soon as the Member State concerned has reasonable grounds for considering that that third-country national may be or has been the victim of offences related to the trafficking in human beings, which is necessarily the case where that third-country national claims, before one of the authorities called upon deal with his or her situation, in a sufficiently plausible manner, that he or she has suffered such treatment.
- 50 In the present case, it is apparent from the information before the Court that, prior to the adoption of the decision of 12 August 2019, the lawfulness of which the referring court must review, the applicant in the main proceedings claimed to have been a victim of trafficking in human beings, declared that he wished to lodge a complaint on that basis and stated that he had recognised one of the perpetrators of that offence in a reception centre in the Netherlands. Accordingly, it appears that the applicant in the main proceedings has claimed, in a sufficiently plausible manner, that he was the victim of trafficking in human beings, which is, however, a matter for the referring court to ascertain.
- 51 In the second place, as regards the argument put forward by the Netherlands Government that the reflection period provided for in Article 6 of Directive 2004/81 is, by its very nature, inapplicable in respect of an applicant for international protection because he is lawfully resident in the territory of a Member State and does not therefore fall within the scope of that directive, it should be observed that no provision of that directive makes a distinction between the third-country nationals concerned on the basis of their residence, lawful or otherwise, in the territory of the Member States. On the contrary, that directive, by stating, in Article 3(1) thereof, that it applies to victims of offences related to the trafficking in human beings, ‘even if’ they have ‘illegally entered the territory of the Member States’, does not in any way preclude such victims, who have entered and reside lawfully in the territory of a Member State, from benefiting from the guarantees afforded by that directive.
- 52 Furthermore, it is apparent from recital 4 of Directive 2004/81 that the rights which it confers on certain third-country nationals are without prejudice, in particular, to the guarantees afforded to them by virtue of their possible status as applicants for international protection. It follows that the EU legislature in no way excluded the possibility that Directive 2004/81 might recognise rights other than those conferred on those third-country nationals by reason of their status as applicants for international protection, having regard, in particular, to specific needs connected to their particularly vulnerable situation, such as needs in terms of safety and protection to be given by the national authorities as laid down in Article 7(2) of that directive.

– *Substance*

- 53 By its second question, the referring court is asking, in essence, whether Article 6(2) of Directive 2004/81 must be interpreted as meaning that the measure by which a third-country national is transferred from the territory of one Member State to that of another Member State, pursuant to the Dublin III Regulation, falls within the scope of the concept of ‘expulsion order’.
- 54 In that regard, it should be noted that Directive 2004/81 does not define the concept of ‘expulsion order’ and contains no express reference to the law of the Member States for the purposes of determining its meaning and scope. That concept must, therefore, be given an autonomous and uniform interpretation, within the meaning of Directive 2004/81 (see, to that effect, judgment of 15 April 2021, *The North of England P & I Association*, C-786/19, EU:C:2021:276, paragraph 49).
- 55 According to the settled case-law of the Court, for the purpose of interpreting a provision of EU law it is necessary to consider not only its wording but also its context and the objectives of the legislation of which it forms part (judgment of 1 August 2022, *Vyriausioji tarnybinės etikos komisija*, C-184/20, EU:C:2022:601, paragraph 121 and the case-law cited).
- 56 In that connection, it should be observed that, from a literal point of view, the term ‘expulsion’, in its usual meaning, does not make it possible to determine whether the territory which the person to be removed must leave is that of the Member State adopting the expulsion order at issue or that of the European Union as a whole. It follows, however, from the objectives pursued by Directive 2004/81 and from the context of Article 6(1) thereof that the order, the enforcement of which is prohibited under that article, is that by way of which the person concerned is ordered to leave the territory of the Member State concerned.
- 57 As regards, in the first place, the objectives of Directive 2004/81, as is apparent in particular from Article 1 of that directive and from recitals 2, 4 and 11 thereof, that directive pursues the twofold objective of concentrating efforts on detecting and dismantling criminal networks while protecting the rights of victims of trafficking in human beings, by allowing those victims, for a certain period, in particular, to consider whether or not to cooperate with the national police, prosecution and judicial authorities, in combating such offences.
- 58 It is in accordance with that twofold objective of protecting the rights of victims of trafficking in human beings and contributing to the effectiveness of criminal proceedings that Directive 2004/81 established the reflection period provided for in Article 6(1) thereof, which, as that provision states, is intended to allow the third-country nationals concerned to recover and escape the influence of the perpetrators of the offences of which they are or have been victims, so that they can take an informed decision as to whether to cooperate with the competent authorities.
- 59 It is also in the light of that twofold objective that, during that reflection period, Article 6(2) of Directive 2004/81 requires, first, that the Member State on the territory of which the person concerned is present satisfy his or her essential needs by granting access to the treatment provided for in Article 7 of that directive and, second, that that Member State refrain from enforcing any expulsion order during that period, temporarily authorising the person concerned to remain in the territory concerned, ‘while awaiting the decision of the competent authorities’. As the Advocate General observes, in essence, in point 69 of his Opinion, these two requirements

are linked, since the assistance and support measures referred to in Article 7 of Directive 2004/81, which must be granted during the reflection period, cannot be fully complied with if the person concerned has left the territory of the Member State concerned.

- 60 To take the view that, during that reflection period, the ‘expulsion order’ referred to in Article 6(2) of Directive 2004/81, the enforcement of which is prohibited, would not cover a decision on transfer to another Member State, taken pursuant to the Dublin III Regulation, would thus be such as to compromise the attainment of the twofold objective pursued by that directive.
- 61 First, the enforcement of such a transfer decision during the reflection period provided for in Article 6(1) of Directive 2004/81 would have the effect of moving the victim of trafficking in human beings away from the specialist assistance services from which he or she has been able to receive support, and thus put an end to the treatment granted to him or her in that Member State under Article 7 of Directive 2004/81, which would harm that victim’s recovery, and, consequently, exacerbate his or her vulnerability.
- 62 Second, enforcing such a decision, at the early stage of which the reflection period granted to the victim of human trafficking forms part, would be detrimental to that victim’s cooperation in the criminal investigation and/or the judicial proceedings. Transferring that victim to another Member State even before he or she has been able, during the reflection period to which he or she is entitled, to take a view on his or her willingness to cooperate in that investigation and/or in those proceedings would not only deprive the competent authorities of a witness statement that could be particularly useful in prosecuting the perpetrators of the offence concerned, but would paradoxically have the effect of removing the person concerned from the territory of the competent Member State, even though he or she should be present there in order to be involved, as necessary, in that investigation and/or those proceedings.
- 63 As regards, in the second place, the context of which the reflection period provided for in Article 6(1) of Directive 2004/81 forms part, it should be recalled that, in accordance with Article 5 thereof, the competent authorities of the Member State concerned are under an obligation to inform the victim of human trafficking in advance of the ‘possibilities offered by [that directive]’. Those possibilities include not only the possibility of benefiting from that period for reflection, but also the possibility of receiving the assistance and support measures provided for in Article 7 of Directive 2004/81 and, under certain conditions, the issue of a temporary residence permit, in accordance with Article 8 of that directive, which, under recital 9 thereof, must constitute a ‘sufficient incentive’ for the victim to cooperate with the competent authorities.
- 64 As the Advocate General observes, in essence, in point 67 of his Opinion, that obligation to provide information would be rendered redundant if the Member State concerned were permitted, during the reflection period provided for in Article 6(1) of Directive 2004/81, to transfer the person concerned to another Member State, whereas the Member State concerned has undertaken to grant him or her, during that period, the benefit of the aforementioned measures and the issue of a temporary permit to reside on its territory, at the latest when such a time period expires, where the conditions laid down in Article 8 of that directive are met.
- 65 The foregoing interpretation cannot be called into question by the examination of Directives 2001/40 and 2004/38, cited by the referring court. It is, in fact, sufficient to find that those directives, which themselves furnish no definition of the concept of ‘expulsion order’, do not make it possible for unambiguous lessons to be drawn as to the geographical scope of such a concept, within the meaning of Directive 2004/81. The argument put forward by the German



Government, which relies in particular on Directive 2001/40, that the concept of ‘expulsion order’ is typically used in relations with third countries is, from a strictly literal perspective, invalidated by the use of that concept, in particular in Article 28 of Directive 2004/38, which undoubtedly refers to expulsion from the territory of a Member State, and not to expulsion from the territory of the European Union as a whole. Moreover, Directive 2004/81 also makes no reference to the provisions of Regulation No 343/2003, which was in force on the date of adoption of that regulation and which, with effect from 18 July 2013, was repealed and replaced by the Dublin III Regulation, which, incidentally, also makes no mention of that latter directive.

- 66 In the light of all the foregoing considerations, the answer to the second question is that Article 6(2) of Directive 2004/81 must be interpreted as meaning that the measure by which a third-country national is transferred from the territory of one Member State to that of another Member State, pursuant to the Dublin III Regulation, falls within the scope of the concept of ‘expulsion order’.

*The third question*

- 67 By its third question, the referring court is asking, in essence, whether Article 6(2) of Directive 2004/81 must be interpreted as precluding a decision to transfer a third-country national, taken pursuant to the Dublin III Regulation, from being adopted or enforced, or preparatory measures for its enforcement from being initiated, during the reflection period provided for in Article 6(1) of that directive.
- 68 Under Article 6(2) of Directive 2004/81, during that reflection, ‘it shall not be possible to enforce any expulsion order’ with regard to the third-country nationals concerned.
- 69 Accordingly, in the light of its wording, Article 6(2) of Directive 2004/81 does not prohibit the adoption of either an expulsion order or any other measure preparatory to the enforcement thereof.
- 70 In the light of the answer given to the second question, that provision therefore precludes only the enforcement, during the reflection period granted in accordance with Article 6(1) of that directive, of a transfer decision, adopted pursuant to the Dublin III Regulation, in respect of third-country nationals who come within the scope of that directive.
- 71 That said, as the Advocate General states, in essence, in point 88 of his Opinion, it is important that, when adopting measures preparatory to the enforcement of the transfer decision during the reflection period provided for in Article 6(1) of Directive 2004/81, the competent national authorities do not jeopardise the attainment of the twofold objective, recalled in paragraph 58 of the present judgment, pursued by that provision. Consequently, although the adoption of measures preparatory to the enforcement of that decision, during that reflection period, is not prohibited, it cannot, however, deprive such a period of its effectiveness, which is a matter for the referring court to determine in the case in the main proceedings. That may be the case, in particular, if the measures preparatory to the enforcement of the transfer decision consist in detaining the victim of human trafficking, for the purposes of his or her transfer, since such preparatory measures do not, inter alia, allow that victim, in view of his or her vulnerability, to recover or to make an informed decision to cooperate with the competent authorities of the Member State on the territory of which he or she is present.

- 72 It should be added that such an interpretation of Article 6(2) of Directive 2004/81 is not such as to compromise compliance with the clearly defined and relatively short time limits which provide the framework for the administrative procedure for transferring responsibility for examining the application for international protection to the requested Member State, pursuant to the provisions of the Dublin III Regulation.
- 73 Thus, it follows, first of all, from paragraph 69 of the present judgment that the grant of a reflection period to an applicant for international protection does not prevent the Member State in the territory of which he or she is present from submitting, during that reflection period, its request that another Member State take charge of that applicant, in accordance with Article 21(1) of that regulation and, in the event that that request is accepted, from adopting, during that reflection period, a decision on transfer to the Member State thus requested.
- 74 Next, it is true that, in accordance with Article 29(1) and (2) of that regulation, in order to carry out the transfer of the applicant, the requesting Member State has a period of six months, from the date of acceptance of the request to take charge or the adoption of the final decision on the appeal against the transfer decision or the review of that decision in fact and in law, where suspensive effect is granted pursuant to Article 27(3) of that regulation, failing which the requested Member State is relieved of the obligation to take charge of the person concerned and responsibility is then transferred to the requesting Member State (see, to that effect, judgment of 26 July 2017, *A.S.*, C-490/16, EU:C:2017:585, paragraphs 46, 57 and 58).
- 75 However, as regards Directive 2004/81, it should be recalled that, as the second subparagraph of Article 6(1) thereof provides, the duration and starting point of the reflection period, provided for in that provision, are to be determined according to national law.
- 76 Consequently, it is for the Member States to ensure that a balance is struck between the duration of the reflection period which they grant to victims of human trafficking in their respective territories and compliance with the time period laid down in Article 29(1) and (2) of the Dublin III Regulation, in order to ensure the correct relationship between those instruments and the preservation of their effectiveness.
- 77 In the light of all the foregoing considerations, the answer to the third question is that Article 6(2) of Directive 2004/81 must be interpreted as precluding the enforcement of a decision to transfer a third-country national, taken pursuant to the Dublin III Regulation, during the reflection period guaranteed in Article 6(1) of that directive, but as not precluding the adoption of such a decision, or of measures preparatory to the enforcement of that decision, provided that those preparatory measures do not deprive such a reflection period of its effectiveness, which is a matter for the referring court to ascertain.

### *The first question*

- 78 By its first question, the referring court is asking in essence, whether Article 6(1) of Directive 2004/81, in the absence of any measure transposing it into national law, must be interpreted as meaning that, first, the reflection period for which that article provides starts to run automatically from the point in time when the third-country national concerned informs the competent national authorities that he or she is, or has been, a victim of trafficking in human beings, and, second, that period ends automatically after that third-country national has lodged a complaint on the ground that he or she has been the victim of trafficking in human beings or, on the contrary, has informed those national authorities that he or she does not wish to do so.

- 79 In the present case, as is apparent from the account of the facts giving rise to the dispute in the main proceedings, as summarised in paragraphs 23 to 30 of the present judgment, the competent national authorities did not, at any time prior to the adoption of the transfer decision of 12 August 2019, inform the applicant in the main proceedings – who had previously claimed to have been the victim of human trafficking, stated that he wished to lodge a complaint on that basis and indicated that he had recognised one of the perpetrators of that offence in a reception centre in the Netherlands – of the possibilities offered under Directive 2004/81, including the possibility of benefiting from the reflection period laid down in Article 6(1) of that directive, or grant such a period to the applicant in the main proceedings.
- 80 That said, it should be noted that, as is apparent from the information provided by the referring court, the dispute in the main proceedings concerns the lawfulness of the decision of 12 August 2019 to transfer the applicant in the main proceedings to Italy pursuant to the Dublin III Regulation. As has been set out in paragraph 77 of the present judgment, Directive 2004/81 does not preclude the adoption of a transfer decision during the reflection period provided for in Article 6(1) of that directive. It follows that, even if such a reflection period ought to have been granted to the applicant in the main proceedings, the irregularity committed by the Netherlands authorities, by failing, in the present case, to grant such a reflection period, could not affect the lawfulness of the transfer decision, which has been challenged before the referring court, since Article 6 of Directive 2004/81 solely precludes such a decision being enforced where the third-country national has not been granted the reflection period to which he was entitled by virtue of Article 6.
- 81 It also follows from the preceding paragraph that, for the purposes of reviewing the lawfulness of the decision of 12 August 2019, an answer to the question as to when and up to what date a reflection period should have been granted to the applicant in the main proceedings would be tantamount to the Court giving an advisory opinion on a purely hypothetical question.
- 82 It is settled case-law that it is not the Court’s task to deliver advisory opinions on general or hypothetical questions (judgments of 16 July 1992, *Meilicke*, C-83/91, EU:C:1992:332, paragraph 25, and of 8 June 2017, *OL*, C-111/17 PPU, EU:C:2017:436, paragraph 33).
- 83 Consequently, it must be held that it is not for the Court to answer the first question.

### Costs

- 84 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

- 1. Article 2 of Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities,**

**must be interpreted as meaning that the measure by which a third-country national is transferred from the territory of one Member State to that of another Member State,**

**pursuant to 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, falls within the scope of the concept of ‘expulsion order’.**

**2. Article 6(2) of Directive 2004/81**

**must be interpreted as precluding the enforcement of a decision to transfer a third-country national, taken pursuant to Regulation No 604/2013, during the reflection period guaranteed in Article 6(1) of that directive, but as not precluding the adoption of such a decision, or of measures preparatory to the enforcement of that decision, provided that those preparatory measures do not deprive such a reflection period of its effectiveness, which is a matter for the referring court to determine.**

[Signatures]