JUDGMENT OF THE COURT (Fourth Chamber)

29 January 2009 *

In Case C-19/08,

REFERENCE under Articles 68(1) EC and 234 EC for a preliminary ruling from the Kammarrätten i Stockholm, Migrationsöverdomstolen (Sweden), made by decision of 17 January 2008, received at the Court on 21 January 2008, in the proceedings

Migrationsverket

v

Edgar Petrosian,

Nelli Petrosian,

Svetlana Petrosian,

* Language of the case: Swedish.

David Petrosian,

Maxime Petrosian,

THE COURT (Fourth Chamber),

composed of K. Lenaerts, President of the Chamber, R. Silva de Lapuerta, E. Juhász, G. Arestis and J. Malenovský (Rapporteur), Judges,

Advocate General: J. Kokott,
Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— the Czech Government, by M. Smolek, acting as Agent,

— the Greek Government, by M. Michelogiannaki, acting as Agent,

— the Hungarian Government, by R. Somssich, J. Fazekas and K. Borvölgyi, acting as Agents,

— the Netherlands Government, by C. Wissels, acting as Agent,

— the Austrian Government, by E. Riedl, acting as Agent,

— the Polish Government, by M. Dowgielewicz, acting as Agent,

— the Finnish Government, by A. Guimaraes-Purokoski, acting as Agent,

— the Norwegian Government, by M. Emberland and S. Gudbrandsen, acting as Agents,

— the Commission of the European Communities, by M. Condou-Durande and J. Enegren, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 The reference for a preliminary ruling concerns the interpretation of Article 20(1)(d) and Article 20(2) 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).

2 The reference has been made in the course of proceedings between Mr and Mrs Petrosian and their three children ('the members of the Petrosian family'), who are Armenian nationals (except for Nelli Petrosian, who is a Ukrainian national), and the Migrationsverket (Swedish Immigration Board), which is responsible for matters relating to immigration and for examining their asylum applications, concerning that board's decision ordering their transfer to another Member State, where their initial asylum application had been refused.

Legal framework

Community legislation

3 The fourth recital in the preamble to Regulation No 343/2003 states:

'[A clear and workable method for determining the Member State responsible for the examination of an asylum application] should be based on objective, fair criteria both for the Member States and for the persons concerned. It should, in particular, make it possible to determine rapidly the Member State responsible, so as to guarantee effective access to the procedures for determining refugee status and not to compromise the objective of the rapid processing of asylum applications.'

4 The 15th recital in the preamble to the regulation reads as follows:

'The Regulation observes the fundamental rights and principles which are acknowledged in particular in the Charter of Fundamental Rights of the European Union [proclaimed at Nice on 7 December 2000 (OJ 2000 C 364, p. 1)]. In particular, it seeks to ensure full observance of the right to asylum guaranteed by Article 18.'

5 Article 1 of Regulation No 343/2003 provides:

'This Regulation lays down the criteria and mechanisms for determining the Member State responsible for examining an application for asylum lodged in one of the Member States by a third-country national.'

6 Article 3(1) of that regulation provides:

‘Member States shall examine the application of any third-country national who applies at the border or in their territory to any one of them for asylum. The application shall be examined by a single Member State, which shall be the one which the criteria set out in Chapter III indicate is responsible.’

7 Article 4 of that regulation states:

‘1. The process of determining the Member State responsible under this Regulation shall start as soon as an application for asylum is first lodged with a Member State.

…

5. An asylum seeker who is present in another Member State and there lodges an application for asylum after withdrawing his application during the process of determining the Member State responsible shall be taken back, under the conditions laid down in Article 20, by the Member State with which that application for asylum was lodged, with a view to completing the process of determining the Member State responsible for examining the application for asylum.

…’

8 In Chapter V of Regulation No 343/2003, concerning taking charge of and taking back asylum seekers, Article 16 is worded as follows:

‘The Member State responsible for examining an application for asylum under this Regulation shall be obliged to:

…

(e) take back, under the conditions laid down in Article 20, a third-country national whose application it has rejected and who is in the territory of another Member State without permission.

…’.

9 Article 20 of Regulation No 343/2003 provides:

‘1. An asylum seeker shall be taken back in accordance with Article 4(5) and Article 16(1)(c), (d) and (e) as follows:

(a) the request for the applicant to be taken back must contain information enabling the requested Member State to check that it is responsible;

(b) the Member State called upon to take back the applicant shall be obliged to make the necessary checks and reply to the request addressed to it as quickly as possible and under no circumstances exceeding a period of one month from the referral. When the request is based on data obtained from the Eurodac system, this time-limit is reduced to two weeks;

(c) where the requested Member State does not communicate its decision within the one-month period or the two-weeks period mentioned in subparagraph (b), it shall be considered to have agreed to take back the asylum seeker;

(d) a Member State which agrees to take back an asylum seeker shall be obliged to readmit that person to its territory. The transfer 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 that charge be taken by another Member State or of the decision on an appeal or review where there is a suspensive effect;

(e) the requesting Member State shall notify the asylum seeker of the decision concerning his being taken back by the Member State responsible. The decision shall set out the grounds on which it is based. It shall contain details of the time-limit on carrying out the transfer and shall, if necessary, contain information on the place and date at which the applicant should appear, if he is travelling to the Member State responsible by his own means. This decision may be subject to an appeal or a review. Appeal or review concerning this decision shall not suspend the implementation of the transfer except when the courts or competent bodies so decide in a case-by-case basis if the national legislation allows for this.

If necessary, the asylum seeker shall be supplied by the requesting Member State with a laissez passer of the design adopted in accordance with the procedure referred to in Article 27(2).

The Member State responsible shall inform the requesting Member State, as appropriate, of the safe arrival of the asylum seeker or of the fact that he did not appear within the set time-limit.

2. Where the transfer does not take place within the six-months' time-limit, responsibility shall lie with the Member State in which the application for asylum was lodged. This time-limit may be extended up to a maximum of one year if the transfer or the examination of the application could not be carried out due to imprisonment of the asylum seeker or up to a maximum of 18 months if the asylum seeker absconds.

…'

National legislation

10 Chapter 1, Paragraph 9, of Law 2005:716 on Aliens (utlänningslagen 2005:716) states that the provisions on deportation of asylum seekers laid down in that law also apply *mutatis mutandis* to decisions on transfer under Regulation No 343/2003.

11 Chapter 4, Paragraph 6, and Chapter 8, Paragraphs 4 and 7, of that law provide that decisions on granting of political refugee status and on deportation of asylum seekers are to be taken by the Migrationsverket.

12 Chapter 14, Paragraph 3, of that law provides that appeals against decisions of the Migrationsverket lie to a Migrationsdomstol (County Administrative Court ruling on immigration matters) if the decision involves, inter alia, deportation of an asylum seeker.

13 The first and third subparagraphs of Chapter 16, Paragraph 9, of that law provide that appeals against decisions of a Migrationsdomstol lie to the Migrationsöverdomstolen (Court of Appeal in immigration matters), against whose decisions there is no appeal.

14 Paragraph 28 of Law 1971:291 on administrative procedure (förvaltningsprocesslagen 1971:291) provides that courts which hear appeals can order that the decision under appeal, if it is immediately enforceable, is not to be enforced until further notice and, in any event, not until a ruling has been made on the merits of the case.

The dispute in the main proceedings and the question referred for a preliminary ruling

15 On 22 March 2006 the members of the Petrosian family were in Sweden and applied for asylum there.

16 On examination of the family's application for asylum it became apparent that the family had earlier applied for asylum in, inter alia, France. The Migrationsverket therefore requested, on the basis of Article 16(1)(e) of Regulation No 343/2003, that the French authorities take the members of the Petrosian family back.

17 The French authorities did not reply to the Migrationsverket's request within the period laid down in Article 20(1)(b) of Regulation No 343/2003, whereupon the Migrationsverket informed them that the French Republic, in accordance with Article 20(1)(c) of that regulation, was deemed to have consented to take back the members of the Petrosian family.

18 Subsequently, the French authorities confirmed to the Migrationsverket that they would take the family back. Against that background, the Migrationsverket decided on 1 August 2006 that the members of the Petrosian family should be transferred to France on the basis of Article 20(1)(d) and (e) of Regulation No 343/2003.

19 The members of the Petrosian family appealed against the decision of the Migrationsverket to the Länsrätten i Skåne län, Migrationsdomstolen (Skåne County Administrative Court, ruling on immigration matters), and claimed that their application for asylum should be examined in Sweden.

20 On 23 August 2006, that court decided to stay execution of the transfer of the members of the Petrosian family to France pending its final decision in the case or until it decided otherwise. It gave a final ruling in the case by its judgment of 8 May 2007, dismissing the appeal and ordering that the decision to suspend the transfer of the family to France should no longer apply.

21 The members of the Petrosian family appealed against the judgment of the Länsrätten i Skåne län, Migrationsdomstolen, to the Kammarätten i Stockholm, Migrationsöverdomstolen (Court of Appeal in immigration matters, Stockholm), and claimed that the decision for transfer to France should be annulled or, in the alternative, that the case should be referred back to the Länsrätten i Skåne län, on grounds of procedural error.

22 On 10 May 2007 the Kammarrätten i Stockholm, Migrationsöverdomstolen, decided to stay execution of the transfer to France pending its final decision in the case or until it decided otherwise.

23 On 16 May 2007 that court gave a final ruling in the case, setting aside the judgment of the Länsrätten i Skåne län, Migrationsdomstolen, and referring the case back to it, on grounds of procedural error relating to the composition of the bench which gave judgment in the case. The Kammarrätten i Stockholm, Migrationsöverdomstolen, further ordered that the decision to transfer the Petrosian family to France was not to be carried out before the Länsrätten i Skåne län, Migrationsdomstolen, had given final judgment on the merits of the case or ordered otherwise.

24 The Länsrätten i Skåne län, Migrationsdomstolen, gave a fresh ruling in the case on 29 June 2007, by which it annulled the decision of the Migrationsverket ordering the transfer of the members of the Petrosian family to France and referred the case back to the Migrationsverket for reassessment. In its reasons for judgment, the Länsrätten i Skåne län, Migrationsdomstolen, referred to a leading judgment of the Kammarrätten i Stockholm, Migrationsöverdomstolen, of 14 May 2007, in which the latter held that Article 20(1)(d) of Regulation No 343/2003, under which transfer is to be carried out at the latest within six months of acceptance of the request that charge be taken by another Member State or of the decision on an appeal or review where there is a suspensive

effect, is to be interpreted as meaning that the period for implementing the transfer is to run from the day of the decision provisionally to suspend execution.

25 The Länsrätten i Skåne län, Migrationsdomstolen, decided on 23 August 2006 to suspend execution of the decision, which meant that the time-limit for execution of the transfer expired, in its view, on 24 February 2007, from which date (i) responsibility for examining the applications for asylum of the members of the Petrosian family lay once more with the Kingdom of Sweden pursuant to Article 20(2) of Regulation No 343/2003; and (ii) the persons concerned could no longer be transferred to France.

26 The Migrationsverket appealed against the judgment of the Länsrätten i Skåne län, Migrationsdomstolen, before the Kammarrätten i Stockholm, Migrationsöverdomstolen, on 9 July 2007. It argued before that court that, following the adoption of a suspensive decision, the period for implementation of the transfer was suspended, with the result that it would run for six months as from the date the suspended decision would once again be enforceable.

27 In those circumstances, the Kammarrätten i Stockholm, Migrationsöverdomstolen, decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Are Article 20(1)(d) and Article 20(2) of … Regulation No 343/2003 … to be interpreted as meaning that responsibility for the examination of an application for asylum passes to the Member State where the application was lodged if the transfer is not carried out within six months after a temporary decision has been made to suspend the transfer and irrespective of when the final decision is made on whether the transfer is to be carried out?'

The question referred for a preliminary ruling

28 By its question, the national court asks, essentially, whether Article 20(1)(d) and Article 20(2) of Regulation No 343/2003 are to be interpreted as meaning that, where, in the context of a procedure to transfer an asylum seeker, the legislation of the requesting Member State provides for suspensive effect of an appeal, the period for implementation of the transfer begins to run as from the time of the provisional judicial decision suspending the implementation of the transfer procedure, or only as from the time of the judicial decision which rules on the merits of the procedure and which is no longer such as to prevent the implementation from taking place.

Observations submitted to the Court

29 The eight governments which have submitted written observations in the present case, as well as the Commission of the European Communities, take the view that Article 20(1)(d) and Article 20(2) of Regulation No 343/2003 are to be interpreted as meaning that, where an appeal against a transfer decision has suspensive effect, the six-month period during which that transfer must take place begins to run only as from the time of the decision on the merits of the appeal and not as from the time of the decision ordering that the transfer be suspended.

30 According to those governments and the Commission, it is clear from the *travaux préparatoires* for Regulation No 343/2003 that the Community legislature intended to establish a scheme under which transfers would not be carried out until a decision had been given on the merits of the appeal. Otherwise, the competent courts and authorities would be bound by a maximum time-limit for ruling on appeals relating to transfer decisions, a matter which the Community legislature may not regulate. Moreover, the assessment of individual situations under that regulation calls for complex examinations and assessments which are difficult to complete within six months.

31 A number of the governments add that, from a practical point of view, requiring national courts to rule within six months would encourage asylum seekers to abuse the appeals process because, in the Member States where those courts are overburdened with cases, the time-limit would frequently be exceeded, with the result that the requesting Member State would automatically become the Member State responsible for the asylum application.

Reply of the Court

32 Under Article 20(1)(d) of Regulation No 343/2003, the transfer of an asylum seeker to the Member State which is required to take him back is to be carried out as soon as practically possible, and at the latest within six months of acceptance of the request that charge be taken by another Member State or of the decision on an appeal or review where there is suspensive effect. Under Article 20(2), where the transfer does not take place within the six-month time-limit, responsibility is to lie with the Member State in which the application for asylum was lodged.

33 It is not evident from the actual wording of those provisions whether the period for implementation of the transfer begins to run as from the time of the provisional judicial decision suspending the implementation of the transfer procedure, or only as from the time of the judicial decision ruling on the merits of that procedure.

34 It must be borne in mind however that, according to settled case-law, in interpreting a provision of Community law it is necessary to consider not only its wording, but also the context in which it occurs and the objective pursued by the rules of which it is part (see, inter alia, Case C-301/98 *KVS International* [2000] ECR I-3583, paragraph 21, and Case C-300/05 *ZVK* [2006] ECR I-11169, paragraph 15).

35 Under Article 20(1)(d) of Regulation No 343/2003, read together with Article 20(1)(c), three events are liable to trigger the six-month period allowed to the requesting Member State within which to carry out the transfer of the asylum seeker, depending on the circumstances: (i) the decision of the requested Member State to agree to take the asylum seeker back; (ii) the expiry of the one-month period where the requested Member State does not communicate its decision on the requesting Member State's request to take the asylum seeker back; and (iii) the appeal or review decision where it has suspensive effect in the requesting Member State.

36 Those three events must be examined according to whether the legislation of the requesting Member State makes provision for appeals to have suspensive effect, having regard to the objective underlying the time-limit for implementation of the transfer provided for in Regulation No 343/2003.

37 In that regard a distinction must be drawn between two situations.

38 In the first situation, it follows from the wording of Article 20(1)(d) of Regulation No 343/2003 that, where there is no provision for an appeal to have suspensive effect, the period for implementation of the transfer starts to run as from the time of the decision, explicit or presumed, by which the requested Member State agrees to take back the person concerned, irrespective of the uncertainties surrounding the appeal against the decision ordering his transfer which the asylum seeker may have lodged before the courts of the requesting Member State.

39 In that case only the practical details of the implementation of the transfer remain to be determined, including setting the date thereof.

40 It is in that context that Article 20(1)(d) of Regulation No 343/2003 allows the requesting Member State six months in which to carry out the transfer. Thus, in view of the practical complexities and organisational difficulties associated with implementing the transfer, the purpose of that period is to allow the two Member States concerned to collaborate with a view to carrying out the transfer and, in particular, the requesting Member State to determine the practical details for implementing the transfer, which is carried out in accordance with that State's legislation.

41 It is, moreover, evident from the explanatory memorandum annexed to the Proposal for a Council Regulation 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, presented by the Commission on 26 July 2001 (COM(2001) 447 final, p. 5 and pp. 19-20) that it was precisely in order to take account of the practical difficulties encountered by the Member States in carrying out transfers that the Commission proposed extending the period during which the transfer is to be carried out. That period, set at one month in the Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities, signed in Dublin on 15 June 1990 (OJ 1997 C 254, p. 1), which was replaced by Regulation No 343/2003, was subsequently increased to six months in Article 20(1)(d) of that regulation, in accordance with that regulation proposal.

42 In the second situation, where the requesting Member State provides for an appeal which may have suspensive effect and the court of that Member State gives its decision such effect, Article 20(1)(d) of Regulation No 343/2003 provides that the period for transfer starts to run as from the time of the 'decision on an appeal or review'.

43 In that second situation, although the point in time where the period for transfer starts to run is different from that laid down for the first situation referred to above, the fact remains that each of the two Member States concerned is confronted with the same practical difficulties in organising the transfer and should thus have the same six-month

period in which to carry out that transfer. There is in fact nothing in the wording of Article 20(1)(d) of Regulation No 343/2003 to suggest that the Community legislature intended to treat those two situations differently.

44 It follows that, in the second situation, in the light of the objective pursued by setting a period for the Member States, the start of that period should be determined in such a manner as to allow the Member States, as in the first situation, a six-month period which they are deemed to require in full in order to determine the practical details for carrying out the transfer.

45 Accordingly, the period for carrying out the transfer may begin to run only as from the time the future implementation of the transfer is, in principle, agreed upon and certain, and only the practical details remain to be determined. Such implementation cannot be regarded as being certain, however, if a court of the requesting Member State which is hearing an appeal has not yet ruled on the merits of the appeal but has merely ruled on an application for suspension of the operation of the contested decision.

46 It follows that, in the second situation referred to above, in order to ensure the effectiveness of Article 20(1)(d) of Regulation No 343/2003 laying down the period for implementation of the transfer, that period must begin to run not as from the time of the provisional judicial decision suspending the implementation of the transfer procedure, but only as from the time of the judicial decision which rules on the merits of the procedure and which is no longer such as to prevent its implementation.

47 This finding is supported by two other sets of considerations, the first concerning observance of the judicial protection guaranteed by a Member State, the second concerning observance of the principle of procedural autonomy of the Member States.

48 In the first place, it is clear that the Community legislature did not intend that the judicial protection guaranteed by the Member States whose courts may suspend the implementation of a transfer decision, thus enabling asylum seekers duly to challenge decisions taken in respect of them, should be sacrificed to the requirement of expedition in processing asylum applications.

49 Those Member States which wished to introduce appeal remedies liable to lead to decisions having suspensive effect in the context of transfer procedures may not, for the sake of meeting the requirement of expedition, be placed in a less favourable situation than those Member States which did not deem it necessary to do so.

50 Thus, a Member State which, in the context of transfer procedures, has decided to introduce various appeal remedies, including ones having suspensive effect, and for that reason had the time available to it to proceed with deportation of the asylum seeker reduced by the amount of time necessary for the domestic courts to rule on the merits of the case, would be placed in an awkward position, since, if it is unable to organise the transfer of the asylum seeker within the very brief period between the judicial decision on the merits of the case and the expiry of the time-limit for implementation of the transfer, it runs the risk, pursuant to Article 20(2) of Regulation No 343/2003 — under which the acceptance of its responsibility by the requested Member States lapses once the time-limit for implementation of the transfer has expired — of becoming definitively the Member State responsible for processing the asylum application.

51 It follows that an interpretation of Article 20(1)(d) of Regulation No 343/2003, laying down the starting point for calculating the period granted to the requesting Member State for proceeding with the transfer of an asylum applicant, cannot lead to a finding that, for the sake of observing Community law, the requesting State must disregard the suspensive effect of a provisional judicial decision taken in the context of an appeal capable of having such effect, which it nevertheless wished to introduce into its domestic law.

52 Regarding, secondly, observance of the principle of procedural autonomy of the Member States, the Court notes that, if the interpretation of Article 20(1)(d) of Regulation No 343/2003 to the effect that the period for implementation of the transfer begins to run as from the time of the provisional decision having suspensive effect were to prevail, a national court wishing to reconcile compliance with the time-limit with compliance with a provisional judicial decision having suspensive effect would be placed in the position of having to rule on the merits of the transfer procedure before expiry of that time-limit by a decision which may, owing to lack of sufficient time granted to the courts, have been unable to take satisfactory account of the complex nature of the proceedings. As rightly pointed out by some of the governments and the Commission in their observations submitted to the Court, such an interpretation would run counter to that principle, as upheld in the case-law of the Community Courts (see, to that effect, Case C-13/01 *Safalero* [2003] ECR I-8679, paragraph 49, and Case C-432/05 *Unibet* [2007] ECR I-2271, paragraph 39).

53 In the light of the foregoing considerations, the answer to the question referred is that Article 20(1)(d) and Article 20(2) of Regulation No 343/2003 are to be interpreted as meaning that, where the legislation of the requesting Member State provides for suspensive effect of an appeal, the period for implementation of the transfer begins to run, not as from the time of the provisional judicial decision suspending the implementation of the transfer procedure, but only as from the time of the judicial decision which rules on the merits of the procedure and which is no longer such as to prevent its implementation.

Costs

54 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:

Article 20(1)(d) and Article 20(2) of Regulation No 343/2003 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 are to be interpreted as meaning that, where the legislation of the requesting Member State provides for suspensive effect of an appeal, the period for implementation of the transfer begins to run, not as from the time of the provisional judicial decision suspending the implementation of the transfer procedure, but only as from the time of the judicial decision which rules on the merits of the procedure and which is no longer such as to prevent its implementation.

[Signatures]