
CJEU - C-411-10 and C-493-10, Joined cases of N.S. v United Kingdom and M.E. v Ireland

Country of Applicant:

Afghanistan

Iran

Nigeria

Date of Decision:

21-12-2011

Citation:

C-411-10 and C-493-10

Court Name:

Grand Chamber of the Court of Justice of the European Union

Keywords:[Dublin Transfer](#) [1][Effective access to procedures](#) [2][Effective remedy \(right to\)](#) [3][Non-refoulement](#) [4][Material reception conditions](#) [5][Responsibility for examining application](#) [6][Safe third country](#) [7]

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Headnote:

This case concerned the concept of 'safe country' within the Dublin system and respect for fundamental rights of asylum seekers. The Court held that EU law prevents the application of a conclusive presumption that Member States observe all the fundamental rights of the European Union. Art. 4 Charter must be interpreted as meaning that the Member States may not transfer an asylum seeker to the Member State responsible within the meaning of the Regulation where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of the provision. Once it is impossible to transfer the asylum seeker to the responsible Member State then subject to the sovereignty clause the State can check if another Member State is responsible by examining further criteria under the Regulation. This should not take an unreasonable amount of time and if necessary then the Member State concerned must examine the asylum application.

Facts:

The case C-411/10 concerned an Afghan national who came to the UK after travelling via Greece. He was arrested in Greece in 2008 but did not make an asylum claim there. He was released from detention in Greece and ordered to leave the country and later was arrested by the police and expelled to Turkey where he was detained for 2 months in appalling conditions. He escaped detention in Turkey and came to the UK where he claimed asylum. He was subsequently placed in a Dublin procedure and the UK issued a transfer decision with respect to Greece. The applicant requested the Secretary of State to accept responsibility for examining his asylum claim under Art. 3(2) on the ground that there was a risk that his fundamental rights under EU law, the ECHR and/or Geneva Convention would be breached if he returned to Greece. This was refused and judicial review was sought whereby the Court of appeal then requested a preliminary reference to the CJEU. The question was as follows:

(1) Does a decision made by a Member State under Article 3(2) of Regulation No 343/2003 whether to examine a claim for asylum which is not its responsibility under the criteria set out in Chapter III of the Regulation fall within the scope of EU law for the purposes of Article 6 [TEU] and/or Article 51 of the Charter ??

If Question 1 is answered in the affirmative:

(2) Is the duty of a Member State to observe EU fundamental rights (including the rights set out in Articles 1, 4, 18, 19(2) and 47 of the Charter) discharged where that State sends the asylum seeker to the Member State which Article 3(1) [of Regulation No 343/2003] designates as the responsible State in accordance with the criteria set out in Chapter III of the regulation (the responsible State?), regardless of the situation in the responsible State?

(3) In particular, does the obligation to observe EU fundamental rights preclude the operation of a conclusive presumption that the responsible State will observe (i) the claimant's fundamental rights under European Union law; and/ or (ii) the minimum standards imposed by Directives 2003/9, 2004/83 and 2005/85 ??

(4) Alternatively, is a Member State obliged by European Union law, and, if so, in what circumstances, to exercise the power under Article 3(2) of the Regulation to examine and take responsibility for a claim, where transfer to the responsible State would expose the [asylum] claimant to a risk of violation of his fundamental rights, in particular the rights set out in Articles 1, 4, 18, 19(2) and/or 47 of the Charter, and/or to a risk that the minimum standards set out in Directives [2003/9, 2004/83 and 2005/85] will not be applied to him?

(5) Is the scope of the protection conferred upon a person to whom Regulation [No 343/2003] applies by the general principles of European Union law, and, in particular, the rights set out in Articles 1, 18 and 47 of the Charter wider than the protection conferred by Article 3 of the ECHR?

(6) Is it compatible with the rights set out in Article 47 of the Charter for a provision of national law to require a court, for the purpose of determining whether a person may lawfully be removed to another Member State pursuant to Regulation [No 343/2003], to treat that Member State as a State from which the person will not be sent to another State in contravention of his rights pursuant to the [ECHR] or his rights pursuant to the [Geneva Convention] and [the 1967 Protocol]?

(7) In so far as the preceding questions arise in respect of the obligations of the United Kingdom, are the answers to [the second to sixth questions] qualified in any respect so as to take account of the Protocol (No 30)??

The case C-493/10 concerned five appellants in the main proceedings, all unconnected with each other, originating from Afghanistan, Iran and Algeria. Each of them travelled via Greece and was arrested there for irregular entry. They then travelled to Ireland and claimed asylum. The High Court decided to stay proceedings and refer the following question to the CJEU:

(1) Is the transferring Member State under Regulation (EC) No 343/2003 obliged to assess the compliance of the receiving Member State with Article 18 of the Charter, Directives 2003/9/EC, 2004/83/EC and 2005/85/EC and Regulation (EC) No 343/2003?

(2) If the answer is yes, and if the receiving Member State is found not to be in compliance with one or more of those provisions, is the transferring Member State obliged to accept responsibility for examining the application under Article 3(2) of Regulation (EC) No 343/2003??

Both cases were joined for the purposes of the written and oral procedure and the judgment. Amnesty International and the AIRE Centre, UNHCR and the Equality and Human Rights Commission intervened in the case of C-411/10 and Amnesty International and the AIRE Centre intervened in the case of C-493/10. Apart from observations submitted by the parties submissions were received from the following States: UK, Belgium, Czech Republic, Germany, Greece, France, Italy, the Netherlands, Austria, Poland, Slovenia, Finland and Switzerland.

Decision & Reasoning:

In response to the first question in the case of C-411/10 the Court held that the discretionary power conferred on the Member States by Article 3(2) forms part of the mechanisms for determining the Member State responsible for an asylum application and therefore is an element of the CEAS (Para. 68). Therefore a Member State which exercises that discretionary power must be considered as implementing EU law within the meaning of Article 51(1) of the Charter.

As regards the rest of the questions the Court noted that the CEAS is conceived in a context making it possible to assume that all the participating States, whether Member States or third States, observe fundamental rights, including the rights based on the Geneva Convention and the 1967 Protocol and on the ECHR, and that the Member States can have confidence in each other in that regard (Para 78).. However, the Court states that it is not inconceivable that that system may, in practice, experience major operational problems in a given Member State, meaning that there is a substantial risk that asylum seekers may, when transferred to that Member State, be treated in a manner incompatible with their fundamental rights. The CJEU held that it cannot be concluded that *any infringement of fundamental rights will affect the obligations of the other Member States to comply with the Dublin regulation?* (Para. 82). The Court considered that it would be incompatible with the aims of the Dublin II Regulation were the slightest infringement of the EU asylum *acquis* regarded as sufficient to prevent a Dublin transfer (Paras 84-85). Accordingly, the prohibition will only be triggered where the nature of the infringement is such as to give rise to a real risk that an asylum seeker would suffer inhuman or degrading treatment within the meaning of Article 4 of the Charter. The Court specified that the existence of systemic flaws in the asylum procedure and reception conditions for asylum seekers in the Member State responsible may give rise to such a risk and consequently, a corresponding prohibition on transfer.

Member States may not transfer an asylum seeker to the Member State responsible within the meaning of the Dublin II Regulation where *they cannot be unaware that systemic deficiencies* in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 CFR.

The operation of the Dublin II Regulation, on the basis of a conclusive presumption that the asylum seeker's fundamental rights will be observed in the responsible Member State is incompatible with the duty of Member States to apply and interpret Dublin II Regulation in a manner consistent with fundamental rights.

Member States cannot work on the basis of a conclusive presumption of compliance with fundamental rights (para 100). The presumption must be rebuttable.

The Court took into account the *M.S.S. v Belgium and Greece* ECHR Grand Chamber ruling and noted that the extent of the infringement of fundamental rights described in that judgment shows that there existed in Greece, at the time of transfer, a systemic deficiency in the asylum procedure and reception conditions.

How can Member States evaluate whether another Member State is in compliance with the fundamental rights of asylum seekers under the CFR?

Para 91 of the judgment refer to the information sources cited by the EctHR in the case of *M.S.S. v Belgium & Greece* as a way of enabling Member States to assess the functioning of the asylum system in the Member State responsible. Therefore, Commission Reports and Dublin Recast Proposal, reports of international non-governmental organizations, documents prepared by UNHCR as well as correspondence on the implementation of the EU asylum acquis are all relevant for such an assessment (para. 90-92). Reference was also made to Article 80 TFEU in stating that asylum policy and its implementation are to be governed by the principle of solidarity and fair sharing of responsibility.

The judgment clearly states that subject to the right to examine the asylum application under Article 3(2) the Member State which should carry out the transfer *must continue to examine the criteria set out in Chapter III of the Regulation in order to establish whether one of the following criteria enables another Member State to be identified* as responsible for the examination of the asylum application (Para. 96).

EU Member States must themselves examine that asylum claim in accordance with Article 3(2) where there is no Member State responsible other than the one primarily responsible (in accordance with the criteria set forth in the Dublin II Regulation) or where determining such alternative Member State would take an unreasonable length of time (paras 95-98). Para 98 states that the Member State must not worsen the situation for asylum seekers by using a procedure for determining the Member State responsible, which takes an unreasonable length of time. In such a situation the sovereignty clause should be applied.

As regards other Charter right than Article 4 the Court merely stated that Articles 1, 18 and 47 of the Charter do not lead to a different answer. Also with regard to the seventh question raised in the C-411/10 case the Court stated that since the rights referred to in the cases in the main proceedings do not form part of Title IV of the Charter, there is no need to rule on the interpretation of Art. 1(2) of Protocol (No. 30).

Outcome:

The CJEU Ruling:

1. The decision adopted by a Member State on the basis of Article 3(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, whether to examine an asylum application which is not its responsibility according to the criteria laid down in Chapter III of that Regulation, implements European Union law for the purposes of Article 6 TEU and/or Article 51 of the Charter of Fundamental Rights of the European Union.

2. European Union law precludes the application of a conclusive presumption that the Member State which Article 3(1) of Regulation No 343/2003 indicates as responsible observes the fundamental rights of the European Union.

Article 4 of the Charter of Fundamental Rights of the European Union must be interpreted as meaning that the Member States, including the national courts, may not transfer an asylum seeker to the Member State responsible within the meaning of Regulation No 343/2003 where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of that provision.

Subject to the right itself to examine the application referred to in Article 3(2) of Regulation No 343/2003, the finding that it is impossible to transfer an applicant to another Member State, where that State is identified as the Member State responsible in accordance with the criteria set out in Chapter III of that regulation, entails that the Member State which should carry out that transfer must continue to examine the criteria set out in that chapter in order to establish whether one of the following criteria enables another Member State to be identified as responsible for the examination of the asylum application.

The Member State in which the asylum seeker is present must ensure that it does not worsen a situation where the fundamental rights of that applicant have been infringed by using a procedure for determining the Member State responsible which takes an unreasonable length of time. If necessary, the first mentioned Member State must itself examine the application in accordance with the procedure laid down in Article 3(2) of Regulation No 343/2003.

3. Articles 1, 18 and 47 of the Charter of Fundamental Rights of the European Union do not lead to a different answer.

4. In so far as the preceding questions arise in respect of the obligations of the United Kingdom of Great Britain and Northern Ireland, the answers to the second to sixth questions referred in Case C-411/10 do not require to be qualified in any respect so as to take account of Protocol (No 30) on the application of the Charter of Fundamental Rights of the European Union to Poland and the United Kingdom.

Observations/Comments:

The Advocate General Trstenjak's Opinion is available [here](#) [51].

For information on the application of this CJEU ruling at the national level please read the Dublin Transnational Network Project 'The Dublin II Regulation: Lives on Hold' Section 11. The case of C-4/11 Puid also reaffirmed that Where the Member States cannot be unaware that systemic deficiencies in the asylum procedure and in the conditions for the reception of asylum seekers in the Member State initially identified as responsible in accordance with the criteria set out in Chapter III 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 provide substantial grounds for believing that the asylum seeker concerned would face a real risk of being subjected

to inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union, which is a matter for the referring court to verify, the Member State which is determining the Member State responsible is required not to transfer the asylum seeker to the Member State initially identified as responsible and, subject to the exercise of the right itself to examine the application, to continue to examine the criteria set out in that chapter, in order to establish whether another Member State can be identified as responsible in accordance with one of those criteria or, if it cannot, under Article 13 of the Regulation.

Conversely, in such a situation, a finding that it is impossible to transfer an asylum seeker to the Member State initially identified as responsible does not in itself mean that the Member State which is determining the Member State responsible is required itself, under Article 3(2) of Regulation No 343/2003, to examine the application for asylum.

It is important to note also that the Dublin III Recast Regulation 604/2013 has incorporated the NS/ME wording into recast Article 3(2) whereby? *Where it is impossible to transfer an application to the Member State primarily designated as responsible because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter, the determining Member State shall continue to examine the criteria set out in Chapter III in order to establish whether another Member State can be designated as responsible?*

Commentaries on the case:

<http://www.freemovement.org.uk/2012/01/11/ns-v-uk-removals-under-the-dublin-ii-regulation/> [52] ;
<http://media.leidenuniv.nl/legacy/ecj-c-411-10-n-s-v-sshd.pdf> [53] ;
<http://eutopialaw.com/2012/01/25/case-comment-n-s-v-secretary-of-state-for-the-home-department-c-41110/> [54] ; Costello, Cathryn: Dublin-case NS/ME: Finally, an end to blind trust across the EU?, *Asiel en Migrantenrecht* 2012 p.83-92 ; <http://humanrights.ie/international-lawinternational-human-rights/nsjudgment/> [55]

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CJEU - C-101/01, *Lindqvist*

CJEU - C-260/89, *ERT*

[ECtHR - M.S.S. v Belgium and Greece \[GC\], Application No. 30696/09](#) [56]

CJEU - C-400/10, *PPU McB*

CJEU - C-5/88, *Wachauf*

[CJEU - C-578/08, Rhimou Chakroun v Minister van Buitenlandse Zaken](#) [57]

[CJEU - C-175/08, C-176/08, C-178/08 and C-179/08, Aydin Salahadin Abdulla, Kamil Hasan, Ahmed Adem, Hamrin Mosa Rashi, Dier Jamal v Bundesrepublik Deutschland](#) [58]

[CJEU - C-31/09 Nawras Bolbol v Hungary - resource](#) [59]

Attachment(s):

C-411_10 NS and ME.pdf[60]

Authentic Language:

English

Country of preliminary reference:

Ireland

National / Other Legislative Provisions:

TFEU - Art 78

TFEU - Art 80

TFEU - Art 6

TFEU - Art 267

Protocol No. 24 on asylum for nationals of Member States of the EU (OJ 2010 C 83)

Commission Regulation (EC) No 2625/2000 of 11 December 2000 (EURODAC)

Temporary Protection Directive 2001/55/EC of 20 July 2001

EC Agreement with Denmark - Council Decision 2006/188/EC of 21 Feb 2006

EC Agreement with Iceland and Norway - Council Decision 2001/258/EC of 15 March 2001

EC Agreement with Swiss Federation - Council Decision 2009/487/EC of 14 Oct 2008

UK - Asylum and Immigration Act 2004

Links:

[1] https://www.asylumlawdatabase.eu/en/case-law-search?f%5B0%5D=field_keywords%3A1213

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[3] https://www.asylumlawdatabase.eu/en/case-law-search?f%5B0%5D=field_keywords%3A30

[4] https://www.asylumlawdatabase.eu/en/case-law-search?f%5B0%5D=field_keywords%3A48

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[10] <http://www.asylumlawdatabase.eu/en/content/en-european-convention-protection-human-rights-and-fundamental-freedoms-echr>

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