

CJEU - C-646/16, Khadija Jafari and Zainab Jafari

Country of Applicant:

Afghanistan

Date of Decision:

26-07-2017

Citation:

C-646/16, Khadija Jafari and Zainab Jafari, 26 July 2017

Court Name:

Court of Justice of the European Union, Grand Chamber

Keywords:[Dublin Transfer](#) [1][Request that charge be taken](#) [2][Inhuman or degrading treatment or punishment](#) [3]**Relevant Legislative Provisions:**

European Union Law > [EN - Returns Directive, Directive 2008/115/EC of 16 December 2008](#) [4] > [Article 2](#) [5]

European Union Law > [EN - Dublin III Regulation, Council Regulation \(EC\) No. 604/2013 of 26 June 2013 \(recast Dublin II Regulation\)](#) [6] > [Recital \(25\)](#) [7]

European Union Law > [EN - Returns Directive, Directive 2008/115/EC of 16 December 2008](#) [4] > [Article 3](#) [8]

European Union Law > [EN - Dublin III Regulation, Council Regulation \(EC\) No. 604/2013 of 26 June 2013 \(recast Dublin II Regulation\)](#) [6] > [Recital \(41\)](#) [9]

European Union Law > [EN - Dublin III Regulation, Council Regulation \(EC\) No. 604/2013 of 26 June 2013 \(recast Dublin II Regulation\)](#) [6] > [Article 1](#) [10]

European Union Law > [EN - Dublin III Regulation, Council Regulation \(EC\) No. 604/2013 of 26 June 2013 \(recast Dublin II Regulation\)](#) [6] > [Article 2](#) [11]

European Union Law > [EN - Dublin III Regulation, Council Regulation \(EC\) No. 604/2013 of 26 June 2013 \(recast Dublin II Regulation\)](#) [6] > [Article 3](#) [12]

European Union Law > [EN - Dublin III Regulation, Council Regulation \(EC\) No. 604/2013 of 26 June 2013 \(recast Dublin II Regulation\)](#) [6] > [Article 7](#) [13]

European Union Law > [EN - Dublin III Regulation, Council Regulation \(EC\) No. 604/2013 of 26 June 2013 \(recast Dublin II Regulation\)](#) [6] > [Article 12](#) [14]

European Union Law > [EN - Dublin III Regulation, Council Regulation \(EC\) No. 604/2013 of 26 June 2013 \(recast Dublin II Regulation\)](#) [6] > [Article 13](#) [15]

European Union Law > [EN - Dublin III Regulation, Council Regulation \(EC\) No. 604/2013 of 26 June 2013 \(recast Dublin II Regulation\)](#)

[6] > [Article 14](#) [16]

European Union Law > [EN - Dublin III Regulation, Council Regulation \(EC\) No. 604/2013 of 26 June 2013 \(recast Dublin II Regulation\)](#) [6] > [Article 17](#) [17]

European Union Law > [EN - Dublin III Regulation, Council Regulation \(EC\) No. 604/2013 of 26 June 2013 \(recast Dublin II Regulation\)](#) [6] > [Article 33](#) [18]

European Union Law > [EN - Dublin III Regulation, Council Regulation \(EC\) No. 604/2013 of 26 June 2013 \(recast Dublin II Regulation\)](#) [6] > [Article 34](#) [19]

Headnote:

A third-country national whose entry was tolerated by the authorities of one Member State faced with the arrival of an unusually large number of third-country nationals seeking transit through that Member State in order to lodge an application for international protection in another Member State, without fulfilling the entry conditions generally imposed in the first Member State, must be regarded as having 'irregularly crossed' the border of the first Member State within the meaning of that provision. Article 13(1) of the Dublin Regulation III therefore applies and Croatia is deemed to be responsible for the protection claims.

Facts:

The facts of the case originate in a preliminary reference lodged by the Austrian Upper Administrative Court concerning two sisters from Afghanistan and their children who had fled their country of origin and travelled to Europe through Serbia to Croatia and from there were transported by bus by Croatian authorities to Slovenia. From Slovenia the sisters entered Austria. Following a request to the Slovenian authorities for further information, the Austrian authorities requested the Croatian authorities to take charge of the applicants on the basis that they had irregularly entered into Croatia. The appeal against the decision to transfer was rejected by the Federal Administrative Court on grounds that without a visa, entry into Croatia was irregular. On appeal the Jafaris argued that they had been admitted into Croatia, Slovenia and Austria in accordance with Article 5(4)(c) of the Schengen Borders Code. The Upper Administrative Tribunal decided to stay proceedings and a series of questions was referred to the CJEU, *inter alia*, asking the court whether facilitating mass border crossing during a situation of humanitarian crisis could be considered (1) the issuance of a 'visa' or (2) 'irregular crossing', under the Dublin III Regulation.

The referring court further requested that the case be determined under the expedited procedure provided for in Article 105 of the Court's Rules of Procedure.

Decision & Reasoning:

First, the Court ruled that the definition of 'visa' under DR III could not be directly inferred from other acts of EU law (such as the Visa Code), but had to be construed on the basis of the definition under Article 2(m) of DR III and the Regulation's general scheme. Therefore, the term 'visa' in Article 2(m) covers not only short-stay visas and airport transit visas but also long-stay visas. In that sense, the CJEU understood that a visa refers to authorisation or decision of a Member State which is 'required for transit or entry' to the territory of that Member State or another. In other words it is an act formally adopted by a national authority (rather than mere tolerance of entry) and could not be confused with the grant of admission to the territory. This understanding is not altered by a situation characterised by the arrival of an unusually large number of asylum seekers. It must also be distinguished from the power to authorise entry on

humanitarian grounds (Article 5(4)(c) of the Schengen Borders Code) and from the capacity to issue humanitarian visas with limited territorial validity (Article 25(1)(a) of the Visa Code). Therefore, the Court understood that tolerating the entry and transit of third country nationals in situations of exceptional number of arrivals is not tantamount to the issuance of a 'visa' under Article 12 of the DR III.

The CJEU then turned to whether the toleration of a large number of third country nationals seeking transit through that Member State and without fulfilling the entry conditions imposed by that Member State constitutes an irregular crossing for the purposes of Article 13 DR III. The Court first notes that the concept of 'irregular crossing' is not defined in the DR III nor in any other EU act and cannot be inferred directly from those acts, thus it must be determined taking into account the context and overall goals of DR III. The crossing of a border without fulfilling the conditions imposed by the legislation applicable in the Member State in question, must be generally considered 'irregular' and the rules laid down by the Schengen Borders Code (SBC) apply. While the SBC allows for a derogation of the entry conditions on humanitarian grounds, such authorisation is valid only in the territory of the Member State concerned, not the territory 'of Member States' as a whole. If it were accepted that authorisation on humanitarian grounds and in derogation of the usual entry conditions was not an irregular crossing this would mean that the Member State allowing such entry was not responsible for the claim. This would counter the scheme and objectives of the Dublin Regulation. Therefore, a Member State cannot be absolved of its responsibility for an international protection claim when it decides to authorise persons who do not have a visa entry to the territory on humanitarian grounds. Such a person must be viewed as having irregularly crossed the territory of that Member State. The arrival of an unusually large number of third-country nationals does not affect that interpretation.

Lastly and in reference to the above the Court states that the EU legislature has taken into account circumstances which may overwhelm a Member State's asylum system such as Article 3(1), 17(1) and 33 DR III, the Temporary Protection Directive, the Council Decisions on relocations from Greece and Turkey. Moreover, under Article 4 CFR and Article 3(2) DR III, an applicant for international protection must not be transferred to the MS responsible if there is a genuine risk that he/she may suffer inhuman or degrading treatment. Therefore, an applicant would not be able to be transferred, following an unusually large number of third country nationals, if a risk of Article 4 Charter would ensue.

Outcome:

Article 12 of 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, read in conjunction with Article 2(m) of that regulation, must be interpreted as meaning that the fact that the authorities of one Member State, faced with the arrival of an unusually large number of third-country nationals seeking transit through that Member State in order to lodge an application for international protection in another Member State, tolerate the entry into its territory of such nationals who do not fulfil the entry conditions generally imposed in the first Member State, is not tantamount to the issuing of a 'visa' within the meaning of Article 12 of Regulation No 604/2013.

Article 13(1) of Regulation No 604/2013 must be interpreted as meaning that a third-country national whose entry was tolerated by the authorities of one Member State faced with the arrival of an unusually large number of third-country nationals seeking transit through that Member State in order to lodge an application for international protection in another Member State, without fulfilling the entry conditions generally imposed in the first Member State, must be regarded as having

?irregularly crossed? the border of the first Member State within the meaning of that provision.

Subsequent Proceedings :

Following the Jafari ruling the Austrian Administrative High Court (Decision [Ra 2016/19/0303](#) [20], 20 September 2017) dismissed the appeal. The Court did not find that the discretionary clauses should be applied in this case.

Observations/Comments:

The judgment stands in contrast with Advocate General Sharpston's opinion who argued that the asylum applications in question in the main proceedings should be examined by the first Member State in which the applications were lodged on grounds that that the term 'irregular crossing' does not cover the situation in the main proceedings, since Member States not only tolerated the mass border crossing but actively facilitated it.

Case Law Cited:

Case C-578/16 - CK and Others v Slovenia

Attachment(s):



[Case C 646_16 Jafari.docx](#)[21]

Other sources cited:

Convention implementing the Schengen Agreement

Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof.

Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), Recitals 6, 27 and 28, Articles 4, 5, 10 and 12.

Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code).

Authentic Language:

German

Country of preliminary reference:

Austria

Links:

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

[2] https://www.asylumlawdatabase.eu/en/case-law-search?f%5B0%5D=field_keywords%3A1211

[3] https://www.asylumlawdatabase.eu/en/case-law-search?f%5B0%5D=field_keywords%3A43

[4] <https://www.asylumlawdatabase.eu/node/1306>

[5] https://www.asylumlawdatabase.eu/node/1306#toc_45

[6] <https://www.asylumlawdatabase.eu/node/4037>

[7] https://www.asylumlawdatabase.eu/node/4037#toc_35

[8] https://www.asylumlawdatabase.eu/node/1306#toc_52

[9] https://www.asylumlawdatabase.eu/node/4037#toc_51

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[18] https://www.asylumlawdatabase.eu/node/4037#toc_348

[19] https://www.asylumlawdatabase.eu/node/4037#toc_362

[20]

https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Vwgh&Dokumentnummer=JWT_2016190303_201

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https://www.asylumlawdatabase.eu/sites/default/files/aldfiles/Case%20C%20646_16%20Jafari.docx