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# 'Second time?s a charm? ? the CJEU?s interpretation of the irregular border crossing criterion in the Dublin Regulation in A.S. and Jafari

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**Introduction**

On 26 July 2017, the Court of Justice of the European Union (CJEU) decided on the request for a preliminary ruling by a Slovenian (C-490/16 [1]) and an Austrian Court (C-646/16 [2]) and held that the responsibility criteria under the Dublin III Regulation (EU/604/2013) also applied during the so-called ?migration crisis? of 2015/2016. According to the Grand Chamber, the tolerated entry of a third-country national to the territory of a Member State without fulfilling the entry conditions (e.g. under the Schengen Border Code) remains an irregular border crossing. This contribution discusses three points addressed in the judgment: first, the application of the Dublin visa-criterion (Art. 12 Dublin III Regulation) and the application of the irregular border crossing-criterion (Art. 13) to a ?tolerated entry?, second, the question of whether Greece is still part of the Dublin area and third, possibilities for solidarity within the Dublin system.

**1. Issue of visas and irregular border crossings**

The main question referred by the national courts was how the tolerated entry of the applicants by Member State authorities was to be interpreted under the visa-criterion (Art. 12) and the irregular border crossing-criterion (Art. 13) of the Dublin III Regulation. To answer the first question, the Court referred to the definition of visa in Art. 2 m Dublin III Regulation. According to the definition, a visa is an ?authorisation or decision of a Member State (...) required for entry for an intended stay?. The Court concluded from this wording that the definition of a visa means that an act formally adopted by a national authority is required and that the mere tolerance of an entry would not be sufficient. The Court convincingly added that a visa was required for the ?purpose of enabling the admission? and that it was not identical with the admission itself (para 48 Jafari).

The question whether a tolerated border-crossing could still be irregular was the more contentious one. The General Advocate, Eleanor Sharpston, had argued in her Opinion [3] that the applicants in this concrete case were unlikely to have met the entry requirements and could not ?therefore be regarded as having regularly crossed the external border?. Yet, she emphasised that a border crossing ?not only tolerated? by a Member State but tacitly authorised and ?actively facilitated? could not be interpreted as ?irregular? in the ?ordinary? sense of the word (para 176 Sharpston). Against this Opinion of the General Advocate, the Court argued, based on the usual meaning of irregular crossing, the crossing of a border without fulfilling the conditions imposed by the legislation applicable in the Member State in question, must necessarily be considered ?irregular?.

Derogation from these conditions based on humanitarian grounds could not apply in the respective cases since such derogation would only be applicable to the territory of the Member State concerned and not for all Member States.

Although the wording would also support another interpretation, as the General Advocate had shown, the Court´s interpretation of the purpose of the Dublin Regulation is, in the author?s view, convincing. With a reference to ?the direct link between the responsibility criteria established in a spirit of solidarity and common efforts towards the management of external borders? (para 85 Jafari), the Court argues that the criteria ?laid down in Articles 12 to 14 (?) cannot, without calling into question the overall scheme of that Regulation, be interpreted to the effect that a Member State is absolved of its responsibility where it has decided to authorise, on humanitarian grounds, the entry into its territory of a third-country national who does not have a visa and is not entitled to waiver of a visa? (para 89 Jafari).

The Dublin Regulation takes into consideration family connections of an asylum seeker with a family member, relative or other family relations, albeit to a limited extent (cf. Art. 8-11 DR) (see UNHCR, Left in Limbo: UNHCR Study on the Implementation of the Dublin III Regulation [4]). Beyond these rules the Dublin Regulation links the responsibility for asylum claims with the management of external borders, the Member State who ?causes? the entry or stay of the applicant is responsible for the examination of the asylum application (para 88 Jafari, para 177 Sharpston). A different interpretation of Art. 13 would therefore indeed undermine this logic on which the Dublin system is based. However, the Court emphasised that a transfer to Croatia could not take place where due to e.g. a mass influx of third country nationals a genuine risk appears that a person might suffer inhuman or degrading treatment within the meaning of Article 4 of the Fundamental Rights Charter. In this case Article 3(2) of the Dublin III Regulation would apply.

**2. Croatia as the country of first irregular entry?**

Following the argumentation of the CJEU, Croatia was, based on Art. 13(i), responsible for the application. Although Dublin-transfers to Greece have been suspended due to systemic flaws in the asylum procedure and in the reception conditions for applicants since 2011, the Dublin Regulation, including the irregular entry criterion still applies to Greece. In its N.S judgment (C-411/10) the Court determined that ?the finding that it is impossible to transfer an applicant to Greece, where that State is identified as the Member State responsible (...), entails that the Member State which should carry out that transfer must continue to examine the criteria (...) 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). A criterion once applied can therefore not be applied twice, it is exhausted. In the present case this would mean that although Greece would have been theoretically responsible after the irregular border crossing of the applicants, the applicants could not be transferred back to Greece due to the still existing flaws in its asylum system. Hence, the Member State determining the responsibility had to continue to assess the allocation of responsibility based on the ?following criteria?, starting therefore with Art.13(ii). However, neither Art. 13(ii) nor Art. 14 applied to Croatia. Of course the responsibility of Greece could have ceased because the applicants transited through a third country (Serbia) after leaving Greece and before re-entering the EU territory in Croatia. But the sheer fact of leaving the EU territory alone is normally not sufficient to end responsibility immediately (cf. C-394/12 ?Abdullahi? AG Cruz Villalón para 63-65; Hruschka/Maiani, EU Immigration and Asylum Law, p 1525 MN4; 1546 MN 6). One option to shift responsibility is the cessation ?12 months after the date on which the irregular border crossing took place? (cf. Art. 13 (i)). Another one is the cessation in case the applicant had left the EU territory for more than three months (cf. Art. 19 (ii); C-155/15 ?Karim? para. 15). However, both grounds for cessation cannot be applied since between the border crossings in Greece and the applications in Austria less than

three months had passed. Following this argumentation and since none of the chapter III criteria were applicable, Art. 3 (ii) should have been used in order to determinate responsibility.

The Court already had the chance to decide this issue in the Abdullahi judgment (C-394/12) but didn´t see the necessity to judge on it. By contrast, the General Advocate Cruz Villalón argued alternatively that in the concrete case the first entry was the relevant one. Because in the case the applicant`s journey from at least Syria to Austria had to be regarded as a single journey and the two deadlines mentioned above were not exceeded. The General Advocate in the Jafari case concluded the same and stated ?nothing in the text of Article 13(i) of the Dublin III Regulation supports the reading that responsibility under that provision transfers to the second Member State of entry (Croatia).? (para 188 Sharpston)

Others have been arguing that also a shorter stay outside the Union can be significant, the relevant entry can be the one into the second Member State in the case that ?the first one does not really determine the lodging of the application in the Dublin area? (cf. Hruschka/Maiani, EU Immigration and Asylum Law, p 1525 MN4). It seems that the CJEU adopted this opinion since it gives no other explanation for the responsibility of Croatia.

**3. Solidarity and responsibility allocation**

The expectation from several sides regarding the judgment where quite high since the cases touched upon the question of solidarity and responsibility allocation for asylum applications within the EU. AG Sharpston had argued in her Opinion that Dublin was not made for the mass influx of protection seekers as seen in 2015/2016. The circumstances of the ?refugee crisis? would ?fall within a gap for which there is no precise legal provision? (para 171 Sharpston). The Dublin provision could also not be interpreted in a way that would make it possible to determine rapidly the Member State responsible, to guarantee effective access to the asylum procedures and to not compromise the objective of the rapid processing of applications for international protection (para 220 Sharpston). For AG Sharpston, it seems unlikely that the legislature ever envisaged that such a situation - as between September 2015 and March 2016 - would arise (para 221 Sharpston).

The CJEU disagreed and referred to the instruments construed in the knowledge of the potential danger of a mass influx: The Dublin III Regulation itself contains a mechanism for early warning, preparedness and crisis management (Art. 33); the temporary protection directive (2001/55/EC), drafted against the background of the refugee flows from the former Yugoslavia in the 1990s, could have been applied; Art. 78 (III) TFEU endows the Council mainly with the power to adopt emergency solidarity measures in the case of a sudden inflow of third country nationals are listed by the Court as examples. Last but not least the Court emphasised that every Member State has the right to use the sovereignty clause in order to take on the responsibility for an asylum application ?in a spirit of solidarity?. The Court also highlights the limits of the application of Dublin III criteria, where a ?transfer entails a genuine risk of the person concerned may suffer inhuman or degrading treatment within the meaning of that Article 4? of the EU-Fundamental Rights Charter. Whereas the Courts reflections end with the remark that following the arrival of an unusually large number of third-country nationals seeking international protection, an applicant cannot be transferred if such a risk of an Article 4 Charter violation existed in the Member State responsible (Jafari para 101), AG Sharpston points out the crucial dilemma of Dublin: If border Member States, such as Croatia, are deemed to be responsible for accepting and processing exceptionally high numbers of asylum seekers, they will be confronted with a disproportionate burden as regards the return of third-country nationals who had been ?waved through?. It would be possible that Croatia, like Greece, would simply be unable to cope with the situation if it was required to receive large numbers of applicants who previously transited through that Member State (para 231, 234 Sharpston).

## 4. Conclusion

The tools are available but one has to use them, seems to be the line of the CJEU. The objective of the Dublin Regulation has been to provide a clear and rapid method for the determination of responsibility mainly based on the link between border protection and responsibility for asylum claims. Although the individual solidarity measures named by the Court have been proven to be insufficient to cope with past and current migratory challenges and the Dublin regulation is still missing a systematic approach to solidarity, the Court?s decision is based on the law applicable and in times where the rule of law is endangered in several ways it is reassuring that the CJEU was not searching for a political answer to the current challenges. This has to be found on the political level. Unfortunately, until the legislators find a way forward to a sustainable and fair Dublin allocation system, Member States will find their ways to avoid responsibility and the overstressing of their asylum systems. For asylum seekers, this will mean that the danger of being trapped in an insufficient, inhuman and ineffective national asylum system is not prohibited.

Notwithstanding the Court?s literal interpretation of the above, the CJEU gives no explanation why it decided to interpret Art. 13 (i) in a way which is neither based on its wording nor on an interpretation which would enable legal certainty. Instead, the multiple application of Art. 13 (i) to subsequent points of entry could jeopardise an effective access to the asylum procedure if Member States will have to determine in the future the irregular entry of an asylum seeker after their "significant" stay outside the Union.

Julia Eichler, Legal Adviser, Brussels office of the Protestant Church in Germany (EKD)

(This journal entry is an expression of the authors' own views, and not those of EDAL or ECRE).

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