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Strengthening effective remedies for asylum seekers in the Dublin procedure: from Abdullahi to Ghezelbash and Karim

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This journal contribution is to be read in conjunction with the EDAL case summaries: [NS/ME](#) [1], [Abdullahi](#) [2], [Ghezelbash](#) [3] and [Karim](#) [4],

Introduction

In *Abdullahi* (C-394/12, judgment of 13 December 2013) the CJEU had concluded that under European law, an asylum seeker could only appeal against a Dublin transfer decision in case of systemic deficiencies of the asylum procedure or the reception system of the responsible Member State. The prohibition of transfers in case of such systemic deficiencies was laid down in Article 3 (2) Dublin III Regulation. On 7 June 2016, the CJEU delivered two eagerly awaited judgments: *Ghezelbash* (C-63/15) and *Karim* (C-155/15). In these cases, the CJEU had to clarify the question whether Article 27 of the Dublin III Regulation brought about a substantial change regarding the right to an effective remedy compared to the situation under the Dublin II Regulation. The question was whether or not the significant lack of legal protection set out in *Abdullahi* was still valid under the Dublin III Regulation.

Facts and questions to the Court

The facts of the two cases were similar in that they called into question the responsibility of a Member State due to absence from the territory of the Member States (in one case regarding the visa criterion, Article 12 (4), in the other regarding the cessation ground in Article 19 (2) Dublin III Regulation):

Mr. Ghezelbash, an Iranian national, asked for asylum in the Netherlands in March 2014. He had previously been issued a visa by the French Embassy in Iran, which had expired in January 2014. The Dutch authorities asked France to take charge of Mr. Ghezelbash, without informing him sufficiently. Therefore he could not make a statement regarding this. After France accepted the take charge request, Mr. Ghezelbash made an appeal against the Dublin transfer decision, which he backed up with different documents to prove that he had returned to his home country after his stay in France for which he had been given the visa. France had no knowledge of these documents at the moment of its acceptance. **The CJEU had to clarify whether the applicant could execute an effective remedy after the acceptance by a state, and if yes, to what extent.**

Mr. Karim is a Syrian national who asked for asylum in March 2014 in Sweden. He had previously asked for asylum in Slovenia in May 2013. Mr. Karim argued that he had left the territory of the Member States for three months in between the two asylum applications. To support this, he

submitted a passport with an entry stamp for Lebanon from July 2013. Slovenia confirmed its acceptance of responsibility despite the indication from the Swedish authorities that the asylum seeker might have been outside the Member States' territory for more than three months, which would have led to cessation of Slovenia's responsibility according to Article 19 (2) Dublin III Regulation. **The CJEU had to clarify whether the asylum seeker could challenge the transfer decision even if he did not invoke systemic deficiencies in the destination state, and if yes, whether the Dublin Regulation could not be applied if he showed that he had been outside the Member States' territory for at least three months.**

Legal remedy ? from Dublin II to Dublin III

In *Ghezelbash*, the CJEU set out the changes in the right to an effective remedy from the Dublin II to the Dublin III Regulation. It concludes that in view of the changes brought about by the Recast, the jurisprudence in *Abdullahi* cannot be upheld under the Dublin III Regulation: As 'the EU legislature has introduced or enhanced various rights and mechanisms guaranteeing the involvement of asylum seekers in the process for determining the Member State responsible, Regulation No 604/2013 differs, to a significant degree, from Regulation No 343/2003, which was applicable in the case which gave rise to the judgment of 10 December 2013 in *Abdullahi* (C-394/12, EU:C:2013:813).? (*Ghezelbash*, para. 46)

The CJEU reasoning is *inter alia* based on the newly introduced information obligations by the Member States (Article 4 Dublin III Regulation), the obligation to grant the right to be heard in a personal interview (Article 5 Dublin III Regulation) and the procedural guarantees regarding notification and the right to an effective remedy in Article 26 and 27. The Court concludes from these provisions that Article 27 in conjunction with recital 19 of the Dublin III Regulation amounts to an **obligation to grant a comprehensive legal remedy regarding the correct application of the criteria**: 'in a situation such as that in the main proceedings, an asylum seeker is entitled to plead, in an appeal against a decision to transfer him, the incorrect application of one of the criteria for determining responsibility laid down in Chapter III of the Regulation, in particular the criterion relating to the grant of a visa set out in Article 12 of the Regulation.?' (*Ghezelbash*, para. 61)

In *Karim*, the CJEU specifies that the cessation clauses are also part of the responsibility determination procedure. Therefore the right to an effective remedy regarding the correct application of the criteria includes the cessation clause: if an asylum seeker is in the possession of means of proof that he or she had been outside the Member States' territory for three or more months, he or she may invoke this in the legal remedy against the decision on responsibility. The court is obliged to fully assess the existing information including means of proof brought forward by the applicant. This means that in addition to the correct application of the responsibility criteria, **the court must also examine whether there is a cessation ground according to Article 19 (2) al. 2 Dublin III Regulation.**

The Court points out that the right to a comprehensive effective remedy does not infringe the mutual trust between Member States in the correct application of the acts of the CEAS and the respect of refugee and human rights guarantees, as the examination merely concerns the correct application of the criteria. Also, it states that 'the making of an application under Regulation No 604/2013 cannot [?] be equated with forum shopping, which the Dublin system seeks to avoid (judgment of 21 December 2011 in *N.S. and Others*, C-411/10 and C-493/10, EU:C:2011:865, paragraph 79). Indeed, the court hearing such an application will not be required to make a Member State that is to the asylum seeker's liking responsible for the examination of the asylum application, but to verify whether the criteria for determining responsibility laid down by the EU legislature have been applied correctly.?' (*Ghezelbash*, para. 54)

In *Ghezelbash* and *Karim* the Court underlines that its reasoning in *Abdullahi* is no longer valid. It

confirms that the scope of the effective remedy also comprises the correct application of the Dublin III Regulation including the correct application of the responsibility criteria and the cessation provisions. This marks considerable progress as it strengthens the asylum seekers' individual rights. The judgments have the following consequences in practice:

- In examining the correct application of the Dublin III Regulation, the courts have to take into account all indications and elements of proof, including those submitted by the asylum seeker.
- The requested state must be informed about the presence of such documents. This means that the personal interview according to Article 5 Dublin III Regulation must be conducted *before* a take charge or take back request so that the requested Member State can examine its responsibility in light of all available information.
- The right to a comprehensive effective remedy regarding the correct application applies to all procedural rules that are relevant when determining responsibility.
- The first instance asylum authority must follow up on submitted indications and evidence and duly take them into account before making a take back or take charge request, and before taking its decision. This must be reflected in its decision.
- If the authority fails to do so, this constitutes a procedural error, which in itself justifies the annulment of the decision in the court procedure.
- Mr. Ghezelbash and Mr. Karim had provided the relevant proof of absence from the Member States' territory. Therefore the CJEU did not comment on the question of the burden of proof. However, it is reasonable to assume that the same principles are valid as regarding the examination of the criteria: If there are indications for cessation, the court must follow up on these indications in order to fully examine whether the Regulation was applied correctly.

Conclusion and open questions

In summary, the CJEU confirms a change in the system from the Dublin II to the Dublin III Regulation. According to the Court, the new provisions guarantee the involvement of asylum seekers in the process for determining the Member State responsible (*Ghezelbash*, para. 46). It should be self-evident that the person concerned also participates in the procedure. However, in the Dublin context it has taken a long process of discussion and many court judgments until the CJEU recognized the individual right to a correct determination of responsibility and the participation in the Dublin procedure.

While these judgments have provided much awaited and welcome clarifications, one significant question remains open: So far the CJEU has clarified that an asylum seeker cannot be transferred in case of systemic deficiencies in the destination Member State (*NS/ME*), and that the asylum seeker may invoke the incorrect application of the responsibility criteria (*Ghezelbash, Karim*). However, the Court has still not clearly stated that this applies in cases of an impossibility of transfer based on individual grounds that are neither caused by systemic deficiencies nor by the incorrect determination of responsibility (including elapsing time limits). In this area, Member States often resort to the use of the discretionary clauses and the application or non-application of these clauses may be decided upon within a large margin of discretion for the Member States. This leads to greatly diverging practice at the national judicial level. The CJEU merely states that if it were established in the course of such an examination that an error had been made, that could have no bearing on the principle of mutual trust between Member States on which the Common European Asylum System is based (para. 55). So the open conflict between the CJEU and the ECtHR regarding transfer decisions in the context of the Dublin procedure has therefore

not explicitly been solved. Also, the hope that the CJEU's judgments would dispel the diverging national court practice in this regard has not (yet) been fulfilled. It is hoped that this open question will soon be referred to the CJEU for clarification.

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

Keywords:

Dublin Transfer

Effective access to procedures

Effective remedy (right to)

Links:

[1] <http://www.asylumlawdatabase.eu/en/content/cjeu-c-411-10-and-c-493-10-joined-cases-ns-v-united-kingdom-and-me-v-ireland>

[2] <http://www.asylumlawdatabase.eu/en/content/cjeu-c-39412-shamso-abdullahi-v-bundesasylamt>

[3] <http://www.asylumlawdatabase.eu/en/content/cjeu-c-%E2%80%9916315-mehrdad-ghezelbash-v-staatssecretaris-van-veiligheid-en-justitie>

[4] <http://www.asylumlawdatabase.eu/en/content/cjeu-case-c-15515-george-karim-v-migrationsverket>