Prejudicial case C-63/15 (Ghezelbash)

Court of Justice of the European Union

Hearing 15 December 2015

Oral Pleadings of P.J. Schüller, Amsterdam, lawyer on behalf of Ghezelbash

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Dear Mr President, Dear Members of the Court,

1. For the first time since *Abdullahi,* before your Court today is the question of the scope of effective remedy under the Dublin Regulation.

2. As I will argue, the transition from Dublin II to Dublin III entails an expansion of this scope, meaning that the ruling as contained in *Abdullahi* can not be upheld without modification.

3. This position, that *Abdullahi* is no longer applicable per se, is shared by the French and Czech Governments who both argue that there must be a form of judicial review possible where individual rights are at stake. I agree with this position, and we would argue that it is consistent to apply it to any instances where the procedures and criteria of the Regulation are incorrectly applied.

4. In the case of *Ghezelbash*, the question is whether and to which extent an asylum applicant should have the opportunity to submit evidence of his departure from the Dublin area after having used a visa to enter that area. The question is, also, whether such evidence, when presented after acceptance of the transfer request by the Receiving State, should be included in order to assure the proper application of Dublin criteria.

5. It is important to note, in this respect, that if the applicant's statements are true and he has indeed left the Dublin area for three months, article 20 (5) of the Regulation provides that any responsibility of France, is annulled

6. I submit that in a case such as this one, where the issue is not whether the Dublin criteria have been correctly applied, but whether the application of the Dublin Regulation itself was incorrect, the Dublin Regulation itself, and the Dublin jurisprudence based thereon including *Abdullahi*, cannot limit the scope of legal remedy under Dublin III. In that sense, it is an opportunity for the Court to define the meaning of Articles 4 and 5 of the Regulation which are new and make the applicant enter the scene at a very early stage.

7. Moreover, *Abdullahi* was case specific and a typical, in the sense that the situation was different from a two rather than three state situation: it was not clear whether Hungary or Greece was the state of reference, if Hungary

accepts its responsibility under Article 10 (13) then the decision is not incorrect. Under article 3(2) Dublin III member states may look at different member states in the proper application of the criteria but here the case is different: The Dutch authorities failed to establish the facts correctly and took a wrongful decision (this was not the case in *Abdullahi*). Of course it follows from the Regulation that the requesting state has to check the situation first and is only after the check allowed to ask the responsible state. Every other approach would diminish the *effect utile* as member states could then ask any other states in the hope of not receiving a timely reply so that that other member states is responsible which would not be the case had the criteria been properly applied. (which in practice also takes place).

8. It was the express intention of the legislature in drafting the third Dublin Regulation that the procedural rights as contained in Dublin II were to be extended and expanded, in order for the individual to have an effective remedy as regards all the rights accorded to him or her in the context of the Dublin system, in accordance with article 47 of the Charter.

9. This means that that the scope of these procedural rights must extend beyond situations where there are systemic deficiencies in the Receiving State. It must also include situations related to the individual characteristics of the individual, and his or her factual situation since these are all matters regulated by EU law and the CEAS is to be seen as a coherent whole (see e.g *Abdullahi* §52). The governments and the Commission do not challenge this position in their submissions.

10. As the Governments have mentioned in their submissions, time limits under Dublin III are now mandatory. If time limits under article 27 (2) are to be reasonable, their rationale as found in the recital 5 of the preamble, must be effective. In earlier Dublin rulings, such as MA (C-648, para 54-58), the aim of the provision as an explanatory tool was highlighted, and a narrower approach to the right to an effective remedy, may lead to a breach of fundamental rights, including 18, 41 and 47 of the Charter.

11. After all, procedural rights are not just important for the asylum seeker. They provide a necessary safeguard for the proper functioning of the Dublin system, and they ensure that Member States properly apply the criteria of the Regulation when determining the Member State responsible for examining an application (see e.g *Puid*). In this sense, article 47 Charter should be regarded as enhancing the principle of mutual trust, the importance of which was underlined by this court in Opinion 2/13, rather than being in conflict therewith.

12. It is easy to imagine situations where the information offered by the asylum seeker is crucial for the proper application of the distribution criteria. Where a failure to take this information into account would lead to a wrongful designation of the member state responsible for dealing with the asylum request, this could be to the detriment of the individual in question, depending on the circumstances. But it would be to the detriment of the proper functioning of the Dublin Regulation as a whole and, consequently, to the principle of inter-state trust. Moreover, as a matter of EU law, there is an

autonomous right to a fair trial, as article 47 has to be in line with article 6 ECHR (*Samba Diouf* §§57-58).

13. An analogy can also be made between *Samba Diouf* in a fast track procedure and the Dublin Regulation in a sense that there should be no obstacle to putting forward circumstances and evidence in front of the court. There should be consistent application of article 47 rights throughout the CEAS, including Dublin. The express right to be heard can be effective only if this takes place before any transfer request is sent or, in the alternative, if information provided after such a request has been sent out can still influence the outcome of the procedure.

14. In Dublin III, the rights to information and to an interview have been expanded, with a view of being useful and effective. Under Article 5, the personal interview serves to easier designate the responsible Member State. To hold this interview after such designation, indeed after the transfer request has been accepted, would render this purpose null and void. Conversely, not allowing individual legal remedies under articles 27 and 47 would greatly diminish their value and consequently advance the risk of arbitrary application of Dublin III, leaving near absolute power to the sending state. It is also hard to reconcile with Article 41 Charter. I would refer to the Court's ruling in *Kastrati*, from which follows that an asylum seeker should always be able to legally challenge the assertion that a Regulation applies to his situation in the first place. If that isn't done properly, a judge (who will look at the case anyway) must be able to correct a flaw other than in *NS/ME* situations such as *Tarakhel* situation All parties will agree that it is undesirable that these legal issues will first be adjudicated in Strasbourg only.

15. The right of an individual to be heard is a general principle of EU law, and is part en parcel of a full art 47 application. This has been consistently upheld by your Court. In the recent recast of the Procedures Directive, the right to be interviewed is further strengthened. Thus, to have a lesser form of examination in Dublin would be an anomaly within the CEAS.

16. Recital 19 of the preamble states that due regard should be given to the developments in international law. Regard should thus be had to relevant developments in the case law of the ECtHR with regard to articles 3, 6, 8 and 13, since January 2014. This includes *Tarakhel*, where the need for States to communicate is emphasised. This obligation is underlined in recital 28.

17. It was the express aim of the Commission that Dublin III that higher standards of protection should apply. Indeed, the reference in recital 19 to "the application of the Regulation" can only be understood to refer to a factor additional to a situation such as the one in *NS/ME*, which was already covered by your Court's case law.

18. Recital 5 unequivocally states that the criteria should be fair to both states and the asylum seeker. If those – fair – criteria can then be applied without regard to what information the applicant may have to offer, and if incorrect application is then "untouchable", this fairness would be void – to both applicant and the

receiving state. It would also be at odds with a rebuttable presumption of compliance with fundamental rights as emphasised in *NS/ME* (§ 100) and subsequent case law of your Court.

19. I would moreover highlight the fact that in the Dutch system the state routinely sends Dublin transfer requests before the asylum seeker in question has been interviewed concerning his or her views on a possible transfer, and before the asylum seeker has obtained legal advice. In the present case, the Dublin transfer was requested on 7 March and accepted on 5 May 2015 by France. Yet only on the 19th of May it became clear for the applicant that the Dutch authorities were intending to transfer him to France. The next day the applicant immediately requested to be sent to a prolonged asylum procedure in order to have the time to gather sufficient evidentiary proof that he has spent three months in Iran, which would make Dublin application improper. This was refused.

20. Maintaining that only systemic deficiencies could lead to a review of a transfer which was already accepted would lead to a situation, moreover, where problems in the receiving state falling short of the systemic deficiencies-threshold of *NS/ME*, but within the scope of *Tarakhel*, could not be adjudicated by any court, and in case of a potential violation of Article 3 ECHR only at the level of the Strasbourg Court. I respectfully submit that the CEAS is meant to redress such issues without having applicants having to revert to Strasbourg, causing major delays. From an international law perspective, the unique legal order within the EU is fully in development, it is no longer a fledgling. Our interpretation of Article 47 would be an advancement in protection standards which is needed to face the many challenges the asylum system faces in many European countries and adhere to the subsidiarity principles between the EU and ECHR legal order.

21. The fact that the Dublin criteria are not properly applied warrants in itself a possibility of judicial redress. Even where an asylum seeker has no right to any preference for a particular country, the system must function as it is intended, and the outcome of the application of the Dublin Regulation must be reasonably foreseeable. This means that errors leading to a different outcome than proper application of the criteria based on all available information should be correctable. If not, the Regulation could slip into disarray and become a ´tombola´. The only manner in which corrections can be enforced is through an appeal to a judge, when the scope of such appeal includes such errors.

22. After all, trusting and acting upon the proper functioning of the Regulation is not the same as “forum shopping”. Thus, an asylum seeker who has obtained a visa for a particular Member State and who subsequently requests asylum in that Member State has a legitimate interest in the criteria to be properly applied. A short example to illustrate this point. A prominent priest of a persecuted religious minority needs to flee the country. He manages to obtain a visa issued by France, where most members of the religious minority reside. He then flies to Amsterdam, and offers all the required documentation to the Dutch authorities at the airport. He can expect to be transferred to France. If in

this hypothetical situation the Dutch authorities refuse to transfer and if it was up to the governments and the Commission, the national court cannot legally redress. Practice has demonstrated that this not merely an academic matter.

23. I do acknowledge that the Dublin system is based on the legal concept that it does not matter for the applicant in which country he applies for asylum. In order for this system to be “practical and effective” under Article 13 ECHR, an applicant must be able to at least put forward his views, as both Dublin II and III also give reliance to the fact that the Dublin system exists to protect those interests and not just the interests of the Member States. Thus an effective meaning of 47Charter aims to ensure that 52 (3) Charter is lived up, so that Article 4 and art 3 ECHR are always in line with each other as a matter of EU law.