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## THE CASES C-582/17 AND C-583/17:

an insight in the EU legislation on asylum and the right to  
effective remedy against transfer procedures

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## **THE CASES C-582/17 AND C-583/17: AN INSIGHT IN THE EU LEGISLATION ON ASYLUM AND THE RIGHT TO EFFECTIVE REMEDY AGAINST TRANSFER PROCEDURES**

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### **1.1 Primary law on asylum: the EU as an area of freedom, security and justice and the establishment of a Common European Asylum System.**

The European Union framework of legal sources is divided into primary law (the Treaties of the European Union and general legal principles), and secondary law (based on the Treaties, composed of regulations, directives, recommendations, decisions, opinions, and atypical acts). Concerning primary law, the Treaty on European Union (TEU), originally signed in Maastricht in 1992, and the Treaty on the Functioning of the European Union (TFEU), originally signed in Rome in 1957 as the Treaty establishing the European Economic Community (EEC), and their protocols are the constitutional basis on which the EU is founded. They are at the top of the hierarchy of sources, and have the scope of defining how the EU institutions shall operate and the matters on which the Union is entitled to legislate. These two treaties have been frequently amended over time, the last time being with the Lisbon Treaty<sup>1</sup>, which came into force in 2009. The Lisbon Treaty also declared the Charter of Fundamental Rights of the Union<sup>2</sup> legally binding in the signatory States, a document whose purpose was to increase protection of human rights vis-à-vis international standards and to ensure that equal protection was applied in different Member States.

The European Union competences on immigration, external border control and asylum are defined as part of the area of freedom, security and justice (AFSJ) (art. 67 TFEU). They are shared competences, between the Union legislator and national legislators, as defined in art. 4(2)(j) TFEU, with a strong external dimension. Shared competences as defined in the TFEU entail the possibility for Member States to adopt legally binding acts on the matter where the EU does not exercise its own competence. Introduced as part of the Treaties of the European Union in 2009, when the Lisbon Treaty (also known

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<sup>1</sup> Treaty of Lisbon of 1 December 2009 *amending the Treaty on European Union and Treaty establishing the European Community*.

<sup>2</sup> Charter of Fundamental Rights of the European Union (2000/C 364/01).

as Reform Treaty) entered into force, replacing the Treaty of Amsterdam<sup>3</sup>, the competences of the Union on the AFSJ are designed in order to ensure that abolition of internal frontiers takes place in full compliance with the respect of fundamental rights (art. 67(2)).

Some of the main objectives of the Union on the matter of asylum legislation get their influence from the political conclusions laid down by the European Council in 1999, including the creation of an AFSJ, the extensive protection of human rights and the development of a Common European Asylum System (CEAS).

In October 1999, the European Council held the so-called ‘Tampere conclusions’<sup>4</sup>, whose objective was the creation of an open and secure Union, “an area of freedom, security and justice in the European Union”. The Council was not only determined to do so by fully using the powers and possibilities offered by the Treaty of Amsterdam, but it also stated the need and conditions for drawing up a draft Charter of Fundamental Rights of the European Union. It was the first political statement on harmonization of standards and procedures for third-country nationals seeking asylum, refugee status or subsidiary protection in the territory of the Union. The Tampere Conclusions also stated the objective of developing a common asylum procedure and a uniform status for those who are granted asylum valid throughout the Union.

The legal basis for the creation of a European legislation on the matter of asylum is represented by art. 78 TFEU, which defines that “the Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to third-country nationals in need of international protection and guaranteeing the principle of non-refoulement”. It moreover states the need that the Union policy on asylum must be in compliance with the Geneva Convention on refugees and other relevant treaties, therefore stressing the importance of interpreting EU legislation in the light of the protection attributed to people in need of international protection as envisaged in the Geneva Convention and other treaties on human rights protection.

The protection of human rights, at the core of the European approach on immigration and asylum, was improved as compared to international standards through the adoption of the Charter of Fundamental Rights of the Union, signed in 2000. It is a legally binding document in accordance with art. 6 TEU and has the same legal value as the European Treaties. The Charter consolidates all the fundamental rights protected by the Union and establishes principles and rights of EU citizens and residents. The Charter came to represent a source of primary legislation after the entry into force of the Lisbon

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<sup>3</sup> Treaty of Amsterdam of 2 October 1997 *amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts*.

<sup>4</sup> Presidency Conclusions of 15-16 October 1999, *on the creation of an area of freedom, security and justice in the European Union*, Tampere Conclusions.

Treaty in 2009, and gained importance in the European jurisprudence ever since. It not only covers civil and political rights, but also apply to workers' social rights.

Following the Schengen agreement of 1985, the freedom of movement gained particular importance in the context of EU legislation, and the legislature decided to extend the right to move freely to third-country nationals in order to properly remove security checks at the common borders of the Union while safeguarding the security of its citizens. Milestone number 3 of the Tampere Conclusions is particularly relevant for this purpose, since it states that the right to move freely throughout the Union "should not be regarded as the exclusive preserve of the Union's own citizens", therefore applying the same freedom to third-country citizens who justifiably seek access to the European territory. For the purpose of making the right to move freely applicable, the Union is required "to develop common policies on asylum and immigration". The freedom of movement was also envisaged in the 1951 Geneva Convention on the status of Refugees (art. 26), which defines that

"Each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence to move freely within its territory, subject to any regulation applicable to aliens generally in the same circumstances".

In the context of the creation of a common market and the abolition of internal frontiers (Schengen agreement<sup>5</sup>), it was necessary for the Union to create a common, integrated system for managing migration flows, asylum applications and other relevant applications for international protection. Although the freedom of movement still not applies to refugees completely, insofar as they are not allowed to choose the Member State of residence inside the Union, it was nonetheless necessary to improve harmonization on entrance and staying of third country nationals in order to make the Schengen area truly applicable.

The creation of a Common European Asylum System (CEAS), envisaged in chapter II of the Tampere conclusions, reaffirmed the will of the Union to respect the right to seek asylum in full compliance with the Geneva Convention and the Protocol on the Status of Refugees. On the basis of binding legislation, the objective was the harmonization of asylum systems and the reduction of national differences in the treatment of applicants for international protection in order to create a common legislation with protection of fundamental rights at the heart of the strategy.

The commitment to the establishment of the CEAS started in 1999 and, until 2005, legislative measures harmonising minimum standards were adopted, including the Temporary Protection Directive<sup>6</sup>, European Refugee Fund, and

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<sup>5</sup> Schengen Convention of 19 June 1990.

<sup>6</sup> Council Directive of 20 July 2001, 2001/55/EC, *on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a*

Family Reunification Directive<sup>7</sup> in order to enhance protection of rights of applicants and create an harmonised system for the management of applications for international protection.

The European Union common approach on immigration and asylum was to be developed in full compliance with the Geneva Refugee Convention of 1951 and the other relevant human rights instruments, in order to be able “to respond to humanitarian needs on the basis of solidarity” (Milestone 4, Tampere Conclusions). The respect of fundamental human rights is at the very core of the common approach on border management, migration and asylum of the Union. The Geneva Convention had the objective of protecting asylum seekers by establishing rights and freedoms applicable to refugees in the contracting States, and the harmonised legislation improved the standards of protection granted by Member States of the Union. Also for the purpose of increasing human rights protection and quality of standards, consultations with the United Nations High Commissioner for Refugees (UNHCR) and other international organizations are required in order to get a better picture of the human rights protection level throughout the signatory States.

According to art. 78 TFEU, the CEAS shall comprise a uniform status of asylum, subsidiary protection, and temporary protection valid throughout the European Union. The Union policies shall be adopted “in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties”. Moreover, it shall set out the “criteria and mechanisms for determining which Member State is responsible for considering an application for asylum” (Dublin Regulation).

The CEAS also ensures that the Union and national institutions will not allow to transfer any individual back to persecution (i.e. respecting the principle of non-refoulement). The principle of non-refoulement is also expressed in the Charter of Fundamental Rights of the European Union (2000/C 364/01), where art. 19(2) defines the protection of asylum seekers from removal, expulsion and extradition, and is implemented by the European Court of Human Rights (ECtHR) as a consequence of the jurisprudence on the prohibition of torture<sup>8</sup>. Protection from refoulement is also defined in the Geneva Convention (art. 33) and is one of the core components of legislation on asylum and human rights protection. It ensures that competences of the EU on human rights protection apply also in relation to the external dimension and to transfer decisions, therefore increasing the standards of protection for migrants.

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*balance of efforts between Member States in receiving such persons and bearing the consequences thereof.*

<sup>7</sup> Council Directive of 22 September 2003, 2003/86/EC, *on the right to family reunification*

<sup>8</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe, 4 November 1950, Rome, art. 3.

The development of the CEAS, as defined in the Policy Plan on Asylum<sup>9</sup>, which was presented in 2008, was based on three main pillars: enhancing the protection of human rights of asylum seekers by harmonizing asylum legislations; the improvement of an effective coordination among Member States; an increased solidarity and responsibility-sharing among Member States and with relevant third-countries.

The protection of fundamental rights within the territory of the Union is defined in the TFEU, art. 6.2, where it is said that actions of the Union and of the Member States shall respect fundamental rights as defined in the European Convention on Human Rights<sup>10</sup> (ECHR). Harmonization of legislation on asylum is promoted through the adoption of acts of secondary law (mainly regulations and directives) that ensure the application of minimum standards of protection and common procedures for examination of applications. Harmonised rules on asylum were developed with the aim of setting out common high standards of protection and cooperation in order to ensure that asylum seekers were treated equally and fairly throughout the Union, regardless of the country in which they applied for asylum, especially in the context of the creation of a common European market.

The enhanced coordination and information-sharing between Member States is based on the European database of fingerprints (Eurodac) for the purpose of managing migration flows, and on cooperation in criminal matters between national authorities and Europol (the European Police Office) for the purpose of reducing international crimes. The Eurosur Regulation<sup>11</sup> aims at improving cooperation between national border guards by facilitating real time information-sharing among Member States with the central hub of Frontex<sup>12</sup>, the European agency for management of operational cooperation at the external borders of the Union. In so doing, the Union develops a uniform approach to migration and asylum and an integrated system of information-sharing that enables the Member States to take correct actions in examining applications for international protection and implementing secondary legislation.

Solidarity and responsibility-sharing are two core principles of the European Union and shall be promoted in the application of common rules and policies such as those on asylum and immigration.

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<sup>9</sup>Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of Regions of 17 June 2008, *Policy Plan on Asylum and Integrated Approach to Protection across the EU*.

<sup>10</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe, 4 November 1950, Rome.

<sup>11</sup> Regulation (EU) No 1052/2013 of the European Parliament and of the Council of 22 October 2013 establishing the European Border Surveillance System (Eurosur).

<sup>12</sup> The European Border and Coast Guard Agency (Frontex) was established by Regulation (EU) 2016/1624 of 14 September 2016 on the European Border and Coast Guard (OJ L 251, 16.9.2016, p. 1).

To preserve the security of the Union and protect citizens' rights, it is not enough to implement legislation at Union level: therefore, the need for externalization of such competence and coordination with third countries. The need for externalization of border control and for cooperation with neighbouring third countries had been envisaged in the Global Approach to Migration and Mobility in 1998, under Austrian Presidency, and has been central ever since. The Global Approach also auspicated for an integrated approach to the external dimension, stating that

“The European Council underlines that all competences and instruments at the disposal of the Union, and in particular, in external relations must be used in an integrated and consistent way to build the area of freedom, security and justice”.

A secure Union is necessary in order to properly tackle migration issues and to effectively enhance applicants' and citizens' rights, and must be promoted in an integrated and consistent way, especially in relation to the external dimension. The Union competence deals with EU citizenship, combating organised crime and terrorism, enhancing the free movement of people within the Union, harmonizing asylum and immigration law, increasing judicial cooperation in criminal matters, enhancing police and custom cooperation. All of these subjects have a strong external dimension and should be tackled through cooperation with (neighbouring) third countries. In the preamble of the consolidated version of TFEU, it is said that actions of the Union shall be made: “*Intending* to confirm the solidarity which binds Europe and the overseas countries”.

Solidarity is one of the core principles on which the Union is founded and shall not only relate to actions between Member States but also to relations between the Union itself and third countries for the purpose of creating a more secure Union. In art. 80 of the TFEU, it is defined that policies of the Union and their implementation

“shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States”.

Solidarity, as defined in the TFEU, is insufficiently applied as it merely pertains to financial solidarity and does not always translate into fair responsibility-sharing among Member States on the examination of applications for international protection. In fact, most of the applications lodged in recent years on the territory of the Union had their examination decided upon by the first Member State in which they were lodged, increasing the workload in the States at the external borders of the Union.

## **1.2 Primary law and international standards for asylum seekers**

Legislation on asylum in the European Union has been influenced by the 1951 Geneva Convention Relating to the Status of Refugees, a multilateral agreement that defines the rights of individuals and the obligations of Nation-states, and the Protocol of 31 January 1967, also relating to the status of

refugees and promoted by the United Nations. By definition of the Protocol and Convention Relating to the Status of Refugees, a refugee is a person who

“owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of his/her nationality and is unable or, owing to such fear, is unwilling to avail him-/herself of the protection of that country; or who, not having a nationality and being outside the country of his/her former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it”<sup>13</sup>.

For the first time, the definition of the term “refugee” was not constrained by any limitation, providing a universal definition which could apply to different circumstances. The Protocol and Convention also apply to stateless persons who are unable or unwilling to return to the country of habitual residence due to well-founded fear of persecution. In general, the Geneva Convention and the Protocol on the status of refugees provide a source of inspiration for regional projects of asylum legislation and human rights protection, such as the European one. The 1951 Convention consolidated previous international instruments relating to refugees in the most comprehensive set of provisions on human rights protection.

In the aftermath of World War II, the United Nations promoted a multilateral agreement in which a clear definition of refugee and the rights and freedoms attributed to it would be promulgated: the Geneva 1951 Convention, which entered into force on 22 April 1954. Although it was the first international document recognising the individual nature of the status of refugees and promoting minimum civil rights, its scope was originally limited in time and space. In fact, the Convention was only applicable in relation to events occurring before 1 January 1951 and signatory States had the possibility to include a geographical limitation by applying the Convention only for those people fleeing events that occurred in Europe before that date. It was only with the 1967 Protocol that the temporal limit was abolished, although States were still allowed to keep the geographical limitation to the application of the Convention. Today, 148 States are signatory to either one or both the Convention and Protocol, the only global instruments dealing with the status and rights of refugees.

The Convention is an instrument both status-based and right-based, and is underpinned by a number of fundamental principles, such as non-discrimination, non-refoulement and non-penalisation. These core principles of human rights protection set out the foundations for the development of a comprehensive codification of the rights of refugees at the international level. This multilateral treaty sets out the legal obligations that States have towards refugees and aims at ensuring that all human beings enjoy fundamental

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<sup>13</sup> Convention of the United Nations on the status of refugees, Geneva, 28 July 1951, art. 1.



freedoms without discrimination of any kind, assuring the “widest possible exercise of these fundamental rights and freedoms” to refugees alike.

All Member States of the EU are part of the Geneva Convention, which they implement through national legislation. Although the EU is not itself part of the Convention, it is nonetheless bound by its principles and it frequently refers to it in the European Treaties and Charter when assuring human rights protection. The Convention is a cornerstone of human rights protection and ensures that people fleeing persecution find their human rights protected in the international community without any distinction or discrimination.

### **1.3 The European format: The ECHR, the Charter of Fundamental Rights of the EU and the enhanced protection under the ‘Geneva plus regime’**

The European Convention on Human Rights<sup>14</sup> (ECHR), formally the Convention for the Protection of Human Rights and Fundamental Freedoms, was drafted in 1950 by the Council of Europe. It is an international agreement whose purpose is the protection of human rights and political freedoms inside the territory of Europe. It draws its inspiration from the Universal Declaration of Human Rights<sup>15</sup> (UDHR), a milestone document on the protection of human rights that was proclaimed by the United Nations General Assembly on 10 December 1948 in Paris, which for the first time established a set of universally protected human rights. All Member States are part of the Convention, which was discussed after the end of World War II to jeopardise the possibility that atrocities such as those that occurred during the two World Wars happen again. Although the European Union itself is not part of the Convention, the EU institutions are nonetheless bound to the obligations set out in the Convention pursuant to art. 6 of the TEU<sup>16</sup>, and must therefore respect fundamental rights in the same way as Member States.

The Convention entered into force on 3 September 1953 and is overseen by the European Court of Human Rights (ECtHR), which ensures control is kept on Member States so that they do not breach fundamental human rights, including civil and political rights. Each of the 47 States which compose the Council of Europe is also signatory to the Convention and one judge for each Member is appointed for the composition of the Court of Strasbourg (ECtHR). The latter issues advisory opinions and judges applications lodged by individuals or contracting States. It ensures that no Member State acts in a way as to jeopardise the protection of human rights when adopting and implementing national or Union legislation.

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<sup>14</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950.

<sup>15</sup> Declaration by United Nations General Assembly, resolution 217 A.

<sup>16</sup> Treaty of Nice of 26 February 2001 *amending the EU Treaty, the Treaties establishing the European Communities and certain related acts*.

At sub-regional level, a primary source of law on human rights protection and asylum is the Charter of Fundamental Rights of the European Union ('EU Charter'), which offers guidelines on the rights enjoyed by protection-seekers within the territory of the Union. The Charter gained the same status as the other EU treaties, as aforementioned, after the entry into force of the Lisbon Treaty in 2009. It draws inspiration from the ECHR and the Geneva Convention and Protocol, and sets high standards of protection within the territory of the Union by making fundamental rights more visible in the Charter.

The Charter has the objectives of preserving the diversity in traditions and cultures of the peoples of Europe as well as their national identities, promote sustainable development and freedom of movement through the extensive protection of human rights. The protection and development of human rights is also described in art. 67(1) TFEU, which provides that "the Union shall constitute an area of freedom, security and justice with respect for fundamental rights". In the preamble, the Charter states that "the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity", and it defines the individual as the component "at the heart of its activities [...] by establishing and creating an area of freedom, security and justice". The right to human dignity is the first of those listed in the EU Charter and dignity itself represents the first chapter of the Charter, followed by chapters on freedom, equality, solidarity, citizens' rights and justice.

The EU Charter affects, in particular, the interpretation of Chapter 2, Title V of the TFEU (i.e. articles 77-80) on Policies on Border Checks, Asylum and Immigration. Art. 78 TFEU clearly states the need for a "common policy on asylum, subsidiary protection and temporary protection" with a view to "offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement". Although efforts have been made in order to harmonize legislation, it must be noted that the conditions under which Member States decide to admit non-citizens are left to the national governments to decide, under the "law of Geneva on refugees"<sup>17</sup>. This lack of coherence and harmonization within national legislations was to be tackled through secondary law.

Many fundamental rights established in the above-mentioned EU Charter get their inspiration from the principles envisaged in the 1951 Geneva Convention, and set the bases for future agreements with a view to increasing protection of asylum-seekers. Art. 18 of the EU Charter, for instance, explicitly refers to the 1951 Geneva Convention and the 1967 Protocol relating to the status of refugees while defining the right to asylum applicable in the territory of the Union. It states that

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<sup>17</sup> MUNARI (2016: 518).

“The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community”.

The principle of unity of the family, defined in the Geneva Convention, ensures that families are kept together and special consideration is given to the rights of the child. From this principle derives the ‘paramountcy principle’, which states that “In all actions relating to children, whether taken by public authorities or private institutions, the child’s best interests must be a primary consideration”. It is enshrined in the Convention on the Rights of the Child and various regional instruments including art. 24 of the Charter of Fundamental Rights of the European Union. Moreover, the respect to family life as defined in art. 7 of the EU Charter has its roots in the same principle of family unity envisaged in the Geneva Convention, recommendation B.

The principle of non-refoulement is defined in art. 33 of the Geneva Convention and states that no Member State shall transfer an applicant “where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion”. A similar provision has been introduced in the EU Charter under the name of ‘protection from removal, expulsion, extradition’ (art. 19), and it prohibits any transfer of applicants in the circumstances where ‘there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment’. It is one of the core principles of human rights protection and has been frequently taken into account by the European Court of Justice (ECJ) and ECtHR in their rulings<sup>18</sup>.

Human rights protection is at the very core of the European approach to migration and presumes strong cooperation and information sharing in order to promptly react to mass influxes of migrants. However, national security and public order are the grounds upon which Member States are allowed to temporarily not fully implement the rights and freedom established in the Union legislation, pursuant to the Schengen Borders Code (SBC) art. 29. The condition for applying such provision is that “exceptional circumstances”, putting the overall functioning of the Schengen area at risk, exist at the external border of the Union and therefore pose a threat to the internal security of the Union.

The ECJ, established in 1952 and headquartered in Luxembourg, is the supreme court of the Union on the matters of EU legislation. It is the judicial institution that promotes content and quality of standards of EU legislation, including those on asylum. It deals with requests for preliminary rulings from national courts, certain actions for annulment, and appeals. Its jurisprudence is considered a source of legislation as it characterises secondary legislation in the light of the Geneva Convention and the protection of fundamental human

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<sup>18</sup> See, inter alia decision by the ECtHR on 23 February 2012, *Hirsi Jaama and others v Italy* [GC], decision of the ECtHR of 4 November 2014, *Tarakhel v. Switzerland* [GC].

rights. When confronted with provisions of EU acts that may conflict with fundamental human rights envisaged in the Geneva Convention or the EU Charter, the court shall interpret the Union legislation in order to promote equal application across Member States of the principles and rights that constitute the common approach of the Union. It is part of the Court of Justice of the European Union (CJEU), which focuses on ensuring that EU law is interpreted and applied in the same way in every Member State.

#### **1.4 Secondary law at EU level: The Dublin system...**

Concerning secondary legislation, it must be noted that it is composed of regulations, directives and decisions that are based on the so-called “Dublin system”, a set of tens of rules that has the aim of increasing harmonization and security while at the same time enhancing protection of rights of applicants vis-à-vis international standards. This enhancement of applicants’ rights vis-à-vis international standards is referred to as “Geneva plus regime”<sup>19</sup>.

The need for harmonization of norms on asylum, immigration and external border control must be understood in the context of the creation of the European common market and the abolition of internal border controls. Read in this light, the need of harmonizing legislation on entrance and staying of third-country nationals and asylum seekers is clearly linked to the promotion and development of the freedom of movement of people, services, capitals and goods envisaged in the Schengen agreement. The abolition of internal border control was to be promoted in parallel with the transfer of the competence of border control to the external frontier of the Union, and harmonised legislation on immigration and asylum was a mean towards a secure and integrated Union.

The Dublin III Regulation<sup>20</sup> (Regulation (EU) No 604/2013) is of paramount importance in the context of EU integration and is one of the central topics of political discussion at Union level, especially in recent years. It first and foremost establishes 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 stateless person. Articles 8-16 of the Regulation set forth a hierarchy of criteria to apply in order to assess responsibility of a Member State for examining an application for international protection and represent an achievement in terms of harmonization of legislation, as the same criteria apply for every Member State when examining an application lodged.

The Dublin system was first discussed during the 1980s and resulted in a treaty between the Member States that was signed on 15 June 1990 with the aim of

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<sup>19</sup> MUNARI (2016: 519).

<sup>20</sup> 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 (recast)*.

being complementary to the Schengen agreement of 14 June 1985<sup>21</sup>. Since the Schengen agreement established, among others, the freedom of movement of people within the Union and the abolition of internal frontiers, it had an effect on (secondary) migratory movement of third-country nationals within the EU, too. In order to contrast the irregular movement of people and the development of international crime across the Union, the EU legislature decided to adopt a set of rules and decisions that would harmonise immigration and asylum legislations across Member States, while also increasing cooperation and information-sharing in order to prevent international crime.

The harmonization of legislation on asylum and the abolition of internal border checks were first envisaged in the White book, published by the Commission in 1985, as necessary policies in order to build the European common market. The Dublin Regulation was the result of intergovernmental cooperation between Member States, and it was only with the Treaty of Amsterdam of 1997 that it was incorporated into the EU legal framework.

The Dublin system is meant to be objective and fair in a double sense: both towards the States and towards individual protection seekers. It is fair towards the State because it is competence of the sovereign nation to decide the conditions upon which to admit third-country nationals according to national politics, internal security and overall economic situation. This decision-making process must be in compliance with fundamental human rights of the applicants. Human rights protection in the Union shall not conflict with any provision of the legal documents on which the Dublin system is based (Geneva Convention and Protocol, Universal Declaration of Human Rights, Charter of Fundamental Rights of the Union), therefore implying primacy of human rights protection over national politics.

### **1.5 ...and other regulations and directives implementing harmonization of standards in the Union**

Harmonization of EU legislation on immigration and asylum is achieved not only through the implementation of the Dublin Regulation, but also through the application of substantial and procedural rules as provided for in the 'Dublin format'<sup>22</sup>. Among the directives and regulations that compose the Dublin format, the EURODAC, EUROSUR, Asylum Procedure Directive, Qualification Directive, Reception Conditions Directive have the purpose of creating common asylum procedures and standards in full compliance with international and European standards of human rights protection. Also, CEAS instruments establish minimum standards of protection for asylum seekers.

The Eurodac regulation<sup>23</sup> establishes a European asylum fingerprint database for the purpose of determining the Member State responsible for examining

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<sup>21</sup> Schengen Agreement between the Governments of the States of Benelux.

<sup>22</sup> MUNARI (2016 : 521 ff.).

<sup>23</sup> Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective

an asylum application made in the EU. It serves the implementation of the Dublin Regulation and, together with it, they make up the so-called “Dublin system”. It was established in 2003 and a proposal to reinforce EURODAC has been discussed since May 2016 following the refugee crisis in 2015, when some Member States were overwhelmed by the number of applications received. The EURODAC central system is the European database where fingerprints of asylum seekers who made an application in any of the Member States are transmitted for the purpose of determining the Member State responsible and checking criminal records of applicants for serious crimes such as murder and terrorism.

The Eurosur Regulation<sup>24</sup> creates a

“multipurpose system of cooperation between the EU Member States and Frontex in order to improve situational awareness and increase reaction capability at external borders”.

It aims at preventing cross-border crime and irregular migration and contributes to protecting migrants’ lives. Each Member State is required to create a National Coordination Centre (NCC) which exchanges information with other NCCs, Frontex and other relevant authorities. The NCC provides a situational picture at the external border and a pre-frontier intelligence picture that contains information on the situation at European borders and the pre-frontier area. The European Border and Coast Guard Agency (Frontex) coordinates the national situational pictures and creates a European situational picture which is rapidly processed and shared with Member States in order to effectively coordinate action to contrast illegal immigration and cross-border crime, or to help boats in distress in the Mediterranean. Once again, the double purpose of the system is to prevent crime and illegal entry to the Union while safeguarding the lives of those who try to reach European shores. Member States in need of assistance can request Frontex to intervene and monitor their borders, detecting cases of irregular migration or cross-border crime, or to locate vessels in distress.

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application of Regulation (EU) No 604/2013 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 and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice.

<sup>24</sup> Regulation (EU) No 1052/2013 of 22 October 2013, *establishing the European Border Surveillance System (Eurosur)*; Regulation (EU) 656/2014 of the European Parliament and the Council of 15 May 2014 *establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by Frontex*; fully integrated in Regulation (EU) 656/2014 of the European Parliament and the Council of 15 May 2014 *establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by Frontex*.

The Asylum Procedure Directive<sup>25</sup> (recast) was adopted by the European Parliament and the Council in 2013 and transposed into national legislations by July 2015. It repealed Council Directive 2005/85/CE on minimum standards on procedures in Member States for granting and withdrawing refugee status. The directive aims at creating a “coherent system which ensures that decisions on applications for international protection are taken more efficiently and more fairly”. It sets rules on the lodging of applications, on time-limits for the examination of such applications, on support of vulnerable people, and on appeals in front of courts and tribunals.

The Qualification Directive of 2011<sup>26</sup> amends Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection, and the content of the protection granted. The directive aims to ensure that people fleeing persecution, wars and torture are treated fairly, in a uniform manner throughout the EU. It clarifies the grounds for granting and withdrawing international protection, it regulates exclusion and cessation grounds, it improves protection of rights and integration measures for the beneficiaries of international protection, and it ensures that the best interest of the child and other gender-related aspects are taken into account in the assessment of asylum applications.

The Reception Conditions Directive<sup>27</sup> ensures that applicants have access to housing, food, clothing, health care, education for minors and access to employment under certain conditions. The current Reception Conditions Directive was adopted in 2013 and replaced the Council Directive 2003/9/CE on minimum standards for the reception of asylum seekers. The deadline for implementing the directive into national law was 20/07/2015. It ensures harmonised standards of reception conditions throughout the Union with a special attention to vulnerable persons, especially unaccompanied minors and victims of torture. It states the need for individual assessment in order to ensure that vulnerable seekers can access medical and psychological support. Moreover, it ensures that fundamental human rights are taken into account in detention.

These pieces of legislation have a pivotal role in shaping the fate of the CEAS, as they create and implement minimum standards that aim at safeguarding the stability of the Union while improving protection of rights of third country

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<sup>25</sup> Asylum Procedure Directive (recast), Directive 2013/32/EU of the European Parliament and the Council of 26 June 2013 *on common procedures for granting and withdrawing international protection (recast)*.

<sup>26</sup> Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 *on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted*.

<sup>27</sup> Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 *laying down standards for the reception of applicants for international protection*, OJ L 180, 29.6.2013, p. 96-116.

nationals and stabilizing migration flows, especially at the South-Eastern borders.

### **1.6 The Dublin Regulation**

The main objective of Dublin I Regulation was to prevent applicants from “orbiting”, when no Member State is considered responsible for the purpose of examining their application, or “asylum shopping”, when multiple applications are lodged in different Member States in order to get the ‘best deal’ out of differences in national legislations. It comes to no surprise that the fundamental rule is that only one Member State should be responsible to examine an application for international protection (art 3.1 Regulation 604/2013). However, which MS has to be regarded as responsible still has to be defined up to now.

Since the system was meant to regulate homogeneous and quite stable migration flows, it soon proved itself insufficient when confronted with the ‘modern’ migratory flows that have affected the European Union during the last decade or so. For such reason, the body of regulations was first amended in 2003 (Dublin II Regulation<sup>28</sup>) and then again in 2013 (‘Dublin III Regulation’). At the time of writing, the third version of the Dublin system is in place (Regulation (EU) 604/2013), a set of rules that aims at harmonizing procedures and criteria among national legislations within the European Union on the matters of asylum, migration and international protection. It applies to the 28 EU countries, Switzerland, Norway, Lichtenstein and Iceland.

The most frequently applied rule for determining the responsibility for examining an application for international protection is sometimes called the “first country rule”, and it defines as responsible the first Member State in which the applicant has lodged a request for international protection (art.13(1)) or the country of illegal entry to the Union (art.13(2)). Art 3(2) of the Dublin III Regulation specifies that such mechanism shall be triggered only when no other Member State can be designated on the basis of the criteria laid down in Chapter III of the Regulation.

It is sometimes said that the security of the Union is as strong as the weakest of its external borders<sup>29</sup> and it is therefore in the Union’s interests to work out a clear and effective method for examining applications lodged on the territory of the Union. The harmonization of national legislations is necessary to preserve the security of the Union, to increase legal certainty and to effectively protect the fundamental rights of migrants and the sovereignty of Nation States. Security issues are often a hot topic for national politicians and for such

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<sup>28</sup> 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.*

<sup>29</sup> RIJPM et al. (2015: 454).



reason national governments are reluctant to leaving the competence of border control to the Union exclusively. Member States, as sovereign States, decide the conditions upon which admitting non-nationals to the country and can also temporarily reintroduce internal borders, availing themselves of the relevant provisions established by the Schengen Code<sup>30</sup>. In effect, borders have been temporarily re-established in “second line” Member States such as Hungary, Germany, Austria<sup>31</sup> following the relocation Decision<sup>32</sup> adopted by the Council of the European Union in 2015 in order to promptly react to the exceptional migratory flows that Member States like Greece and Italy had been confronted with.

At the same time, beyond recognising State sovereignty, the Union shall recognise fundamental rights and freedoms of third-country national applying for international protection on Union territory. It must be noted that explicit protection of fundamental human rights of the applicants was only included in the third attempt to set up a European integrated asylum system. By referring to the rights recognised in the EU Charter and on the European Convention on Human Rights (ECHR) when listing, in Chapter III of the Dublin III Regulation, the criteria that trigger the responsibility allocation mechanism, the new Dublin system identifies special procedures to protect the rights of the child (rec.13) and the right to family life (rec.14). It also prohibits any treatment that could be considered inhumane or degrading (art. 4) and defines the right to an effective remedy (rec.19).

Within the hierarchy of criteria set in Chapter III (Dublin III), criteria based on humanitarian reasons, such as the right to family reunification and the protection of the rights of the child, are ranked higher than the most common rule applied, based on the entry and/or stay of the applicant on the territory of a Member State. However, it must be noted that in the vast majority of cases it is the ‘first country rule’ the one that determines the Member State responsible for examining applications lodged in recent waves of migration. Based on art. 13 of the Regulation, the first country rule establishes that responsibility for examining the application lies on the Member State whose border the applicant has irregularly crossed by land, sea or air having come from a third country. The responsibility on the Member State of entrance ceases after 12 months from the date of irregular border crossing. Therefore, it is often the first Member State in which the applicant has been identified the one which has the obligation to examine the application lodged, creating

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<sup>30</sup> Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 *establishing a Community Code on the rules governing the movement of persons across borders*.

<sup>31</sup> Commission Opinion of 23 October 2015 *on the necessity and proportionality of the controls at the internal borders reintroduced by Germany and Austria pursuant to Article 24(4) of Regulation No 562/2006* (Schengen Borders Code).

<sup>32</sup> Council Decision (EU) 2015/1601 of 22 September 2015 *establishing provisional measures in the area of international protection for the benefit of Italy and Greece*.

unequal burden-sharing of costs and responsibilities among European nations, also due to different geographic location.

Since taking responsibility for examining an application for international protection can be expensive in costs and time, voluntary approaches that promote solidarity are defined in art. 17(1) (“sovereignty clause”) and in art. 16(1) (“humanitarian clause”) of Regulation 604/2013. These voluntary approaches have been barely ever invoked by Member States, leaving boarder countries with a higher share of applications to examine as compared to inland Member States. This lack of solidarity between Member States is likely to negatively affect the correct functioning of the Dublin system and reduce the mutual trust between Member States. An exception to this lack of solidarity is represented by the voluntary approach of Germany to examine applications made by Syrian nationals in the territory of the Union starting from 2015, although humanitarian concerns have been expressed on the legitimacy of this ethnic differentiation. Germany has endorsed the so called Halaf<sup>33</sup> doctrine, which permits any Member State to examine requests for asylum irrespective of the criteria set out by the Dublin regime, although, in this case, at the cost of ultimately increasing the workload for “front line” Member States.

Moreover, as described in Paolo Grasso’s book “L’Europa deporta: richiedenti asilo nella rete del Regolamento di Dublino”, most of the people arriving at European borders are unwilling to remain in the first country in which they were identified (often Italy or Greece), increasing their feeling of exclusion and limiting the possibilities of integration in the civil society. Migrants are often left ‘in transit’<sup>34</sup>, waiting for results of long procedures in countries that have far too many applications to examine and on which territories they are unwilling to stay. In Italy, for instance, procedures to have a residence permit can last up to 3,5 years<sup>35</sup>, during which applicants for international protection cannot seek employment or find legal accommodation.

Due to the length of the procedures that lead to examining the applications and to the lack of concerns over the preferences of applicants, many migrants move from the country of entry to the Union to other, more preferable, countries. Their journey, defined as secondary movement, is often long and unsuccessful, and migrants are often *deported* back to the country where their fingerprints were obtained for the purpose of examining the application following the criteria of responsibility defined in the Dublin III Regulation.

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<sup>33</sup> MUNARI (2016: 537).

<sup>34</sup> BREKKE et al. (2014: 145).

<sup>35</sup> GRASSI (2016).

### **1.7 Procedures and conditions for transferring a protection-seeker under the Dublin III regime: take charge and take back procedure**

As said before, the first country rule is the most frequently applied mechanism for the allocation of responsibility under the Dublin system. However, transfer procedures, both voluntary and not, have been set up in order to improve the responsibility-sharing amongst Member States and/or to apply the default rule in case the applicant has left the territory of the Member State without having a permission granted for it.

Voluntary approaches to the responsibility allocation mechanisms include the ‘sovereignty clause’, defined in art. 17(1), and the ‘humanitarian clause’, defined in art. 16(1). These approaches allow Member States to examine an application even if such examination is not their responsibility under the Dublin Criteria laid down in Chapter III.

Since one of the main objectives of the integrated approach to migration is to reduce the incentives resulting from secondary movements in order to have each application processed only once, two procedures have been envisaged in the Dublin Regulation in order to forcibly transfer applicants from the Member State in which they are residing to the one who is responsible for examining their applications for international protection, meaning the Member State in which the fingerprints were first registered and sent to EURODAC (and therefore where the application was first lodged). These two procedures for transferring an applicant from the Member State in which he or she is residing to the Member State considered responsible are called take charge and take back procedures, both laid down in Chapter VI of the Dublin III Regulation.

The first procedure, defined as “take charge procedure”, is regulated by art. 21 and art. 22 of the Regulation. It applies to all situations where the Member State on which territory the applicant is residing considers that another Member State is “responsible for examining the application” according to Chapter III of the Dublin III Regulation. In this case, the criteria of responsibility must be evaluated before determining which Member State should be considered responsible for the purpose of examining the application<sup>36</sup>. The application of the criteria for determining responsibility is necessary in order to proceed with a take charge request and, as defined in art. 22(2) to (5), the competent authority of the second Member State must be provided with proof and circumstantial evidence supporting such examination of responsibility. Requests for take charge procedures shall be made as quickly as possible and in any event within three months of the date on which the application was lodged. The second Member State shall reply to the first Member State within a two-month period (reduced to one month when

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<sup>36</sup> See, to that effect, judgement of 7 June 2016, *Ghezelbash*, C- 63/15, paragraph 43.

information is taken from the Eurodac system), and failure to act within the time period shall be “tantamount to accepting the request” (art. 22(7)).

On the other hand, take back procedures, as defined in art. 23(1) and art. 24(1) of the Dublin III Regulation, are situations in which the transfer of an applicant to the first Member State in which he or she had previously lodged an application for international protection is not solely meant for the purpose of determining the Member State responsible. As they apply to all situations covered in art. 18(1)(b) to (d) and in art. 20(5), there is no need to assess responsibility based on the criteria laid down in Chapter III of the Dublin III Regulation before submitting a take back request. The requested Member State must satisfy the conditions laid down in articles 20(5) and 18(1)(b) to (d) and therefore not necessarily be considered responsible for examining the application for international protection.

Article 18(1)(b) to (d) of the Dublin III Regulation describes different kinds of situation in which take back procedures may be invoked. It refers to a person who has lodged an application in a Member State, which is under examination, has been rejected at first instance or has been withdrawn by the applicant, who then makes a new application in a different Member State or is there residing without residence permits<sup>37</sup>.

Art. 18(1)(b) concerns an applicant who made an application for international protection which is under examination in a Member State, who then left the first country and made a new application in a different Member State. In this case, the take back procedure can be invoked for the purpose of examining or completing the application lodged in the first Member State. Therefore, the aim of the transfer is to complete the responsibility-allocation process and not the examination of the request itself. This provision applies to the situations such as those at issue in the main proceedings and will be further analysed in this paper together with the scope of the right to effective remedy envisaged in the Dublin Convention in relation to this situation.

Art. 18(c) defines a situation which differs from the previous one since the applicant, before leaving the country and making a new application in a different Member State, withdrew the first application before a first instance decision was made. The applicant, in this case, can either request the Member State responsible to complete its application or he can lodge a new application for international protection in that Member State. The country to which the applicant shall be transferred is “the Member State with which that application for international protection was first lodged”, meaning the ‘first country rule’ still applies in these situations. Art. 18(1)(d) concerns an applicant whose application has been rejected in the first country at first instance only, and who made a new application in a different MS or is there residing without a residence document.

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<sup>37</sup> See, to that effect, judgement of 25 January 2018, *Hasan*, C-360/16, paragraph 44.

The situations referred to in art. 18(1)(c) or (d) entail the examination of the opportunity the applicant has/had to seek an effective remedy against the transfer decision. As defined in art. 27(1) of the Regulation, the right to an effective remedy against a transfer decision, in the form of an appeal or a review, “in fact and in law”, brought before a court or tribunal, shall apply to those applicants who withdrew or had their application rejected in the first country where they lodged it.

Concerning art. 20(5), it describes a situation in which an applicant for international protection has lodged an application in a Member State, has withdrawn the application in that Member State during the process of determining responsibility, and made a new application in a different Member State, where he/she is residing. Under the conditions laid down in articles 23, 24, 25 and 29 the applicant shall be taken back to the country where the application for international protection was first lodged. The purpose of this transfer is to complete the process of determining the Member State responsible, as specified in the provision, since that process had been halted in the first Member State due to the withdrawal of the applicant. This provision has the objective of reducing incentives resulting from secondary movements and implementing the rule that only one Member State is required to analyse an application for international protection.

Art. 25 describes the procedure for requesting and accepting take back requests, and contains no provision on the need to apply the criteria expressed in Chapter III of the Regulation when applying take back procedures. The provision merely states that the necessary checks shall be made by the requested Member State and a decision on the take back request shall be made within one month (two weeks if the data is obtained from Eurodac system) from the date on which the request was received. Failure to act within the time limits defined in the Regulation is tantamount to accepting the request, and shall entail an obligation to take back the person concerned and provide for proper arrangements on arrival as defined in art. 25(2).

### **1.8 The right to effective remedy attributed to protection seekers against a transfer decision**

The right to effective remedy and fair trial, defined in art. 27(1) of the Regulation, is one of the procedural safeguards that aim at protecting asylum seekers from the incorrect application of the principles guaranteed by the integrated approach of the European Union on the issues of immigration and asylum. It states that

“The applicant or another person as referred to in art. 18(1)(c) or (d) shall have the right to an effective remedy, in the form of an appeal or a review, in fact and in law, against a transfer decision, before a court or tribunal”.

Read in the light of recital 19 of the Dublin III Regulation, the right to effective remedy must cover both the examination of the application of the Regulation itself and the legal and factual situation in the Member State where the

applicant has to be transferred<sup>38</sup>. Both the observance of the rules attributing responsibility for examining an application for international protection to a Member State and the procedural safeguards laid down in the Regulation can be questioned before the referring court in an action against a transfer decision. Different categories of applicants for international protection are equally entitled to plead the incorrect application of the Regulation or the insufficient conditions of reception in the Member State in which the applicant is to be transferred.

An applicant can resort to this right if he/she satisfies the conditions laid down in art. 18(1)(c) or (d) and if the applicant is subject to a transfer decision, regardless of whether the competent authorities issued a take back or a take charge procedure on the case. However, the provision does not imply that the applicant may rely on the provisions of the Regulation in a national court when the competent authorities are not bound by such provisions when adopting transfer decisions. In the case at issue, the question of the referring court specifically arises from doubts on whether the competent authorities (in this case, Netherland authorities) are obliged to take account of the criteria laid down in Chapter III of the Regulation, and in particular in this case art. 9, before issuing a take back request.

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<sup>38</sup> Judgements of 26 July 2017, *Mangestab*, C-670/16, paragraph 43, and of 25 October 2017, *Shiri*, C201/16, paragraph 37.

## **2.1 Introduction to the disputes and to the questions referred for preliminary ruling**

The joined cases concern two Syrian nationals who both lodged a second application for international protection in the Netherlands after having lodged a previous application in Germany. Both women claimed a family relationship existed with a person who was beneficiary of international protection in the Kingdom of Netherlands and both made an appeal against the decision to transfer them under take back procedures to the first country in which they lodged the application (i.e. Germany) on the grounds of the presence of their husband on the territory of the second Member State. The question referred to the Court for preliminary ruling concerns the possibility of an applicants to plead the incorrect application of the criteria for determining responsibility set out in Chapter III of the Regulation, and in particular art. 9, against a transfer decision, and in particular a take back decision, pursuant to art. 18(1)(b). The question is particularly relevant since it concerns the procedural right of effective remedy under art. 27(1) of the Dublin III Regulation and follows a vast jurisprudence on the interpretation of such provision in the light of recital 19 of the Regulation. Moreover, it defines whether or not the competent authorities of a second Member State are required to examine the criteria for determining responsibility before they can properly issue a take back request.

## **2.2 Facts at issue in the proceedings**

### **C-582/17**

A Syrian national, referred to as H., lodged an application for international protection in the Netherlands on 21 January 2016. The State Secretary of the Netherlands, two months later, submitted to the German authorities a take back request after considering that the applicant had previously lodged an application in Germany and therefore the situation was the one described in art. 18(1)(b) of the Dublin III Regulation. In fact, the time limits provided for in the Regulation had not been exceeded and responsibility was still imposed on the first Member State, where the decision on the application was under examination. Failing the German authorities to reply within the two-weeks period prescribed by the Regulation, the State Secretary decided by decision of 6 May 2016 not to examine the application for international protection lodged by H. in the Kingdom of Netherlands. The view of the State Secretary was that H was not entitled to rely on the criteria for determining responsibility laid down in Chapter III of the Regulation, and in particular art. 9, since a take back situation rather than a take charge procedure was at issue. The applicant had, in fact, previously informed the Dutch authorities of the presence of her husband on the territory of the Member State, therefore implying the relevance of the criteria laid down in Chapter III of the Regulation when examining her application. Nonetheless, the view of the State Secretary was that she was not entitled to rely on those criteria in a take back situation such as that at issue in the proceeding. H. brought an action against the State Secretary's decision

before the Rechtbank Den Haag, zittingsplaats Groningen (District Court, The Hague, sitting at Groningen, Netherlands), which upheld and annulled the decision of the State Secretary on the grounds that it was “insufficiently reasoned”. Both H. and the State Secretary appealed against that judgement. The referring court’s reasoning was that, in accordance with the logic underpinning the Dublin Regulation, only the first Member State in which an applicant lodged an application for international protection was entitled to determine the Member State responsible for examining an application based on the criteria defined in the Regulation. Therefore, it concluded that the applicant could not rely on the criteria for determining responsibility in the Netherlands, since she had not waited until the end of the procedure in the first Member State in which she had lodged the application and a take back agreement existed between the two Member States. Nonetheless, the Court was uncertain on whether such approach would be in contrast with previous judgements of the 7 June 2016, *Ghezelbash* and *Karim*<sup>39</sup>. In these previous cases, the Court confirmed that

“the provision on effective remedy in art. 27 of the Dublin III Regulation must be interpreted as meaning that asylum seekers are given the opportunity to request a court to suspend the implementation of the transfer decision pending the outcome of his or her appeal”.

Moreover, the Court stated in *Ghezelbash* that an asylum seeker is entitled to plead, in an appeal against a transfer decision, the incorrect application of the criteria for determining responsibility laid down in Chapter III of the Dublin III Regulation. This interpretation confers a right to effective remedy against any transfer decision, including take back procedures such as those at issue. Given this doubt on the interpretation of the right to effective remedy, the Council of State of the Netherlands (Raad van State) referred the following question to the Court of Justice for a preliminary ruling:

“Must [the Dublin Regulation] be interpreted as meaning that only the Member State in which the application for international protection was first lodged can determine the Member State responsible, with the result that a foreign national has a legal remedy only in that Member State, under Article 27 of [that regulation], against the incorrect application of one of the criteria for determining responsibility set out in Chapter III of [the Dublin Regulation], including Article 9?”.

#### **C-583/17**

R., a Syrian national, lodged an application for international protection in the Netherlands on 9 March 2016. Taking the view that she had already lodged an application in Germany, the State Secretary sent a request to take her back to the German authorities pursuant to art. 18(1)(b) of the Dublin III Regulation. The German authorities initially rejected the request taking the view that R. had a husband who was beneficiary of international protection in the Netherlands and therefore art. 9 of the Regulation ought to be applied in that

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<sup>39</sup> Judgements of 7 June 2016, *Ghezelbash*, C-63/15, and *Karim*, C-155/15.



situation, with the result of acknowledging the responsibility of the Kingdom of Netherlands. The State Secretary of Netherlands sent a new request to the German authorities to reconsider the request on the grounds that R's marriage was deemed implausible. The German authorities, after reconsidering the situation, agreed as of 1 June 2016, to take back R. The State Secretary decided, by decision of 14 June 2016, not to examine the application lodged by R for two reasons: first, because the marriage was not deemed plausible by Dutch authorities; in the second place because the applicant was not considered entitled to rely on art. 9 of the Dublin III Regulation since a take back situation was at issue and therefore the first country rule applied when determining the Member State responsible for the examination of her application for international protection. R brought an action before the Rechtbank Den Haag zittingsplaats 's-Hertogenbosch (District Court, The Hague, sitting at 's-Hertogenbosch, Netherlands), which, by decision of 11 August 2016 upheld and annulled the decision of the State Secretary. The District Court made its decision on the grounds that applicants for international protection are entitled to rely on the criteria for determining responsibility both in take charge and take back situations. R. was therefore entitled to plead the incorrect application of the criteria for determining responsibility set out in Chapter III of the Regulation against any transfer decision, including the take back procedure at issue in the proceeding. The State Secretary appealed against the decision before the referring court. The Council of State (Raad van State) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

“Must [the Dublin Regulation] be interpreted as meaning that only the Member State in which the application for international protection was first lodged can determine the Member State responsible, with the result that a foreign national has a legal remedy only in that Member State, under Article 27 of [that regulation], against the incorrect application of one of the criteria for determining responsibility set out in Chapter III of [the Dublin Regulation], including Article 9?”.

Then, it continued:

“In answering question 1, to what extent it is significant that, in the Member State in which the application for international protection was first lodged, a decision on that application had already been made or, alternatively, that the foreign national had withdrawn that application prematurely?”.

The Court on 19 October 2017 decided that the cases be joined for the purpose of written and oral procedure and judgement, since similar questions were referred to the Court in the two preliminary rulings.

### **2.3 Question referred**

Art. 267 of the TFEU (former Article 234 TEC) entails the possibility for a national court or tribunal to refer to the Court of Justice of the EU (CJEU) for a preliminary ruling. National courts can request a preliminary ruling when the interpretation of the Treaties establishing the European Union or the

interpretation and validity of acts of EU institutions, bodies, offices or agencies are involved. The conditions for submitting a preliminary ruling is that the decision is necessary for the national court to give a judgement, or that there is no judicial remedy against the pending decision under national law. The question shall be relevant for the interpretation of EU law and the uniform application of it throughout the territory of the Union, and must necessarily come from doubts raised before a national court on the interpretation of EU law and existing case-law. The question referred to the CJEU must be new and of general interest for the interpretation and application of Union law.

Art. 9 of the Dublin III Regulation establishing the criteria and mechanisms for determining responsibility of an application lodged in a Member State by a third-country national or stateless person (Regulation 604/2013) states that

“Where the applicant has a family member, regardless of whether the family was previously formed in the country of origin, who has been allowed to reside as a beneficiary of international protection in a Member State, that Member State shall be responsible for examining the application for international protection, provided that the persons concerned expressed their desire in writing”.

The examination of an application for international protection lodged by a person as referred to in art. 3 who has a family member<sup>40</sup> beneficiary of international protection and is legally residing in another Member State, shall, by means of art. 9 of the Regulation, be transferred to that Member State on account of the existing family relation. The provision entails that, for the transfer of responsibility to occur, the applicant shall express desire in writing to the competent authorities of the Member State in which he/she lodged the application.

The question for preliminary ruling, in the cases described in this paper, refers to the interpretation of Dublin III Regulation and, in particular, whether a third-country national who entered the territory of the Union in a Member State and there lodged an application for international protection, then left the Member State and subsequently lodged a new application in a different Member State, is entitled to rely in the second Member State on the criteria for determining responsibility laid down in Chapter III of the Regulation, and in particular on art. 9, against a decision to transfer him/her, in an action brought under art. 27(1). The referring Court was unsure on whether the competent national authorities were obliged to consider the criteria for determining responsibility defined in Chapter 3 of the Regulation in the context of a take back procedure and whether art. 9 is applicable in the situations such as those at issue in the main proceedings.

The two cases, examined together, concern applicants who had transfer decisions pending over their cases on the grounds that responsibility for the examination of their application for international protection still applied to the

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<sup>40</sup> Definition of “family members” Dublin III Regulation, art. 2(g).

first country in which they lodged an application (i.e. Germany), given that the time limits had not been exceeded. However, both applicants provided the competent authorities of the second Member State (i.e. Netherlands) with information clearly establishing the responsibility of that second Member State on the ground that they were married to persons who were beneficiary of international protection in the Kingdom of Netherlands, and therefore the criterion for determining responsibility as defined in art. 9 of the Regulation could apply to their situations. Nonetheless, since a take back situation does not normally require the examination of the criteria for determining responsibility laid down in Chapter III, the referring court of the Netherlands was unsure on whether the applicants could, in an action brought under art. 27(1), rely on the criterion set out in art. 9 against a take back decision.

The right to effective remedy and fair trial, defined in the Dublin III Regulation under art. 27(1), provides a right to a person who is subject to a transfer decision. The remedy against a transfer decision provided for in the above-mentioned provision must be in form of an appeal or review, in fact and in law, before a court or tribunal. Since it is not explicitly defined to which transfer decision it applies, the Court held that the fact that the remedy is adopted at the end of a take charge or take back procedure is not capable of influencing the scope of the right. Moreover, the right applies to any applicant subject to a transfer decision and to other persons referred to in art. 18 (c) or (d) of the Regulation.

In order to ensure compliance with international law and standards, the effective remedy against transfer decisions must cover: 1) the examination of the application in compliance with the Regulation, and 2) the legal and factual situation in the Member State where the applicant is to be transferred. It comes from precedent case-law<sup>41</sup> that the right to effective remedy has a scope, read in the light of recital 19 of the Regulation, which is significantly larger than the one envisaged in *Abdullahi*, where the reasoning of the Court suggested that pleading systemic deficiency in the asylum system was the only ground on which an applicant could rely on art. 27(1). Recital 19 states that the right to effective remedy “[...] should cover both the examination of the application of the [Dublin III] Regulation and of the legal and factual situation in the Member State to which the applicant is transferred”. Moreover, Recital 19 explicitly refers to art. 47 of the Charter of Fundamental Rights of the Union when establishing legal safeguards, and the right to effective remedy, for the purpose of guaranteeing effective human rights protection of the persons concerned.

The provision must be interpreted as meaning that an applicant who is residing in a Member State which made a transfer decision against him/her, is entitled to rely on art. 27(1) against that decision both in a take charge and take back situation. The remedy shall relate to both the application and observance of

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<sup>41</sup> Judgement of 26 July 2017, *Mengesteab*, C- 670/16, paragraph 43, and of 25 October 2017, *Shiri*, C- 201/16, paragraph 37.

the rules for attributing responsibility for examining the application, and the procedural safeguards laid down in the regulation. The referring court of the Netherlands asked, in the preliminary ruling, whether the authorities of the Member State are required to take account of the criteria for determining responsibility laid down in the Regulation when issuing a take back request, and whether the premature withdrawal of the application or the adoption of a decision in the first Member State are significant in order to answer the first question.

#### **2.4 Parties to the proceedings**

The disputes saw, on one side, the two applicants, H. and R., and on the other side the Staatssecretaris van Veiligheid en Justitie (State Secretary for Security and Justice of the Kingdom of Netherlands). The judging Court (Grand Chamber) gave its decision after having heard the Opinion of the Advocate General Sharpston and having considered the observations submitted by the lawyers (advocaat) of the applicants, and by the Netherlands Government, the Finnish Government, the United Kingdom Government, the Swiss Government and the European Commission, all acting as Agents in the proceedings through their representatives. The decision was reached and given at the sitting on 29 November 2018.

### **3.1 The procedure applicable in situations such as those at issue in the main proceedings**

Take back procedures are defined in art. 23(1) and art. 24(1) of the Dublin Regulation and apply to the persons referred to in art. 20(5) and art. 18(1)(b) to (d).

Concerning art. 20(5), it relates to an applicant for international protection who lodges an application for international protection in a Member State after he has formally withdrawn a previously lodged application in a different Member State, during the process of determination of responsibility. The said applicant could be transferred, under a take back procedure pursuant to art. 23(1) and art. 24(1), to the first Member State in which he lodged the application, and such transfer could occur regardless of the fact that the applicant formally withdrew the application in the first Member State or not. Since a transfer could be issued in respect of an applicant who gave formal notice to the competent authorities of the first Member State of his wish to withdraw the application, a take back decision can, *a fortiori*, be issued in respect to an applicant who did not formally notify the competent authorities of his decision to abandon the territory and consequently left the Member State during the process of determination of the Member State responsible. However, for the purpose of applying the provision, the Court held that art. 20(5) is also applicable to situations in which a formal notice has not been submitted to the competent authorities and the applicant has departed without providing information on his wish to abandon that territory and withdraw the application. Therefore, in line with the opinion of the Finnish Government and the Commission at the hearing, the Court defined that an applicant's departure from the territory of a Member State shall be considered as an implicit withdrawal of his application, thereby extending the application of art. 20(5) to applicants who did not formally notify the competent authorities of the first Member State but left its territory.

Art. 18(1)(b) to (d), on the other hand, refers to a person who lodged an application for international protection or is residing in a Member State without a residence document after he had previously lodged an application in a different Member State. The provision applies when the application in the first Member State is under examination, has been withdrawn by the applicant while under examination, or has been rejected at first instance by decision of the Member State. Worth of consideration is the fact that "examination of an application for international protection", as defined in art. 2(d) of the Regulation, covers any examination carried out by the competent authorities relating to an application for international protection except the procedure for determining the Member State responsible for examining the application in accordance with the Regulation. Therefore, the Court held that art. 18(1)(b) to (d) can apply only when the first Member State has completed the examination of responsibility by accepting that it is the Member State responsible for examining the application lodged, and has started examining such application

by applying the Directive 2013/32<sup>42</sup>. Accordingly, it must be held that the cases referred to in the proceedings fall within the scope of take back procedures, irrespective of whether the examination of the application in the first Member State has started pursuant to Directive 2013/32 or the applicant has withdrawn its application by formally (or not) notifying the competent authorities.

### **3.2 The scheme applicable to take back procedures**

The two procedures for transferring an applicant from the Member State in which he is residing to the Member State responsible are envisaged in Chapter VI of the Dublin III Regulation, and in particular sections 2 and 3. Take charge procedures, as defined in section 2 of the said Regulation, entail the necessity to assess responsibility based on the criteria laid down in Chapter III of the Regulation before properly make a take charge request (art. 21(1)), therefore permitting take charge procedures to be issued only when the Member State to which the applicant is to be transferred is considered responsible for examining the application for international protection lodged. In this circumstances, the process of determination of responsibility pursuant to the criteria laid down in the Regulation is of crucial importance and the requesting Member State shall provide the other Member State with proof and circumstantial evidence supporting its examination of responsibility (art.22(2) to (5)). Take back procedures, on the other hand, as defined in section 3, do not require the requested Member State to be responsible for examining the application pursuant to the criteria laid down in Chapter III, but merely to be the State which satisfies the conditions provided for in art. 20(5) or art. 18(1) (b) to (d). It must be stressed that take back procedures as defined in art. 23(1) and art. 24(1) can be invoked not when the criteria for determining responsibility apply, but when the requested Member State satisfies the conditions laid down in art. 20(5) or art. 18(1) (b) to (d). The requested Member State shall be the one in which the applicant has previously lodged the application for international protection or through which he entered the territory of the Union, either legally or illegally.

The Court analysed the provisions establishing transfer procedures under the Dublin Regulation with a view to analysing the influence attributed to the criteria for determining responsibility defined by the EU legislature. It first and foremost found that the criteria set out in Chapter III of the Regulation have a pivotal role in take charge procedures, but lack overall relevance in the context of take back decisions. From the wording of the provisions themselves, the standard forms annexed to the Regulation, and the different time limits set out in order to lawfully issue a transfer procedure, the Court recognised the different nature and scope of the two transfer procedures. Moreover, the Court defined the limitations that an opposite interpretation, following which in both cases the competent authorities of the Member State

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<sup>42</sup> Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 *on common procedures for granting and withdrawing international protection*.

shall apply the same criteria of responsibility before being able to issue a transfer procedure, would create in the context of an integrated management of asylum applications. Beyond recognizing that the EU legislature would have not created two different procedures if the application of the two provisions was to be the same, the Court also noticed that applying the same criteria for determining responsibility in take charge and take back situations is capable of undermining some of the core principles and objectives of the Union on the matter of asylum legislation, namely the obligation that a single Member State shall be responsible for examining the application, the rapid processing of applications, the disincentives towards secondary movements. The reasoning of the Court on the cases at issue developed on 5 main points.

In the first place, the Commission observed that the term “responsible” is used in a different manner in the provisions defining take charge and take back procedures: in the case of take charge procedures, responsibility is assessed, as previously said, on the basis of the criteria for determining responsibility and pertains to the responsibility to examine the application for international protection itself; on the other hand, in the case of take back procedures, the responsibility is assessed on the basis of the provisions in art. 20(5) and art. 18(1)(b) to (d) and does not necessarily translate into responsibility to examine the application. Responsibility as defined in art. 23(1) and art. 24(1) does not automatically translate into responsibility to examine the application, therefore permitting transfers to occur for purposes which differ from the examination of the applications themselves. When applying a take back procedure, the term “responsible” does not necessarily include responsibility of examining an application lodged as does art. 21(1) in setting out the rules to apply in the case of take charge procedures.

Concerning art. 20(5), the Court considered apparent from its wording that the obligation to take back is imposed on the Member State in which the application was “first lodged”, therefore implying irrelevance of the criteria for determining responsibility for the examination of applications in such a context and in relation to take back procedures. The provision describes a situation in which a third-country national or stateless person issued an application for international protection in a Member State, then formally withdrew the application and applied in a different Member State during the process of determination of the Member State responsible in the first Member State. The special status provided for in the Regulation applying to the Member State in which the application was first lodged does not take legitimacy in the application of the criteria of the Regulation, and the application of the criteria cannot serve to identify the Member State responsible. The purpose of the transfer to the Member State responsible pursuant to art. 20(5) is to enable the latter to complete the process of determination of responsibility for examining that application for international protection, and not the completion of the examination itself. The Member State in which the application was first lodged gains a special status under the Dublin III Regulation in relation to the application lodged and must fulfil some

special obligations deriving from such ‘special status’<sup>43</sup>. Since the aim of the transfer in such context is specifically to enable the first Member State to “complete the process of determining the Member State responsible”, by applying the criteria laid down in Chapter III, it must be held that the application of a criterion is not capable of influencing the procedure in a way as to prevent the transfer to the Member State responsible pursuant to art. 20(5) for determining the responsibility for the examination of the application.

Art. 18(1)(b) to (d) imposes special obligations on the Member State responsible, and, as previously found, specifically applies when the process of determination in the first Member State has been completed and resulted in the Member State acknowledging its own responsibility for examining the application lodged. Since the provision applies to different situations, it must be noticed that the same reasoning pertains to individuals whose application is under examination, has been rejected at first instance or has been withdrawn by the applicant, and who then lodged a new application in a different Member State. In such circumstances, when responsibility for the examination has been assessed by the first Member State and resulted in the recognition of its own responsibility, it is clearly unnecessary to re-apply in the second Member State the rules and criteria defined in the Regulation governing the process of determination of responsibility. In this context, it is apparent that the criteria set out in Chapter III of the Regulation cannot serve as a basis for determining responsibility, since responsibility for determining which Member State should examine the application pursuant to such criteria pertains to the first Member State in which the application was lodged.

A second line of reasoning concerning the difference between take charge and take back procedures considers the requirements envisaged in the Regulation, set out, respectively, in art. 22(2) to (5) and art. 25 of the Dublin III Regulation. The requirements defined in the context of a take charge procedure include the submission to the Member State considered responsible of elements of proof and circumstantial evidence in relation to the application of the criterion set out in Chapter III and how to properly apply those criteria to the situations under consideration. The same cannot be said for take back procedures, insofar as the only requirement provided for in art. 25 is that “necessary checks” be made in order to give a decision on the transfer of the applicant, with no reference to the application of the criteria for determining responsibility. Moreover, it must be noted that the time limit established in the context of take charge procedures is significantly longer than that provided for in the context of a take back procedure, reinforcing the idea that a simplified mechanism applies to take back decisions as compared to take charge ones.

In the third place, the abovementioned interpretation is supported by the different standard forms for take charge and take back procedures established

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<sup>43</sup> Judgement of 26 July 2017, *Mengesteab*, C-670/16, paragraphs 93 and 95.



in Regulation No 1560/2003<sup>44</sup>. Specifically defined in Annex I, the take charge form provides the requesting Member State with the possibility to mention the relevant criterion applied by ticking a box and submitting information in order to enable the requested Member State to check the correct application of the criterion in the case at issue. On the other hand, the standard form for take back procedures, defined in Annex III, merely requires the requesting Member State to define whether the decision was made on the basis of art. 20(5) or art. 18(1)(b), (c), or (d), and contains no section relating to the application of the criteria of Chapter III. The absence of a section relating to the criteria for determining responsibility in the standard form applicable for take back requests is, *de facto*, an evidence supporting the claim that such criteria are not relevant in that context, therefore implying that the competent authorities of a Member State are not obliged to take account, before making a take back request, of the criteria set out in the Regulation.

In the fourth place, it must be noted that the opposite interpretation, according to which take backs can only be made when the requested Member State is responsible pursuant to the criteria for determining responsibility, is at variance with the general scheme of the Regulation. It would eventually mean that a single procedure was to be applied in both situations almost in the same way by applying the same criteria before submitting a request. Such a single mechanism would imply a first step, where the competent authorities of the Member State determine the Member State responsible for examining the application for international protection pursuant to the criteria for determining responsibility, and a second step consisting of the submission of the request to the responsible Member State. Take back and take charge procedures would, then, be assessed and determined on the same basis (the compliance with the criteria set out in the Regulation), and a single mechanism for transferring applicants would have been envisaged. However, had the European legislature intended to create a single mechanism, it would not have set out two separate procedures applicable in different situations, set out in details and subject to two different provisions. Therefore, it must be concluded that it is only in the case of take charge procedures that the criteria for determining responsibility are relevant and can be invoked against a transfer procedure.

Last but not least, the Court noticed that the interpretation just mentioned is also capable of undermining some of the objectives achieved by the Dublin III Regulation. In the cases referred to in art. 18(1)(b) to (d), it would imply that the authorities of the second Member State could, *de facto*, re-apply the criteria for determining responsibility and re-examine an application for international protection on which the first Member State had already reached a decision. It follows that an applicant who leaves the territory of the first

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<sup>44</sup> Commission Regulation (EC) No 1560/2003 of 2 September 2003 *laying down detailed rules for the application of Council Regulation (EC) No 343/2003 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*.

Member State while the process of determination of the Member State responsible has started, could have its application re-examined by the competent authorities of a second Member State on the same basis even after a conclusion is reached in the first Member State regarding its own responsibility on the application. One of the goals of the Dublin Regulation being specifically to reduce incentives coming from secondary movement by establishing uniform mechanisms and criteria for determining the Member State responsible, such an interpretation would eventually run counter to one of the core principles of the European approach on asylum.

Moreover, the aforementioned interpretation would run counter to an essential principle of the Dublin Regulation stated in art. 3(2), according to which only a single Member State is responsible for examining an application for international protection, in the case in which the two Member States reach different conclusions on the determination of the Member State responsible. The re-examination, beyond risking to undermine the principle expressed in art. 3(2), could also jeopardise the objective of rapid processing of applications defined in recital 5 of the Regulation. Depending on the circumstances, the re-examination might occur on several occasions and could give rise to different decisions on the assessment of responsibility, thereby increasing the time spent in the process of determination and further threatening the rapid processing of applications.

It follows that, in the cases referred to in art. 23(1) and art. 24(1), the competent authorities of the Member State are not required to establish, before making a take back request, whether the requested Member State shall be considered responsible pursuant to the criteria set out in Chapter III of the Regulation and, in particular, on the basis of art. 9. Considering that take charge and take back procedures differ substantially and that the standard forms reflect the different requirements, it must be held that an applicant for international protection is not entitled to plead the incorrect application, in a Member State different from the one responsible for the examination of the application for international protection, of one of the criteria for determining responsibility defined in Chapter III, and in particular art. 9.

Nevertheless, the Court noted that, in the cases referred to in art. 20(5), a transfer could occur without having been established that the Member State is the one responsible for examining the application, since it concerns an applicant who formally withdrew the first application during the process of determination of the Member State responsible. This implies that in the situation in which the process of determination of responsibility results in the competent authorities acknowledging that the Member State who previously issued the take back procedure is the Member State responsible for examining the application, another transfer, in the opposite direction, might have to be envisaged. Also in this case, the objective of rapid processing of applications could be severely undermined, and so would the possibility for a new take charge request to be issued. The time limit for take charge requests, defined

in art. 21(1), although significantly larger than the one applicable to take back procedures, would be nonetheless capable of hindering the possibility that a new take charge request be made. Given the former, the Court concluded that

“the criteria for determining responsibility set out in articles 8 to 10 of the Regulation, read in the light of recitals 13 and 14 thereof, are intended to promote the best interest of the child and the family life of the persons concerned”.

Those rights are moreover established by articles 7 and 24 of the Charter of Fundamental Rights, therefore constituting a source of primary law in the EU legislation and a principle of human rights protection. With this in mind, and in the context of sincere cooperation, the Court held that a Member State cannot transfer an applicant as defined in art. 20 (5) to another Member State in the context of a take back request when the person concerned provides information clearly establishing that it should be regarded as the Member State responsible pursuant to the criteria laid down in the Regulation. On the contrary, when such situation occurs, the Member State shall accept its responsibility for examining the application.

### **3.3 Answer to the questions referred**

The Court (Grand Chamber) ruled that

“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 must be interpreted as meaning that a third-country national who lodged an application for international protection in a first Member State, then left that Member State and subsequently lodged a new application for international protection in a second Member State:

- is not, in principle, entitled to rely, in an action brought under Article 27(1) of the Regulation in that second Member State against a decision to transfer him or her, on the criterion for determining responsibility set out in Article 9 thereof;

- may, by way of exception, invoke, in such an action, that criterion for determining responsibility, in a situation covered by Article 20(5) of the Regulation, in so far as that third-country national has provided the competent authority of the requesting Member State with information clearly establishing that it should be regarded as the Member State responsible for examining the application pursuant to that criterion for determining responsibility“.

An applicant who lodged an application for international protection in a Member State after having withdrawn an application under examination previously lodged in another Member State, can, by way of exception, invoke the right to effective remedy against a decision to transfer him by invoking the application of one of the criteria for determining responsibility. The condition for the criteria to apply to take back procedures is that the applicant, in a situation described in art. 20(5), provides the second Member State with proof

and circumstantial evidence establishing that the criteria laid down in the Regulation apply to his situation and entail the responsibility of that Member State for the examination of the application for international protection laid by the person concerned on the territory of the Union. When proof and circumstantial evidence is provided by the applicant and assessed on the basis of the Regulation, the Member State shall annul the transfer decision and accept its own responsibility for examining the application for international protection. When, on the other hand, the situation at issue does not involve the application of art. 20(5) but pertains to responsibility under art. 18(1)(b) to (d), the applicant for international protection is not entitled to rely on the criteria set out in the Regulation and, in particular, art. 9, against a transfer decision made by the competent authorities on his case. In an action brought under art. 27(1) against a transfer decision, an applicant whose situation does not involve the application of art. 20(5) cannot rely on the criteria for determining responsibility laid down in Chapter III.

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## RIASSUNTO

### Introduzione alla sentenza e alla questione pregiudiziale

Questa tesi analizza una sentenza della Corte di Giustizia dell'Unione Europea riguardante le cause riunite C-582/17 e C-583/17 che hanno come argomento principale l'interpretazione del regolamento Dublino III<sup>45</sup>. La domanda di pronuncia pregiudiziale, ai sensi dell'art. 267 TFUE<sup>46</sup>, chiede se, nel contesto del regolamento Dublino III, un cittadino di un paese terzo che ha presentato una domanda di protezione internazionale in un primo Stato membro, ha poi lasciato quello Stato membro e si è trasferito in un secondo Stato membro, dove ha presentato una nuova domanda di protezione, possa invocare, nel secondo Stato membro, in un ricorso ai sensi dell'art. 27(1) avverso a una decisione di trasferimento, i criteri di competenza enunciati nel capo III del regolamento, e in particolare l' art. 9.

### Quadro delle fonti giuridiche primarie in materia di immigrazione e asilo

Il quadro delle fonti giuridiche dell'Unione Europea è suddiviso in diritto primario (i Trattati dell'Unione Europea e i principi generali) e diritto derivato (basato sui Trattati, costituito da regolamenti, direttive, raccomandazioni, decisioni, opinioni e atti atipici). Il Trattato sul Funzionamento dell'Unione Europea (TFUE) e il Trattato sull'Unione Europea (TEU), e i loro protocolli, costituiscono le fonti primarie del diritto comunitario e risiedono all'apice della gerarchia giuridica. Essi stabiliscono le competenze legislative dell'Unione e degli Stati membri e definiscono il ruolo e le modalità operative delle istituzioni europee. La competenza in materia di asilo è definita in art. 4(2)(j) TFUE e fa parte delle competenze condivise tra l'Unione e gli Stati membri.

Il Trattato di Lisbona<sup>47</sup> dichiarò, tra le altre cose, la Carta dei Diritti Fondamentali dell'Unione Europea<sup>48</sup> (la Carta) vincolante negli Stati membri, ai sensi dell'art. 6 TEU. La Carta, firmata nel 2000, ha lo stesso valore legale dei Trattati e ha l'obiettivo di promuovere lo sviluppo di standard europei che rafforzino la protezione dei diritti umani vis-a-vis gli standard internazionali, e di garantire una pari applicazione degli stessi negli Stati membri. Alcuni principi di protezione dei diritti umani definiti nella Carta comprendono la protezione del principio di unità familiare, la primaria considerazione attribuita all' interesse del bambino nelle azioni di istituzioni pubbliche e agenti privati, e il principio di non respingimento.

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<sup>45</sup> Regolamento (UE) n. 604/2013 del Parlamento europeo e del Consiglio, del 26 giugno 2013, *che stabilisce i criteri e i meccanismi di determinazione dello Stato membro competente per l'esame di una domanda di protezione internazionale presentata in uno degli Stati membri da un cittadino di un paese terzo o da un apolide*.

<sup>46</sup> Art. 267 TFUE (ex art. 234 TEC).

<sup>47</sup> Trattato di Lisbona del 1 dicembre 2009 *che modifica il trattato sull'Unione europea e il Trattato che istituisce la Comunità europea*.

<sup>48</sup> Carta dei Diritti Fondamentali Dell'Unione Europea (2000/C 364/01).

La protezione dei diritti umani è un principio fondamentale dell'approccio Europeo alla gestione dei flussi migratori e al controllo delle frontiere esterne, e deve essere perseguito concordemente agli standard internazionali definiti nella Convenzione di Ginevra del 28 luglio 1951 e nel Protocollo del 31 gennaio 1967 sui rifugiati. Questi due strumenti internazionali, promossi dall'Organizzazione delle Nazioni Unite (ONU), il cui scopo è l'estensiva protezione dei diritti umani, vedono come firmatari tutti gli Stati membri dell'Unione e costituiscono una pietra miliare della protezione dei diritti umani e delle libertà fondamentali garantiti dall'Unione Europea.

Inoltre, come definito in art. 6(2) TFEU, le azioni dell'Unione e degli Stati membri devono rispettare i diritti umani fondamentali definiti nella Convenzione Europea sui Diritti dell'Uomo<sup>49</sup> (CEDU), la quale, firmata nel 1950 dal Consiglio d'Europa, aveva l'obiettivo di promuovere le libertà fondamentali e diritti umani nel territorio dell'Unione, e prese ispirazione dalla Dichiarazione Universale dei Diritti Dell'Uomo (UDHR), promossa nel 1948 dall' ONU. La Corte Europea dei Diritti dell'Uomo (Corte EDU), che ha sede a Strasburgo, assicura che gli Stati membri e le istituzioni comunitarie non infrangano i diritti fondamentali degli individui durante l'adozione e l'applicazione di norme, nazionali e comunitarie. La Corte di Giustizia dell'Unione Europea (CGUE), fondata nel 1952 e con sede a Lussemburgo, è l'istituzione europea a cui compete il giudizio riguardo ai dubbi in materia di diritto comunitario. Essa ha il compito di promuovere gli standard di protezione garantiti dal diritto Europeo e di interpretare gli atti e le azioni delle istituzioni europee in maniera coerente con gli standard di protezione internazionali e la Carta.

### **La creazione del Sistema Europeo Comune di Asilo e l'armonizzazione del diritto**

L'armonizzazione del diritto in materia di immigrazione e asilo fu un obiettivo introdotto nelle Conclusioni di Tampere del 1999<sup>50</sup> nel contesto della creazione di "uno spazio di sicurezza, libertà e giustizia nell'Unione Europea". La base legale su cui si fonda l'approccio integrato all'asilo risiede nell'art. 78 del TFEU, il quale inserisce tra gli obiettivi dell'Unione la creazione di

“una politica comune in materia di asilo, di protezione sussidiaria e di protezione temporanea, volta a offrire uno status appropriato a qualsiasi cittadino di un paese terzo che necessita di protezione internazionale”.

Lo sviluppo di un Sistema Europeo Comune di Asilo (CEAS), previsto dal capitolo II delle Conclusioni di Tampere, fu accompagnato dalla promozione, fino al 2005, di misure volte a armonizzare gli standard minimi di protezione garantiti dagli Stati membri, tra cui la Direttiva per la Protezione

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<sup>49</sup> Convenzione europea del 4 novembre 1950 per la salvaguardia dei diritti dell'uomo e delle libertà fondamentali.

<sup>50</sup> Conclusioni del Consiglio Europeo del 15-16 ottobre 1999, *sulla creazione di uno spazio di sicurezza, libertà e giustizia nell'Unione Europea*, Conclusioni di Tampere

temporanea<sup>51</sup>, il Fondo Europeo per i Rifugiati, e la Direttiva sul Ricongiungimento Familiare<sup>52</sup>.

Come definito nel Piano Strategico sull'Asilo<sup>53</sup>, presentato nel 2008, il CEAS si regge su tre pilastri: il rafforzamento della protezione garantita ai richiedenti asilo tramite l'armonizzazione delle normative in materia di asilo; un migliore e più efficiente coordinamento tra gli Stati membri; una maggiore centralità dei principi di solidarietà e ripartizione delle responsabilità nelle azioni intraprese dagli Stati membri tra loro e con i paesi terzi interessati.

L'armonizzazione delle norme in materia di asilo, tramite l'adozione di atti di diritto derivato (regolamenti e direttive), fu perseguita con l'intenzione di promuovere l'applicazione di standard minimi di protezione e di procedure comuni per l'esaminazione di richieste di protezione internazionale.

Il rafforzamento del coordinamento e del sistema di condivisione delle informazioni tra gli Stati membri si basa sul sistema Eurodac per quanto riguarda la gestione dei flussi migratori, e sulla cooperazione tra le autorità competenti degli Stati membri e Europol per quanto riguarda la lotta contro la criminalità organizzata. Il Regolamento Eurosur<sup>54</sup> rafforza la cooperazione tra le guardie nazionali di frontiera e tra queste e Frontex, l'agenzia per la gestione delle frontiere esterne dell'Unione.

Le azioni dell'Unione in materia di asilo e immigrazione devono infine essere condotte nel rispetto dei principi di solidarietà e di condivisione delle responsabilità. Il principio di solidarietà, definito in art. 80 TFEU, si estende alla cooperazione con paesi terzi ed è promossa con l'obiettivo di creare un'Unione sicura per i cittadini degli Stati membri. La solidarietà, applicata nell'ambito dell'asilo e dell'immigrazione, non si traduce ad oggi in una ripartizione equa delle responsabilità per l'esame delle domande di asilo tra gli Stati membri.

#### **Quadro di diritto derivato in materia di asilo: il Sistema Dublino.**

Il diritto derivato in materia di asilo è composto da regolamenti, direttive e decisioni che si basano sul c.d. "Sistema Dublino", un insieme di norme che mirano ad armonizzare la legislazione e aumentare la sicurezza pubblica senza

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<sup>51</sup> Direttiva del Consiglio del 20 luglio 2001, 2001/55/EC, *sulle norme minime per la concessione della protezione temporanea in caso di afflusso massiccio di sfollati e misure che promuovono l'equilibrio degli sforzi tra i paesi dell'UE*.

<sup>52</sup> Direttiva del Consiglio, del 22 settembre 2003, 2003/86/EC, *relativa al diritto al ricongiungimento familiare*.

<sup>53</sup> Comunicazione della Commissione al Parlamento europeo, al Consiglio, al Comitato economico e sociale europeo e al Comitato delle regioni del 17 giugno 2008 – Piano strategico sull'asilo: un approccio integrato in materia di protezione nell'UE.

<sup>54</sup> Regolamento (UE) n. 1052/2013 del Parlamento europeo e del Consiglio del 22 ottobre 2013 che istituisce il sistema europeo di sorveglianza delle frontiere (EUROSUR).



compromettere gli standard di protezione dei diritti umani garantiti dall'Unione sotto il c.d. "Geneva plus regime"<sup>55</sup>.

Il sistema Dublino venne discusso già a partire dagli anni '80, e si concretizzò in un trattato firmato il 15 giugno 1990 (Dublino I), che doveva essere complementare al Trattato di Schengen <sup>56</sup>. Poiché il Trattato di Schengen stabiliva la graduale eliminazione dei controlli alle frontiere interne, la libertà di movimento acquisì particolare rilevanza nel contesto legislativo europeo. La promozione di norme armonizzate in materia di immigrazione e asilo, specialmente per quanto riguarda le condizioni di ingresso e residenza di cittadini di paesi terzi, furono necessarie per mantenere la sicurezza interna e l'ordine pubblico dell'Unione nel totale rispetto dei diritti umani.

Il regolamento Dublino III è di importanza fondamentale nel contesto dell'integrazione europea e rappresenta un argomento centrale nella discussione politica comunitaria e nazionale. Il principio fondamentale del regolamento è espresso nell'art. 3(1), secondo cui solo uno Stato membro è competente per l'esame di ciascuna domanda. Negli articoli 8-16, il regolamento stabilisce una gerarchia di criteri che le autorità competenti degli Stati membri sono tenute a prendere in considerazione quando determinano lo Stato membro competente per l'esame di una domanda di protezione internazionale.

Tra i criteri definiti nel capo III, i criteri basati su motivazioni di carattere umanitario, come il diritto alla riunificazione familiare e la protezione dei diritti del fanciullo, occupano un posto di particolare rilevanza. Ai sensi dell'art. 13 del regolamento, lo Stato membro attraverso il quale il richiedente fa ingresso nell'Unione è lo Stato da considerarsi responsabile per l'esame della domanda d'asilo quando i criteri definiti nel capo III non si applicano. L'applicazione di questa norma ha prodotto diseguaglianze nella distribuzione delle responsabilità tra gli Stati membri e inefficienze nella promozione di una solidarietà europea.

La prolungata durata delle procedure di determinazione dello Stato membro competente in alcuni Stati in "prima linea" (come Grecia e Italia), spesso confrontati con un ingente numero di richieste di protezione, spingono alcuni individui a spostarsi dal paese d'ingresso verso altri Stati membri nella speranza di ottenere condizioni più favorevoli. Questo trasferimento è definito "movimento secondario". Per disincentivare questi movimenti secondari, due procedure di trasferimento sono state create per trasferire un richiedente nel territorio dello Stato membro responsabile: procedure di presa e ripresa in carica, definite nel capo VI del regolamento.

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<sup>55</sup> MUNARI (2016: 519).

<sup>56</sup> Trattato di Schengen tra i governi degli Stati del Benelux.

### **Le controversie: C-582/17 e C-583/17.**

Le controversie in esame nella sentenza riguardano due richiedenti protezione internazionale siriane che, dopo aver presentato una domanda di protezione internazionale in un primo Stato membro (Germania), si sono trasferite nel territorio di un secondo Stato membro (Paesi Bassi) e hanno lì presentato una seconda domanda di protezione internazionale.

In entrambi i casi, le richiedenti ai sensi dell'art. 18(1)(b) hanno fatto ricorso, ai sensi dell'art. 27(1), contro una decisione di trasferimento che prevedeva la ripresa in carico da parte del primo Stato membro delle domande di protezione internazionale. Dichiarandosi congiunte a persone beneficiarie di protezione internazionale presenti sul territorio del secondo Stato membro, le richiedenti hanno ritenuto che l'art. 9, che prevede il trasferimento della competenza per l'esaminazione di una domanda di protezione internazionale allo Stato membro sul cui territorio risiede legalmente un membro familiare a cui è stato accordato lo status di beneficiario, dovesse essere considerato nel contesto di una procedura di ripresa in carico.

La Corte considera, prima di tutto, che la portata del diritto a un ricorso attribuito ai richiedenti di protezione internazionale (art. 27(1)) non è influenzato dal tipo di procedura di trasferimento contro la quale viene esperito il ricorso. Continua poi definendo lo schema di applicazione della procedura di ripresa in carico definita in articoli 23(1) e 24(1), ponendo l'accento sui contrasti con la procedura di presa in carico. In primo luogo, la Corte analizza le norme enunciate nel capo VI del regolamento e stabilisce che, nelle procedure di ripresa in carico, il trasferimento non è necessariamente ai fini del completamento dell'esame della domanda, come invece avviene nelle procedure di presa in carico (art.21(1)). Il fatto che i trasferimenti possano avere uno scopo diverso dal completamento dell'esame della domanda implica che i criteri di determinazioni al capo III del regolamento non siano cruciali nell'identificazione dello Stato "responsabile". Inoltre, la formulazione delle norme sulle procedure di ripresa in carico stabiliscono come "responsabile" lo Stato membro che soddisfi le condizioni definite negli articoli 20(5) o 18(1)(b) a (d), e non lo Stato membro ai sensi dei criteri di determinazione. Questa interpretazione è supportata inoltre dall'art. 25, che conferma l'irrelevanza dei criteri di competenza enunciati nel capo III nell'ambito delle procedure di ripresa in carico, dal modulo uniforme di richiesta di ripresa in carico, contenuto nell'allegato III del regolamento n. 1560/2003<sup>57</sup>, e dai termini di risposta alle richieste, sensibilmente più brevi rispetto a quelli stabiliti per le procedure di presa in carico.

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<sup>57</sup> Regolamento (CE) n.1560/2003 della Commissione, del 2 settembre 2003, *recante le modalità di applicazione del regolamento (CE) n. 343/2003 del Consiglio che stabilisce i criteri e i meccanismi di determinazione dello Stato membro competente per l'esame di una domanda d'asilo presentata in uno degli Stati membri da un cittadino di un paese terzo.*

Per supportare il suo ragionamento, la Corte (punto 73) rileva che l'interpretazione opposta, secondo cui le autorità competenti devono tenere in considerazione i criteri di competenza per formulare una richiesta di ripresa in carico, è in contrasto con lo schema generale del regolamento. Questa interpretazione implicherebbe, prima di tutto, che le procedure di presa e ripresa in carico debbano essere condotte secondo una singola procedura basata sull'applicazione dei criteri al capo III. Inoltre, tale interpretazione sarebbe in grado di compromettere alcuni dei principi e obiettivi fondamentali dell'approccio europeo, tra cui il principio espresso in art. 3(1), e l'obiettivo di rapido espletamento delle domande di protezione internazionale (considerando 5 del regolamento).

Nonostante ciò, la Corte al punto 81 rileva che, nei casi previsti dall'art. 20(5), "[...] non può escludersi che debba essere preso in considerazione un trasferimento, in senso inverso, verso lo Stato membro che aveva precedentemente richiesto la ripresa in carico del richiedente." Come notato dal governo tedesco e dalla Commissione, in tal caso sarebbe probabile che i termini per la formulazione di una nuova richiesta di presa in carica siano scaduti.

#### **Risposta della Corte alle questioni sollevate nelle cause.**

Considerando quanto analizzato fino ad ora, la Corte (Grande Sezione) dichiara che:

“Il regolamento (UE) n. 604/2013 del Parlamento europeo e del Consiglio, del 26 giugno 2013, che stabilisce i criteri e i meccanismi di determinazione dello Stato membro competente per l'esame di una domanda di protezione internazionale presentata in uno degli Stati membri da un cittadino di un paese terzo o da un apolide, deve essere interpretato nel senso che un cittadino di un paese terzo che abbia presentato una domanda di protezione internazionale in un primo Stato membro, abbia poi lasciato tale Stato membro e abbia successivamente presentato una nuova domanda di protezione internazionale in un secondo Stato membro:

- non può, in linea di principio, invocare, nell'ambito di un ricorso proposto, ai sensi dell'articolo 27, paragrafo 1, di tale regolamento, in detto secondo Stato membro avverso la decisione di trasferimento adottata nei suoi confronti, il criterio di competenza enunciato all'articolo 9 di detto regolamento;

- può, in via eccezionale, invocare, nell'ambito di un simile ricorso, il suddetto criterio di competenza, in una situazione coperta dall'articolo 20, paragrafo 5, del medesimo regolamento, laddove il suddetto cittadino di un paese terzo abbia trasmesso all'autorità competente dello Stato membro richiedente elementi che dimostrino in modo manifesto che quest'ultimo dovrebbe essere considerato lo Stato membro competente per l'esame della domanda in applicazione di detto criterio di competenza. “.