



## Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

6 November 2012\*

(Regulation (EC) No 343/2003 — Determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national — Humanitarian clause — Article 15 of that regulation — Person who enjoys asylum in a Member State and is dependent on the assistance of an asylum seeker because she suffers from a serious illness — Article 15(2) of the regulation — Obligation on that Member State, which is not responsible according to the criteria laid down in Chapter III of that regulation, to examine the application for asylum made by that asylum seeker — Conditions)

In Case C-245/11,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Asylgerichtshof (Austria), made by decision of 20 May 2011, received at the Court on 23 May 2011, in the proceedings

**K**

v

**Bundesasylamt,**

THE COURT (Grand Chamber),

composed of V. Skouris, President, K. Lenaerts, Vice-President, A. Tizzano, R. Silva de Lapuerta, L. Bay Larsen (Rapporteur), A. Rosas, M. Berger and E. Jarašiūnas, Presidents of Chambers, E. Juhász, J.-C. Bonichot, D. Šváby, A. Prechal and C.G. Fernlund, Judges,

Advocate General: V. Trstenjak,

Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 8 May 2012,

after considering the observations submitted on behalf of:

- K, by A. Egger, Rechtsanwalt,
- the Austrian Government, by C. Pesendorfer and P.Cede, acting as Agents,
- the Czech Government, by M. Smolek, acting as Agent,
- the French Government, by G. de Bergues and B. Beaupère-Manokha, acting as Agents,

\* Language of the case: German.

- the Italian Government, by G. Palmieri, acting as Agent, assisted by G. Palatiello, avvocato dello Stato,
- the Hungarian Government, by M. Z. Fehér and K. Veres, acting as Agents,
- the Polish Government, by M. Szpunar, acting as Agent,
- the United Kingdom Government, by S. Ossowski, acting as Agent,
- the European Commission, by M. Condou-Durande and W. Bogensberger, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 27 June 2012,

gives the following

### **Judgment**

- 1 This reference for a preliminary ruling concerns the interpretation, first, of Article 15 of Council Regulation (EC) No 343/2003 of 18 February 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 (OJ 2003 L 50, p. 1) and, second, Article 3(2) of that regulation.
- 2 The reference has been made in the context of proceedings between K, a national of a third country, and the Bundesasylamt (Federal Office for Asylum) in relation to the Bundesasylamt's rejection of the application for asylum brought by the applicant in the main proceedings in Austria, on the ground that the Republic of Poland is the Member State responsible for examining the application for asylum.

### **Legal context**

#### *Regulation No 343/2003*

- 3 Recitals 3 and 4 in the preamble to Regulation No 343/2003 are worded as follows:
  - '(3) The Tampere conclusions ... stated that [the common European asylum system] should include, in the short term, a clear and workable method for determining the Member State responsible for the examination of an asylum application.
  - (4) Such a method should be based on objective, fair criteria both for the Member States and for the persons concerned. It should, in particular, make it possible to determine rapidly the Member State responsible, so as to guarantee effective access to the procedures for determining refugee status and not to compromise the objective of the rapid processing of asylum applications.'
- 4 Recitals 6 and 7 in the preamble to the Regulation state:
  - '(6) Family unity should be preserved in so far as this is compatible with the other objectives pursued by establishing criteria and mechanisms for determining the Member State responsible for examining an asylum application.

- (7) The processing together of the asylum applications of the members of one family by a single Member State makes it possible to ensure that the applications are examined thoroughly and the decisions taken in respect of them are consistent. Member States should be able to derogate from the responsibility criteria, so as to make it possible to bring family members together where this is necessary on humanitarian grounds.’
- 5 As is apparent from recital 15 in the preamble to Regulation No 343/2003, read in the light of Article 6(1) TEU, that regulation observes the rights, freedoms and principles which are acknowledged in particular by the Charter of Fundamental Rights of the European Union (‘the Charter’). In particular, it seeks to ensure, on the basis of Articles 1 and 18 of the Charter, full observance of asylum seekers’ human dignity and their right to asylum.
- 6 Article 1 of Regulation No 343/2003 provides that the regulation ‘lays down the criteria and mechanisms for determining the Member State responsible for examining an application for asylum lodged in one of the Member States by a third-country national’.
- 7 The following definitions appear in Article 2(c), (d), (e) and (i) of Regulation No 343/2003:
- ‘(c) “application for asylum” means the application made by a third-country national which can be understood as a request for international protection from a Member State, under the Geneva Convention [of 28 July 1951 relating to the status of refugees]. Any application for international protection is presumed to be an application for asylum, unless a third-country national explicitly requests another kind of protection that can be applied for separately;
- (d) “applicant” or “asylum seeker” means a third country national who has made an application for asylum in respect of which a final decision has not yet been taken;
- (e) “examination of an asylum application” means any examination of, or decision or ruling concerning, an application for asylum by the competent authorities in accordance with national law except for procedures for determining the Member State responsible in accordance with this Regulation;
- ...
- (i) “family members” means, insofar as the family already existed in the country of origin, the following members of the applicant’s family who are present in the territory of the Member States:
- (i) the spouse of the asylum seeker or his or her unmarried partner in a stable relationship, where the legislation or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to aliens;
- (ii) the minor children of couples referred to in point (i) or of the applicant, on condition that they are unmarried and dependent and regardless of whether they were born in or out of wedlock or adopted as defined under the national law;
- (iii) the father, mother or guardian when the applicant or refugee is a minor and unmarried’.

- 8 Article 3(1) and (2) of Regulation No 343/2003, in Chapter II thereof, headed ‘General Principles’, states:

‘(1) Member States shall examine the application of any third-country national who applies at the border or in their territory to any one of them for asylum. The application shall be examined by a single Member State, which shall be the one which the criteria set out in Chapter III indicate is responsible.

(2) By way of derogation from paragraph 1, each Member State may examine an application for asylum lodged with it by a third-country national, even if such examination is not its responsibility under the criteria laid down in this Regulation. In such an event, that Member State shall become the Member State responsible within the meaning of this Regulation and shall assume the obligations associated with that responsibility. Where appropriate, it shall inform the Member State previously responsible, the Member State conducting a procedure for determining the Member State responsible or the Member State which has been requested to take charge of or take back the applicant.’

- 9 In order to determine the ‘Member State responsible’ within the meaning of Article 3(1) of Regulation No 343/2003, Articles 6 to 14, in Chapter III of that regulation, list objective criteria set out in hierarchical order.

- 10 Article 15 of Regulation No 343/2003, which is the only article in Chapter IV thereof, headed ‘Humanitarian Clause’, provides:

‘(1) Any Member State, even where it is not responsible under the criteria set out in this Regulation, may bring together family members, as well as other dependent relatives, on humanitarian grounds based in particular on family or cultural considerations. In this case that Member State shall, at the request of another Member State, examine the application for asylum of the person concerned. The persons concerned must consent.

(2) In cases in which the person concerned is dependent on the assistance of the other on account of pregnancy or a new-born child, serious illness, severe handicap or old age, Member States shall normally keep or bring together the asylum seeker with another relative present in the territory of one of the Member States, provided that family ties existed in the country of origin.

...

(4) Where the Member State thus approached accedes to the request, responsibility for examining the application shall be transferred to it.

(5) The conditions and procedures for implementing this Article including, where appropriate, conciliation mechanisms for settling differences between Member States concerning the need to unite the persons in question, or the place where this should be done, shall be adopted in accordance with the procedure referred to in Article 27(2).’

- 11 Chapter V of Regulation No 343/2003, headed ‘Taking Charge and Taking Back’, includes Article 16(1) which states as follows:

‘The Member State responsible for examining an application for asylum under this Regulation shall be obliged to:

...

(c) take back, under the conditions laid down in Article 20, an applicant whose application is under examination and who is in the territory of another Member State without permission;

...'

*Regulation (EC) No 1560/2003*

- 12 Article 11 (entitled 'Situations of dependency') of Commission Regulation (EC) No 1560/2003 of 2 September 2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 (OJ 2003 L 222, p. 3) provides:

'(1) Article 15(2) of [Regulation No 343/2003] shall apply whether the asylum seeker is dependent on the assistance of a relative present in another Member State or a relative present in another Member State is dependent on the assistance of the asylum seeker.

(2) The situations of dependency referred to in Article 15(2) of [Regulation No 343/2003] shall be assessed, as far as possible, on the basis of objective criteria such as medical certificates. Where such evidence is not available or cannot be supplied, humanitarian grounds shall be taken as proven only on the basis of convincing information supplied by the persons concerned.

...

(4) The application of Article 15(2) of [Regulation No 343/2003] shall, in any event, be subject to the assurance that the asylum seeker or relative will actually provide the assistance needed.

...'

**The dispute in the main proceedings and the questions referred for a preliminary ruling**

- 13 K entered Poland irregularly via a third country and, in March 2008, made her first application for asylum there.
- 14 Without awaiting the conclusion of the examination of that application for asylum, she subsequently left Polish territory and entered Austria irregularly, where she rejoined one of her adult sons who already enjoys refugee status there along with his spouse and their three minor children.
- 15 In April 2008, K lodged a second application for asylum in Austria.
- 16 According to the Asylgerichtshof, it is proved that K's daughter-in-law is dependent on K because the daughter-in-law has a new-born baby and suffers from a serious illness and handicap following a serious and traumatic occurrence which took place in a third country. If what happened were to become known, the daughter-in-law would risk violent treatment at the hands of male members of the family, on account of cultural traditions seeking to re-establish family honour. Since K rejoined her daughter-in-law in Austria, she has become her confidante and closest friend, not only on the basis of family ties but also because she has appropriate professional experience.
- 17 Taking the view that the Republic of Poland is responsible for examining the application for asylum lodged by K, the Austrian authorities requested that Member State to take K back.
- 18 Replying to that request, the Polish authorities, without making a request to the Austrian authorities with a view to taking charge of K on the basis of Article 15 of Regulation No 343/2003, agreed to take her back in accordance with Article 16(1)(c) of Regulation No 343/2003.

19 In those circumstances, by decision of 16 July 2008, the Bundesasylamt rejected K's application for asylum, made by her in Austria, on the ground that the Member State responsible for examining that application is the Republic of Poland.

20 K appealed against that decision to the Asylgerichtshof.

21 Basing itself on the finding that the Republic of Poland is, in principle, responsible for examining K's application for asylum, because it was that Member State's border that she first crossed irregularly having come from a third State, that court considers in fact that, in a situation such as that in the case before it, the application of Article 15 of Regulation No 343/2003, or even Article 3(2) thereof, should be taken into consideration. Applying either of those provisions would lead to the Republic of Austria being responsible for examining that application for asylum.

22 The Asylgerichtshof also considers that, as a *lex specialis*, Article 15 of Regulation No 343/2003 takes precedence over the general rules laid down in Articles 6 to 14 of that regulation.

23 According to the Asylgerichtshof, the application of Article 3(2) of Regulation No 343/2003 is subsidiary to the application of Article 15 thereof, with the result that the Republic of Austria should exercise its right, of its own motion, to take responsibility for examining the application for asylum on the humanitarian grounds set out in Article 15.

24 Finally, it is apparent from the referring court's discussion of the interpretation of Article 15 of Regulation No 343/2003 that it takes the view that, in circumstances such as those of the case before it, the possible application of Article 15(2) of Regulation No 343/2003 should be examined before the question whether Article 15(1) of the regulation can apply in the alternative.

25 It was in those circumstances that the Asylgerichtshof decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

(1) Must Article 15 of Regulation No 343/2003 be interpreted as meaning that a Member State prima facie not responsible for examining the asylum claim of a person in accordance with the rules of Articles 6 to 14 of that regulation becomes automatically responsible if in that country the asylum seeker has a daughter-in-law who is seriously ill and, on account of cultural factors, at risk or has grandchildren below the age of majority who, as a result of the daughter-in-law's illness, are in need of care and the asylum seeker is both willing and able to support her daughter-in-law and grandchildren? Does the same apply even if the Member State prima facie responsible has not made a request in accordance with the second sentence of Article 15(1) of Regulation No 343/2003?

(2) Must Article 3(2) of Regulation No 343/2003 be interpreted as meaning that in the circumstances mentioned in Question 1 the Member State prima facie not responsible becomes automatically responsible if the responsibility otherwise provided for by Regulation No 343/2003 will result in an infringement of Article 3 or Article 8 of the [European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950] (Article 4 or Article 7 of the [Charter])? In that case, in the accessory interpretation and application of Article 3 or Article 8 of [that Convention] (Article 4 or Article 7 of the [Charter]), may more extensive notions of "inhuman treatment" or "family", at variance with the interpretation developed by the European Court of Human Rights, be applied?

## Consideration of the questions referred

### *The first question*

- 26 By its first question, the referring court seeks, in essence, to ascertain whether Article 15 of Regulation No 343/2003 must be interpreted as meaning that, in circumstances such as those in the main proceedings, in which the daughter-in-law of the asylum seeker is dependent on the asylum seeker's assistance because that daughter-in-law has a new-born baby and suffers from a serious illness and handicap, a Member State which is not the State responsible for examining the asylum request according to the criteria laid down in Chapter III of that regulation can automatically become the responsible State on humanitarian grounds. If the answer to that question is in the affirmative, that court wishes to know whether that interpretation remains valid where the Member State which is responsible in accordance with those criteria did not make any request pursuant to the second sentence of Article 15(1) of the regulation.
- 27 In that regard, it should be noted that, while Article 15(1) of Regulation No 343/2003 is an optional provision which affords the Member States extensive discretion with regard to deciding to 'bring together' family members and other dependent relatives on humanitarian grounds based in particular on family or cultural considerations, Article 15(2) of the same article, however, restricts that power in such a way that, where the conditions laid down in that provision are satisfied, the Member States 'normally keep together' the asylum seeker and another member of his family.
- 28 The first question therefore aims, primarily, to obtain an interpretation of Article 15(2) of Regulation No 343/2003.
- 29 On the one hand, it must be held that, contrary to what is claimed by the Austrian and Czech Governments, the mere fact that the asylum seeker is no longer on the territory of the 'responsible Member State' but already present on the territory of the Member State in which he seeks to obtain 'family reunification' by relying on humanitarian grounds, cannot have the effect of excluding per se the application of Article 15(2) of Regulation No 343/2003.
- 30 Article 15(2) of Regulation No 343/2003 refers not only to the situations in which Member States 'bring together' the asylum seeker and another member of his family, but also those where they 'keep' them together, the persons concerned being already on the territory of a Member State other than that which is responsible under the criteria laid down in Chapter III of Regulation No 343/2003.
- 31 That interpretation is not only consistent with Article 3(2) of Regulation No 343/2003, according to which each Member State 'may' examine an application for asylum lodged with it by a third-country national, even if that examination is not its responsibility under the criteria laid down in that regulation, but it is also the interpretation most apt to ensure the effectiveness of Article 15(2) of that regulation.
- 32 On the other hand, it is necessary to establish, first, whether Article 15(2) of Regulation No 343/2003 can be applied in a situation of dependency such as that at issue in the main proceedings, where it is not the asylum seeker himself who is dependent on the assistance of the member of his family present in a Member State other than that identified as responsible pursuant to the criteria laid down in Chapter III of Regulation No 343/2003 but the family member present in that other Member State who is dependent on the assistance of the asylum seeker.

- 33 In that regard, Article 15(2) of Regulation No 343/2003 does not refer expressly to the situation of an asylum seeker who is dependent on the assistance of another person. By contrast, by employing, in that provision, general terms such as ‘the person concerned’ to indicate who is dependent on the assistance of the ‘other’ within the meaning of that provision, the European Union legislature implied that both the concept of ‘person concerned’ and that of the ‘other’ can refer to the asylum seeker.
- 34 That interpretation cannot be invalidated by the mere fact that, in the second sentence of Article 15(1) of Regulation No 343/2003, that same legislature, by using the phrase ‘the application for asylum of the person concerned’ established, in that specific provision, a link between the asylum seeker and the words ‘the person concerned’. It must be pointed out, in that regard, that in the following sentence of the same paragraph, the asylum seeker and the other person are described as ‘persons concerned’.
- 35 That interpretation is, by contrast, in conformity with the objective of Article 15 of Regulation No 343/2003, which seeks, as laid down in recital 7 in the preamble to that regulation, to allow Member States to bring together ‘family members’ where that is necessary on humanitarian grounds.
- 36 In that regard, the objective of Article 15(2) of Regulation No 343/2003 is attained both where it is the asylum seeker who is dependent on a member of his family present in a Member State other than the one responsible pursuant to the criteria set out in Chapter III of that regulation and, conversely, where it is that family member who is dependent on the assistance of the applicant.
- 37 Similarly, Article 11(1) of Regulation No 1560/2003, within the limits of the implementing powers granted under Regulation No 343/2003, makes it clear that the words ‘person concerned’ in Article 15(2) of that regulation must be understood as also covering a situation of dependence such as that at issue in the main proceedings.
- 38 Second, it should be noted that, notwithstanding the fact that the definition of ‘family members’ within the meaning of Article 2(i) of Regulation No 343/2003 does not cover the daughter-in-law or grandchildren of an asylum seeker, Article 15 of that regulation must nonetheless be interpreted as meaning that such persons are covered by the words ‘another relative’ used in Article 15(2).
- 39 In that regard, it must first be observed that the various language versions of the abovementioned wording of Article 15(2) of Regulation No 343/2003 diverge and that some of them, for example the English version, use different and broader wording than that used in Article 2(i) of that regulation.
- 40 Second, given that Regulation No 343/2003 contains, in Articles 6 to 8, binding provisions which seek to preserve family unity in accordance with recital 6 in the preamble to the regulation, the humanitarian clause contained in Article 15, since its purpose is to permit Member States to derogate from the criteria regarding sharing of competences between the Member States in order to facilitate the bringing together of family members where that is necessary on humanitarian grounds, must be capable of applying to situations going beyond those which are the subject of Articles 6 to 8 of Regulation No 343/2003, even though they concern persons who do not fall within the definition of ‘family members’ within the meaning of Article 2(i) of Regulation No 343/2003.
- 41 Taking into account its humanitarian purpose, Article 15(2) of Regulation No 343/2003 delimits, on the basis of a criterion of dependence on account of, inter alia, an illness or serious handicap, a group of members of the family of the asylum seeker which is necessarily wider than that defined by Article 2(i) of that regulation.
- 42 Where family ties existed in the country of origin, it is necessary to establish that the asylum seeker or the person with whom he has family ties actually requires assistance and, as the case may be, that the person who must provide the other person with assistance is in a position to do so.

- 43 In those circumstances, Article 15(2) of Regulation No 343/2003 is applicable where the humanitarian grounds referred to therein are satisfied in relation to a dependent person within the meaning of that provision who, not being a family member within the meaning of Article 2(i) of that regulation, has family ties with the asylum seeker, and is a person to whom the asylum seeker can actually provide the assistance needed in accordance with Article 11(4) of Regulation No 1560/2003.
- 44 In the third place, where there is a situation of dependence which can fall under Article 15(2) of Regulation No 343/2003, as interpreted in paragraphs 33 to 43 above, and where in that situation the persons concerned are present in the territory of a Member State other than the one responsible in the light of the criteria laid down in Chapter III of that regulation, that Member State is, on condition that the family ties existed in the country of origin, ‘normally’ obliged to keep those persons together.
- 45 With regard to the latter condition, suffice is to note that it is apparent from the order for reference that, in the case in the main proceedings, the family ties between the asylum seeker and her daughter-in-law already existed in the country of origin.
- 46 With regard, more precisely, to the obligation ‘normally’ to keep together the asylum seeker and the ‘other’ family member within the meaning of Article 15(2) of Regulation No 343/2003, this must be understood as meaning that a Member State may derogate from that obligation to keep the persons concerned together only if such a derogation is justified because an exceptional situation has arisen. It should, however, be noted that, in its reference for a preliminary ruling, the referring court did not refer to any such exceptional situation.
- 47 Where the conditions stated in Article 15(2) are satisfied, the Member State which, on the humanitarian grounds referred to in that provision, is obliged to take charge of an asylum seeker becomes the Member State responsible for the examination of the application for asylum.
- 48 In that regard, it should be added that the competent national authorities are under an obligation to ensure that the implementation of Regulation No 343/2003 is carried out in a manner which guarantees effective access to the procedures for determining refugee status and which does not compromise the objective of the rapid processing of an asylum application.
- 49 That objective of speed, which is apparent from recital 4 in the preamble to Regulation No 343/2003, must also be underlined where it is necessary, in the fourth place, with regard to the second part of the first question, to explain the reasons why, in circumstances such as those in the main proceedings, an application of Article 15(2) of Regulation No 343/2003 is justified even where the ‘Member State responsible’ has not made a request to that effect in conformity with the second sentence of Article 15(1) of that regulation.
- 50 Next, with regard to the argument made by various governments which submitted observations to the Court in the present case, according to which a request by the ‘Member State responsible’ is, in all circumstances, a prerequisite for the application of Article 15(2) of Regulation 343/2003, it is important to note that that provision does not contain, unlike the second sentence of Article 15(1) of that regulation, any reference to a ‘request’ originating from another Member State.
- 51 In that regard, it must be held that, where the asylum seeker and another member of his family who are present together on the territory of a Member State other than that which is responsible in the light of the criteria laid down in Chapter III of Regulation No 343/2003 have duly proved the existence of a situation of dependence within the meaning of Article 15(2) of that regulation, the competent authorities of that Member State may not ignore the existence of that particular situation, and the making of a request such as that provided for in the second sentence of Article 15(1) of the regulation becomes redundant. In those circumstances, such a requirement would be purely formal in nature.

- 52 In a situation such as that at issue in the main proceedings, where what is at issue is not the ‘bringing together’ of family members within the meaning of Article 15(2) of Regulation No 343/2003 but ‘keeping’ them together in the Member State in which they are present, the requirement of a request originating from the ‘Member State responsible’ would run counter to the obligation to act speedily, because it would unnecessarily prolong the procedure for determining the Member State responsible.
- 53 Consequently, in a situation such as that at issue in the main proceedings, Article 15(2) of Regulation No 343/2003 may be applied even if the Member State in which the application for asylum is lodged did not receive a request to that effect from the ‘Member State responsible’.
- 54 In the light of all the foregoing considerations, the answer to the first question is that, in circumstances such as those in the main proceedings, Article 15(2) of Regulation No 343/2003 must be interpreted as meaning that a Member State which is not responsible for examining an application for asylum pursuant to the criteria laid down in Chapter III of that regulation becomes so responsible. It is for the Member State which has become the responsible Member State within the meaning of that regulation to assume the obligations which go along with that responsibility. It must inform in that respect the Member State previously responsible. This interpretation of Article 15(2) also applies where the Member State which was responsible pursuant to the criteria laid down in Chapter III of Regulation No 343/2003 did not make a request in that regard in accordance with the second sentence of Article 15(1) of that regulation.

*The second question*

- 55 In the light of the answer given to the first question, it is not necessary, in the context of the present reference for a preliminary ruling, to rule on the second question referred by the national court.

**Costs**

- 56 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

**In circumstances such as those in the main proceedings, Article 15(2) of Council Regulation (EC) No 343/2003 of 18 February 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 must be interpreted as meaning that a Member State which is not responsible for examining an application for asylum pursuant to the criteria laid down in Chapter III of that regulation becomes so responsible. It is for the Member State which has become the responsible Member State within the meaning of that regulation to assume the obligations which go along with that responsibility. It must inform in that respect the Member State previously responsible. This interpretation of Article 15(2) also applies where the Member State which was responsible pursuant to the criteria laid down in Chapter III of Regulation No 343/2003 did not make a request in that regard in accordance with the second sentence of Article 15(1) of that regulation.**

[Signatures]