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Member State
Portugal

Topic
Asylum and migration

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Supremo Tribunal Administrativo

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ECLI (if available)
Not available

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EU legal sources and CJEU jurisprudence
Article 4 of the Charter of Fundamental Rights of the European Union (CFREU)

Judgment of 21.12.2011 [Joined Cases C-411/10 and C-493/10] of the Court of Justice of the European Union.

ECtHR Jurisprudence
Not available

Subject Matter

Asylum and migration

Legal issue(s)

The legal issue revolves around whether or not the State examining an asylum application from an applicant who, despite having the nationality of a third State from which he has fled, comes from another State of the European Union which has provisionally received him, must ascertain, before deciding on the non-admissibility of the application, whether there are systemic failings in the asylum procedure and reception conditions of the State where the applicant has been provisionally received and whether such failings entail the risk of inhuman or degrading treatment.

Request for expedited/PPU procedures
Not available

Interim Relief
Not available

National Law Sources

Law No. 27/2008, of 30th June, which Establishes the conditions and procedures for granting asylum or subsidiary protection and the status of asylum seeker, refugee and subsidiary protection, transposing into national law Council Directives 2004/83/EC of 29 April 2004 and 2005/85/EC of 1 December 2005

Facts of the case

A non-Portuguese national was sleeping in the street and was approached by a police officer. After this approach, he informed the police officer that he was waiting for the opening of the Temporary Reception Centre there, in order to apply for political asylum. This applicant, prior to this event, had already been in Italy, where he had been denied political asylum.

On 23 July 2018 the applicant applied for international protection with the Asylum and Refugee Office of the Aliens and Borders Service in Lisbon – "SEF". On 27 of that same month, the Portuguese authorities sent the Italian authorities a take back request, invoking Article 18(1)(b) of Regulation [EU] No 604/2013 of the European Parliament and of the Council of 26 June 2013 - better known as the Dublin Regulation.

This Regulation sets out 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, stipulating that only one Member State is responsible and the application is therefore subject to a special admissibility procedure.

This procedure provides that an application for international protection may be considered inadmissible if it is established, on the basis of objective data, evidence or clues, that a member-state – namely, Portugal - is not responsible for examining the application for international protection.

Once the applicant had been interviewed, and as the Italian authorities had not replied to the request to take back the applicant, the Portuguese authorities decided that the application for international protection was inadmissible and considered that Italy agreed to take back the applicant for international protection.

However, at the time of that decision there were a number of media reports indicating that Italy had tightened its policy on the reception of refugees, with the aim of substantially reducing the number of asylum seekers. This new policy, among other things, involved training Libyan coastguards to actively patrol the Libyan coast to intercept migrants who wanted to flee, and it was claimed that Italy was well aware of the degrading conditions in Libyan detention centres.

At the same time, the same news also reported the existence of "improvised" refugee camps built on the border between Italy and France, the closure of which forced children living there to wander into nearby towns, often placing themselves in degrading, promiscuous and dangerous situations.

Faced with the SEF's decision, the applicant brought an action before the Lisbon Administrative Court, which held that SEF should not have considered the application for international protection inadmissible and ordered the transfer to Italy without first collecting reliable and up-to-date information on the operation of the asylum procedure in Italy and on the reception conditions for applicants for international protection in that Member State of the European Union.

Challenging that decision, SEF lodged an appeal with the South Administrative Central Court, which was dismissed. In light of that circumstance, SEF lodged a "review appeal" with the Supreme Administrative Court.

Reasoning (role of the Charter or other EU, ECHR related legal basis)

It is important to note, first of all, that the Court of First Instance, which found in the applicant's favour, based its decision on the following:

- The applicant, in the interview to which he was subjected, invoked issues concerning insecurity and lack of health care in the camp where he was during his period of stay in Italy, and SEF did nothing to ensure whether or not this corresponded to the truth;

- Taking into account the news broadcast by the national and international media on the situation of great influx of refugees in Italy and on the conditions of reception and stay of the applicants for international protection in that Member State - which, according to the court, were "notorious facts" - it was incumbent upon SEF, beforehand, to instruct the procedure with updated reliable information on the functioning of the Italian asylum procedure and the conditions of reception of the applicants for international protection in that State drawing on credible and consolidated sources such as the European Asylum Support Office, the United Nations High Commissioner for Refugees and relevant human rights organisations, in order to ascertain whether or not, in the specific case, the determining reasons for the impossibility of the transfer, referred to in the second subparagraph of Article 3(2) of Regulation [EU] 604/2013 of the European Parliament and of the Council of 26 June 2013, were present;

- In order to justify that view, the court of first instance relies on case-law of the Court of Justice of the European Union, in particular the judgment of 21.12. 2011 [Joined Cases C-411/10 and C-493/10], where it is stated that "it is incumbent on Member States, including national courts, not to transfer an asylum seeker to the Member State responsible, within the meaning of Regulation No. 343/2003, where they cannot ignore the fact that systemic failures in the asylum procedure and in the reception conditions of asylum seekers in that Member State constitute serious and credible grounds that the applicant runs a real risk of being subjected to inhuman or degrading treatment, within the meaning of that provision";

- Thus, for the Court of First Instance, it is necessary for Member States to consider all known information about the country considered responsible for examining the application for international protection, when they cannot be unaware of the facts which determine a manifest violation of Article 4 of the CFREU in the country of destination in order to assess whether there are, in this case, reasons justifying the decision not to transfer, in particular the existence of a real direct or indirect risk that the applicant will be subjected to inhuman or degrading treatment, within the meaning of Articles 3 of the ECHR and 4 of the CFREU;

- Thus, and in conclusion, the fact that the decision of the SEF does not mention anything about the functioning of the Italian asylum procedure and the reception conditions of applicants for international protection in that Member State, makes it impossible to assess whether or not there is a real direct or indirect risk that the applicant will be subjected to inhuman or degrading treatment, within the meaning of Articles 3 of the ECHR and 4 of the CFREU.

The Supreme Administrative Court (SAC), however, had a different understanding:

- The Supreme Administrative Court starts from a literal interpretation of what is stipulated in Article 3 of Regulation [EU] 604/2013 of the European Parliament and of the Council of 26.06.2013, which states the following:

«1. Member States shall examine all applications for international protection made by third-country nationals or stateless persons on the territory of any Member State, including at the border or in transit zones. Applications 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. Where no Member State responsible can be designated on the basis of the criteria listed in this Regulation, the first Member State with which the application for international protection was lodged shall be responsible for examining the application.

Where it is impossible to transfer an applicant to the Member State initially designated as responsible because there are substantial grounds for believing that there are systemic deficiencies in the asylum procedure and in the reception conditions of applicants in that Member State which give rise to a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union, the Member State carrying out the determination of the Member State responsible shall continue the examination of the criteria set out in Chapter III in order to decide whether any of those criteria allows another Member State to be designated as responsible.

Where a transfer pursuant to this paragraph cannot be made to a Member State designated on the basis of the criteria set out in Chapter III or to the first Member State where the application was lodged, the Member State determining the Member State responsible shall become the Member State responsible».

- The Supreme Court considers that the SEF's decision is in perfect harmony with the stipulations of the first paragraph of Article 3(2) cited above: in fact, since Portugal "could not be designated" on the basis of the criteria set out in Chapter III of the Regulation in question, the first State responsible for examining the application for international protection formulated would be the Italian State;

- For the SAC, the Court of First Instance, in having favoured the application of the second and third subparagraphs of Article 3(2) in question to the detriment of the first subparagraph, precisely because it considered that there were indications of "systemic failures" in the asylum procedure and reception conditions of applicants for international protection in Italy, erred insofar as those indications, together with the applicant's statements, did not impose on the SEF the duty to conduct an ex-officio search for information relating to the asylum procedure and reception conditions of refugees in Italy;

- For the SAC, from the statements given by the applicant it can only be concluded that he came from Italy to Portugal because he did not feel safe, as there were many problems in the camp where he was staying and because it was very difficult to go to hospital. In other words, according to the Supreme Court, the applicant essentially invokes reasons of safety and difficult hospital attendance, doing so in a very general way, since he does not specify

any episode that could illustrate his complaint;

- Also for the SAC, it follows from recitals 4 and 5 of Regulation [EU] 604/2013, of the European Parliament and of the Council, of 26.06.2013, that it was intended to implement a clear and operational method for determining the Member State responsible for examining asylum applications, and that that method should be based on objective and fair criteria, so as to enable a rapid determination of the Member State responsible and not to compromise the objective of the rapid processing of applications for international protection. It follows that only in duly justified cases, that is to say, in those cases in which there are valid reasons to believe that 'there are systemic failings in the asylum procedure and in the reception conditions of applicants' and that such failings entail a risk of inhuman or degrading treatment, in particular because they involve torture, is it incumbent on the State concerned to seek to obtain up-to-date information on the existence of a risk that the applicant will be subjected to that kind of treatment;

- However, according to this court, this is not the case here, where the applicant's complaints about his stay in a "refugee" camp in Italy are not such as to give rise to any "serious suspicion" - valid reasons - that he will suffer "inhuman or degrading" treatment by the Italian State;

- It should be added that the news reports referred to also do not require the condemnation of the SEF, since for the Supreme Court they refer, in isolation, to an unusual situation: that of the abnormal flow of illegal immigration of citizens from African countries to Europe, via Italy;

- According to the Supreme Court, it was an avalanche of illegal immigration, made up of a group of immigrants including potential refugees but not only potential refugees, which caused a deficit in the conditions of reception by Italy, provoking a hostile political reaction in order to arouse the solidarity of the other Member States in the resolution of the problem. Hence, the news conveyed only reflects this, and are not capable, in itself, of implying the risk of inhuman or degrading treatment, including torture, of applicants for international protection by the Italian State.

In light of the above, the Supreme Administrative Court decided to agree with the SEF, concluding that, in the case in question, it should not have proceeded with the investigation imposed on it by the first instance decision.

Relation of the case to the EU Charter

It is interesting to note that only the Court of First Instance referred to the CFREU, namely to its Article 4. In fact, insisting that a situation of inhuman treatment by Italy could be at stake, and in line with its interpretation of the Regulation, the Court of First Instance considered that SEF should have proceeded with the ex-officio investigation of the existence of possible conditions of inhuman

treatment in the refugee camps located in Italy. By failing to do so, it was in breach of Article 4 of the Charter.

In contrast, and also as seen above, the Supreme Administrative Court confined itself to the first paragraph of Article 3(2) of the Regulation, disregarding the reports in the media. This is sufficient for it also to disregard any reference to the CFREU thereafter.

Relation between the EU Charter and ECHR

The same reasoning applicable to the relation of the case to the EU Charter is applicable to the relation between the EU Charter and ECHR but in reference to Article 3 of the ECHR.

Use of Judicial Interaction technique(s)

Regarding the Court of First Instance, we can speak of a consistent interpretation, namely with the CFREU. In fact, as soon as this court gives special focus to the duties arising for the State from the second and third paragraphs of Article 3 of the Regulation, it is necessary to subsequently verify whether the State has complied with them, under penalty of jeopardizing the prohibition arising from the aforementioned articles of the CFREU and the ECHR.

Regarding the Supreme Court, this interpretation was also consistent, but in the opposite direction, insofar as, for this court, there was no duty imposed on the Portuguese State, so that, consequently, there was no violation of the CFREU and the ECHR.

Horizontal Judicial Interaction patterns (Internal – with other national courts, and external – with foreign courts)

Not applicable.

Vertical Judicial Interaction patterns (Internal – with other superior national courts, and external – with European supranational courts)

The Court of First Instance referred to a decision of the Court of Justice of the European Union to justify the duty of the States not to return the applicant when they cannot ignore the fact that the systemic failures in the asylum procedure and in the reception conditions of asylum seekers in that Member State constitute serious and credible grounds for the applicant to run a real risk of being subjected to inhuman or degrading treatment.

The Supreme Administrative Court interacts with the Court of First Instance in order to reject the Court's position and replace it with its own.

Strategic use of judicial interaction technique (purpose aimed by the national court)

While the Court of First Instance opted for a combined reading of the provisions of the Regulation, the CFREU and the news published in the national and international media, the Supreme Administrative Court preferred a more isolated reading of the same precept in the Regulation, disregarding the news that had been published, as it considered that these were the result of a political option that is not only beyond the court's competence to pronounce on, but that are also not sufficient to conclude that there may be a possible violation of the prohibition of cruel and inhuman treatment.

Thus, and in other words, while the Court of First Instance is engaging in greater interaction with legal bodies and instruments of the European Union, the Supreme Administrative Court prefers to confine itself to the Regulation and to its literal interpretation, disregarding the interpretation made of it by other Member States and by the CJEU.

Impact on Legislation / Policy

Not applicable.

Notes on the national implementation of the preliminary ruling by the referring court

Not applicable.

Impact on national case law from the same Member State or other Member States

Not applicable.

Connected national caselaw / templates

Not applicable.

(Link to) full text

http://www.dgsi.pt/jsta.nsf/35fbbbf22e1bb1e680256f8e003ea931/bfe6e6782fe5db15802584f7003a2565?O
