

## Portugal, Portuguese Ombudsman's Office, May 2020

### Member State

 Portugal

---

### Topic

Asylum and migration

---

### Deciding Court Original Language

Ombudsman/Provedoria de Justiça de Portugal

---

### Deciding Court English translation

Not judicial/European Ombudsman query

---

### Registration N

The only reference to this case is on the European Ombudsman's website: Q2/2020/JF

See here: <https://www.ombudsman.europa.eu/pt/case/pt/56927>

---

### Date Decision

The consultation requested by the Portuguese Ombudsman to the European Ombudsman took place on 6 May 2020, and a decision by the European Ombudsman is still pending.

---

### ECLI (if available)

Not available

---

### National Follow Up Of (when relevant)

Not available

---

### EU legal sources and CJEU jurisprudence

Article 4 of the Charter of Fundamental Rights of the European Union (CFREU)

---

## Subject Matter

Asylum and migration

---

## Legal issue(s)

The legal issue concerns the so-called double refoulement: namely whether Portugal, having (re)sent two citizens from Afghanistan to Sweden - i.e. to the State where they were first received - can be held responsible if Sweden returns the same citizens to Afghanistan and they are subject to persecution and ill-treatment there.

---

## 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.

Regarding the European Union, one should of course highlight The Regulation (EU) No 604/2013 (Dublin III Regulation), replacing Council Regulation (EC) No 343/2003 (Dublin II Regulation), which establishes the criteria and mechanisms for determining the EU country responsible for examining an asylum application.

---

## Facts of the case

Two citizens of Afghanistan, who had initially been in Swedish territory, "fled" to Portugal and were intercepted by the Foreigners and Borders Service of Portugal - better known as "SEF".

The SEF's decision was to return these two citizens to Sweden immediately, invoking Article 3(2) of the Dublin Regulation, which states:

"2. Where no Member State responsible can be designated on the basis of the criteria set out in this Regulation, the first Member State in 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 involve a risk of inhumane 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".

Faced with that decision, the citizens complained to the Portuguese Ombudsman's Office, claiming that, if that decision were complied with and they were returned to Sweden, Sweden would return them to Afghanistan where they would be persecuted and subjected to ill-treatment.

---

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

The Ombudsman's decision was, of course, based on Article 3 of the Regulation in question.

However, before deciding, the Portuguese Ombudsman wanted to find out whether the allegation made by the two citizens was true - i.e. that Sweden would return them to Afghanistan if Portugal returned them to Sweden - and therefore asked the Swedish Ombudsman the same question. The answer was no - in other words, Sweden answered that it would not return these two citizens to Afghanistan if Portugal decided to return them to Sweden.

Even so, to clear up any remaining doubts, the Portuguese Ombudsman consulted the European Ombudsman to ascertain the correct interpretation of the Dublin Regulation - specifically article 3:

1. Whether Portugal could be held responsible in the event that Sweden returned citizens to Afghanistan and they were persecuted and ill-treated there;
2. Who is competent to assess the risk of ill-treatment in Afghanistan, particularly in the light of Article 3 of the Dublin Regulation: Portugal or Sweden?

Although the Ombudsman has responded positively to the first question, stating that Portugal could possibly be held responsible, with regard to the second question it decided to consult the European Commission before replying. A reply to the latter question is still awaited.

---

## Relation of the case to the EU Charter

There is a clear relationship with the CFREU, in particular with Article 4, insofar as this article is expressly referred to in Article 3 of the Dublin Regulation, which motivated the questions raised by Portugal.

In fact, it was precisely in order not to materialise a possible violation of Article 4 of the CFREU that Portugal decided to consult the European Ombudsman, who, as we have seen, answered affirmatively to the question of whether Portugal could be held responsible for violating that article if Sweden returned citizens to Afghanistan after Portugal had returned them to Sweden.

---

## Relation between the EU Charter and ECHR

The same reasoning we made in the previous field should also be made here, but regarding Article 3 of the ECHR.

---

## Use of Judicial Interaction technique(s)

There is a clear concern for consistent interpretation on the part of the Portuguese Ombudsman. In fact, it was the concern to be in line with the stipulations of European Union Law that motivated the consultation of the European Ombudsman. According to the Portuguese Ombudsman, the Dublin Regulation is not clear on the two questions that were asked, and clarification is therefore required.

---

## 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)

Although we cannot speak of judicial bodies, from the moment the Portuguese Ombudsman consults the European Ombudsman, there is a clear vertical interact between these two bodies.

This consultation is therefore part of the European Network of Ombudsmen, which connects the European Ombudsman with national and regional ombudsmen in order to ensure that complainants can receive the appropriate level of help, while sharing information about European Union law and its impact on Member States and facilitating cooperation between ombudsmen in order to safeguard the rights of EU citizens and persons covered by EU law.

---

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

Not applicable.

---