

**Italy, District Court of Florence, XXX.XX, ordinary instance, 29/04/2021, reference for a preliminary ruling. Judgment of the Court (Second Chamber) of 30 November 2023 (Joined Cases C?228/21, C?254/21, C?297/21, C?315/21 and C?328/21)**

Member State

 Italy

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Topic

Mutual trust

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Sector

Judicial Interaction Techniques; Asylum; Use of the Preliminary Reference Procedure

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Deciding Court Original Language

Tribunale ordinario di Firenze - Sezione Protezione Internazionale

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Deciding Court English translation

District Court of Florence - Section for international protection

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Registration N

Not available

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Date Decision

29/4/2021

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ECLI (if available)

CJEU judgment: ECLI:EU:C:2023:934

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National Follow Up Of (when relevant)

The national decision originated the case C-297/21. The CJEU issued judgment on joined cases C-228/21, C-254/21, C-297/21, C-315/21, C-328/21 on 30 November 2023.

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## EU legal sources and CJEU jurisprudence

The national decision directly refers to the following EU sources:

EU Charter, Articles 4 (Prohibition of torture and inhuman or degrading treatment or punishment), 18 (Right to asylum), 19 (Protection in the event of removal, expulsion or extradition), and 47 (Right to an effective remedy and to a fair trial).

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 (Dublin Regulation), Articles 3 (access to the procedure for examining an application for international protection), 17 (discretionary clauses), 18 (obligations of the Member State responsible), 27 (remedies).

The national decision directly refers to the following judgments of the CJEU (chronological order): B and D., Joined Cases C-57/09 and C-101/09, 9 November 2010, ECLI:EU:C:2010:661; N.S. and Others, 21 December 2011, Joined Cases C-411/10 and C-493/10, ECLI:EU:C:2011:865; 30 May 2013, Halaf, Case, C-528/11, ECLI:EU:C:2013:342; 10 December 2013, Abdullahi, Case C-394/12, ECLI:EU:C:2013:813; C.K., Case C-578/16, 16 February 2017, ECLI:EU:C:2017:127; M.A. and Others, 23 January 2019, Case C-661/17, ECLI:EU:C:2019:53; M, Case C-391/16, 14 May 2019, ECLI:EU:C:2019:403

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## ECtHR Jurisprudence

The national decision directly refers to the ECHR, Article 3 (Prohibition of torture and inhuman or degrading treatment or punishment).

The national decision directly refers to the following judgments of the ECtHR (chronological order): M.S.S. v. Belgium and Greece, 21 January 2011, App. No 30696/09, ECLI:CE:ECHR:2011:0121JUD003069609; Hirsi Jamaa and Others v. Italy, 23 February 2012, App. No. 27765/09, ECLI:CE:ECHR:2012:0223JUD002776509; Sharifi and Others v. Italy and Greece, 21 October 2014, App. No 16643/09, ECLI:CE:ECHR:2014:1021JUD001664309.

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## Subject Matter

Mutual trust - Fundamental rights - Prohibition of inhuman or degrading treatment - indirect refoulement - Common European Asylum System - Regulation (EU) No 604/2013 - Transfer of an asylum seeker to the competent Member State

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## Legal issue(s)

The Court of Florence issued a request for preliminary ruling concerning the suspension of the Dublin mechanism to ensure fundamental rights. Notably, the request concerns the possible suspension of the Dublin procedure where, following the transfer of the asylum seeker to the Member State which is primarily designated as responsible under the Dublin Regulation and which has already denied the asylum request, the asylum seeker is likely to be deported to his country of origin where he would run a real risk of torture or inhuman or degrading treatment (risk of indirect refoulement).

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### Request for expedited/PPU procedures

YES. The national court requested the CJEU to review the case under the expedited procedure for three reasons. Firstly, the high number of proceedings which must be suspended pending the CJEU's decision. Second, the urgency to settle the conflict of interpretation existing in the Italian case-law on the Dublin transfer in case of a risk of indirect refoulement. Third, the necessity to refer a question to the Italian Constitutional Court if the CJEU accepted a narrow interpretation of the discretionary clause.

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### Interim Relief

No interim relief requested

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### National Law Sources

Italian Constitution, Articles 10, para. 3, (Right to asylum) and 24, paras. 1 and 2 (Right to be Heard in Court)

Legislative Decree 25/2008 transposing Council Directive 2005/85/EC repealed by Directive 2013/32/EU on common procedures for granting and withdrawing international protection, Article 3 concerning the remedy against a transfer decision adopted under the Dublin Regulation.

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### Facts of the case

The applicant is an Afghan national who submitted an asylum request in Germany. After his application was rejected and the German authority issued a final deportation order to Afghanistan, the applicant reached Italy where he submitted a second asylum request. Since the Eurodac system revealed his previous request, the Dublin Unit of the Italian Ministry of Interior submitted a take back request to Germany, as the competent Member State according to the Dublin criteria. After Germany accepted, the Italian authority adopted a transfer decision which was challenged by the applicant before the district Court of Florence. Notably, the applicant argued that, following his transfer, the German national authorities would deport him to Afghanistan where he would run a real risk of inhuman or degrading treatment prohibited by Article 4 of the EU Charter; therefore, he invoked the application of the discretionary clause set out in Article 17(1) of the Dublin Regulation.

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

The Court of Florence starts from the different interpretations developed in the Italian case-law in relation to a risk of indirect refoulement (see points 6.2 and 6.3). Notably, the Italian Court of Cassation stated that the discretionary power conferred on Member States by Article 17(1) of the Dublin Regulation implies that such a clause can be applied only by the administrative authority. By contrast, according to this interpretation, the national judge seized of an action for the annulment of a transfer decision, under Article 27 of the Dublin Regulation, cannot assess the non-application of the clause by the administrative authority.

While recognising the discretionary nature characterising Article 17(1) of the Dublin Regulation, the Court of Florence points out that the said clause aims to protect fundamental rights where the transfer of the asylum seeker would expose him to a real risk of inhuman or degrading treatment which does not result from systemic flaws in the competent Member State. Indeed, the presumption of security of the Dublin transfer to another Member State is not absolute, as recognised by the CJEU beginning with N.S. Notably, as held in C.K., the absolute nature of Article 4 of the Charter entails that the Dublin transfer must be ruled out in any situation in which the transfer will expose the asylum seeker to a real risk of inhuman or degrading treatment in the

competent Member State.

Moreover, according to the Court of Florence, the discretionary clause makes it possible to implement EU law in compliance with the constitutional national identity (Article 4(2) TEU) and the constitutional national tradition (Article 6(3) TEU). Notably, the referring court stresses the importance of the right to asylum enshrined in Article 10(3) of the Italian Constitution which has a broader scope of application than the international protection defined by EU law. In this latter regard, the national judge points out that firstly, EU law asylum system defines the minimum level of protection to be guaranteed which does not exclude a higher level defined by the national legal system. Secondly, the right to asylum must be qualified as a fundamental principle of the Italian constitutional order which represents a limit to the primacy of EU law and can trigger the “counter-limits”.

In conclusion, according to the referring court, the discretionary nature of Articles 17(1) of the Dublin Regulation only concerns the definition of the Member States’ responsibility for examining an asylum request. By contrast, the said discretionary nature does not prevent the national judge from assuring compliance with the principle of non-refoulement which, as stated by the ECtHR, covers also the indirect refoulement.

Against this background, the Court of Florence refers a question for preliminary ruling to the CJEU asking whether Article 17(1) of the Dublin Regulation, read in accordance with Article 27 thereof and Articles 19 and 47 of the Charter, implies that the national court seized of an action for the annulment of a transfer decision may establish the competence of the transferring Member State if it determines the existence of a real risk of indirect refoulement following the transfer of the asylum seeker to the competent Member State.

In the alternative, if the answer to the first question is in the negative, the Court of Florence submits a second preliminary question on the interpretation of Article 3(2) of the Dublin Regulation. According to this provision, where the transfer to the competent Member State is impossible due to systemic flaws in the asylum procedure and in the reception conditions, the transferring Member State must establish whether another Member State can be designated as competent in accordance with Dublin criteria; however, where such a designation is not possible, the competence lies on the transferring Member State. As recalled by the Court of Florence, the link established by Article 3(2) between the existence of systemic flaw in the competent Member State and the non-execution of the Dublin transfer due to a risk of inhuman or degrading treatment, was broken by the CJEU in C.K. Against this background, the Court of Florence wonders whether, after excluding the application of Article 17(1) of the Dublin Regulation, the protection against the risk of indirect refoulement may be ensured by applying Article 3(2) thereof.

In conclusion, the national judge asks the CJEU whether Article 3(2) of the Dublin Regulation, read in conjunction with Articles 19 and 47 of the Charter and Article 27 of the Dublin Regulation, must be interpreted as meaning that the national judge may declare the competence of the transferring Member State where it is found that:

- a) in the Member State primarily designated as responsible there is a real risk of violation of the principle of non-refoulement because the applicant is likely to be deported to his country of origin where he would be exposed to a real risk of inhuman or degrading treatment;
- b) it is impossible to transfer the asylum seeker in another Member State designated as responsible in accordance with the Dublin criteria.

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### Relation of the case to the EU Charter

The national judge significantly refers to the EU Charter (Articles 4, 18, 19, and 47) as a legally binding parameter to interpret Regulation (EU) No 604/2013. Notably, the Court of Florence refers to the interpretation that the CJEU gave to Article 4 of the EU Charter in C.K. to argue that the national judge seized of an action for the annulment of a transfer decision, under Article 27 of the

Dublin Regulation, must assess whether the transfer of the asylum seeker to the competent Member State expose him to a risk of indirect refoulement and, if this is the case, the judge must declare the competent of the transferring State by applying either Article 17(1) or Article 3(2) of the Dublin Regulation.

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### Relation between the EU Charter and ECHR

The national judge refers to Article 3 ECHR and its relevant jurisprudence to interpret Article 4 EU Charter in line with Article 52.3 thereof. Notably, the Court of Florence refers to the case-law of the ECtHR where the Court recognised that Article 3 ECHR prohibits indirect refoulement, too.

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### Use of Judicial Interaction technique(s)

Preliminary reference; mutual recognition

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

The Court of Florence points out that different interpretations have been developed in the Italian case-law in relation to a risk of indirect refoulement.

According to a first line of interpretation (District Court of Rome, decree No. 15369/2019, 10/05/2019, and decree No. 7899/2018 del 05/06/2018) the national judge seized of an action for the annulment of a transfer decision, under Article 27 of the Dublin Regulation, must ensure the absolute prohibition of inhuman and degrading treatment, as recognised in Article 4 of the EU Charter and Article 3 ECHR. Therefore, if in the competent Member State there is a real risk of violation of the principle of non-refoulement because the applicant is likely to be deported to his country of origin where he would run a real risk of inhuman or degrading treatment, the national judge must apply Article 17(1) of the Dublin Regulation and declare that Italy is responsible for examining the applicant's request. Notably, according to this line of interpretation, the discretionary clause allows the judicial authority to strike a balance between the necessity to ensure the protection of the fundamental rights and the necessity to determine rapidly the Member State responsible for examining the asylum request.

A slightly different line of interpretation was developed by the District Court of Milan (Decree No. 27034/2020 of 14/10/2020). While reaching the same conclusion adopted by the Court of Rome, the Court of Milan did not apply the discretionary clause set out in Article 17(1) of the Dublin Regulation, but Article 3(2) thereof. The Court argued that, since the transfer cannot be executed and it is not possible to designate another competent Member State in accordance with the Dublin Regulation criteria, the responsibility for examining the applicant's request for international protection must be undertaken by the Italian authorities. The Court of Milan applied this provision referring to the CJEU judgments in *C. K.* where the CJEU stated that the absolute nature of Article 4 of the Charter implies that the Dublin transfer must not be executed not only where the competent Member State is affected by a systemic flaw entailing a real risk of inhuman or degrading treatment, but whenever the applicant will run such a risk following his transfer.

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

The Court of Florence refers to the interpretation held by the Italian Supreme Court of Cassation (orders No. 23584-23585-23586/2020 and 23724/20) in relation to the risk of indirect refoulement. The Court of Cassation emphasised that, according to the CJEU, Article 17(1) of the Dublin Regulation conferred a wide discretionary power on Member States (among others, M.A. and

Others, C-661/17). It follows that the discretionary clause can be applied only by the administrative authority and cannot be subject to judicial review. Therefore, according to the Court of Cassation, the national judge seized of an action for the annulment of a transfer decision, under Article 27 of the Dublin Regulation, can neither apply the discretionary clause nor impose its application to the Dublin Unit.

Moreover, the Court of Florence refers to the relevant case-law of the CJEU. Notably, the Court of Florence refers to the CJEU judgment in C.K. to argue that the absolute nature of Article 4 of the EU Charter entails that the national judge, seized of an action for the annulment of a transfer decision, under Article 27 of the Dublin Regulation, must ensure that the asylum seeker is protected against the risk of indirect refoulement which he can run following his transfer to the competent Member State. Moreover, the Court of Florence cites the B and D judgment where the CJEU recognised that the EU law asylum system only defines the minimum level of protection to be guaranteed and it does not exclude a higher level defined by the national legal system.

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

The scope pursued by the national court when using judicial interaction techniques is to solve conflicts of judicial interpretation involving fundamental rights enshrined in the EU Charter. Notably, the Court of Florence seeks guidance from the CJEU in order to ensure the protection of fundamental rights, notably the principle of indirect refoulement as recognised by the EU Charter, the ECHR and the Italian Constitution, where their protection entails the suspension of the Dublin system.

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#### Impact on Legislation / Policy

N/A

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

N/A

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Did the national court quote case law of the CJEU/ECtHR (in particular cases not already referred to by the CJEU in its decision) or the Explanations?

The national court widely quoted the case-law of the CJEU and ECtHR (see points 4.3 and 4.4.)

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Did the national court quote soft law instruments, such as GRECO Reports, Venice Commission, CEPEJ Reports, or CCEJ Reports?

The national court did not quote soft law instruments.

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Did the national court take into account national case law on fundamental rights?

The national court refers to the interpretation elaborated in relation to a risk of indirect refoulement by the Italian case-law, and in particular by other district courts, such as the district Court of Milan and Rome (see point 6.2.) and by the Italian Court of Cassation (see point 6.3).

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

Not applicable. The national decision originated the case C-297/21 still pending before the CJEU.

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## Connected national caselaw / templates

Not applicable. The national decision originated the case C-297/21 still pending before the CJEU.

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(Link to) full text

<https://www.questionegiustizia.it/data/doc/2892/rinvio-pregiud-firenze-resping-indiretto.pdf>

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