Field:

BVerwGE: yes
Trade press: yes

Asylum law

Sources in law:

TFEU	Art. 78(2)
Asylum Procedure Act	Secs. 27a, 31(6), Sec. 34a(1)
Residence Act	Sec. 11
Dublin II Regulation	Art. 10(1), Art. 13, 16(1), Art. 18(7), Art. 19(2), (3) and (4), Art. 20(1) and (2)
Dublin III Regulation	Art. 26(2), Art. 29(1), Art. 49(2)
Dublin Implementing Regulation	Art. 7(1)
EU Charter of Fundamental Rights	Art. 6, 52(1) sentence 2
Baden-Württemberg State Administrative Procedure Act	Sec. 19(2)
Directive 2008/115/EC	Art. 2(1), Art. 7

Title:

Deportation Order in Dublin Procedure

Key words:

Deportation; deportation order; asylum application; taking charge; alternative means; supervision; instruction; Dublin Rules; feasible; own initiative; voluntary departure; priority; return; ban; transfer; direct compulsion; inadmissibility; proportionality; administrative compulsion; enforcing authority; taking back; responsibility.

Headnotes:

1. The Dublin Regulations do not prescribe any priority for the three transfer procedures they provide (cf. Art. 7(1) Regulation (EC) No. 1560/2003). In particular, there is no priority favouring a transfer on the asylum applicant’s own initiative.

2. The provision under Sec. 34a(1) of the Asylum Procedure Act, according to which the Federal Office can order deportation as the only option for transferring a foreigner to the Member State responsible for reviewing his asylum application, is compatible with Union law. The foreigners authority tasked with enforcing the deportation must take due account of the principle of proportionality.

3. The principle of proportionality is maintained in that while transfer regularly takes the form of a deportation, in exceptional cases a transfer without administrative compulsion is possible. The executing authority must allow the asylum applicant the option of a transfer without administrative compulsion if it appears certain that he will voluntarily travel to the Member State responsible for reviewing his application and will report in a timely manner to the responsible authority there.

4. A transfer without administrative compulsion is not a deportation, and therefore does not result in a statutory ban on entry and residence under Sec. 11 of the Residence Act.

Judgment of the First Division of 17 September 2015 – BVerwG 1 C 26.14

I. Stuttgart Administrative Court, 5 May 2014
Case: VG A 4 K 1410/14
II. Mannheim Higher Administrative Court, 27 August 2014
Case: VGH A 11 S 1285/14

FEDERAL ADMINISTRATIVE COURT

IN THE NAME OF THE PEOPLE

JUDGMENT

BVerwG 1 C 26.14
VGH A 11 p 1285/14

Released
on 17 September 2015
...
Clerk of the Court

In the administrative case

Translator's Note: The Federal Administrative Court, or *Bundesverwaltungsgericht*, is the Federal Republic of Germany's supreme administrative court. This unofficial translation is provided for the reader's convenience and has not been officially authorised by the *Bundesverwaltungsgericht*. Page numbers in citations of international texts have been retained from the original and may not match the pagination in the parallel English versions.

When citing this decision, it is recommended to indicate the court, the date of the decision, the case number and the paragraph: BVerwG, Judgment of 17 September 2015 – BVerwG 1 C 26.14 – para. …

the First Division of the Federal Administrative Court
upon the hearing of 17 September 2015
by Presiding Federal Administrative Court Justice Prof. Dr Berlit
and Federal Administrative Court Justices Prof. Dr Dörig, Prof. Dr Kraft, Fricke
and Dr Rudolph

has decided:

The Complainant's appeal against the judgment of the Baden-Württemberg Higher Administrative Court of 27 August 2014 is denied.

Costs of the complaint proceedings are imposed on the Complainant.

R e a s o n s :

I

1 The Complainant, a Pakistani national, challenges the order for his deportation to Italy.

2 By his own account the Complainant, born in 1992, entered Germany in October 2013 and applied here for asylum. He stated to the Federal Office for Migration and Refugees – the 'Federal Office' – that he had arrived in Italy by ship the previous month, where he had also undergone identity screening.

3 In its ‘Checklist for Filing the Record in Dublin II Proceedings’ (undated), the Federal Office found that there were no Eurodac hits in ‘Cat 1’ (asylum applicants), but there was one in ‘Cat 2’ (illegal immigrants). On 30 December 2013, the Federal Office addressed a request to Italy to take charge on the basis of Art. 10(1) of the Dublin II Regulation. As the competent Italian agencies did not respond, the Federal Office informed the Italian Ministry of the Interior in a letter dated 3 March 2014 that the request to take charge was deemed to have been accepted.

4 In a decision dated 12 March 2014, the Federal Office ruled that the application for asylum was inadmissible (Point 1 of the decision), and ordered the Complainant deported to Italy in accordance with Sec. 34a(1) sentence 1 of the Asylum Procedure Act (Point 2 of the decision). An application to the Administrative Court for preliminary injunctive relief was denied in an order dated 7 April 2014. In the main proceedings, the Administrative Court found against the Complainant.

5 The Higher Administrative Court gave leave to appeal that judgment with regard to the deportation order (Point 2 of the Federal Office decision), but denied leave with regard to the decision on admissibility of the application (Point 1 of the Federal Office decision). In a judgment of 27 August 2014, the Higher Administrative Court denied the Complainant’s appeal. The court based its decision on essentially the following grounds: The Respondent’s deportation order under Sec. 34a of the Asylum Procedure Act was compatible with Union law, and in particular with the Dublin Regulations of 2003 and 2013 for determining the Member State responsible for examining an asylum application. The court ruled that there was no need to decide which of these two Regulations applied to a situation like the present one, under which the requests to take charge (or take back) were sent while the Dublin II Regulation was in force, while the procedure for transfer that is at issue here was initiated only after the Dublin III Regulation took effect. It is not incompatible with Union law, the court held, that Sec. 34a of the Asylum Procedure Act mandatorily prescribes issuing a deportation order. The wording of the provision is left open in such a way that deportation is not required to take place without exception, as for example in cases where it is opposed by Union law. Although the Dublin Regulations allow the

Member States a certain latitude in this respect, that latitude is limited by the principle of proportionality under Union law. Consequently it is not permissible under Union law to provide for and execute transfers solely by way of deportation. The court noted that the German states' foreigners authorities responsible for such duties must take account of this aspect in deciding on how to carry out a transfer decision. In this regard, no specification is required in the decision from the Federal Office. Allocating to the foreigners authorities the task of deciding on procedures for transfer is consistent with Germany's federal structure. The court ruled that it cannot be argued successfully against the lawfulness of the deportation notice that transfer to Italy is no longer possible. First of all, such a transfer is indeed still possible, just as it was before. Moreover, the Complainant also cannot rely on a reversion of jurisdiction to Germany, because Point 1 of the challenged decision has now become final, and thus the question of jurisdiction has been settled as res judicata.

6 In his appeal to this Court, the Complainant challenges the appellate court's interpretation of law, in which he sees a violation of the principle of proportionality that is anchored in Germany's Basic Law and in Union law. He argues that transferring an asylum applicant serves only for the enforcement of a finding on jurisdiction. It is disproportionate to permit only the compulsory means of a deportation order for this purpose. A deportation, he argues, is typically executed with means of direct compulsion. If a realistic view is taken, ordering deportation excludes the graduated regulatory structure of various modes of transfer as prescribed by Union law. It is also not possible to either construe or handle the matter in a way consistent with Union law, because the concept of a deportation order inherently contains a mandatory imperative from which one cannot depart. The reference in the challenged judgment to the foreigners authorities' latitude for action in executing the transfer cannot guarantee an application consistent with Union law. If the Federal Office arranges a transfer by issuing a deportation order, the foreigners authorities are bound by that order. There is also much to argue, the Complainant says, that Union law requires a single fundamental decision about lack of jurisdiction and the procedures for transfer, and thus in general one must allow the possibility of a 'voluntary self-transfer'.

7 The Respondent holds that the deportation order is lawful. The terms of Union law do not prescribe which of the transfer options permissible under Union law must be specified by a national legislature. Since April 2015, it argues, the Federal Office's decisions have offered the option of voluntary emigration when that possibility has been agreed by all participating agencies. But there is no legal entitlement to it.

8 The Representative of the Federal Interests before the Federal Administrative Court has not taken part in the proceedings.

II

9 The Complainant's appeal to this Court is without merit. The judgment of the court below is consistent with the law subject to supreme court review. The challenged deportation order meets the statutory requirements under Sec. 34a(1) of the Asylum Procedure Act. The basis in statute is compatible with Union law. The principle of proportionality must be observed in the foreigners authorities' decision on how to execute the ordered deportation. The order is also not to be lifted on grounds that transfer to Italy may no longer be possible.

10 The legal assessment of the Complainant's petition is governed by the Asylum Procedure Act, in the version promulgated on 2 September 2008 (BGBl. I p. 1798) and the Residence Act in the version promulgated on 25 February 2008 (BGBl. I p. 162), the Asylum Procedure Act as last amended by the Act for the Transposition of Directive 2011/95/EU of 28 August 2013 (BGBl. I p. 3474), the Residence Act as last amended by the Act Redefining the Right of Residence and Termination of Residence of 27 July 2015 (BGBl. I p. 1386). According to the established case law of the Federal Administrative Court, changes in the law enacted after an appellate decision must be taken into account by the supreme court if the court below would have to observe them if it were to decide now (cf. Federal Administrative Court, judgment of 11 September 2007 – 10 C 8.07 – BVerwGE 129, 251 para. 19). As the present dispute concerns asylum procedure, for which under Sec. 77(1) of the Asylum Procedure Act the appellate court must regularly base its findings on the situation of fact and law at the

date of its last oral hearing or decision, if that court were to decide now it would have to decide on the basis of the new situation of law, unless – as in the instant case – a deviation is required by substantive law.

11 The Higher Administrative Court correctly found that the Complainant's deportation to Italy as ordered in Point 2 of the challenged decision meets the statutory requirements under Sec. 34a(1) of the Asylum Procedure Act. According to Sec. 34a(1) sentence 1 of the Asylum Procedure Act, the Federal Office for Migration and Refugees (the Federal Office) shall order a foreigner's deportation to the country responsible for carrying out the asylum procedure under Sec. 27a of the Asylum Procedure Act, as soon as it has been ascertained that the deportation can be carried out. This provision serves as a transposition of the European Union's Dublin Regulations for determining the Member State responsible for examining an application for international protection.

12 1. The Federal Office's decision in Point 1 of the challenged order, which is now res judicata, establishes that the Complainant's asylum application is inadmissible under Sec. 27a of the Asylum Procedure Act. Notwithstanding the wording chosen by the Federal Office ('The asylum application is inadmissible'), this is not a declaratory finding, but a dispositive decision that rejects the asylum application as inadmissible, as required under Sec. 31(6) of the Asylum Procedure Act (cf. Mannheim Higher Administrative Court, judgment of 10 November 2014 – A 11 S 1778/14 – DVBl 2015, 118, 123).

13 2. Section 34a(1) of the Asylum Procedure Act is compatible with the terms of the Dublin Regulations under Union law, namely not only with the regulation that applies here, 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 L 50 p. 1) – the Dublin II Regulation – in conjunction with Commission Regulation (EC) No. 1560/2003 of 2 September 2003 for the implementation of the Dublin II Regulation (OJ L 222 p. 3) – the Dublin Implementing Regulation – but also with the regulation that is not applicable here, Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for de-

termining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national (OJ L 180 p. 31) – the Dublin III Regulation.

14 a) In the present case, the Dublin II Regulation remains applicable. This proceeds from the transitional provision under Art. 49 second paragraph of the Dublin III Regulation. Under that provision, the Dublin III Regulation is to apply to applications for international protection filed only on or after the first day of the sixth month following its entry into force, meaning from 1 January 2014. In the instant case, the application was lodged in October 2013, and therefore before the applicable cut-off date. Moreover, although the Dublin III Regulation does apply as from 1 January 2014 for any request to take charge of or take back applicants, irrespective of the date on which the application was made, this is the case only if those requests had not already been made by 1 January 2014 (cf. Federal Administrative Court, judgment of 17 June 2014 – 10 C 7.13 – BVerwGE 150, 29 para. 27). Here the request to take charge was made on 30 December 2013, and therefore before the applicable cut-off date. Applicability of the Dublin III Regulation also cannot be derived from the consideration that the deportation order to be assessed here initiated the transfer procedure within the meaning of Art. 29 et seqq. of Dublin III Regulation, and thus an independent segment of the proceedings. The provision for a cut-off date in the second paragraph of Art. 49 of the Dublin III Regulation applies fundamentally for all applications for international protection, and includes a retroactive exception only for requests to take charge or take back that are made after the cut-off date. As the request to take back concerned here was made on 30 December 2013, the Dublin II Regulation also applies to the deportation order that initiated the transfer procedure.

15 b) The Dublin Regulations do not establish any priority for the three transfer procedures that they provide. Accordingly, the options are a transfer at the initiative of the asylum seeker, by a certain specified date (Art. 7(1)(a) Dublin Implementing Regulation, Art. 19(2), Art. 20(1)(e) Dublin II Regulation, Art. 26(2) Dublin III Regulation), a supervised departure, with the asylum seeker being accompanied to the point of embarkation in the country of departure by an official of the requesting Member State (Art. 7(1)(b) Dublin Implementing Regula-

tion, Art. 29(1) subsection 2 Dublin III Regulation), and escorted transfer until the asylum seeker is handed over to the authorities in the responsible Member State (Art. 7(1)(c) Dublin Implementing Regulation, Art. 29(1) subsection 2 Dublin III Regulation; an attempt was made to draw a line between these three variants in a judgment by the French Conseil d'Etat of 11 October 2011 – No. 353002). Which of these variants will be used for the transfer is subject to the regulatory powers of the requesting Member State (‘in accordance with the national law’: Art. 19(3) Dublin II Regulation, corresponding to Art. 29(1) Dublin III Regulation).

16 One also cannot derive a general priority of transfer at the asylum applicant’s initiative from the fact that Art. 19(2) of the Dublin II Regulation (corresponding to Art. 26(2) of the Dublin III Regulation) includes notification obligations for the case of a transfer at the individual’s own initiative. Those obligations are expressly provided only for the case that the asylum applicant has been granted that option (‘if necessary’). Nor does anything else proceed from the Dublin III Regulation, which is not applicable here. According to its 24th recital, the Member States ‘should’ promote voluntary transfers by providing adequate information to the applicant, but this does not yield any priority for a departure organised by the individual himself.

17 c) There is also no obligation to first permit the asylum seeker to transfer without administrative compulsion on the basis of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ L 348 p. 98) – the Return Directive. It is true that as a general rule, Art. 7 of that Directive – unlike the Dublin Regulations – permits an illegally staying foreigner to depart voluntarily, before it is permissible to take measures of compulsion. The Return Directive applies in general to all third-country nationals staying illegally (Directive Art. 2(1)). This also includes asylum applicants who have illegally entered the country from a third country and who the Federal Office has found are required to leave (cf. Hailbronner, Ausländerrecht, December 2013, Sec. 34a Asylum Procedure Act para. 11). However, with regard to the procedures for a transfer, the Dublin Regulations are *leges speciales* in comparison to the provisions of the Return Directive.

18 This is evident if only from the fact that the Return Directive governs the return of third country nationals staying illegally in the country. This objective is to be obtained with voluntary departure, which represents the least rigorous and therefore the preferred means for achieving the purpose. The transfer provisions of the Dublin Regulations, by contrast, serve the purpose of transferring the asylum applicant, or having him report on his own initiative, to the authorities of the Member State responsible for conducting the procedure for granting asylum, under a procedure supervised by the authorities. The transfer is not completed until the person arrives at the responsible authority; until that time, the governing transfer period continues to run (cf. Swiss Federal Supreme Court, judgment of 11 November 2013 – 2 C 861/2013 – BGE 140 II 74, 77). If transfer is not carried out on time, responsibility is transferred to the transmitting Member State (cf. Art. 19(4) Dublin II Regulation). Voluntary departure within the meaning of Art. 7 of the Return Directive is not capable of establishing the transfer of responsibility to the responsible Member State, which is the objective of the Dublin Regulations. Consequently the institution of voluntary departure is also unknown to the Dublin Regulations. Any transfer under the Dublin Regulations is a departure of the person concerned to another Member State, under government supervision, even if it takes place at the asylum applicant's initiative and without the application of administrative compulsion (cf. Art. 7(1)(a) Dublin Implementing Regulation). It must always be organised by the authorities in respect of defining the place and time (cf. Art. 7 through 10 Dublin Implementing Regulation).

19 3. Section 34a of the Asylum Procedure Act, as interpreted by this Court, is also consistent with the principle of proportionality under Union law.

20 a) Under the principle of proportionality pursuant to Union law, limitations of fundamental rights (here: freedom of movement under Art. 6 of the Charter of Fundamental Rights) are permitted only if they are necessary and genuinely meet objectives of general interest recognised by the Union (Art. 52(1) sentence 2 Charter of Fundamental Rights). The statutory provision under Sec. 34a of the Asylum Procedure Act serves to guarantee a transfer of an asylum seeker in compliance with the terms of the Dublin Regulations, and thus the functions of

the common European asylum system. This is an objective of general interest within the meaning of Art. 78(2) TFEU (cf. CJEU, judgment of 21 December 2011 – C-411/10 and C-493/10 [ECLI:EU:C:2011:865], N. S. – para. 79 et seqq.).

21 The German legislature was also allowed to view arranging administrative compulsion as fundamentally necessary in order to accomplish a timely transfer under the Dublin Regulation. The legislative background materials indicate that the need for a deportation arrangement is founded on the fact that a return to the third country can normally be carried out only within a short time, and in general a voluntary return to the third country is not possible (cf. Bundestag Printed Matter 12/4450 p. 23 on return to a safe third country). The Directive Transposition Act of 2007 expanded the provision to transfers in Dublin proceedings (cf. Bundestag Printed Matter 16/5065 p. 218). The option for departure on one's own initiative is considerably impaired because while a foreigner regularly has the right to enter the country of which he is a national, he has no such right to enter another country in which his asylum application is to be reviewed under the rules of the Dublin procedure. Furthermore, transfer without official accompaniment under Art. 7(1)(a) of the Dublin Implementing Regulation is usually not an option as suitable as transfer by deportation because its success depends on the asylum seeker's willingness to cooperate, and noncompliance with the transfer deadlines results in a transfer of responsibility. Consequently the transferring state would bear the consequences of choosing a transfer method that is unsuitable in practical terms (so held as well by Filzwieser/Sprung, Dublin-III-Verordnung, 2014, p. 290 note K2).

22 The national implementation of the Dublin Regulations with a rules-and-exceptions system favouring officially supervised transfer is also consistent with the procedure in other states participating in the Dublin procedure. The Swiss Federal Supreme Court, for example, held in a judgment of 11 November 2013 (2 C 861/2013 – BGE 140 II 74) that an officially organised transfer takes priority over a transfer without administrative compulsion. It explained this on the understandable grounds that in order to fulfil obligations under the Dublin Regulations, it must be ensured that the asylum seeker to be transferred does indeed arrive at his destination. For that reason, according to that decision, voluntary

return comes under consideration only if there is no reason to believe that it will jeopardise the return procedure.

23 b) The court below correctly held that the principle of proportionality under Union law can be duly taken into account within Germany's federal structure by the federal states' foreigners authorities assigned to execute the transfer decision. These authorities are also required under national law to comply with proportionality.

24 It is true that the foreigners authority responsible for executing a deportation order under Sec. 34a of the Asylum Procedure Act may as a rule assume that a transfer under the Dublin Regulations can be carried out only through administrative compulsion, whether by accompanying the foreigner until he boards the means of transport or by escorting him to the competent authority in the Member State that has responsibility for processing. However, by exception in individual cases, transfer without official supervision under Art. 7(1)(a) of the Dublin Implementing Regulation may be suitable for placing an asylum applicant under the care of the authorities in the responsible Member State within the necessary time. This is conceivable, for example, in cases where the person desires to join his or her family in the other Member State. However, the initiative for this must come from the asylum applicant, and the applicant must normally also raise the financial resources for the journey, unless provided otherwise (cf., e.g., Art. 30(3) Dublin III Regulation). If it appears, after a review of the circumstances of the specific case, that a timely transfer is also assured if the person is allowed to organise travel himself or herself, the foreigners authority responsible for execution must allow the foreigner this opportunity. This is required by the principle of proportionality, not only because of the interference with personal freedom caused by the direct compulsion associated with deportation, but also because of the additional burden on the foreigner that results from the ban on re-entry that proceeds from an executed deportation under Sec. 11 of the Residence Act.

25 The executing authorities are also required to conduct such a proportionality review under national laws for the execution of administrative measures. For example, under Sec. 19(2) of the Baden-Württemberg State Administrative Pro-

cedure Act, which applies here, when the executing authority chooses among various suitable means for carrying out the decision, it must apply the one that is likely to interfere the least with the individual concerned and the general public. But also in the application of direct compulsion – as is characteristic of a deportation – the least rigorous measure from among the various forms of direct compulsion must be chosen (cf. Deusch/Burr, Beck'scher Online-Kommentar VwVG, version of 1 July 2015, Sec. 12 para. 4). The principle of proportionality also comes to expression in the case law on what is known as ‘alternative means’. If several means for averting a threat come under consideration, according to this case law it suffices if one of them is specified. Upon request, the person concerned must be permitted to apply another means that is equally effective (an ‘alternative’ means) if it has no greater adverse impact on the general public (cf., e.g., Mannheim Higher Administrative Court, judgment of 30 October 1991 – 3 S 2273/90 – juris). Here too, however, the initiative for choosing a different means must come from the individual concerned – as in the case of a transfer organised personally by the asylum applicant under Art. 7(1)(a) of the Dublin Implementing Regulation. Contrary to the interpretation argued in the appeal to this Court, the power conferred on the foreigners authority of reviewing whether, by exception in a specific case, carrying out a transfer by way of deportation may be waived also suffices for the national principle of proportionality, insofar as there is still room for that requirement in addition to the principle of proportionality under Union law.

26 The Higher Administrative Court has already pointed out that allocating responsibility to the foreigners authorities for establishing proportionality in each specific case may result in a duplication of legal recourse in some circumstances. If an asylum applicant wishes to have his application decided in Germany and the decision on responsibility goes against him, he must first appeal the order of the Federal Office, and if that appeal fails, he must initiate a second action in court against the foreigners authority if he wishes to achieve a transfer without administrative compulsion. But this is a consequence of the different authorities’ responsibilities under a federally organised governmental structure, and is also consistent with practices in other federally organised states like Switzerland (cantonal authorities’ responsibility; cf. Swiss Federal Supreme Court, judgment of 11 November 2013 – 2 C 861/2013 – BGE 140 II 74, 75). Furthermore, this

allows for current developments that have arisen only after the Federal Office issued its decision, such as a subsequent acceptance of family members whom the applicant wishes to join in another Member State. Moreover, it is only at this stage of the proceedings that it is regularly possible to determine the specific form in which the asylum seeker can cooperate in his transfer.

27 c) This Court points out that any ban set by the Federal Office under Sec. 11 of the Residence Act when it issues the deportation order has no effect for cases of a transfer without administrative compulsion under Art. 7(1)(a) of the Dublin Implementing Regulation. Only an executed deportation results in a ban on entry and residence under Sec. 11 of the Residence Act; the deportation order alone does not suffice for this purpose. Furthermore, a (subsequent) reduction of a specified ban may be required if the foreigner cooperates in a compelled transfer, and in some cases this may even result in the ban's being reduced to zero.

28 4. It does not argue against the lawfulness of the deportation order in Point 2 of the challenged decision that the decision includes no instructions on the possibility of applying to the foreigners authority responsible for the Complainant for a transfer without administrative compulsion, as complained in the appeal to this Court.

29 It is true that under Art. 19(2) sentence 2 of the Dublin II Regulation, the competent authority must 'if necessary, [state] information on the place and date at which the applicant should appear, if he is travelling to the [responsible] Member State by his own means.' The challenged decision of the Federal Office does not contain such information. We may leave aside the question whether the absence of such information has any effect at all on the lawfulness of the deportation order, for it is evident from the very wording of this provision ('if necessary') that such information need be given only if the asylum applicant has been granted the option of a transfer on his own initiative. That was not the case here, and would furthermore – as already discussed above – be a matter under the charge of the foreigners authority. The present proceedings, by contrast, concern the order of the Federal Office and not the subsequent decision of the foreigners authority.

30 However, it would be consistent with the objective of transparency in the Dublin procedure if the Federal Office notifies the persons concerned, even without an express legal duty to do so, about the possibility of applying to the foreigners authority for a transfer on their own initiative under Art. 7(1)(a) of the Dublin Implementing Regulation, and thus takes due account of the objective of the 24th Recital of the Dublin III Regulation ('should').

31 5. The challenged deportation order also meets the statutory requirement under Sec. 34a(1) of the Asylum Procedure Act that it must be possible for the deportation to be carried out. In particular, it does not stand to oppose the feasibility of deportation that the transfer period under Art. 19(4) of the Dublin II Regulation has already expired. We may leave aside the question whether the Complainant might in any event be able to assert a possible expiration of the deadline and a consequent transfer of responsibility, for the transfer period had not yet expired at the relevant date of the decision by the Higher Administrative Court.

32 To that extent – contrary to the opinion of the court below – the governing factor is the Dublin rules for 'taking charge'. These apply to asylum applicants for whom another Member State is responsible, when the requirements of Art. 16(1)(c), (d) or (e) of the Dublin II Regulation are not met, for example because the person stayed in the other Member State before entering the state in which he first applied for asylum. By contrast, the rules for 'taking back' apply if one of the conditions under Art. 16(1) (c), (d) or (e) of the Dublin II Regulation is met, or in other words – unlike the present case – if the asylum applicant has already applied for asylum in another Member State.

33 Here the rules for taking charge (Art. 19 Dublin II Regulation) apply for the following reasons: The Higher Administrative Court did not find that the Complainant had applied for asylum in Italy, nor did he say so himself. The Federal Office as well determined that Italy was responsible for reviewing the Complainant's asylum application because he first entered that country (Eurodac hit under Cat 2, not under Cat 1). Accordingly, it founded its request for Italy to take charge, dated 30 December 2013, on Art. 10(1) of the Dublin II Regulation – illegal

crossing of the border – and not on an asylum procedure in Italy pursuant to Art. 13 of the Dublin II Regulation. Thus the rules for taking charge of an asylum applicant apply, and Italy's period for a response was two months (Art. 18(7) Dublin II Regulation). The Federal Office also referred to the two-month deadline under Art. 18(7) of the Dublin II Regulation in the challenged decision of 12 March 2014, thus establishing that responsibility had been transferred to Italy.

34 By contrast, the Higher Administrative Court incorrectly held that the rules on 'taking back' applied, and thus that the request to Italy had already been accepted after two weeks, pursuant to Art. 20(1)(c) of the Dublin II Regulation. However, if the matter is governed by the deadlines for a request to 'take charge', the transfer period under Art. 19(4) of the Dublin II Regulation had not expired yet at the date of the court's decision on 27 August 2014, which also governs the decision in the present proceedings.

35 6. The disposition as to costs proceeds from Sec. 154(2) of the Code of Administrative Court Procedure. Court costs are not imposed, in accordance with Sec. 83b of the Asylum Procedure Act. The value at issue proceeds from Sec. 30 of the Act on Attorney Compensation; there are no grounds for a deviation pursuant to Sec. 30(2) of that Act.

Prof. Dr Berlit Prof. Dr Dörig Prof. Dr Kraft

Fricke Dr Rudolph