

THE COMMON EUROPEAN ASYLUM SYSTEM

**ERF, TEMPORARY PROTECTION,
RECEPTION CONDITIONS,
DUBLIN II.**

Presentation
by
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at the CEU, 2011

The European Refugee Fund 2008-2013

**DECISION No 573/2007/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of
23 May 2007**

establishing the European Refugee Fund for the period 2008 to 2013

as part of the General programme

'Solidarity and Management of Migration Flows'

and repealing Council Decision 2004/904/EC

OJ L 144/8, 6.6.2007

The European Refugee Fund 2008-2013

- **Running period:** 1 January 2008 – 31 December 2013
- **Participants:** All MS except Denmark
- **Purpose:**
to support and encourage the efforts made by the Member States in receiving and bearing the consequences of receiving refugees and displaced persons by way of co-financing actions provided for in the ERF decision
- **Tool:** 628 million euros for the whole period (§ 12)
- „Target groups” (§ 6) = **Beneficiaries:**
 - Recognized Convention refugees
 - Persons enjoying subsidiary protection within the meaning of Council Directive 2004/83/EC of 29 April 2004
 - Asylum seekers applying for status or subsidiary protection
 - Persons benefiting from temporary protection
 - Persons resettled into a MS

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Supported actions

1. **Reception** conditions and asylum **procedures**;
2. **Integration** of persons whose stay in the Member State is of a lasting and stable nature;
3. **Capacity development** of MS
4. **Resettlement** from third countries into a MS
5. **Transfer** of refugees and beneficiaries from one MS to another MS
6. **Emergency measures** to help Member States in the event of a sudden mass influx of refugees or displaced persons, on the basis of a unanimous decision of the Council

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Some details on actions supported by the ERF – national actions

Reception	Integration	Capacity building
accommodation infrastructure or services	advice and assistance: in housing, labour market, medical, psychological and social care	collection, compilation, use and dissemination of country of origin information
provision of material aid and medical or psychological care	enabling recipients to adapt to the society of the Member State in socio-cultural terms and promote self-empowerment	collect, analyse and disseminate statistical data
social assistance, information or help with administrative formalities	promote durable and sustainable participation in civil and cultural life	enhancing the capacity to assess asylum applications, including appeals
legal aid and language assistance	education, vocational training, recognition of qualifications and diplomas	Impact assessment of refugee policies
support services (e.g. translation and training to help improve reception conditions)	promote meaningful contact and constructive dialogue between concerned persons and the receiving society	
information for local communities	language training	

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Some details on actions supported by the ERF – Community actions

the furthering of Community cooperation in implementing Community law and good practices;

support for the setting-up of transnational cooperation networks and pilot projects

support for transnational awareness-raising campaigns on European asylum policy and the situation and circumstances

offer to networks linking non-governmental organisations which assist refugees and asylum seekers and which are present in at least 10 Member States
structural support intended to facilitate exchanges of experience and sound practice

Emergency measures

Reception, subsistence, medical and psychological care, staff costs, logistical and transport costs – in case of Temporary Protection directive (2001/55/EC)
application

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The mechanism of regular support

- The Commission sets strategic guidelines
- MS develop national programs (multiannual and yearly) to be approved by the Commission
- 3 year „multiannual” programs (2008-2010, 2011-2013) set the objectives and the strategies, the yearly implement them
- The Fund
 - allocates a yearly fixed sum to every MS: old MS get 300 000 Euros, new MS 500 000 (§ 13)
 - The rest depends on the number of beneficiaries
 - (30 % goes to Convention refugees and other protected persons including resettled persons, 70 % to asylum seekers and temporarily protected „registered over the previous three years”)
 - The EU only pays max 50 % of the national actions (exceptionally: 75% in case of specific priorities) Capacity building may only make up 15 % of what the state gets
 - Payment is gradual, control is detailed, primarily by the State itself

The European Refugee Fund 2008-2013

3 new elements („actions”)

- **Capacity building** for the asylum systems of the Member States **in general**;
- Voluntary efforts of Member States to provide a durable solution in their territories to refugees and displaced persons identified as eligible for **resettlement** by the UNHCR
- **Voluntary burden sharing between Member States** consisting of the transfer of beneficiaries of international protection from one Member State to another, which grants them a similar protection.

_____ Further changes _____

- Return of rejected asylum seekers no longer within its scope
- From 2008 **the reserve** established for emergency measures **can also be used** to address **sudden arrivals of large numbers of persons** who may be in need of international protection and which place significant and urgent demands on Member States' reception facilities or asylum systems.

Temporary Protection Directive, 2001

**2001/55 EC Directive on Giving Temporary Protection in
the Event of a Mass Influx of Displaced Persons and on
Measures Promoting a Balance of Efforts Between
Member States in Receiving Such Persons and Bearing the
Consequences Thereof**

2001 July 20, OJ L 212/12

TEMPORARY PROTECTION DIRECTIVE

- Goal:
 - minimum standards for giving temporary protection in the event of a mass influx of displaced persons
 - +
 - to promote a balance of effort between Member States
- Basic principles:
 - Neither replaces nor excludes recognition as Convention refugee
 - Any discrimination among persons with temporary protection is forbidden

Temporary Protection Directive

Beneficiaries = 'displaced persons'

who

- have had to leave their country or region of origin,
- or have been evacuated,
- and are unable to return in safe and durable conditions

in particular:

(i) persons who have fled areas of armed conflict or endemic violence;

(ii) persons at serious risk of, or who have been the victims of, systematic or generalised violations of their human rights;

Temporary Protection Directive

- **Mass influx'** means arrival in the Community of a large number of displaced persons, who come from a specific country or geographical area
- The Council decides by qualified majority the start and end of T.P.
- Duration
 - 1 year + max two times 6 months
 - = total max: **2 years**
- Council may end it earlier, but must not exceed two years'

Not applied until 2011 February

Temporary Protection Directive

- Rights of beneficiaries:
 - Entry visa for free
 - Residence permit, identity paper,
 - Employment, self employment under the same conditions as recognized refugees
 - Suitable accommodation or the means to obtain housing.
 - Social welfare and means of subsistence, if they do not have sufficient resources
 - Medical care in emergency cases and illness
 - Specific assistance to vulnerable groups

Temporary Protection Directive

- Further rights:
 - if minor aged: schooling like the nationals
 - family unification (partner also, broader family) if
 - if they had lived together
 - parted due to circumstances surrounding the mass influx
 - extends to spouse (partner) , dependent non-married child, exceptionally to other traumatized close relative.

Temporary Protection Directive

Relation to Convention status

Temporarily protected may qualify as Convention Refugees

Access to determination procedure must be guaranteed

The decision on status may be suspended for the time of T.P.

Non-recognition of Conv. status does not affect T.P.

Reception conditions directive

**COUNCIL DIRECTIVE 2003/9/EC
of 27 January 2003**

**laying down minimum standards for the reception of asylum
seekers**

(OJ 2003 L 31/18)

Reception Conditions Directive

Scheme:

- I. Purpose, definitions, scope
- II. General provisions on reception conditions
- III. Reduction or withdrawal of reception conditions
- IV Persons with special needs
- V Appeals
- VI-VII Administrative cooperation and final provisions

Reception Conditions Directive

Purpose:

- To ensure asylum seekers a dignified standard of living and comparable living conditions in all Member States during the refugee status determination procedure
- and
- by the similarity of treatment across the EU limit the secondary movements of asylum seekers influenced by the variety of conditions for their reception

Scope:

Obligatory

Geneva Convention
applications



(This is presumed
of all applications)

Optional

Applications for
subsidiary protection

Not-applicable

Temporary
protection

Only the minimum is prescribed – states may overperform!

Reception Conditions Directive

General provisions

Information 15 days, in writing, language!

Documentation 3 days, permit to stay ↔ detention, border

Freedom of movement/detention the state may

assign an area / decide on the residence / confine to a particular place or
make the material conditions only available in a specific place

Family unity maintain as far as possible

Medical screening optional

Schooling minors: compulsory, (after 3 months) but may in
accommodation centre

Employment optional exclusion from labour market; after 1 year:
compulsory access, if no 1st instance dec. yet. Ranking after EU/EEA
citizens

Reception Conditions Directive

General provisions (Cont'd)

Vocational training optional (States may grant access)

Material conditions: standard + asylum seekers' contribution

„to ensure a standard of living adequate for the health of applicants and capable of ensuring their subsistence” (§ 13)

The State may require the applicant to contribute to mat. cond. and health care if A. has sufficient resources. If A. had – refund
Provision: in kind – money – vouchers or mix.

Housing/accommodation and its modalities shall ensure: family life, access to lawyer, UNHCR and /recognized/ NGO-s /except: security reason/, prevention of assault, may transfer.

Deviation possible: specific needs, geographic area, housing exhausted detention, border procedure = „shall be as short as possible” (§14 (8))

Health care minimum: „emergency care and essential treatment of illness” (§ 15)

Reception Conditions Directive

Reduction, withdrawal

- Reduction/withdrawal always **optional**
- No reduction/withdrawal before (first) negative decision on status
- Decisions „shall be taken **individually, objectively and impartially and reasons shall be given**” (§16 (4))
- Cases of reduction/withdrawal: conditions may be reduced or withdrawn when an asylum seeker:
 - ❖ abandons the determined place of residence w/out permit
 - ❖ does not report as prescribed or does not appear for interview
 - ❖ has already lodged an application in the same Member State.
 - ❖ has concealed financial resources and has therefore unduly benefited
 - ❖ has failed to demonstrate that the asylum claim was made as soon as reasonably practicable after arrival in that Member State.
- ❖ As a sanction for serious breach of the rules of the accommodation centres or for seriously violent behaviour.

Emergency health care must not be withdrawn in any case!

Reception Conditions Directive

Persons with special needs

- **Compulsory specific attention to vulnerable persons** such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence (§ 17)
- **Minors: best interest of the child guides**
- **Unaccompanied minors:** representation as soon as possible + housing with adults (relatives) or specific centers + siblings together + tracing family without jeopardizing them) + appropriate training employees
- **Victims of torture and violence:** MS must ensure necessary treatment

Reception Conditions Directive

Appeals

- Against
 - a negative decisions relating to the granting of benefits (including reduction or withdrawal decisions) or
 - decisions on residence and freedom of movement (§ 7) which individually affect asylum
- Affecting individual asylum seekers
- Procedure: laid down in the national law.
- At least in the last instance: appeal or a review before a judicial body

Provisions on cooperation and transposition

MS: must allocate necessary resources, provide the necessary basic training and inform the Commission

Commission: report to Parliament by 6 August 2006

Transposition deadline **6 February 2005**

„Contrary to what was predicted following adoption of the Directive, it appears that Member States have **not lowered their previous standards** of assistance to asylum seekers. **However**, the present report has clearly shown that **the wide discretion** allowed by the Directive in a number of areas, notably in regard to access to employment, health care, level and form of material reception conditions, free movement rights and needs of vulnerable persons, **undermines the objective of creating a level playing field** in the area of reception conditions.”

COM(2007) 745 final, p. 10

Recasting the Reception conditions directive – the 2008 Commission proposal COM(2008) 815 final – major suggestions

- **Scope** : include applicants for subsidiary protection
- **Access to the labour market** : no compulsory exclusion+access after a period of maximum 6 months after lodging an application (not 12 as so far)
- **Material reception conditions**: higher standards in financial support, attention to groups with special needs in housing, limits to withdrawal of conditions
- **Detention**: 4 new articles trying to limit the practice, by giving possible grounds, requiring that it be shortest period possible, regularly reviewed by courts, etc.
- **Persons with special needs**: early identification of this group obligatory

The Dublin Convention and the Dublin II regulation (1990 and 2003)

**Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities
(1990) OJ 1997 C 254/1**

and

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 50/1

Implementing regulation

Commission Regulation (EC) No 1560/2003 of 2 September 2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 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 222 of 5 September 2003, p. 1);

Basic data of the Dublin Convention and the regulation replacing it

- Convention:
 - Signature: 15 June 1990.
 - Entry into force: 1 September 1997.
 - Parties: A 15 EU member states, Iceland and Norway
- Regulation:
 - EC Council reg. **343/2003** (18 February 2003), **OJ (2003) L 50/1 2003. 02.25**
 - **Start of application: 1 September 2003.** (In respect of applications submitted after the date and requests for readmission)
 - Participants: EU member states except for Denmark plus Norway and Iceland
 - Denmark has a special link to it,
see 2006/188/EC: Council Decision of 21 February 2006 on the conclusion of the Agreement between the European Community and the Kingdom of Denmark extending to Denmark the provisions of Council Regulation (EC) No 343/2003

Purpose and philosophy of Dublin

- Every asylum seeker **should gain access** to the procedure. There must be a MS to determine the case
- **Only one procedure should be conducted** within the Union. **A decision** by any MS be taken in the name of others = no parallel or subsequent application should take place
- Allocation of responsibility: **not burden sharing** but family links or failure to deny access to EU territory

The philosophy of Dublin:
under what conditions is taking charge by another state –
without investigation of the merits in the first state fair

- If the substantive law (the refugee definition) is identical
- If procedural rules guarantee equal level of protection at least in terms of
 - legal remedies (appeals)
 - access to legal representation
 - physical conditions (support) during the procedure

Problems with the Dublin Convention

Five important cases:

- **T.I. V. United Kingdom** ECtHR Appl. 43844/98
2000. March 7. (IJRL vol. 12 (2000) 244 - 268.pp)
- **Adan and Aitseguer** (House of Lords) **19 December** 2000.
Regina v. Secretary of State for the Home Department (appellant) ex parte Adan
(respondent)
Regina v. Secretary of State for the Home Department (appellant) ex parte
Aitseguer
(respondent)
[2001] 2 WLR 143 (ld. www.refugeecaselaw.org)
- **K.R.S. v. the United Kingdom** Appl. no. 32733/08, ECtHR judgment of 2
December 2008
- **M.S.S v Belgium, and Greece**, appl. no. 30696/09, ECtHR Judgment of 21 January
2011 – return to Greece and treatment of a.s. in Greece violates Art 3.
- **NS contra Secretary of State /UK/ C-411/10** CJEU reference for preliminary
ruling: is the decision to apply the sovereignty clause regulated by EU law? Joined
with **M.E. and Others v Refugee Applications Commissioner, Minister for Justice
and Law Reform** (Ireland) - not yet (March 2011) decided

EC Regulation 343/2003 (DUBLIN II)

- Material scope: : „ application for asylum” = a request for international protection from a Member State, under the Geneva Convention
//Not: for subsidiary protection!//
- Criteria of identifying the responsible state (this is the hierarchy)
 - Unaccompanied minor: where family member lives legally or where minor submitted
 - recognized refugee family member
 - asylum seeker family member if not decided yet
 - residence permit
 - visa issued
 - visa free entry
 - airport transit area
 - external border crossed illegally
unless a year passed, or unless lived in another country for 5 months
 - if none of the above: where lodged
- Cases of the non-responsible state examining the application
 - any other MS may proceed where submitted
 - MS have the freedom to send to safe third country
- Appeal: not necessarily suspensive
- The case of Greece!!!! M.S.S v Belgium, and Greece, appl. 30696/09 ,
- Judgment of 21 January 2011 – return to Greece and treatment of a.s. in Greece violates Art 3.

Regulation 343/2003 (Dublin II) Procedure - deadlines

- The responsible state has to be requested as soon as possible but not later than 3 months after the submission of the application.
 - If not: loss of right to transfer
- Reply: within 2 months. Silence = agreement
 - In urgent cases: 1 month for reply
- Transfer: within 6 month
 - from acceptance to take charge or
 - from the end of procedure in which transfer was challenged

= taking charge

Regulation 343/2003 (Dublin II) Procedure - deadlines

Taking back:

- In case the applicants leaves the state's territory during the procedure of
 - determining the responsible state
 - determining whether she qualifies for status (merits)
 - or after a negative decisionthat state has to *take* her *back*.

Reply: within 1 month (if Eurodac based request:
2 weeks)

Taking back: within 6 months from acceptance

Regulation 343/2003-as (Dublin II) Procedure - appeal

There is appeal against (or review of) the decision to

- transfer in order to take charge (other state being responsible)
- transfer in order to take back (return to the

Suspensive effect?

Usually not, unless court or competent body so decides

The Petrosian case C-19/08, decided on 29 January 2009

- **Facts:** Armenian family in Sweden, after having applied in several countries. Sweden assumes France is responsible, France first silent – Sweden decides to transfer (France confirms), P challenges transfer – in Sweden appeal has suspensive effect
- **Preliminary question** raised by Stockholm court: what is the starting point of the 6 months period after which the requesting state becomes responsible

the moment
of suspension

the moment of decision
on the merits

- **Judgment:** „where the legislation of the requesting Member State provides for suspensive effect of an appeal, *the period for implementation of the transfer begins to run*, not as from the time of the provisional judicial decision suspending the implementation of the transfer procedure, but only as *from the time of the judicial decision which rules on the merits of the procedure* and which is no longer such as to prevent its implementation”

What if a Dublin state does not exercise its responsibility properly? Must a state apply the sovereignty clause (3§ 2.)

Problems with Greece since 2008, at least – no decent access to procedure, inhuman circumstances during procedure

K.R.S v. UK (ECtHR, 2008 December) it is not a violation of Art 3 to return asylum seekers to Greece. If Art. 3 is breached, application from Greece is possible

M.S.S v. Belgium and Greece (ECtHR, 2011 January) **total reversal** : return to Greece violates Art. 3 as well as treatment in Greece violates it. Both states are in breach of the European Convention

M.S.S v. Belgium and Greece – main points

Facts:

- The applicant is M.S.S. is an Afghan man, who worked as an interpreter in Afghanistan and chose Belgium as the destination country because of his contacts with Belgian troops in Kabul
- He travelled through Iran, Turkey Greece and France. He was caught in Greece in December 2008 but did not apply for asylum. On 10 February 2009 he arrived in Belgium, presented himself to the Aliens office and applied for asylum.
- Feared persecution: reprisal by the Taliban for his having worked as an interpreter for the international air force troops stationed in Kabul. He produced certificates confirming that he had worked as an interpreter.
- Belgian authorities denied appeal against transfer, ECtHR did not grant Rule 39 relief (provisional measure to halt transfer)
- 15 June 2009: M.S.S. was returned to Greece which was obliged to take charge (as it had remained silent for two months)

M.S.S v. Belgium and Greece – main points

Facts continued

15-18 June 2009 detention of M.S.S. in Greece under harsh conditions

§34: „locked up in a small space with 20 other detainees, had access to the toilets only at the discretion of the guards, was not allowed out into the open air, was given very little to eat and had to sleep on a dirty mattress or on the bare floor.”

After living in the park (and not reporting to the police) on 1 August 2009: attempt to leave Greece with a false Bulgarian passport → second detention, expulsion order, later revoked due to the pending asylum procedure. The applicant contacted the police, had his residence card renewed twice for 6 months, but no accommodation was provided to him.

August 2010: another attempt to leave Greece, towards Italy – caught again, almost expelled to Turkey

His family back in Afghanistan, strongly advised him not to come home because the insecurity and the threat of reprisals had grown steadily worse

The case was pending in the Court since 11 June 2009

Facts as to Greece:

88 % of illegal arrivals into Europe through Greece (in 2009)

Recognition rates 0,04 % Convention status, 0,06 Subsid protection = 1 out of 10 000 at first instance

Appeal: 25 Convention status and 11 subsid prot out of 12 905

M.S.S v. Belgium and Greece – Claims against Greece

M. S. S. – the applicant

- A) Both periods of detention amounted to inhuman and degrading treatment.
- B) The state of extreme poverty in which he had lived since he arrived in Greece amounted to inhuman and degrading treatment
- C) He had no effective remedy concerning the above claims

The issue of the detention (A)

The Government

The rooms were suitable equipped for a short stay + (in August 2009) on 110 m² there were 9 rooms and two toilets + public phone and water fountain

The Court

General principles to be applied (as to detention) – the meaning of Article 3.

„confinement of aliens, .. is acceptable only in order to enable States to prevent unlawful immigration while complying the 1951 Geneva Convention and the European Convention on Human Rights.” (§ 216)

„ **Article 3** of the Convention, ... enshrines one of the most fundamental values of democratic societies and **prohibits in absolute terms** torture and inhuman or degrading treatment or punishment irrespective of the circumstances and of the victim's conduct” (§218)

Ill treatment „must attain a certain level of severity”

Severity is relative: duration, physical, mental effects, and sex, gender and age of the victim matter as well as his/her state of health

M.S.S v. Belgium and Greece – Claims against Greece

Ill treatment „must attain a **certain level of severity**”

Severity is relative: duration, physical, mental effects, and sex, gender and age of the victim matter as well as his/her state of health (§ 219)

Inhuman treatment = when it was “premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical or mental suffering” (§ 220)

„Treatment is considered to be “**degrading**” when it humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance”. (ibid)

„It may suffice that the victim is humiliated in his or her own eyes, even if not in the eyes of others (see, among other authorities.” The purpose of the treatment need not be humiliation.

M.S.S v. Belgium and Greece – Claims against Greece

„Article 3 of the Convention requires the State to ensure that **detention conditions are compatible with respect for human dignity**, that the manner and method of the execution of the measure **do not subject the detainees to distress or hardship of an intensity exceeding the unavoidable level** of suffering inherent in detention and that, given the practical demands of imprisonment, their health and well-being are adequately secured” (§ 221)

Application of the principle to the present case – the Court’s dictum

The Court acknowledges the increased hardship of external border states because of Dublin, but Art. 3 is absolute

After return to Greece the authorities knew, that M.S.S. did not „have the profile of an ‘illegal migrant’”

145 persons on 110 m² usually locked up, without hygienic tools

+ the asylum seeker especially vulnerable -->

„taken together, **the feeling of arbitrariness** and the **feeling of inferiority** and **anxiety** often associated with it, as well as the profound **effect such conditions of detention** indubitably have on a person's dignity, **constitute degrading treatment** contrary to Article 3 of the Convention.

In addition, **the applicant's distress was accentuated** by the vulnerability **inherent in** his situation as an **asylum seeker.**” (§ 233)

VIOLATION of Article 3 held UNANIMOUSLY

M.S.S v. Belgium and Greece – Claims against Greece

The issue of the living (reception) conditions during the procedure (B)

The government

The applicant has not visited the police station as advised.

After December 2009 when he showed up, efforts were made to find an accommodation but M.S.S. had no address where to inform him.

Homelessness is widespread in States, parties to the ECHR – it is not contrary to the Convention.

The Court

General principles: as above +

There is no duty under Article 3 to provide home or financial assistance.

Application to the present case

The reception conditions directive bounds Greece

Asylum seekers constitute a special group in need of special protection

The reception capacity of Greece is clearly inadequate, „an adult male asylum seeker has virtually no chance of getting a place in a reception centre” (§ 258) none of the Dublin returnees between February and April 2010 got one.

The authorities have not informed M.S.S. of the available accommodation even when they saw him in June 2010

There was no realistic access to the job market due to administrative riddles

M.S.S v. Belgium and Greece – Claims against Greece

. “..the Court considers that the Greek authorities **have not had due regard to the applicant's vulnerability as an asylum seeker** and must be held **responsible, because of their inaction**, for the situation in which he has found himself for several months, living in the street, with no resources or access to sanitary facilities, and without any means of providing for his essential needs.

The Court considers that the applicant **has been the victim of humiliating treatment** showing a **lack of respect for his dignity** and that this situation has, without doubt, **aroused in him feelings of fear, anguish or inferiority** capable of inducing desperation. It considers that such living conditions, combined with the **prolonged uncertainty** in which he has remained and **the total lack of any prospects of his situation improving**, have **attained the level of severity** required to fall within the scope of Article 3 of the Convention.” (§ 263)

= VIOLATION OF ARTICLE 3. HELD 16 : 1

M.S.S v. Belgium and Greece – Claims against Greece

The issue of effective remedies with respect to Articles 2 and 3 - claim (C)

(Only protected from refoulement because of ECtHR interim measure, no serious examination of the merits of the asylum claim. The appeal to the Supreme Court would not have suspensive effect, practically nobody is recognised by the Greek authorities)

The Government

The applicant

failed to cooperate,
assumed different identities (when trying to leave Greece),
had access to interpreter.

The review by the Supreme Court is effective remedy,
Asylum seekers were not entitled to a right to appeal under the ECHR
and Article 6 (Right to a fair hearing) of the Convention did not
apply to asylum cases,

No danger to transfer to Turkey as the readmission agreement with
Turkey does not cover returnees from other EU MS.

The applicant did not appear at the hearing planned for 2 July - = did
not exhaust local remedies

M.S.S v. Belgium and Greece – Claims against Greece

The Court

General principles

The remedy must be linked to a Convention right and must **deal with the substance** of an arguable complaint

It must be **available in law and in practice**

It must grant **appropriate relief** and must not be of excessive duration

„In view of the importance which the Court attaches to Article 3 of the Convention and the irreversible nature of the damage which may result if the risk of torture or ill-treatment materialises, the effectiveness of a remedy within the meaning of Article 13 imperatively requires ..., **independent and rigorous scrutiny** of any claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 .., as well as a particularly **prompt response**

In cases of Article 3 threat the remedy must have **automatic suspensive effect**

M.S.S v. Belgium and Greece – Claims against Greece

Application to the present case

The gravity of the situation in Afghanistan and the risks that exist there are not disputed by the parties - arguable claim (but the Court does not rule on the possible consequences of return only on whether there was an effective remedy against removal within Greece) (§§ 296 – 298)

M.S.S. had not enough information and his non-appearance is the result of lack of reliable communication.

Uncertainty about the hearing on 2 July – perhaps only told in Greek.

„The Court is not convinced by the Greek Government's explanations concerning the policy of returns to Afghanistan organised on a voluntary basis. It cannot ignore the fact that forced returns by Greece to high-risk countries have regularly been denounced by the third-party interveners and several of the reports consulted by the Court” (314)

His efforts to escape from Greece can not be held against him as he tried to escape Art 3 treatment.

Conclusion: violation of Art 13 in conjunction with Article 3: „...because of the **deficiencies in the** Greek authorities' **examination of the applicant's asylum request** and the **risk he faces of being returned directly or indirectly** to his country of origin **without any serious examination of the merits** of his asylum application and **without having access to an effective remedy**.

VIOLATION of Article 13 in conjunction with Article 3 held UNANIMOUSLY

M.S.S v. Belgium and Greece – Claims against Belgium

M. S. S. – the applicant

Sending him by Belgium to Greece exposes him to the risk of violating Article 2 and 3 by way of *refoulement*

The application of the Dublin Regulation did not dispense the Belgian authorities from verifying whether sufficient guarantees against *refoulement* existed in Greece (and they were insufficient)

Belgium

When needed Belgium applied the sovereignty clause (§3 (2)) of the Dublin regulation

M.S.S did not complain about Greece, nor had he told that he had abandoned an asylum claim in Greece

Greece assured that it would investigate the merits of the case

In the *K.R.S v. UK* case Greece gave assurances that no *refoulement* would occur

M.S.S v. Belgium and Greece – Claims against Belgium

Interveners

- The Netherlands: „It was for the Commission and the Greek authorities, with the logistical support of the other Member States, and not for the Court, to work towards bringing the Greek system into line with Community standards.” (§ 330)
- „In keeping with the Court's decision in *K.R.S.* (cited above), **it was to be assumed that Greece would honour its international obligations** and that transferees would be able to appeal to the domestic courts and subsequently, if necessary, to the Court. To reason otherwise would be tantamount to **denying the principle of inter-State confidence** on which the Dublin system was based...” (§ 330)
- UK: Dublin is to speed up the process – calling to account under § 3 ECHR would slow it down
- UNHCR: **each Contracting State remained responsible** under the Convention for not exposing people to treatment contrary to Article 3 through the automatic application of the Dublin system.
- AIRE Center and AI: transferring to a state violating Art 3 entails the responsibility of the transferring state

M.S.S v. Belgium and Greece – Claims against Belgium

The Court

Difference from the Bosphorus case: there sovereign powers were transferred to an organisation which entailed protection of fundamental rights equivalent with the Convention protection. (Namely the EU legal order and the CJEU) and the state was obliged to act.

Here Belgium could refrain from the transfer so it was not an international obligation (§ 340)

Lessons from T.I and K.R.S.:

„When they apply the Dublin Regulation, ... **the States must make sure that the intermediary country's asylum procedure affords sufficient guarantees** to avoid an asylum seeker being removed, directly or indirectly, to his country of origin without any evaluation of the risks he faces from the standpoint of Article 3 of the Convention.”

„the Court rejected the argument that the fact that Germany was a party to the Convention absolved the United Kingdom from verifying the fate that awaited an asylum seeker” (ibid) → **rejection was based on the fact that Germany had an adequate asylum procedure.**

In K.R.S the Court **could assume that Greece was complying** with the reception conditions directive and the asylum procedures directive, nor was a danger that a rule 39 intervention by the Court would not be observed.

M.S.S v. Belgium and Greece – Claims against Belgium

- The Court had to consider whether the Belgian authorities ought to have regarded as rebutted the presumption that the Greek authorities would respect their international obligations.
- The situation changed since December 2008 (K.R.S v UK decision)
 - more and more reports about the conditions in Greece
 - UNHCR's letter to Belgium to suspend transfers
 - Commissions proposal for Dublin recast – entailing a rule on suspension of transfers
 - The Belgian Aliens Office Regulation left no possibility for the applicant to state the reasons militating against his transfer to Greece
- Adequate protection: existence of domestic laws and accession to treaties not enough when reliable sources report contrary practices
- Guarantee by the Greek Government was too general, not about the person
- „the Court deems that its analysis of the obstacles facing asylum seekers in Greece clearly shows that applications lodged there at this point in time are illusory” (§ 357)

M.S.S v. Belgium and Greece – Claims against Belgium

The Courts conclusion on the application of Dublin

- The „Court considers that at the time of the applicant's expulsion the Belgian authorities knew or ought to have known that he had no guarantee that his asylum application would be seriously examined by the Greek authorities. They also had the means of refusing to transfer him.” (§ 358)
- „...it was in fact up to the Belgian authorities, ...to first verify how the Greek authorities applied their legislation on asylum in practice. Had they done this, they would have seen that the risks the applicant faced were real and individual enough to fall within the scope of Article 3. The fact that a large number of asylum seekers in Greece find themselves in the same situation as the applicant does not make the risk concerned any less individual where it is sufficiently real and probable.” (§ 359)
- VIOLATION OF ARTICLE 3. by the transfer and exposing him to the deficiencies of the asylum procedure (threat of refoulement) HELD 16 : 1
- VIOLATION OF ARTICLE 3. by returning him to the Greek the detention and living conditions HELD 15 : 2

Questions of principle

- 1. Should the asylum seeker have a right to choose the country of asylum?
- 2. Is Dublin (the idea of one state deciding on behalf of others) compatible with the Geneva Convention?
- 3. Possible forms of responsibility sharing.
 - by allocating financial resources
 - by allocating the persons
 - by sending them to third countries
 - by using extra-EU processing and protecting centers

Recasting the Dublin system – the 3 December 2008 Commission proposal (COM(2008) 825 final) – major suggestions

3 aims of the amendments:

- increase the system's efficiency
- ensure higher standards of protection
- contribute to better addressing situations of particular pressure on Member States' reception facilities and asylum systems

Unchanged rationale:

„**responsibility** for examining an application for international protection **lies primarily** with the Member State **which played the greatest part in the applicant's entry into or residence** on the territories of the Member States, subject to exceptions designed to protect family unity”

(COM(2008) 825 final), p. 6

Recasting the Dublin system – the 3 December 2008 Commission proposal (COM(2008) 825 final) – major suggestions

Scope: extended to applicants for (and beneficiaries of) subsidiary protection.

Efficiency:

- deadlines:
 - for submitting take back requests established
 - for replying to requests for information is reduced;
 - for replying to requests on humanitarian grounds is introduced
- a provision on the organisation of a compulsory interview is inserted
- cessation of responsibility clauses clarified
- discretionary clauses (humanitarian and sovereignty) have been clarified
- rules on erroneous transfers and costs for transfers have been added
- existing dispute settlement mechanism extended to the whole regulation

Recasting the Dublin system – the 3 December 2008 Commission proposal (COM(2008) 825 final) – major suggestions

Legal safeguards for the persons:

- adoption of a common information leaflet to be used across the MS
- the right to appeal against a transfer decision, together with the obligation for the competent authorities to decide within 7 days whether or not its enforcement should be suspended and to allow the person remain
- Detention: 12 new paras trying to limit the practice, by giving possible grounds, requiring that it be shortest period possible, regularly reviewed by courts, etc (along the lines of the rules in the reception directive)
- enhanced rules on guaranteeing effective access to the asylum procedure
- **Family unity, sovereignty clause and humanitarian clause**
 - Unity with beneficiaries of subsidiary protection
 - Making compulsory unity with dependent relative (not just humanitarian clause)
 - Extend family to non-dependent minor and married minor children and to minor siblings
 - Sovereignty and humanitarian clauses brought together as „discretionary clauses” mainly with humanitarian focus. Their application is dependent on consent of the applicant
- **Unaccompanied minors**
 - Rules on „best interest”, wider unification entitlements

Recasting the Dublin system – the 3 December 2008 Commission proposal (COM(2008) 825 final) – major suggestions

Particular pressure or inadequate level of protection

- When a MS is „faced with ***a particularly urgent situation which places an exceptionally heavy burden*** on its reception capacities, asylum system or infrastructure, ***and*** when ***the transfer*** of applicants... ***could add to that burden***, that [MS] State may request that such transfers be suspended+ (§ 37)
- When the Commission or another MS „is concerned that the ***circumstances prevailing in another Member State may lead to a level of protection*** for applicants for international protection which ***is not in conformity*** with Community legislation”
they can request suspension of transfers. The ***Commission decides***.
Suspension for ***6 months***, extendable once ***by 6 months***. Council may overrule Commission

The Eurodac regulation(s)

Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention (OJ L 316 of 15 December 2000, p. 1);

Implementing regulation:

Council Regulation (EC) No 407/2002 of 28 February 2002 laying down certain rules to implement Regulation (EC) No 2725/2000 concerning the establishment of "Eurodac" for the comparison of fingerprints for the effective application of the Dublin Convention (OJ L 62 of 5 March 2002, p. 1);

EURODAC

(Council Regulation 2725/2000/EC, 11 December 2000, O.J. 2000 L. 316/1)

- Goal:
 - promoting the implementation of Dublin I and II,
i.e. the identification of the state responsible for the
examination of the asylum application
 - screening out the repeated application
 - identifying the external border crossed
- Tool: Central storage of fingerprints and comparison with those
submitted by MS
- Target Group (above the age of 14):
 - All asylum seekers,
 - „Aliens” who have crossed the external border illegally
 - „Aliens” found illegally present in a MS (not stored, but
compared)

EURODAC

- Procedure:
 - all fingers and palm are electronically printed, sent to the Central Unit (without name just with reference number), which compares with stored one automatically and indicates in case of a hit
- Data protection: detailed in both direction
 - (as personal data, and as data of the system)
- Storage: asylum seekers: 10 years (blocked if recognized) illegal crossers: 2 years

Recasting the Eurodac regulation – the 3 December 2008 Commission proposal (COM(2008) 825 final) – major suggestions

Extend its scope to cover subsidiary protection and align the terminology

Increase efficiency: clearer deadlines for data transmission will be set.

Better data protection requirements: the Central System informs Member States of the need to delete data.

More transparency concerning recognised refugees: data on them will be deblocked (i.e. made available for searches).

MS have to indicate in EURODAC that they apply the discretionary clauses

Repeal the Implementing Regulation and include its content into the main regulation

Thanks!

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