A short course on EU asylum law. IV.

# THE DUBLIN SYSTEM, EURODAC

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# The asylum process



## Figure 1: Overview of the asylum process

Detention

Dublin transfer

Arrival of possible asylum applicants (e.g. At the border)

Determination of Member State responsible, according to **Dublin III regulation**

Declined application

Return

Declined application

Appeal

Registration of asylum application

**Asylum determination procedure** asylum application

**Reception standards** (e.g. accommodation)

Non-asylum seekers (e.g. economic migrants)

Accepted application (no longer asylum seeker) :**refugee or subsidiary status under Qualifications Directive**, or other status. **Integration measures.**

Source: (European Parliament:) What system of burden-sharing between Member States for the reception of asylum seekers? A study written by Dr Christina Boswell, Dr Eiko Thielemann and Richard Williams, PE 419.620,, p-34 Updated by BN

# THE DUBLIN SYSTEM

# The Dublin Convention the Dublin II and the Dublin III regulations (1990, 2003 and 2013)

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);

**REGULATION (EU) No 604/2013 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 June 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 (recast)**

**(OJ 2013 L 180/96)**

COMMISSION IMPLEMENTING REGULATION (EU) No 118/2014 of 30 January 2014

amending Regulation (EC) No 1560/2003 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 2014 L 39/1

# 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

# THE PHILOSOPHY OF DUBLIN: UNDER WHAT CONDITIONS IS TAKING CHARGE BY ANOTHER STATE – WITHOUT INVESTIGATION OF THE MERITS IN THE FIRST STATE FAIR



## Fairness preconditions

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
- reception conditions (support) during the procedure (detention, e.g.!)

# The Dublin system as seen by the CJEU (*NS and ME*, para 79)



Based on mutual confidence of MS

**Principal aim**

To speed up the handling of claims

in the interests both of asylum seekers and the participating Member States.

**Secondary aims**

rationalise the treatment of asylum claims

avoid blockages in the system as a result of the obligation on State authorities to examine multiple claims by the same applicant,

increase legal certainty with regard to the determination of the State responsible for examining the asylum claim

avoid forum shopping,

# NOT BURDEN SHARING !

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

Scope:

UK, Ireland, Norway, Switzerland Liechtenstein in, Denmark out

# Problems with the Dublin system in light of judgments (see also Annex)

**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 (Id. www.refugeecaselaw.org)

**M.S.S v Belgium, and Greece**, Ap. 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) - CJEU judgment of 21 December 2011

**MA, BT, DA v Secretary of State for the Home Department** (UK) Case C-648/11, Judgment of 6 June 2013 (Minors – secondary movement)

Shamso **Abdullahi** v Bundesasylamt, C-394/12, Judgment of the Grand Chamber, 10 December 2013

**Tarakhel v Switzerland** ECtHR Ap.no. 29217/12, ECtHR Judgment of 4 Nov. 2014 (Parents + 6 children – return to Italy – inhuman conditions)

**Ghezelbash** v **Staatssecretaris van Veiligheid en Justitie,** Case C-63/15, CJEU judgment 7 June 2016

**C.K. and others,** C-578/16 PPU CJEU judgment, 16 February 2017

Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie **v Salah Al Chodor and Others** Case C-528/15, CJEU judgment, 15 March 2017

# REGULATION 604/2013/EU (DUBLIN III) CRITERIA 8 – 15. §

Material scope: : „ application for international protection" = a request for international protection from a Member State, under the Geneva Convention of for subsidiary protection!!

**Criteria of identifying the responsible state (this is the hierarchy)**

**1 Minor**

- Unaccompanied minor: where family member or sibling legally present

  Other adult responsible for the minor, whether by law or by the practice

  (If several such persons: minor's interest determines)
- Where minor submitted

**2 Adult applicant**

- The state in which family member enjoying international protection - if so requested
- The state in which asylum applicant before first decision – if so requested
  - If responsibility would separate the family, then
    - The state responsible for the largest number
    - Where oldest applicant submitted the application

# Regulation 604/2013/EU (Dublin III) criteria 8 – 15. §

## 3 Residence permit, visa

- The state that issued a valid residence permit. (if more: the longest) visa issued
- The state which issued a valid visa (on whose behalf it was issued)
- The state which issued a residence permit which expired in less than 2 years or a visa (expired less than 6 months) if that was used for entry
- If they expired earlier and the person has not left the EU territory – the State where submitted

## 4 Irregular crossing of external border

An irregularly crossed the border into a Member State by land, sea or air having come from a third country, unless 12 months have passed since irregular border crossing took place.

**5 Unnnoticed stay** Five months continuous living in a Member State (after irregular entry more than 12 months ago or unknown entry) before lodging the application. (If in several: the last in which she stayed for 5 months)

# Regulation 604/2013/EU (Dublin III) criteria 8 – 15. §

**6 Visa waived entry**

If a state waives visa obligation – that state is responsible

**7. Needy family members** (not compulsory!)

States „shall normally bring together" (§ 16) In cases of pregnancy, a new-born child, serious illness, severe disability or old age, when an applicant is dependent on the assistance of his or her child, sibling or parent legally resident in one of the Member States, or his or her child, sibling or parent legally resident in one of the Member States is dependent on the assistance of the applicant - usually the state in which the legally residing person is living should conduct the RSD unless applicant's health prevents travelling there

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Responsibility of the state terminates when the applicant leaves the territory of the EU for 3 months
See: *Abdullahi* case, CJEUjudgment, 2013 December

# „Sovereignty and humanitarian clause(s)"

17 § (1) „…each Member State may decide to examine an application for international protection lodged with it by a third-country national or a stateless person, even if such examination is not its responsibility under the criteria laid down in this Regulation.

17 § (2) A Member State … may, at any time before a first decision regarding the substance is taken, request another Member State to take charge of an applicant in order to bring together any family relations, on humanitarian grounds based in particular on family or cultural considerations, even where that other Member State is not responsible. Affected applicants must agree in writing. The requested state may approve the resuest

# Regulation 604/2013/EU (Dublin III)
# Procedure - deadlines

Taking charge (Another MS, in which the applicant did not apply, is responsible for the procedure, not where the applicant submitted the application)

The responsible state has to be requested as soon as possible but not later than 3 months after the submission of the application.

If there is a Eurodac hit, request within 2 months

- If deadline missed: loss of right to transfer – the requesting state becomes the responsible state

Reply: within 2 months. Silence = agreement

- In urgent cases: requesting state sets deadline. Min. 1 week. Response may be extended to 1 month by requested state

# Regulation 604/2013/EU (Dublin III)
# Procedure - deadlines



Taking back (Procedure is still pending in the requested state, applicant withdrew her application there or the application was rejected)

Request:

If no Eurodac hit: 3 months for request

Eurodac hit: 2 months

Response: 1 month (no hit) ; 2 weeks (Eurodac hit)

If taking back not requested in time: opportunity to submit a new application must be given

# PROCEDURE – TRANSFER (§ 29)

Within 6 months

- From accepting the request to take charge or take back (or from expiry of respective deadline to respond in both cases)
- From the final decision in case of an the appeal against transfer

If transfer does not take place within 6 months the responsible state is relieved from the obligation to take charge or take back.

The deadline may be extended to one year if the person is imprisoned and to 18 months if she absconds

# PROCEDURE – REMEDIES (§ 27)



The affected a.s. shall have the right to an effective remedy – within reasonable time - in the form of an appeal or a review, in fact and in law, against a transfer decision, before a court or tribunal.

Suspensive effect? – MS decides

if for the whole appeal

or

- automatic suspension at least until „a court or a tribunal, after a close and rigorous scrutiny, shall have taken a decision whether to grant suspensive effect to an appeal or review" (§ 27 3. (b))

or

until a separate decision of a court or tribunal on suspending the transfer is taken when applicant submits such a request (The decision may allow transfer, while appeal is pending)

Access to legal assistance must be guaranteed. Free legal assistance on conditions only

# The impact of the NS and ME case – duty not to transfer to Member State threatening with ill-treatment
# New Article 3 (2)

Where it is impossible to transfer an applicant to the Member State primarily designated as responsible because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and reception conditions for asylum applicants in that Member State resulting in risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union, the determining Member State shall continue to examine the criteria set out in Chapter III in order to establish whether one of the following criteria enables another Member State to be designated as responsible for the examination of the asylum application.

# The impact of the NS and ME case – duty not to transfer to Member State threatening with ill-treatment New Article 3 (2)

Where the transfer cannot be made pursuant to this paragraph to any Member State designated on the basis of the criteria set out in Chapter III or to the first Member State with which the application was lodged, the determining Member State becomes the Member State responsible for examining the application for international protection.

# The recast and the lesson from MSS and ME and NS

The suspension of Dublin mechanism not accepted by MS-s

Instead: two moves

Council conclusions on „genuine and practical solidarity towards Member States facing particular pressures due to mixed migration flows" 8 March 2012

Introduction of a „mechanism for early warning, preparedness and crisis management" (see next slide)

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Council conclusions on solidarity:

No hard sums or quotas agreed

Emphasis on prevention and co-operation with EASO and Frontex

Voluntary relocation and joint processing: to be (further) studied

Intensified joint returns (FRONTEX co-ordinating)

Emergency funding from the future Asylum and Migration Fund and the future Internal Security Fund in case of „unexpected pressure" and „crises in the area of asylum, including through mixed migration flows, affecting one or more Member States"

# Article 33 of Dublin III - Early warning and preparedness



## Risk of pressure or deficiency – preventive action plan

„Where, on the basis of, in particular, the information gathered by EASO … the Commission establishes that the application of this Regulation may be jeopardised due either to a substantiated risk of particular pressure being placed on a Member State's asylum system and/or to problems in the functioning of the asylum system of a Member State, it shall, in cooperation with EASO, make recommendations to that Member State, inviting it to draw up a preventive action plan."

„The Member State concerned shall inform the Council and the Commission whether it intends to present a preventive action plan" … [or] „ a Member State may, at its own discretion and initiative, draw up a preventive action plan" with the assistance of the Commission, EASO and other MSs.

The MS will report on its implementation to the Commission and that in turn to EP and Council

The Member State concerned shall take all appropriate measures to deal with the situation of particular pressure on its asylum system or to ensure that the deficiencies identified are addressed before the situation deteriorates.

# Article 33 of DUBLIN III. (cont'd) - Crisis management

## Serious risk of crisis – compulsory crisis management action plan

If the particular pressure may jeopardise the application of this Regulation, the Commission shall seek the advice of EASO before reporting to the European Parliament and the Council.

Where deficiencies are not remedied by the plan the or „where there is a serious risk that the asylum situation in the Member State concerned develops into a crisis which is unlikely to be remedied by a preventive action plan, the Commission, in cooperation with EASO as applicable, may request the Member State concerned to draw up a crisis management action plan"

Drawing up a crisis management plan is compulsory – deadline: max three months

Reporting as in the case of preventive action plans

Council shall closely monitor the situation

and may request further information

provide political guidance,

discuss and provide guidance on any solidarity measures as they deem appropriate. (with EP)

# DETENTION § 28

Only if there is a significant risk of absconding

Detention must be „on the basis of an individual assessment and only in so far as detention is proportional and other less coercive alternative measures cannot be applied effectively.”

„for as short a period as possible”

Request for transfer to be made within 1 month

Reply (requested state must respond) in two weeks (if silence: implicit acceptance)

Transfer: six weeks from approval

If deadlines not met: detention must end (normal rules apply)

Article 2 (n) "risk of absconding" means the existence of reasons in an individual case, which are based on objective criteria defined by law, to believe that an applicant or a third-country national or a stateless person who is subject to a transfer procedure may abscond.

Al Chodor , CJEU judgment 2017
Member States [must] establish, in a binding provision of general application, objective criteria underlying the reasons for believing that an applicant for international protection who is subject to a transfer procedure may abscond.

# THE EURODAC SYSTEM

# EURODAC

**REGULATION (EU) NO 603/2013 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 26 JUNE 2013**



Goal:

promoting the implementation of Dublin III,

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

and

enhancing law enforcement by allowing Member States' designated authorities and the European Police Office (Europol) to request the comparison of fingerprint data with those stored in the Central System

Tool: Central storage by the EU Agency for Large-Scale IT Systems (eu-LISA, Tallin/Strasbourg) of fingerprints and comparison with those submitted by MS

Target group (above the age of 14):

All asylum seekers, including those applying for subsidiary protection

„Aliens" who have crossed the external border illegally

„Aliens" found illegally present in a MS (not stored, but compared)

Comparable fingerprints – extended to serious criminals

# EURODAC FROM 20 JULY 2015

Storage: asylum seekers: 10 years (blocked if recognized) illegal crossers: 18 months

Oversight: European Data Protection Supervisor, in responsible for auditing and monitoring the processing of personal data in cooperation with national authorities.

72-hour deadline to send the fingerprints to the Eurodac system;

More information concerning asylum seekers is to be uploaded (to assure, the right person is transferred)

A ban on transmitting Eurodac data to third states in most cases (Article 35)

# EURODAC FROM 20 JULY 2015

Law enforcement agencies' access (entry into force: 20 July 2015)

Access will be given to the nationally designated law enforcement authorities

for "the prevention, detection or investigation of terrorist offences or other serious criminal offences"

if that is

"necessary in a specific case", and the comparison "will substantially contribute to the prevention, detection or investigation of any of the criminal offences in question"

provided

neither MS' database nor the VIS offered a match

A „verifying agency" (which transmits the request) controls that these conditions are met

Comparisons must be individual – no routine, bulk checking

Access extends to protected persons for 3 years after protection need recognised

# THANKS!

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# DUBLIN IN LIGHT OF COURT CASES

„Annex”

# MA, BT, DA v Secretary of State for Home Department, C-648/11 – judgment of 6 June 2013

## Facts

MA and BT are Eritrean nationals, both born in 1993 who arrived in the UK in 2008 July and 2009 August respectively. Both of them had lodged an application in Italy before. MA was not transferred and was later recognised as a refugee in the UK, BT was actually transferred to Italy, the responsible state, in December 2009.

BT brought an action before the High Court to challenge the legality of her transfer to Italy. Following a decision taken by that court on 18 February 2010, BT was able to return to the United Kingdom on 26 February 2010. Subsequently she was also recognised as a refugee

DA, an Iraqi national, arrived in the United Kingdom in November 2009, where he claimed asylum in December 2009 . Since he had acknowledged that he had already lodged an asylum application in the Netherlands, the Netherlands authorities were requested to take him back, which, on 2 February 2010, they agreed to do.

DA challenged the transfer-order. As a result the UK agreed to act as the responsible state

# MA, BT, DA v Secretary of State for Home Department, C-648/11 – judgment of 6 June 2013

## Legal issues

1. Is the case moot? (As the persons have been recognised in two cases) This is what Belgium as an intervener argued

   CJEU: not as BT claimed compensation – still pending

2. The essence of the question of the High Court: where an unaccompanied minor with no member of his family legally present in the territory of a Member State has lodged several asylum applications, which is the responsible state: where the first was lodged, or where the minor is present?

**Dublin II § 6 (2)**

„In the absence of a family member, the Member State responsible for examining the application shall be that where the minor has lodged his or her application for asylum."

# THE COURTS REASONING AND DECISION

Art 6 (2) is obscure

Contextual interpretation:

Art 5 (2) and Art 13 refer to „first lodged" and to „first Member State with which the application for asylum was lodged" 6/2 does not help

Teleological (purposive) interpretation

- Goal defined in preamble (para 3-4): rapid determination of resp. State and effective access to procedure

-„Since unaccompanied minors form a category of particularly vulnerable persons, it is important not to prolong more than is strictly necessary the procedure for determining the Member State responsible, which means that, as a rule, unaccompanied minors should not be transferred to another Member State."

- Charter of Fundamental Rights, Art 24 para (2) „child's best interests are to be a primary consideration.

Operative part:

The second paragraph of Article 6 of the Dublin II. regulation *„must be interpreted as meaning that, ..., where an unaccompanied minor with no member of his family legally present in the territory of a Member State has lodged asylum applications in more than one Member State, the Member State in which that minor is present after having lodged an asylum application there is to be designated the 'Member State responsible'."*

## 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's claims

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 $m^2$ 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)

# 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…"(E.g. the 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**

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

After return to Greece the authorities new, that M.S.S. did not „have the profile of an 'illegal migrant'"

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

145 persons on 110 $m^2$ 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 bit 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 binds 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

## 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 on effective remedy**

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

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

## N. S. (C-411/10) v Secretary of State for the Home Department (UK)

## and

## M. E. and others (C-493/10) v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform, (Ireland)

## CJEU judgment, 21 December 2011

# N.S. and M.E (UK and Ireland) CJEU preliminary judgment C 411/10 and C-493/10 joined cases

N. S. (C-411/10) v Secretary of State for the Home Department (UK) and M. E. and others (C-493/10) v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform, (Ireland) CJEU judgment, 21 December 2011

Importance of the case: The Commission, UNHCR, Amnesty International (+other NGOs) and Austria, Belgium, the Czech Republic, Finland, Germany, Greece, France, Italy, The Netherlands, Poland, Slovenia and Switzerland submitted observations.

## Facts

## C-411/10

**NS** Afghan national arrested in Greece, Sept, 2008 - does not apply for asylum - order to leave – later expelled to Turkey (2 month in prison there) – 12 January arrival in **UK** – Request to Greece to take charge – silence- 18 June Greece deemed to have accepted responsibility – 30 July removal order without an appeal with suspensive effect as Greece „safe" according to the 2004 British Act on Asylum – NS seeks judicial review – granted – March 2010 High Court dismisses application but allows further appeal –Court of Appeal raises preliminary questions to the Court of the European Union

# N.S. and M.E (UK and Ireland) CJEU preliminary judgment C 411/10 and C-493/10 joined cases



## Facts continued

## C-493/10

Five unconnected individuals from Afghanistan, Iran and Algeria – none apply for asylum in Greece – application in Ireland – Eurodac shows hit – no argument based on Art 3 ECHR – resistance to return based on claim that reception conditions and the asylum procedures in Greece are inadequate

## Questions, as grouped by the Court

A ) Does a decision adopted by a Member State to apply the „sovereignty clause" (Article 3(2) of The Dublin II regulation /343/2003/) fall within the scope of European Union law for the purposes of Article 6 TEU and/or Article 51 of the Charter.

# N.S. and M.E (UK and Ireland) CJEU preliminary judgment C 411/10 and C-493/10 joined cases

B) Whether the transferring Member State

Ba) is obliged to assess the compliance of the other Member State, with EU law

Bb) may operate on the basis of a conclusive presumption that the responsible State will observe the claimant's fundamental rights and the minimum standards imposed by the directives

Bc) may maintain a provision of national law which requires a court to treat the responsible Member State as a 'safe country' as compatible with the rights set out in Article 47 of the Charter.

Bd) is obliged to accept responsibility (must apply the sovereignty clause) if the responsible state is found not to be in compliance with fundamental rights

C) Is the extent of protection offered by the Charter articles 1 (human dignity), 18 (Right to asylum), 47 (effective remedy) wider than that of Art 3 of the ECHR?

D) Whether Protocol 30 to the Treaties on the application of the Charter to the UK (and Poland) qualifies the answers on the duty to assess the destination country's circumstances and the on the applicability of the safe country presumption

# N.S. and M.E (UK and Ireland) CJEU preliminary judgment C 411/10 and C-493/10 joined cases - answers



Ad A) Exercising sovereignty clause is still within the Dublin system („becoming responsible") – part of CEAS – applying EU law – Charter is applicable (51 (1)).

Ad B) Combined answers:

*„The Common European Asylum System is based on the full and inclusive application of the Geneva Convention and the guarantee that nobody will be sent back to a place where they again risk being persecuted.*" (§ 75)

⟹ secondary rules must be interpreted as not in being conflict with fundamental rights

⟹ the Dublin system is based on mutual confidence, it must be assumed that asylum seekers are treated according to the Charter, GC51 and ECHR – that is the raison d'être of creating the CEAS

⟹ slight infringements do not prevent transfer

⟹ by contrast systemic flaws in the procedure or in reception conditions prevent transfer(see next slide!)

# N.S. and M.E (UK and Ireland) CJEU preliminary judgment C 411/10 and C-493/10 joined cases



**Answer to Bd First part**

„if there are substantial grounds for believing that there are systemic flaws in the asylum procedure and reception conditions for asylum applicants in the Member State responsible, resulting in inhuman or degrading treatment, within the meaning of Article 4 of the Charter, of asylum seekers transferred to the territory of that Member State, the transfer would be incompatible with that provision" (§ 86)

**Answer to Ba**

⇒ in Greece there are systemic deficiencies in procedure and reception conditions as acknowledged in the M.*S.S.* v. *Belgium and Greece* judgment of the ECtHR

⇒ states must assess the situation in other member states based on available reports and judgments

**Answer to Bd First part (con-tinued)**

⇒ „ Member States, … [must] not transfer an asylum seeker to the 'Member State responsible' …. where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter. „ (§ 94)

# N.S. and M.E (UK and Ireland) CJEU preliminary judgment C 411/10 and C-493/10 joined cases



⇨ if no transfer is possible he MS must examine further (possible) criteria for transfer but: no unreasonable delay in transferring

**Answer to Bb**

⇨ an application of the Dublin II regulation on the basis of the conclusive presumption that the asylum seeker's fundamental rights will be observed in the responsible Member State is incompatible with the duty of the Member States to interpret and apply the Dublin II regulation in a manner consistent with fundamental rights.

**Answer to Bc**

⇨ Safety of a country must be a rebuttable presumption! (§ 104)

**Answer to Bd second part**

⇨ If criteria do not lead to finding another state responsible or if transfer would entail unreasonable delay the „Member State must itself examine the application in accordance with the procedure laid down in Article 3(2) of" the Dublin II Regulation.

# N.S. and M.E (UK and Ireland) CJEU preliminary judgment C 411/10 and C-493/10 joined cases



Ad C) The Court in an obscure response states that (in light of the MSS judgment of the ECtHR) if systemic deficiencies in the procedure and in the reception conditions exist, then the Charter provisions „do not lead to a different answer" than given in the preceding paragraphs

Ad D) The Charter applies to the UK, just it blocks the extension of the already existing powers of the courts.

⇒ It does not qualify the essence of this judgment

## Bundesrepublik Deutschland v Kaveh Puid, C-4/11, Grand Chamber judgment of 14 November 2013



### Facts

Mr Puid, born in 1979, arrived in Greece with false identity papers in October 2007. He did not apply for asylum and after four days travelled on to Frankfurt am Main (Germany) where he lodged his application for asylum.

In December 2007 the Budesasylamt ordered his transfer to Greece. In January 2008 he was transferred, but the Verwaltungsgericht Frankfurt am Main in July 2009 found that Germany was responsible under § 3 (2) of the Dublin II regulation (the sovereignty clause).

Puid was recognised as a refugee in Germany in May 2011.

The preliminary question was not revoked as Mr Puid may demand compensation for unlawful detention in order to transfer.

# Bundesrepublik Deutschland v Kaveh Puid, C-4/11, Grand Chamber judgment of 14 November 2013



## The legal question

Whether Article 3(2) of the Regulation must be applied (and the State intending the transfer must conduct the RSD) if the situation prevailing in the responsible Member State, poses a threat to the fundamental rights of the asylum seeker?

## The court's answer

- Transfer is then prohibited

-The MS has the right to proceed under 3 (2), but is not obliged

-It may seek another member state under the criteria

Therefore

*„a finding that it is impossible to transfer an asylum seeker to the Member State initially identified as responsible does not in itself mean that the Member State which is determining the Member State responsible is required itself, under Article 3(2) of Regulation No 343/2003, to examine the application for asylum."*

# Shamso Abdullahi v Bundesasylamt, C-394/12, Judgment of the Grand Chamber, 10 December 2013



## Facts

Ms Abdullahi, a Somali national travels to Syria, Turkey and then crosses illegally to Greece. Does not apply for asylum. Moves on through Macedonia, Serbia, enters the EU (again) through Hungary's border with Serbia and moves on to Austria, where she is arrested. Applies for refugee status

Austria intends to return her to Hungary, which accepts responsibility. Abdullahi claims inhuman treatment in Hungary and objects return. Court does not accept A's argument.

Then Abdullahi claims that in fact Greece is the responsible state

## The legal question

Can the applicant in the Dublin procedure challenge the application of the criteria, (Hungary or Greece is responsible) or can she only challenge the safety in the country which has accepted responsibility (conditions in Hungary)?

# Shamso Abdullahi v Bundesasylamt, C-394/12, Judgment of the Grand Chamber, 10 December 2013

## The court's answer

Article 19(2) of the Dublin II regulation must be „interpreted as meaning that, in circumstances where a Member State has agreed to take charge of an applicant for … the only way in which the applicant for asylum can call into question the choice of that criterion is by pleading systemic deficiencies in the asylum procedure and in the conditions for the reception of applicants for asylum in that Member State, which provide substantial grounds for believing that the applicant for asylum would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union."

# Ghezelbash v Netherlands (Staatssecretaris van Veiligheid en Justitie,)
# CJEU, Grand Chamber, 7 June 2016



## Facts

Mr G (an Iranian national) applied in the Netherlands on 7 March 2014. Had a French visa until 11 January 2014. After a visit to France he returned to Iran on 19 December 2013.
France accepted responsibility to take charge, before the decision to seek transfer was communicated to G.

## Legal issues

Whether under an appeal against a transfer decision „an asylum seeker is entitled to plead the incorrect application of one of the criteria for determining responsibility"?

This means: is *Abdullahi* to be overruled and appeal allowed beyond the systemic failures of the destination country's system.

# Ghezelbash v Netherlands (Staatssecretaris van Veiligheid en Justitie,)
## CJEU, Grand Chamber, 7 June 2016



### The Courts arguments

- Recast is not the same as original regulation – new provisions on effective remedy
- States may only take charge if indeed they are responsible (no favours to other states)
- Preambular para 19 and Article 27 (1) effectively mean that remedy should be granted against an incorrect application of the criteria

### Dictum:

The rule on effective remedy (Article 27 (1) of the Dublin regulation of 2013), „must be interpreted as meaning that, … an asylum seeker is entitled to plead, in an appeal against a decision to transfer him, the incorrect application of one of the criteria for determining responsibility laid down in Chapter III of the regulation, in particular the criterion relating to the grant of a visa set out in Article 12 of the regulation."