

# **"UNFINISHED SYMPHONY"**

## **THE COMMON EUROPEAN ASYLUM SYSTEM IN THE MAKING.**

**(DECISION MAKING, ACQUIS, RECASTS)**

**Presented at the  
Advanced training course on European asylum law and  
practice  
(14-16 September 2011 - European Youth Centre,  
Budapest)**

**In the framework of the  
KNOWLEDGE-BASED HARMONISATION OF EUROPEAN ASYLUM PRACTICES  
A project of the Hungarian Helsinki Committee co-financed by the  
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# **(EMOTIONAL) INTRODUCTION**

## GUARDIAN, REPORTING ON 8 MAY 2011

A boat carrying 72 passengers, including several women, young children and political refugees, ran into trouble in late March after leaving Tripoli for the Italian island of Lampedusa. Despite alarms being raised with the Italian coastguard and the boat making contact with a military helicopter and a warship, no rescue effort was attempted.

**All but 11 of those on board died from thirst and hunger after their vessel was left to drift in open waters for 16 days.** "Every morning we would wake up and find more bodies, which we would leave for 24 hours and then throw overboard," said Abu Kurke, one of only nine survivors. "By the final days, we didn't know ourselves ... everyone was either praying, or dying."

Source\_ <http://www.guardian.co.uk/world/2011/may/08/nato-ship-libyan-migrants>, visited 9 May 2011

# Figures: by 27 April 634,835 persons left Libya

## Population Movements

By 27 April, a total of 634,835 people had crossed from Libya into neighbouring countries, including 254,705 third country nationals.

Breakdown as of 26 April 2011

Tunisia		Egypt		Niger		Algeria		Sudan		Chad	
Tunisians	27,593	Egyptians	87,912	Nigeriens	52,689	Algerians	1,078	not available		Chadians	17,148
Libyans*	89,525	Libyans*	84,851	Others	3,450	Libyans	3,599			Others	238
Others	173,749	Others	66,928			Others	9,449				
<b>TOTAL</b>	<b>290,867</b>	<b>TOTAL</b>	<b>239,691</b>	<b>TOTAL</b>	<b>56,139</b>	<b>TOTAL</b>	<b>14,126</b>	<b>TOTAL</b>	<b>2,800</b>	<b>TOTAL</b>	<b>17,386</b>

Source: IOM in cooperation with national authorities  
\* Includes usual border crossings of commuters, traders etc.

## And the „flooding” of Europe?!

**To Italy** since mid-January: **27,922**. Among them are 23,002 Tunisians and 4,920 other nationalities, including 783 Eritreans, 393 Ivorians, 293 Somalis, 254 Nigerians, 246 Ghanaians, 209 Ethiopians, 125 Pakistanis, 123 Malians, 96 Bangladeshis and **19 Libyans**

**To Malta** **1,132** people, including 411 Somalis, 272 Eritreans, 100 Ethiopians, 50 Ivorians, 28 Malians, 14 Pakistanis.

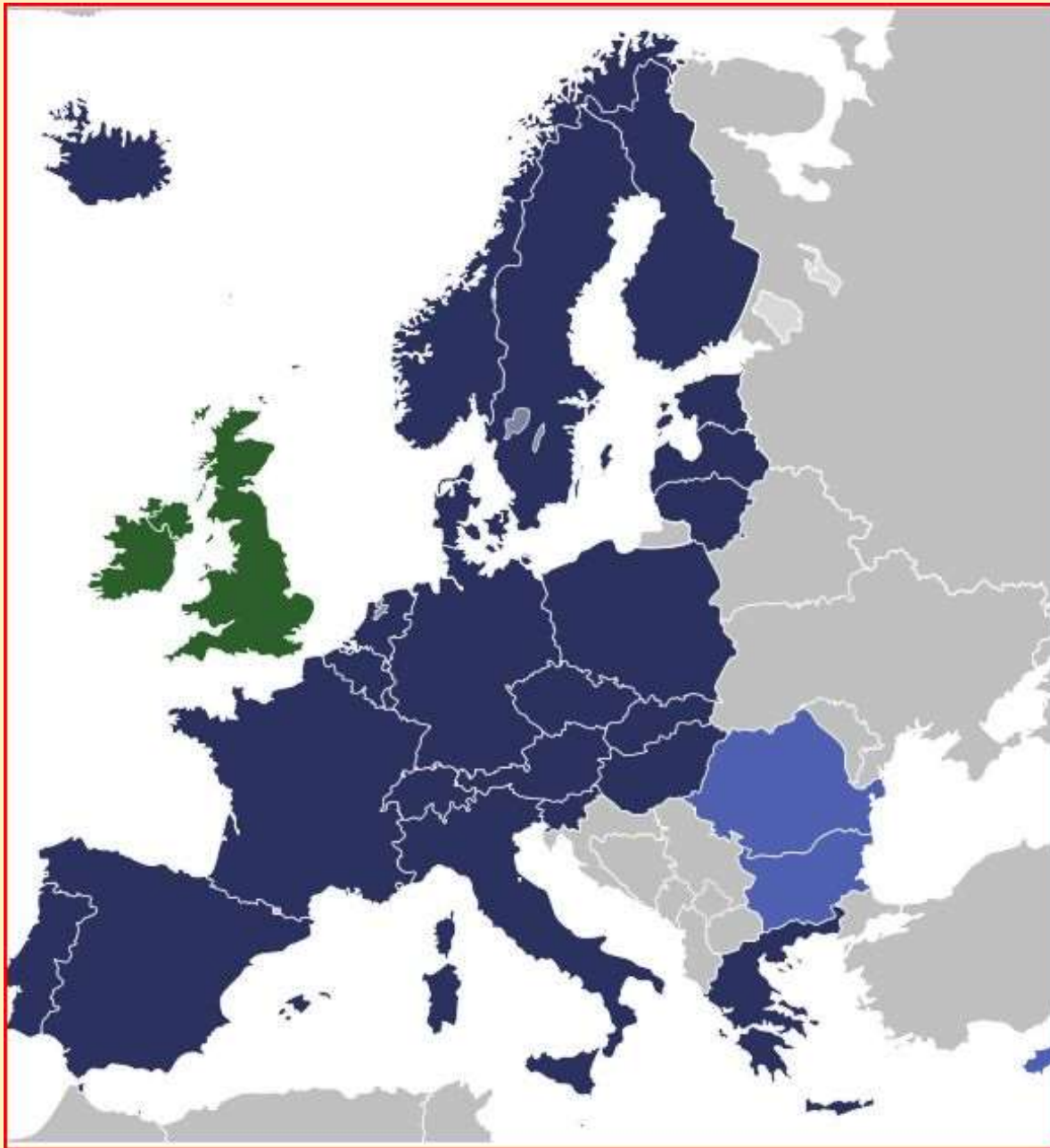
- Source: UNHCR: Update no 22 Humanitarian Situation in Libya and the Neighbouring Countries 28 April 2011  
<http://www.unhcr.org/pages/4d7755246.html> - visited 9 may 2011

# **Do we create a permanent emergency?**

**Why can people simply not leave zones of armed conflict or other disasters and move to safe areas?**

# **Borders!!!!**

**THE RATIONALE BEHIND DEVELOPING  
AN EU ACQUIS:  
SCHENGEN**



**SCHENGEN  
AFTER  
SWITZERLAND'S  
ACCESSION**

# **THE FUNDAMENTAL INSTITUTIONAL STRUCTURE AND THE BASIC NOTIONS**



# THE AREA OF FREEDOM, SECURITY AND JUSTICE

## THE METAMORPHOSIS OF CONCEPTS

1958 - 1993 = Up to Maastricht: **intergovernmental** cooperation

Schengen Agreement (1985) and Convention implementing the Sch. A.  
(1990)

The Dublin Convention on determining the state responsible for the asylum  
procedure (1990)

1993 – 1999 = Between Maastricht (1 November 1993) and Amsterdam (1 May  
1999) = **Justice and home affairs** = **III pillar** = **9 matters of common  
interest** as in Article K (Title IV) of the **TEU** (Maastricht treaty)

1999 - 2009 = From entry into force of the A.T. till entry into force of the Lisbon  
Treaty (1 December 2009) = **Justice and home affairs** = **Area of freedom,  
security and justice** =

**I pillar** = Title IV. of TEC (**Visas, asylum, immigration** and other policies  
related to free movement of persons + civil law cooperation)  
+

**III pillar** = Title VI. of TEU (Provisions on **police and judicial cooperation  
in criminal matters**)

2009 december 1 - = Area of freedom, security and justice **reunited** in Title V of  
the **Treaty on the Functioning of the European Union** = Border checks,  
asylum, immigration; civil law cooperation; criminal law cooperation; police  
cooperation = **no pillar structure but CFSP is outside** of the „normal” EU  
regime

# THE MESSAGE OF THE TAMPERE EUROPEAN COUNCIL CONCLUSIONS (1999)

2. ... The challenge of the Amsterdam Treaty is now to ensure that **freedom**, which includes the right to move freely throughout the Union, can be enjoyed in conditions of security and justice **accessible to all**. ...
3. This freedom **should not, however, be regarded as the exclusive preserve of the Union's own citizens**. Its very existence acts as a draw to many others world-wide who cannot enjoy the freedom Union citizens take for granted. It would be **in contradiction with Europe's traditions to deny such freedom** to those whose circumstances lead them **justifiably to seek access** to our territory.

This in turn requires the Union to develop **common policies on asylum and immigration**, while taking into account the need for a consistent **control of external borders to stop illegal immigration** and to combat those who organise it and commit related international crimes.....

# THE MESSAGE OF THE TAMPERE EUROPEAN COUNCIL CONCLUSIONS (1999)

4. The aim is an open and secure European Union, fully committed to the obligations of the Geneva Refugee Convention and other relevant human rights instruments, and able to respond to humanitarian needs on the basis of solidarity. A common approach must also be developed to ensure the integration into our societies of those third country nationals who are lawfully resident in the Union.

# THE STOCKHOLM PROGRAM PROGRAM, 2009

The development of a Common Policy on Asylum should be based on a **full and inclusive application** of the 1951 Geneva Convention relating to the Status of Refugees and other relevant international treaties.

## THE ACTION PLAN IMPLEMENTING THE STOCKHOLM PROGRAMME, 2010 APRIL

...the European Union has more than ever the duty to **protect and project our values** and to **defend our interests**. Respect for the **human person and human dignity, freedom, equality, and solidarity** are our everlasting values at a time of unrelenting societal and technological change. These values must therefore be at the heart of our endeavours.

**THE RULES IN FORCE AFTER THE  
ENTRY INTO FORCE OF THE  
LISBON TREATY**

# THE STRUCTURE OF THE UNION AFTER LISBON (SINCE 1 DECEMBER 2009)

Designation	European Union		European Atomic Energy Community
Legal Basis	Treaty of Rome, 1957 (+ SEA, Maastricht, Amsterdam Nice, Lisbon)	Treaty of Maastricht 1992 (+ Amsterdam Nice, Lisbon)	Treaty establishing the European Atomic Energy Community (1957) (+ SEA, Maastricht, Amsterdam Nice, Lisbon)
Present designation	Treaty on the Functioning of the European Union	Treaty on the European Union	Same Short: Euratom Treaty
Field of cooperation	Justice and home affairs + Economic cooperation (internal market, external action )	Common foreign and security policy Fundamental principles, Institutional rules	Nuclear
Types and forms of legal acts	Type Legislative – delegated – implementing Form: Regulation, directive, decision	No legislative acts. General guidelines Decisions on actions, positions and their implementation (TEU § 25)	Regulation, directive, decision
Court control (ECJ)	Yes	No (except: personal sanctions)	Yes

# DECISION MAKING IN MATTERS RELATED TO ASYLUM

During the first five years (1999-2004)

After 1 May 2004

After 1 December 2009

## Initiative

Commission and  
Member State

Only the Commission  
(M. S. may request that the  
Commission submit a  
proposal to the Council)

Only the Commission

## Decision making process

Unanimous, after  
consultation with  
Parliament

Ordinary legislation according  
to Art. 251 after adoption of  
common rules and basic  
principles (practically **since  
December 2005**)

Ordinary decision making  
according to Art. 294

## Decision

Regulation, directive,  
decision,  
recommendation,  
opinion

Regulation, directive,  
decision,  
recommendation,  
opinion

Regulation, directive, decision,  
recommendation, opinion

# DECISION MAKING STRUCTURE IN THE EU TITLE V TFEU

<b>COUNCIL OF MINISTERS (JHA COUNCIL)</b>			
<b>High-Level Working Group on Asylum and Migration</b>	<b>COREPER</b>		<b>Standing Committee on Operational Cooperation on Internal Security (COSI) (see § 71 TFEU)</b>
<b>Strategic Committee on Immigration, Frontiers and Asylum (SCIFA)</b>	<b>Coordinating Committee in the area of police and judicial cooperation in criminal matters (CATS)</b>		<b>Working Party on Civil Law Matters</b>
Working party on Integration Migration and Expulsion	Law Enforcement Working Party	Working Party for Schengen Matters	Working Party on Fundamental Rights Citizens Rights and Free Movement of Persons
Visa Working Party	Working Party on Cooperation in Criminal Matters	Working Party on General Matters including Evaluation	Working Party on Civil Protection
Asylum Working Party	Working Party on Substantive Criminal Law	Working Group on Information Exchange and Data Protection	JAI -RELEX Working Party
Working Party on Frontiers	Working Party on Terrorism		Customs Cooperation Working Party

Based on Council doc 5688/1/11 „LIST OF COUNCIL PREPARATORY BODIES” REV1

<http://register.consilium.europa.eu/pdf/en/11/st11/st11903.en11.pdf> - visited 11 September 2011



# Votes distribution – qualified majority

	Before accessions of 2004, 2007	Now, with Bulgaria and Romania until 2014	After 1 November 2014  1 member – 1 vote  Qualified majority = „double majority”  On a proposal from the Commission or the High Representative      On any other proposal	
France	10	29	<b>55% of the ministers (countries) (15) representing 65% of the population of the EU</b>	<b>72 % of the ministers (20) representing 65 % of the population of the EU</b>
Germany	10	29		
Great Britain	10	29		
Italy	10	29		
Spain	8	27		
Poland	-	27		
Romania	-	14		
The Netherlands	5	13		
Belgium	5	12		
Greece	5	12		
Portugal	5	12		
Czech republic	-	12		
Hungary	-	12		
Ausztria	4	10		
Sweden	4	10		
Bulgaria	-	10		
Denmark	3	7		
Finland	3	7		
Ireland	3	7		
Lithuania	-	7		
Slovakia	-	7		
Luxembourg	2	4		
Cyprus	-	4		
Estonia	-	4		
Latvia	-	4		
Slovenia	-	4		
Malta	-	3		
<b>Total</b>	<b>87</b>	<b>345</b>	<b>Blocking minority : minimum 4 countries even if 3 represent more than 35 % of the population</b>	
Qualified majority	62 (71,26%)	255 (73,91 %)		
Blocking minority	26	91		

# VARIABLE GEOMETRY IN THE FIELD OF AFSJ

	TFEU Title V. <b>not related to Schengen</b>	Building on <b>Schengen</b> under Title V.	<b>Schengen</b> acquis in former <b>title VI of the TEU</b>	<b>Other</b> elements of former <b>Title VI</b>	TFEU and TEU <b>SIS, visa rules abolition of internal borders</b>
UK Ireland	Opts in or out	Opts in or out	Opts in or out	Opts in or out	No participation
Denmark	No participation	No participation, but creates an obligation under international law	Binding, frozen	Binding, frozen	Takes part
Norway, Iceland	No participation	Binding	Binding	No participation	Takes part
Switzerland	No participation	Binding	Binding	No participation	Applied since 12 December 2008 (on airports since 29 March 2009)
NMS of 2004	Binding	Binding	Binding	Binding	Applied since 21 December 2007, on airports since March 2008.
Bulgaria Romania Cyprus	Binding	Binding	Binding	Binding	Not yet applied

# THE ROLE OF THE COURT OF JUSTICE OF THE EUROPEAN UNION (CJEU) IN ASYLUM AND MIGRATION MATTERS

## Procedures against states

**Infringement procedure** = Commission against state for failure to fulfil obligations *Article 285 TFEU (ex Article 226 TEC)*

**Interstate dispute** = State against state for failure to fulfil obligations (*Hardly ever used*) *Article 259 (ex Article 227 TEC)*

**Enforcement procedure** = Commission against MS - when a state fails to implement a judgment of the CJEU *Article 260 (ex Article 228 TEC)*

## Challenging the legality of an act or the failure to act

**Annulment procedure** = review of legality of acts *Article 263 (ex Article 230 TEC)*

MS, Parliament, Council or Commission challenging an act (of the other bodies) on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers + Natural and legal persons also, if personally and directly affected

**Challenging failure to act** = MS and institutions against any institution, body or organ if the latter fails to act in infringement of the Treaties

## Preliminary ruling

MS's courts may (any level) must (highest level) request a preliminary ruling on

- the interpretation of the Treaties;
- the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union

# THE COMMISSIONERS



Cecilia  
Malmström

Home affairs

Borders, visa, immigration asylum  
Fight against economic, cyber and financial crimes;  
Organised crime, trafficking of men and drugs, drug-trade,  
corruption;  
Fight against terrorism;  
Police and criminal justice co-operation (e.g.I.FRONTEX,  
EUROPOL)



Viviane  
Reding

Vice president of the  
Commission  
Access to law, fundamental  
rights, EU citizenship

## Access to law

Judicial co-operation in civil and commercial matters  
Co-operation in criminal law matters  
Contract law and consumer rights

## Fundamental rights

Charter of Fundamental Rights and the Fundamental Rights Agency (Vienna)  
Rights of the child  
Gender issue, discrimination (Roma issues)

## Union citizenship

Rights of an EU citizen  
Active citizenship

# ASYLUM PROVISIONS

Location: the new Title V of the „Treaty on the Functioning of the European Union”, on an „area of freedom security and justice „ re-uniting I. and III. pillar

## *Article 78 (1)*

1. The Union shall develop a **common policy on asylum, subsidiary protection and temporary protection** with a view to offering appropriate **status to any third-country national** requiring international protection and **ensuring compliance with the principle of *non-refoulement***. This policy must be in **accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.**

# MAIN NOVELTIES

Uniform status

„asylum” = Convention refugee status  
subsidiary protection

Common procedure

**No longer minimum** standards! Goal: to adopt them in 2012

↔ recasts 2008, 2009! NOT creating uniform status and common procedure

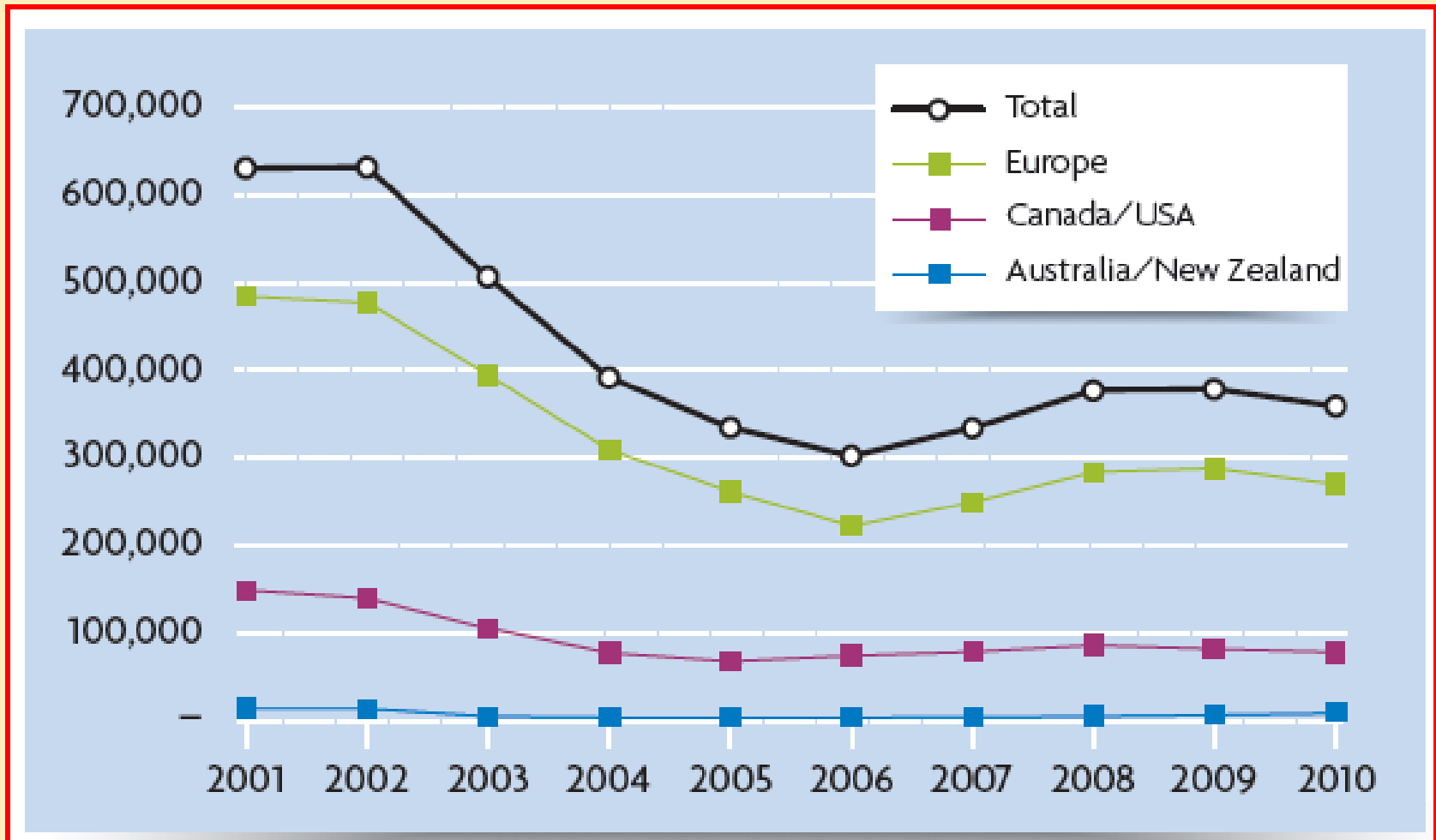
Partnership with third countries

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Not mentioned in the Lisbon treaty: European Asylum Support Office

**THE FACTUAL  
BACKGROUND  
(STATISTICS, REMINDER)**

## Long term asylum application trends



Source: [UNHCR Global Trends 2010](http://www.unhcr.org/4dfb66ef9.html) 60 years and still counting, 20 June 2011. Excel sheets Annexes .  
<http://www.unhcr.org/4dfb66ef9.html> - visited on 11 September 2011



State	2008	2009	2010
Austria	12750	15815	11060
Belgium	15940	22955	26560
Bulgaria	745	855	1025
Cyprus	3920	3200	2875
Czech Republic	1650	1245	790:
Denmark	2375	3775	5100
Estonia	15	40	35
Finland	3770	5700	3675
France	41845	47625	52725
Germany	26945	33035	48590
Greece	19885	15925	10 275
Hungary	3175	4670	2 105
Ireland	3865	2690	1 940
Italy	30145	17670	10 050
Latvia	55	60	65
Lithuania	520	450	495
Luxembourg	455	485	785
Malta	2605	2385	175
Netherlands	15255	16140	15 100
Poland	8515	10595	6540
Portugal	160	140	160
Romania	1180	965	885
Slovakia	905	820	540
Slovenia	260	200	245
Spain	4515	3005	2 745
Sweden	24875	24260	31 940
United Kingdom	30550	31695	23 745
Iceland	75	35	n.a.:
Liechtenstein	25	285	110
Norway	14430	17225	10065
Switzerland	16605	16005	15565
European Union (27 countries)	:	266395	260 210
Total	:	299945	Approximat. 286000:

The number of asylum applications in the EU 27 and in other states participating in the Dublin system

Source:  
Eurostat : migr\_asyappctza-  
Asylum and new asylum applicants by citizenship, age and sex Annual aggregated data (rounded)  
Update: 30-08-2011

>15000	14999 - 1500	1499 - 0
Belgium	Austria	Czech R
France	Cyprus	Estonia
Germany	Finland	Latvia
The Netherl.	Greece	Lithuania
Switzerland	Hungary	Luxembourg
Sweden	Ireland	Malta
UK	Poland	Portugal
	Spain	Romania
	Norway	Slovakia
		Slovenia
		Iceland
		Liechtenstein

# Recognition rates, by applicants 2010

Table 6b: First instance decisions by outcome across the 30 main groups of asylum applicants<sup>1)</sup> countries of citizenship in the EU-27, 2010 (rounded figures)

	Total decisions	Total positive decisions	Refugee status	Subsidiary protection	Humanitarian reasons	Rejected
<b>Non-EU</b>	222 105	55 095	27 045	20 400	7 645	167 010
Afghanistan - (AF)	18 290	8 050	2 150	4 040	1 865	10 240
Iraq - (IQ)	15 620	8 165	4 930	2 660	575	7 455
Somalia - (SO)	15 570	10 390	1 785	6 965	1 640	5 180
Russia - (RU)	13 815	2 615	1 885	530	200	11 200
Serbia - (RS)	12 690	320	190	25	105	12 370
Kosovo - (XK)	10 220	575	290	70	215	9 645
Iran - (IR)	9 660	3 920	3 315	405	200	5 740
Nigeria - (NG)	8 935	450	100	110	235	6 490
Sri Lanka - (LK)	8 365	1 465	1 195	155	110	4 905
Pakistan - (PK)	8 350	680	365	255	65	5 675
Turkey - (TR)	8 300	985	715	105	165	5 315
Armenia - (AM)	8 150	400	175	105	120	5 750
Georgia - (GE)	5 365	135	60	35	40	5 230
China - (CN)	5 090	805	570	165	70	4 285
Eritrea - (ER)	4 625	3 070	1 700	1 300	70	1 555
MK	4 535	60	35	5	20	4 470
Syria - (SY)	4 510	1 160	975	80	105	3 350
Bangladesh - (BD)	3 915	170	65	60	45	3 745
CD	3 765	695	530	90	70	3 070
Guinea - (GN)	3 760	920	580	270	70	2 840
Algeria - (DZ)	2 940	90	50	35	5	2 845
India - (IN)	2 720	50	15	15	15	2 675
Zimbabwe - (ZW)	2 660	795	545	240	10	1 865
Azerbaijan - (AZ)	2 220	330	200	75	55	1 890
Sudan - (SD)	2 170	730	610	90	30	1 440
Vietnam - (VN)	1 980	95	20	45	30	1 890
Stateless	1 800	580	340	135	105	1 220
Haiti - (HT)	1 645	220	110	40	65	1 430
BA	1 590	115	60	5	50	1 475
Mongolia - (MN)	1 560	45	15	10	15	1 520
<b>Other</b>	37 275	7 025	3 465	2 270	1 290	30 250

1) Countries selected here are those with the highest number of first instance decisions issued in 2010.

Notes: Kosovo – Kosovo / UNSCR 1244; BA – Bosnia and Herzegovina; CD – Congo, the Democratic Republic of the; MK – the former Yugoslav Republic of Macedonia; Syria – Syrian Arab Republic.

Source: Eurostat (online data code: [migr\\_asydcfsta](#))

Source:  
EurostatData  
in focus  
5/2011, p. 11

# Recognition rates, by deciding countries 2010

Table 6a: First instance decisions by outcome across EU Members, 2010 (rounded figures)

	Total decisions	Total positive decisions	Refugee status	Subsidiary protection	Humanitarian reasons	Rejected
EU-27	222 105	55 095	27 045	20 400	7 645	167 010
Belgium	16 245	3 510	2 700	805	-	12 740
Bulgaria	515	140	20	120	-	375
Czech Republic	500	175	75	75	20	330
Denmark	3 280	1 345	660	520	170	1 935
Germany	45 310	10 445	7 755	545	2 145	34 865
Estonia	40	15	10	5	-	25
Ireland	1 600	25	25	5	-	1 575
Greece	3 455	105	60	20	30	3 350
Spain	2 785	610	245	350	15	2 175
France	37 620	5 115	4 095	1 020	-	32 505
Italy <sup>1)</sup>	11 325	4 305	1 615	1 465	1 225	7 015
Cyprus	2 440	425	30	370	25	2 015
Latvia	50	25	5	20	-	25
Lithuania	190	15	*	15	-	175
Luxembourg	475	70	55	15	-	405
Hungary	1 040	260	75	115	70	785
Malta	350	210	45	165	15	125
Netherlands	17 145	7 565	810	4 010	2 745	9 575
Austria	13 770	3 445	2 055	1 390	-	10 325
Poland	4 420	510	80	195	230	3 910
Portugal	130	55	5	50	-	75
Romania	425	70	40	30	0	355
Slovenia	115	25	20	*	-	95
Slovakia	295	90	5	55	30	205
Finland	4 260	1 595	165	1 240	190	2 665
Sweden	27 630	8 495	1 935	5 955	605	19 140
United Kingdom	26 690	6 440	4 445	1 850	140	20 250
Iceland	:	:	:	:	:	:
Liechtenstein	85	*	*	-	0	85
Norway	15 255	5 300	2 975	1 565	760	9 955
Switzerland	18 475	7 815	3 380	1 155	3 280	10 660

1) See country information notes.

'-' – not applicable

\*\* – represents 2 or fewer first instance decisions recorded in the reference period

Source: Eurostat (online data code: [migr\\_asydcfst1a](#))

Source:  
EurostatData  
in focus  
5/2011, p. 10

# The Common European Asylum System (CEAS)

- Goal: Common European Asylum system
  - First phase: harmonized rules (minimum standards)
  - Second phase common procedure and uniform status

(Majority decision-making only after first phase complete – from 2005 December)

-

# Asylum issues

## Adopted measures

1. Regulation **on Eurodac** (2000)
2. Directive on **temporary protection** (2001)
3. **Reception conditions** directive (2003)
4. **Dublin II** Regulation and its implementing rules (2003)
5. Qualification (**Refugee definition**) directive (2004)
6. **Asylum procedures** directive (2005)
7. Decision on the (third) **European Refugee Fund** (2007)
8. Establishment of an **European Asylum Support Office** (2010)

# Two (and a half) packages of amendments 2008 and 2009 (and 2010-2011)

## First: 3 December 2008

- COM(2008) 820 final –recasting the **Dublin** regulation
- COM(2008) 825 final –recasting the **Eurodac** regulation
- COM(2008) 815 final – recasting the **Reception conditions** directive

## Second: 21 October 2009

- COM(2009) 554 final: Recasting the **procedures** directive Complemented by two staff working papers
- COM/2009/551 final: recasting the **qualification** directive Complemented by two staff working papers

## + Half:

### 11 October 2010

COM(2010) 555 final: recasting (for the third time) the **Eurodac** regulation

### 7 June 2011

COM(2011) 319 final: second recast of the **Procedures** directive

COM(2011) 320 final: second recast of the **Reception conditions** directive

# **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**

**Amended by: DECISION No 458/2010/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**of 19 May 2010**

**OJ L 129/1, 28.5.2010**

# 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~~– 614 million euros for the whole period (§ 12) (after the amendment of 2010)
- „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



# The European Refugee Fund

## 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

# The European Refugee Fund 2008-2013

## 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	

# The European Refugee Fund 2008 - 2013

## 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

## Changes in 2010

- Due to the establishment of the European Asylum Support office the budget was reduced and some coordination tasks (good practices exchange, statistical methodology) can no longer be financed from the ERF

# **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 September!

# **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

## 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 decision. 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)

## Commission evaluation, 2007 November

„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

# **THE „DUBLIN II” REGULATION**

Prehistory: 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);

# 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 System

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](http://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 (September 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

## Regulation 343/2003 (Dublin II) Taking charge - 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)

### Taking back - procedure - deadlines

#### Taking back:

- In case the applicant 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 where the person has already applied)

Suspensive effect?

Usually not, unless court or competent body so decides

See: The Petrosian case C-19/08, decided on 29 January 2009 (Deadlines for transfer only run from final decision on appeal)

## 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

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***For the details of the **M.S.S. case see the annex to this presentation*****

# **THE EURODAC REGULATION(S) (2000)**

**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)

# **THE „QUALIFICATION DIRECTIVE” (2004)**

**EC Council Directive 2004/83/EC of 29 April 2004  
on Minimum Standards for the Qualification and Status of Third Country  
Nationals or Stateless Persons as Refugees  
or as Persons who otherwise need International Protection  
and the Content of the Protection granted  
(OJ L 304/12 of 30.9.2004)**



# Qualification directive

## Purpose

- **Guaranteeing a minimum of protection**
- **Closing the protection gap concerning persons not threatened with Geneva Convention type persecution**
- **Prevention of asylum shopping and abuse of the asylum system**

## Scope of application

- **26 Member states of the EU, including the UK and Ireland who opted in (Denmark not)**

## Minimum standards

- **According to Art 3. states may introduce or retain more favourable standards. This is the bare minimum**

## Major innovations

- **Introduction of „subsidiary protection” and identification of rights accompanying it.**
- **Non-state actors may qualify as persecutors in a Geneva Convention sense**
- **Internal flight alternative is an exclusion ground.**
- **The directive not only offers detailed definition (as the common position of 1996), but also identifies the rights of the protected persons.**

## Qualification directive (cont'd)

- 2 § Definitions:
  - Application = seeking refugee **or** subsidiary protection status
  - **Refugee** = Geneva Convention (1951/67) definition + absence of exclusion grounds according to Art 12 of the D.
  - **Person eligible for subsidiary protection**

» See next slide

## Qualification directive (cont'd)

### Art 2 (e)

„‘person eligible for **subsidiary protection**’ means a third country national or a stateless person who **does not qualify as a refugee** but in respect of whom **substantial grounds have been shown for believing** that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, **would face a real risk of suffering serious harm as defined in Article 15**, and to whom Article 17(1) and (2) do not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country”

## Qualification directive (cont'd)

### Article 15: Serious harm

Serious harm consists of:

- (a) **death penalty** or execution; or
- (b) **torture** or inhuman or degrading treatment or punishment of an applicant in the country of origin; or
- (c) **serious and individual threat** to a civilian's life or person **by reason of indiscriminate violence** in situations of international or internal armed conflict.

## QUALIFICATION DIRECTIVE PERSECUTION (CONT'D)

### Persecutor / serious harm doer

- the State;
- parties or organizations controlling the State or a substantial part of the territory of the State;
- **non-State actors**, if the state or other agents are **unable** or unwilling to provide protection

### Protector

- the State; or
  - parties or organizations, **including international organizations**, controlling the State or a substantial part of the territory of the State.
  - Protection means at least that
    - an effective legal system for the detection, prosecution and punishment of persecution or serious harm is operated
    - the applicant has access to such protection.
- 
- Recast, 2009: Protection **must be effective and durable** and can only be provided by the above mentioned actors if they are **willing and able to enforce the rule of law**.

## Qualification directive Persecution (cont'd)

### Internal relocation alternative (8§)

- Optional! (MS „may” determine)
- In a **part of the country** of origin
  - there is **no well-founded fear** of being persecuted / **no real risk** of suffering serious harm
  - the applicant „can **reasonably be expected to stay** in that part of the country”
- „Have regard” to –general circumstances +personal circumstances of the applicant
- If no possibility to return for technical reasons, still applies!

### Recast, 2009:

- incorporates the 2007 Salah Sheek judgment of the ECtHR: legally travel there, gain admittance and settle there
- removes the applicability even if technical obstacles
- Establishes obligation of authorities to have up-to-date info

## Subsidiary protection – conceptual issues

Complementary – subsidiary

**Preamble (24) :**

**„Subsidiary protection should be complementary and additional to the refugee protection enshrined in the Geneva Convention”**

**Is subsidiary protection of a lesser standing, do beneficiaries deserve less rights/protection?**

# The moral dilemma – what is the basis of subsidiary protection?

## Compassion

- Differentiation between Convention status and complementary protection is conceivable
- State discretion in granting or withholding it

## Integrity, dignity and human rights of the human being

- Differentiation is unjustified
  - The state only recognizes the necessity of protection
- "There is no legal justification for differentiating between convention refugees and the status of beneficiaries of complementary protection,"*
- (McAdam, 2007, p.1.)



# The Elgafaji case – C-465/07 ECJ – Judgment, 17 February 2009

- Is it more than Article 3 of ECHR and  
(Answer: yes)
- , **when** does a person run „**a real risk of serious and individual threat** by reason of indiscriminate violence

ECJ:

- It does not refer to specific acts of violence, but to the **threat** of the applicant's life and person.
- That threat is **triggered by violence**, which is indiscriminate (34. §)
- **Indiscriminate**: it extends to the person „**irrespective of her/his personal circumstances**”

# The Elgafaji case - Judgment, 17 February 2009

## The key sentence

- ...[T]he word **'individual'** [threat-BN] must be understood as covering **harm** to civilians **irrespective of their identity**, where the **degree of indiscriminate violence** characterising the armed conflict taking place ... **reaches such a high level** that substantial grounds are shown for believing **that a civilian**, returned to the relevant country or, as the case may be, to the relevant region, **would, solely on account of his presence on the territory** of that country or region, **face a real risk of being subject to the serious threat** referred in Article 15(c) of the Directive

- „**the existence** of a serious and individual **threat** to the life or person of an applicant for subsidiary protection **is not subject to** the condition that that applicant adduce evidence **that he is specifically targeted by** reason of factors particular to his personal circumstances”

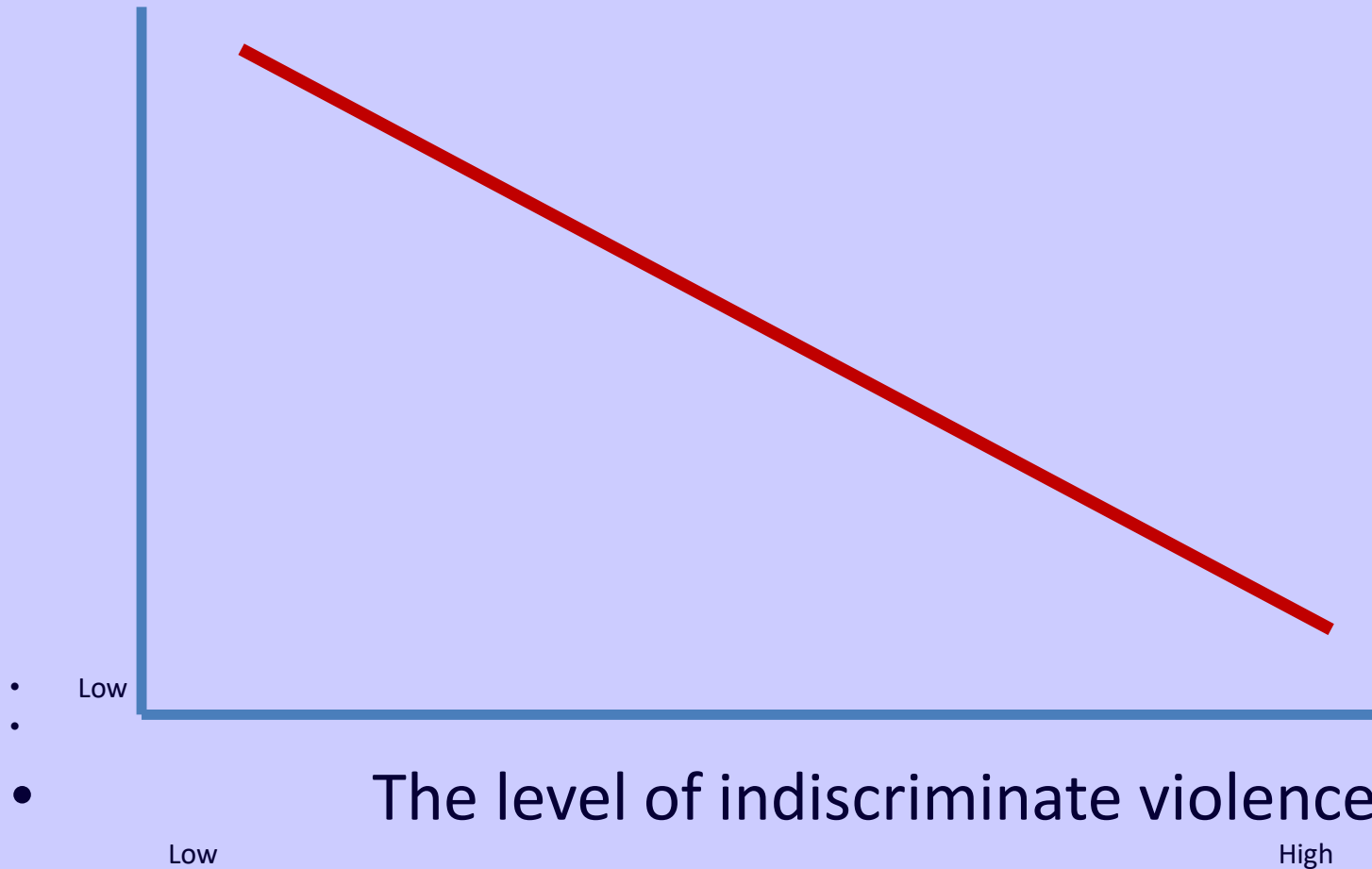
(§ 43)

# The measure of individualisation and the level of violence

## Elgafaji, 39. pont

- Individualisation

- High



- Low

- 

- The level of indiscriminate violence

Low

High

# **THE „PROCEDURES DIRECTIVE” (2005)**

**Council Directive 2005/85/EC of 1 December  
2005 on minimum standards on procedures in  
Member States for granting and withdrawing  
refugee status**

**(OJ L 326/13 of 13.12.2005)**

## Directive on minimum standards on procedures Scope, definitions, more favourable rules

- **Purpose:** common minimum standards for the procedures on recognizing and withdrawing refugee status
- **Scope:**
  - obligatory: for Geneva Conv status applications
  - optional: for protection other than Geneva

**More favourable provisions:** MS may maintain or introduce „insofar” as are compatible with this directive (5 §)

# Directive on minimum standards on procedures

## Basic principles and guarantees

- **Access** to procedure - each adult has the right
- **Right to stay** - until first instance decision (exception: subsequent application and European Arrest Warrant + int'l criminal courts)
- Procedural requirements: **appropriate examination**:
  - = individual, objective, impartial,
  - = up to date country of origin and transit info
  - = personnel knowledgeable about asylum law
  - = appeal authorities also informed about country of orig. and transit
- **Decision: in writing**, justification if negative (!)

## Directive on minimum standards on procedures

### Further guarantees

**Information** on procedure and consequences (in a language the applicant „may reasonably be supposed to understand”)

**Interpreter** „whenever necessary”

Access to **UNHCR** or an agency working on its behalf

**Notice** of the decision **on time** in a language supposed to be understood – if not assisted by lawyer

On appeal: only interpreter, access to UNHCR, timely notification



## Directive on minimum standards on procedures

### Duties of the applicant:

Report to authorities, hand over documents, report place of residence, allow search, photograph and recorded statement

**Interview:** Compulsory, but exceptions (Dublin II, assistance at submission of request, „not reasonably practicable” /e.g.unfit applicant/)

### Requirements: minimal

- „steps” to ensure comprehensive account,
- interviewer „sufficiently competent”,  
(to take account of applicant’s cultural origin or vulnerability)
- interpreter to ensure „appropriate communication”, not necessarily in language preferred by applicant.
- written report: access before or after the decision, approval of applicant not necessary!

# Directive on minimum standards on procedures

## Legal assistance:

- Applicant must have **access to lawyer** (at his cost)

Lawyers access to closed areas may be curtailed but not rendered impossible

- **Free legal assistance/representation**: MS „shall ensure” *after negative decision* on conditions as to nationals + further grounds for not offering:

- only for appeal (not admin. review)
- if applicant has no means to finance
- if „review is likely to succeed”
- only from among chosen representatives

Ms may set time or financial limits and not disclose sensible info

Presence at interview: MS discretion

## Unaccompanied minors:

must have representative before interview

interviewer and decision maker has specialized knowledge

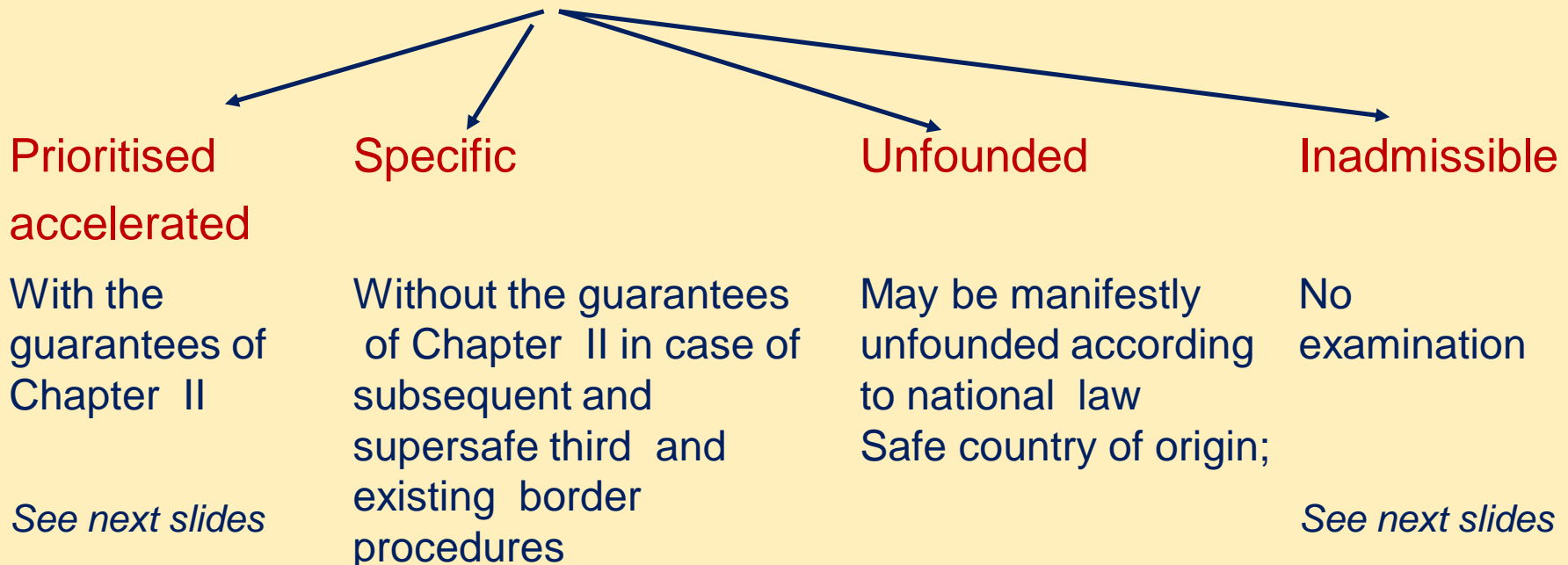
several exceptions to this duty (e.g 16 years of age, married etc.)

## Directive on minimum standards on procedures

- **Detention:**
  - „shall not hold in detention for the sole reason that he/she is an applicant”
  - Condition, duration: not fixed, „speedy judicial review required”
- **Implicit withdrawal:** Conceivable if applicant does not report, absconds, does not appear for an interview, does not provide information
- **UNHCR** (and organizations acting on its behalf):
  - access to: applicant, information
  - right to present its view

## Directive on minimum standards on procedures

- Normal „examination” procedure (Art 23, 1-2)
  - no deadline prescribed „as soon as possible” - after 6 months „information” on the delay and expected time frame
- Other procedures and applications



## Directive on minimum standards on procedures Accelerated or prioritized procedures

1. No relevant issue raised
2. the applicant clearly does not qualify as a refugee
- 3 safe country of origin
4. safe third country (non MS)
5. misled the authorities by presenting false information or documents with respect to his/her identity
6. filed another application for asylum stating other personal data; or
- 7 destroyed or disposed of an identity or travel document that would have helped establish his/her identity or nationality; or
- 8 the applicant has made inconsistent, contradictory, unlikely or insufficient representations
- 9 subsequent application raising no relevant new elements
- 10 failed to make his/her application earlier,
- 11 merely in order to delay or frustrate removal
- 12 violations of behavioral rules (reporting etc.)
- 13 entered unlawfully or prolonged his/her stay unlawfully and, without good reason, has either not presented himself/herself to the authorities and/or filed an application for asylum as soon as possible
- 14 the applicant is a danger to the national security or the public order
- 15 refuses to have his/her fingerprints taken
- 16 the application was made by an unmarried minor after the application of the parents responsible for the minor has been rejected

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C-69/10 *Diouf v Ministre du Travail, de l'Emploi et de l'Immigration (Luxembourg)* decided: 28 July 2011. No separate appeal against a decision to examine in accelerated procedure, 15 days for appeal are enough, one level court review constitutes effective remedy

# Directive on minimum standards on procedures

## Specific procedures-Unfounded – Inadmissible applications

Specific	Unfounded	Inadmissible
Subsequent application	safe country of origin	Dublin II applies
Border procedures		Refugee status in another MS
Supersafe" third country cases „European safe third countries" 36 § - CJEU abolished in 2008		Non MS = first country of asylum (already recognized there as refugee)
		„Normal" safe third country applies
		Other title to stay, with at least refugees' rights pending the determination of that other title
		identical repeat application
		Dependent repeating parents rejected application

## Directive on minimum standards on procedures Criticism, concerns

- “**Safe third country**” criteria that go below any standards that could ensure effective protection and provisions that lack any possibility of individual review before return to a “safe” country, and extension of the concept to countries where the applicant may have no links and which he or she may not even have transited;
- Need for minimum principles and guarantees during **border procedures**;
- **Lack of “suspensive effect** of appeals” (or denial of right to remain in the country while an appeal is heard);
- Provisions that channel up to **16** different categories into **accelerated procedures**;
- Failure to limit or define permissible grounds for **detention** of asylum-seekers;
- **Restrictions on free legal assistance** and representation including at appeal, for asylum-seekers arriving irregularly as well as unaccompanied children;
- **Lack of** specific provisions to ensure the **gender sensitivity** of procedures;
- Failure to take advantage of the opportunity to introduce a **single procedure**.

Source: UNHCR Aide Memoire, November 2003

# **THE EUROPEAN ASYLUM SUPPORT OFFICE (EASO)**

**REGULATION (EU) No 439/2010 OF THE  
EUROPEAN PARLIAMENT AND OF THE COUNCIL  
of 19 May 2010  
establishing a European Asylum Support Office  
(OJ L 132/11 of 29.5.2010)**



# The European Asylum Support Office

- ❑ Commission Proposal for a Regulation of the European Parliament and of the Council establishing a European Asylum Support Office, adopted on 18.2.2009 (COM (2009) 66 final)
- ❑ Political agreement on a common position in November 2009
- ❑ Adoption 19 May 2010
- ❑ Seat: Malta

## Purposes

- **coordinate and strengthen practical cooperation** among Member States
- and **help to improve the implementation** of the Common European Asylum System.
- **operational support** to Member States subject to **particular pressure**
- **scientific and technical assistance** for Community policy-making and legislation

# The European Asylum Support Office

## EASO planned activities - a few highlights

- Source of Country of origin information
- Coordination and assistance to intra EU reallocation of beneficiaries of protection
- Intervention at the request of the affected MS in case of mass influx:
  - Sending asylum support teams with expertise in
    - » interpreting services,
    - » information on the countries of origin
    - » and knowledge of the handling and management of asylum cases
  - Decision to send: 3/4 of Management Board – experts sent by MS chosen from an Asylum Intervention Pool

# The European Asylum Support Office

Ministers agreed on priorities in the Fall of 2010

**Support of training**

**Country of origin info**  
(Portal, analysis)

**Capacity building**  
(especially in countries exposed to particular pressure)

**Promoting implementation of the CEAS** (Assisting the Commission in controlling its implementation)

First meeting of the Board of Managers: Malta, 2010 nov 25-26

Start of operation June 2011 (in a hotel room....)

**THE FUTURE OF THE  
INTERNATIONAL AND  
EUROPEAN REFUGEE  
REGIME**

# **THE STOCKHOLM PROGRAM**

**The Stockholm Programme -**

**An open and secure Europe serving and  
protecting the citizen**

**Formally adopted by the European Council on  
10/11 December 2009**

**See Council Conclusions of 11 December 2009  
(EUCO 6/09) and the programme in Council  
register doc 17024/09)**

## 6.2 Asylum: a common area of protection and solidarity

The European Council remains committed to establishing a **common asylum procedure and a uniform status for those granted international protection.**

### *6.2.1 A common area of protection*

#### **Starting points/Goals**

The development of a Common Asylum Policy **should be based on a full and inclusive application of the Geneva Convention on the status of refugees and other relevant international treaties.**

**The European Asylum Support Office (EASO) will be an important tool strengthening all forms of practical cooperation between the Member States. EASO should further develop a common educational platform for national asylum officials.**

## Stockholm - 6.2.1 A common area of protection

### Proposals

The Council and the European Parliament intensify the efforts to establish a common asylum procedure and a uniform status in accordance with Article 78 TFUE for those who are granted asylum or subsidiary protection by 2012 at the latest,

The Commission to consider (after 2012) the possibilities for creating a framework for the transfer of protection of beneficiaries of international protection when exercising their acquired residence rights under EU law,

A feasibility study on Eurodac as a supporting tool for the entire CEAS, while fully respecting data protection rules,

Finalise Commission study on the joint processing of asylum applications.

## Stockholm - 6.2.2 Sharing of responsibilities and solidarity

### *6.2.2 Sharing of responsibilities and solidarity between the Member States*

#### **Starting points/Goals:**

Effective solidarity with the Member States facing particular pressures should be promoted.

#### **Proposals**

Developing mechanism for **sharing responsibility** between the Member States

Creating instruments and coordinating mechanisms for MS to support **each other** in **building capacity**,

A **more effective use of existing EU financial systems** aiming at reinforcing internal solidarity,

**Secondment of officials** in order to help those Member States facing particular pressures of asylum seekers.



# Stockholm - 6.2.3 The external dimension of asylum

## 6.2.3 The external dimension of asylum

### Starting points/goals

Partnership and cooperation with third countries hosting large refugee populations.

A common EU approach and cooperation with the UNHCR and other actors

The EU should promote its accession to the 1951 Geneva Convention

Solidarity with third countries: capacity building and help in protracted refugee situations

### Proposals

To enhance capacity building in third countries

Develop and expand the idea of Regional Protection Programmes.

Encourage the voluntary participation of Member States in the joint EU resettlement scheme and increase the total number of resettled refugees. (Commission to report on resettlement yearly)

Strengthen EU support for the UNHCR

Enhance access to asylum procedures in main transit countries - Member States could participate on a voluntary basis.

**THE RECASTS**  
**(Missing movements from**  
**the symphony)**

# **Reception conditions**

## FROM THE BACKGROUND OF THE SECOND RECAST

„[M]any Member States opposed specific provisions of the proposal because of the particularities of their asylum and/or legal systems. In this respect it was feared that adaptations would require substantial financial efforts and administrative readjustments and would impede the effectiveness of the asylum procedure.” com (2011) 320, p.4

„The main objective of this modified proposal is to further clarify and **provide more flexibility** to the proposed reception standards **so that they can be easier built into the national legal systems.**” – p. 6 – **Clear surrender**

### **Concessions made concerning**

- guarantees for detained asylum seekers,
- reception conditions in detention facilities,
- deadlines for access to the labour market,
- level of health care provided for persons with special reception needs and identification mechanisms for such needs,
- access to material support and
- the reporting obligations of MS

Recasting the Reception The first recast  
COM(2008) 815 final – major suggestions

- **Scope** : include applicants for subsidiary protection
- **Access to the labour market** : 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

Recasting the Reception The second recast  
COM(2011) 320 final

- **Scope** : same
- **Access to the labour market** more flexibility for states to deny access to labour market (non-access for 12 months if large scale influx, or applicant delaying procedure)
- **Material reception conditions**:
- No common points of reference as to the standards of living
- **Detention**: less access to free legal aid; at borders and in transit no full guarantees, minors can be detained, exceptionally allowed in prison
- **Persons with special needs**: early identification of this group obligatory but the rules are less detailed

# **The Dublin system**

## 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

**EURODAC**

## 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.
- More precise data protection rules

# **Qualifications directive**

# Recast of the Qualification Directive, 2009 (COM (2009) 551 and related documents)

## Problems identified:

### Symptoms

- Divergent recognition rates
- Remaining secondary movements
- Lack of integration

### Causes

Vague terms, different interpretation

- actors of protection
- internal protection
- membership of a particular social group

Different standards of protection

- Convention refugees – beneficiaries of subsidiary protection
- Limited right to family unification

# Suggested changes to QD

- Restrict the broad interpretation of the concepts "actors of protection" and "internal protection" by specifying the criteria for assessing the accessibility and effectiveness of protection
- Ensure a more inclusive interpretation of the concept "particular social group" in line with the standards of the Geneva Convention, by better defining the significance to be attached to aspects arising from the applicants' gender and thus enhancing access to protection in particular for women.
- Approximate the rights of beneficiaries of subsidiary protection to those of refugees by removing all differences
  - regarding the duration of their residence permit;
  - access to employment and employment-related education activities;
  - access to social welfare, health care and to integration facilities;
  - access to benefits for their family members.

## Suggested changes to QD

- Enhance the **integration of beneficiaries of protection** taking into account their specific needs:
  - enhance recognition of their qualifications;
  - vocational training and employment support;
  - accommodation and integration programmes
- Enhance respect the protection to family life: **broaden the definition of family members** so as to address the case where a beneficiary is a minor and the wide range of situations where a minor might be considered dependent, while ensuring the best interest of the child.



# **Procedures directive**

## Recast (COM (2009) 554 final, 21.10.2009

### Major suggestions

- Refined definitions in line with the Qualifications directive (QD) and the Convention on the Rights of the Child
- Compulsory extension to the procedure on application for subsidiary protection (envisaging a single procedure)
- New article granting access to border zones (HHC practice!)
- Limits on avoiding personal interview
- Deadline for 1st instance decision: 6 months
- Separation of prioritized procedures from accelerated procedures
  - Prioritized = well founded or persons with special needs
  - Accelerated: abuse or no serious ground of the application  
(Irregular entry, border application, lack of documents or forged documents – not automatic accelerated procedure)  
Even then reasonable time limits have to be set
- Abolition of the „specific procedures” category

## Recast (COM (2009)554 final, 21.10.2009

- Right to „present their views” if the application is inadmissible (ref status in another MS, first country of asylum elsewhere, safe third country, identical application before, dependant makes application after refusal)
- Safe third country
  - Material and procedural changes
    - if no risk of serious harm according to QD (added to the already existing criteria)
    - Challenge extended: if not safe (not only torture etc.) or if no connection to it
  - Minimum common list of safe third countries. no longer expected
- Safe country of origin:
  - No common list!
  - Further refinement of the criteria (no application to a part of a country, regular review obligatory)
  - Standstill clause to be abolished (no retaining of national criteria with less guarantees than in Annex II)
  - As no common list exist application is not unfounded

## Recast (COM (2009)554 final, 21.10.2009

- Subsequent (repeat applications):
  - more lenient towards those with new facts or evidence (no time limit to submit them) harsher with multiple applications (no right to stay)
- Border procedures: only if accelerated (basically: abuse)
- Appeal
  - must extend to facts and law (to be effective)
  - have automatic suspensive effect (except in accelerated or identical if MS opt so)

## Detention – a comparison

**The Commission is concerned about the wide use of detention of asylum seekers while the EU asylum acquis is silent on this issue.**

(Second recast of the reception conditions directive COM (2011) 320, p. 6.)

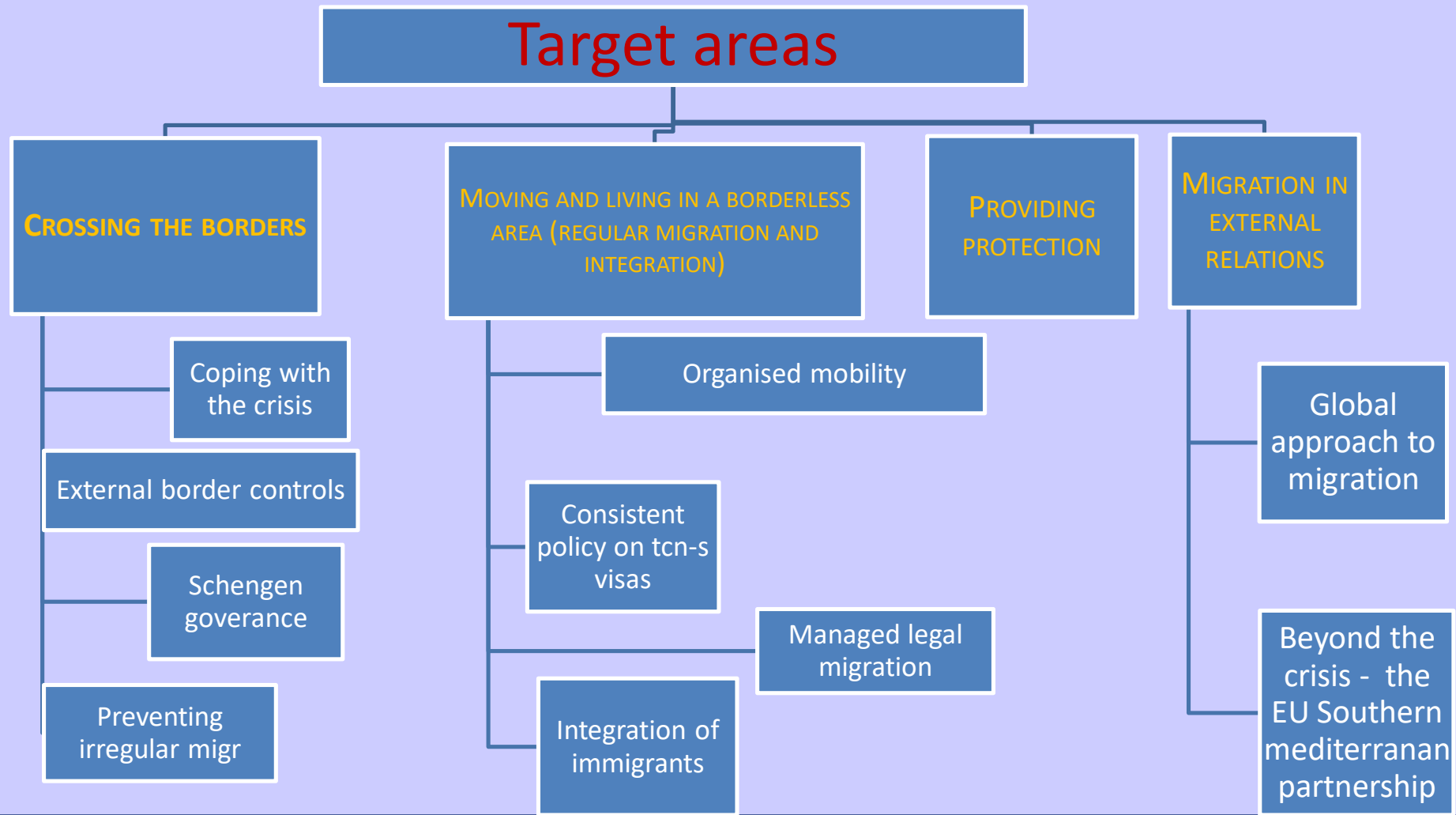
**See separate handout**

**THE MISSING COMPASS  
AND THE LACK OF A MUSE**

**TO FIND THE WAY –  
FINISH THE SYMPHONY**

# Communication on migration COM(2011) 248 final, 4 May 2011

Not simply a reaction to the Tunisian and Lybian outflow in Spring 2011, but a „roadmap” of the Commission’s plans on migration



## The Commission's ambitions enshrined in the 2011 communication on migration COM (2011) 248 final

The common asylum system should provide for

- „(a) the **fair treatment** of and **appropriate guarantees** for asylum seekers and beneficiaries of international protection;
- (b) procedural devices that will help national authorities to **properly and quickly** assess asylum claims, in **a more convergent way** and with tools to **deal with abusive claims**;
- (c) the appropriate level of **approximation of rights for beneficiaries** of international protection which will contribute to cost savings in administrative processes and to limiting secondary movements and asylum shopping, while at the same time improving integration prospects;
- (d) the **improvement of** the efficiency of the '**Dublin system**', while **catering for situations of exceptional pressures** which may be faced by individual Member States; and (e) a EURODAC database which continues to support the efficiency of the Dublin Regulation, whilst also meeting other needs of law enforcement authorities but under very strict conditions.”

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No word on uniform status or common procedure (neither on single procedure) let alone integration of refugees



# SUMMARY

- **No chance** to have **the second phase** of the CEAS – the uniform status and the common procedure - completed by 2012.
- The Commission in its 2011 round of **recasts** pretends that they are a step in that direction, but in fact they are still about establishing **minimum standards**.
- They limit their **scope** to territorial waters (beyond the land), so actions on the high seas are (thought to be) still exempt
- Whereas the **Commission** was seeking genuine **improvement and clarification** the **states** insist on having their **national priorities** incorporated in the texts
- Instead of heading towards a common asylum area (where the geographic location of the submission of an application does not really matter) **practical co-operation** is the name of the game

# SUMMARY

- The new buzzword: principle of **solidarity** and **fair sharing of responsibility**
- **EASO, relocation within Europe, increased co-operation with third states** are the genuine priorities, all targeting the asylum seeker in with a view to **diminish his/her impact** on Europe or the member States
- The absurd (non) functioning of the Dublin system, the hectic reactions to the Arab Spring, the extremely unequal distribution of asylum seekers and the wide margin of decisions concerning the same groups show that **the system is not working (properly)**.

# Thanks!

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# ANNEX

## 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 m<sup>2</sup> 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 new, that M.S.S. did not „have the profile of an ‘illegal migrant’”

145 persons on 110 m<sup>2</sup> 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