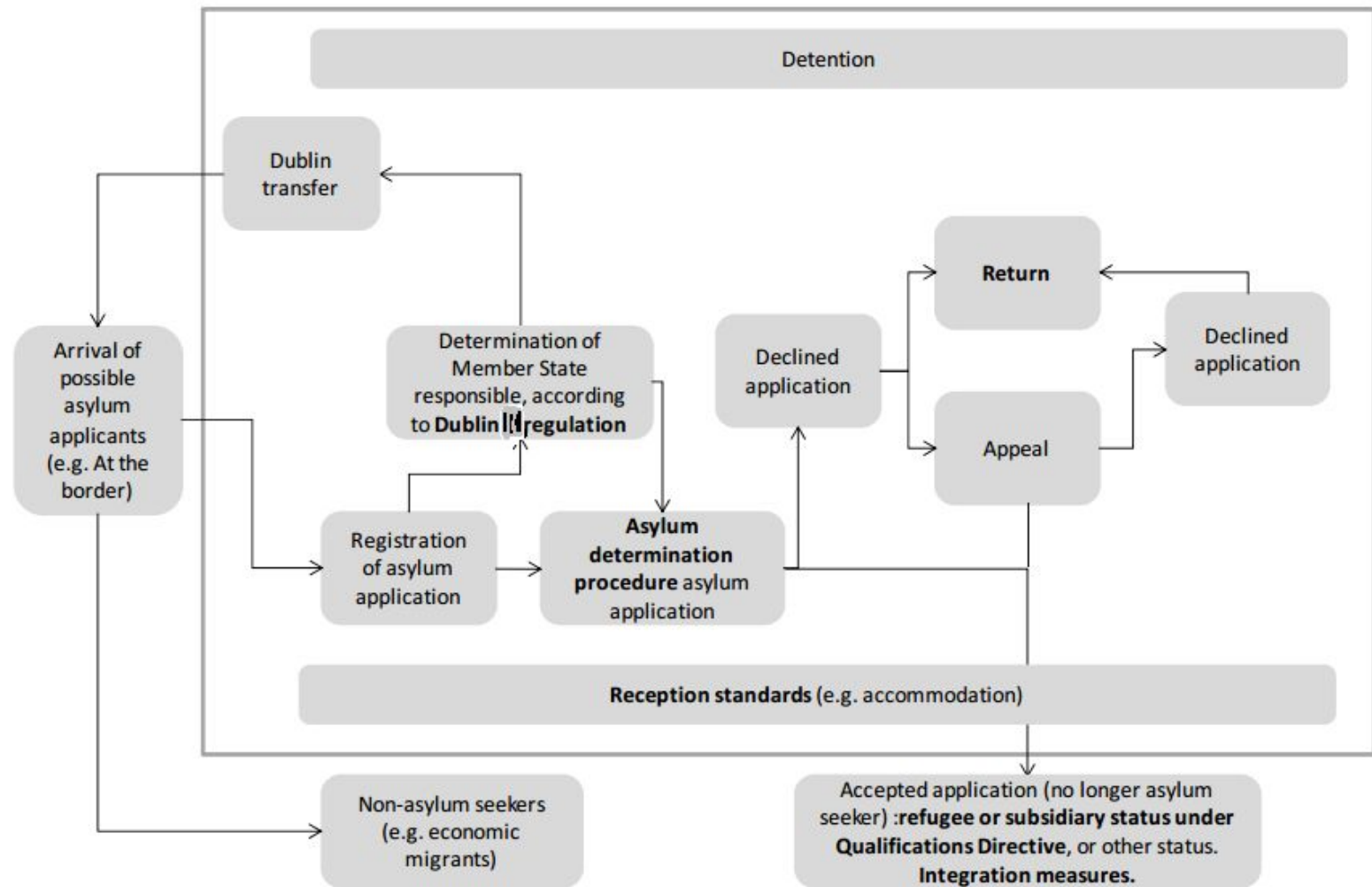


THE DUBLIN SYSTEM, EURODAC RECEPTION CONDITIONS

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THE ASYLUM PROCESS

Figure 1: Overview of the asylum process



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 **substantivelaw** (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

NOT BURDEN SHARING !

avoid forum shopping,

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 (but cooperates based on treaty)

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

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 Unnoticed 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)

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

Responsibility of the state **terminates** when the applicant **leaves** the territory of the EU **for 3 months**

See: *Abdullahi* case, CJEU judgment, 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 request

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

New Article 3 (2)

Where **it is impossible to transfer** an applicant to the Member State primarily designated as **systemic flaws** in the responsible because there are substantial grounds for believing that there are **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)

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.

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.

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 asylumseekers 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

Reception conditions directive

Directive **2013/33/EU** of the European Parliament and of the
Council
of 26 June 2013
laying down standards for the reception of applicants for
international protection (recast)
(OJ 2013 L 180/96)

Replacing
COUNCIL DIRECTIVE 2003/9/EC
of 27 January 2003
laying down minimum standards for the reception of asylum seekers
(OJ 2003 L 31/18)

New emphasis

Preamble explicitly refers to MS „which are faced with **specific and disproportionate pressures** on their asylum systems, due in particular to their geographical or demographic situation”.

It emphasises that the EU asylum policy „should be governed by the principle of **solidarity and fair sharing of responsibility**, including its financial implications, between the Member States.”

Much **refinement** concerning **detention** and persons with special needs

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

Not-applicable

Geneva Convention
applications

Applications for
subsidiary protection

Temporary
protection

(This is presumed
of all applications)

Only the minimum is prescribed – states may overperform

RECEPTION CONDITIONS DIRECTIVE

Information 15 days, in writing, language!

Documentation 3 days, permit to stay ↔ detention, border

Family unity maintain as far as possible

Medical screening optional

Schooling minors compulsory, (after 3 months)

Employment optional exclusion from labour market for a maximum of 9 months. Then access if no first instance decision yet

Ranking after EU/EEA citizens

RECEPTION CONDITIONS DIRECTIVE

Vocational training optional (States may grant access)

Material reception conditions: „provide an adequate standard of living for applicants, which guarantees their subsistence and protects their physical and mental health.” (§ 17 /2)

Asylum system may have to contribute

Provision: in kind – money – vouchers or mix.

No equal treatment with needy nationals

Housing/accommodation: in kind or allowance for it

Family life, access to lawyers, UNHCR be guaranteed

Health care minimum: „emergency care and essential treatment of illness and of serious mental disorders” (§ 19)

Detention – a limited, exceptional tool

• Article 8 para 2:

Member States may detain only detain an applicant, „if other less coercive alternative measures cannot be applied effectively” – individual assessment is required

Less coercive alternatives:

- regular reporting to the authorities,
- the deposit of a financial guarantee,
- obligation to stay at an assigned place

RECEPTION CONDITIONS DIRECTIVE

- Six grounds :

- determine or **verify** his or her **identity or nationality**;
- determine those **elements on which the application** for international protection **is based which could not be obtained** in the absence of detention, in particular when there is a **risk of absconding** of the applicant;
- **border procedure** (decision on entry);
- when detained subject to **a return procedure** the application is made only in order to **delay or frustrate the enforcement** of the return decision
- when protection of **national security or public order** so requires;
- **Dublin** procedure

Guarantees:

Detention only on the basis of **a written, reasoned order** by court or administrative authority

Info in writing on reasons and **appeal** possibilities

Detention must be **as short as possible**, and only as long as grounds are applicable.

Appeal or ex officio review of the administrative detention decision + **periodic review** of all detention + free legal assistance in the judicial review (but: MS may restrict access to free legal aid)

Detention of vulnerable persons and persons with special needs (§11)

Detention – possible (**unaccompanied minors: „only in exceptional circumstances”**, never in prison, separately from adults)

Health and mental health – primary concern

Monitoring and „adequate support”

Families: „shall be provided” with separate accommodation „**guaranteeing adequate privacy”**

Females separate from males (unless consenting family)

Derogations at border detention possible

- vulnerable persons such as minors,
- unaccompanied minors,
- disabled people,
- elderly people,
- pregnant women,
- single parents with minor children,
- victims of human trafficking,
- persons with serious illnesses,
- persons with mental disorders
- persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, such as victims of female genital mutilatio

SPECIAL NEEDS IDENTIFICATION

Assessment of the special reception needs of vulnerable persons

Member States shall assess whether the person has special needs and what they are

Within a reasonable period of time after an application

If they become apparent at a later stage in the asylum procedure still to be addressed

The support provided to applicants with special reception needs must last throughout the duration of the asylum procedure and be monitored

No prescribed form for the assessment (no formal procedure – no appeal)

Only vulnerable persons in accordance with Article 21 may be considered to have special reception needs

RECEPTION CONDITIONS DIRECTIVE

Reduction/withdrawal always **optional**

Decisions „shall be taken **individually, objectively and impartially and reasons shall be given**” (§ 20/5)

Cases of reduction/withdrawal: conditions may be reduced or withdrawn when an asylum seeker:

- abandons the determined place of residence w/out permit
- does not report as prescribed or does not appear for interview
- has already lodged an application in the same Member State.
- has concealed financial resources and has therefore unduly benefited
- has failed to demonstrate that the asylum claim was made as soon as reasonably practicable after arrival in that Member State.

As a sanction for serious breach of the rules of the accommodation centres or for seriously violent behaviour.

Emergency health care must not be withdrawn in any case!

Appeals

Against

a negative decisions relating to the granting of benefits (including reduction or withdrawal decisions) or
decisions on residence and freedom of movement (§ 7) which individually affect asylum seekers

Procedure: laid down in the national law.

At least in the last instance: appeal or a review before a judicial body

THANKS!

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CEU IR and Legal

Annex

Two important Dublin cases

**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 m² there were 9 rooms and two toilets + public phone and water fountain

The Court

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

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

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

Ill treatment „must attain a certain level of severity”

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

M.S.S v. BELGIUM AND GREECE – CLAIMS AGAINST GREECE

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

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

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

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

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

M.S.S v. BELGIUM AND GREECE – CLAIMS AGAINST GREECE

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

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

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

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

145 persons on 110 m² usually locked up, without hygienic tools
+ the asylum seeker especially vulnerable -->

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

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

VIOLATION of Article 3 held UNANIMOUSLY

M.S.S v. BELGIUM AND GREECE – CLAIMS AGAINST GREECE

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

The government

The applicant has not visited the police station as advised.

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

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

The Court

General principles: as above +

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

Application to the present case

The reception conditions directive bounds Greece

Asylum seekers constitute a special group in need of special protection

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

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

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

M.S.S v. BELGIUM AND GREECE – CLAIMS AGAINST GREECE

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

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

= VIOLATION OF ARTICLE 3. HELD 16 : 1

M.S.S v. BELGIUM AND GREECE – CLAIMS AGAINST GREECE

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

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

The Government

The applicant

failed to cooperate,

assumed different identities (when trying to leave Greece),

had access to interpreter.

The review by the Supreme Court is effective remedy,

Asylum seekers were not entitled to a right to appeal under the ECHR and Article 6 (Right to a fair hearing) of the Convention did not apply to asylum cases,

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

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

M.S.S v. BELGIUM AND GREECE – CLAIMS AGAINST GREECE

The Court

General principles

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

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

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

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

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

M.S.S v. BELGIUM AND GREECE – CLAIMS AGAINST GREECE

Application to the present case

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

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

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

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

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

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

VIOLATION of Article 13 in conjunction with Article 3 held UNANIMOUSLY

M.S.S v. BELGIUM AND GREECE – CLAIMS AGAINST BELGIUM

M. S. S. – the applicant

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

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

Belgium

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

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

Greece assured that it would investigate the merits of the case

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

M.S.S v. BELGIUM AND GREECE – CLAIMS AGAINST BELGIUM

Interveners

The Netherlands: „It was for the Commission and the Greek authorities, with the logistical support of the other Member States, and not for the Court, to work towards bringing the Greek system into line with Community standards.” (§ 330)

„In keeping with the Court's decision in *K.R.S.* (cited above), **it was to be assumed that Greece would honour its international obligations** and that transferees would be able to appeal to the domestic courts and subsequently, if necessary, to the Court. To reason otherwise would be tantamount to **denying the principle of inter-State confidence** on which the Dublin system was based...” (§ 330)

UK: Dublin is to speed up the process – calling to account under § 3 ECHR would slow it down

UNHCR: **each Contracting State remained responsible** under the Convention for not exposing people to treatment contrary to Article 3 through the automatic application of the Dublin system.

AIRE Center and AI: transferring to a state violating Art 3 entails the responsibility of the transferring state

M.S.S v. BELGIUM AND GREECE – CLAIMS AGAINST BELGIUM

The Court

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

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

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

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

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

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

M.S.S v. BELGIUM AND GREECE – CLAIMS AGAINST BELGIUM

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

M.S.S v. BELGIUM AND GREECE – CLAIMS AGAINST BELGIUM

The Courts conclusion on the application of Dublin

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

**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**

Ad A) Exercising discretion – 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 do (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)

⇒ 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

Answer
to Ba

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 the 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