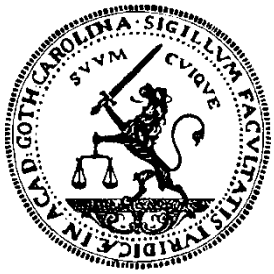

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The Legality of Dublin Transfers

LAGF03 Essay in Legal Science

Bachelor Thesis, Master of Laws Programme
15 higher education credits

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Semester: Autumn 2015

Contents

Summary

There is no right to asylum, but there is a right not to be returned to persecution. The principle of non-refoulement, which is expressed in article 3 ECHR, encompasses this right and it is an essential part of individual rights protection. The Dublin Regulation presumes that EU member state are safe and it designates which member state is responsible to try an application for asylum. The regulation allows for the transfer of the applicant to the designated state – a practice known as a Dublin transfer.

This thesis applies the sources of law and the means of interpretation of both international law and EU law to discern the requirements for a Dublin transfer to be legal according to the ECHR and the Dublin Regulation respectively. The findings are compared and discussed from an individual rights perspective.

Both systems require that there should be substantial grounds for believing that the applicant faces a real risk of torture, inhumane or degrading treatment in the receiving state for the transfer to be precluded. The prohibition includes indirect refoulement. The requirements on the applicant to meet these prerequisites have been considerably lowered by the ECtHR.

The Dublin Regulation contains the additional prerequisite that systemic flaws in the asylum procedure and the reception conditions should cause this risk. There is lacking consensus on how this provision should be interpreted, but there is ample ground to argue that it should be interpreted in a manner compatible with the ECHR.

According to both systems, the presumption of safety can be rebutted. The transferring state has a duty to inspect the actual conditions if there is information available indicating that human rights are not respected in the receiving state. The CJEU maintains that the presumption of safety concerns the raison d'être of the EU.

From an individual rights perspective it is unsatisfactory that the meaning of systemic flaws is unclear and that the responsibility to investigate is contingent upon third party information. The present Dublin III Regulation lacks a system to generally suspend transfers to certain states, which means that protections is granted on a case-by-case basis, where the authorities of the member states must assess whether other member states fulfil their international obligations.

Sammanfattning

Det finns ingen rätt till asyl, men det finns en rätt att inte återsändas till förföljelse. Denna rätt omfattas av principen om non-refoulement, som uttrycks i artikel 3 EKMR, och är en grundläggande del i skyddet för individuella rättigheter. Dublinförordningen presumerar att EU länder är säkra och utpekar vilket land som ansvarar för att pröva en asylansökan. Förordningen tillåter att den sökande överförs till den ansvariga staten, vilket kallas för en Dublinöverföring.

Denna uppsats tillämpar både folkrättens och EU-rättens källor och tolkningsmetoder för att utreda vilka krav som ställs enligt EKMR respektive Dublinförordningen för att en överföring ska vara laglig. Resultaten jämförs och diskuteras utifrån ett individrättsligt perspektiv.

Båda system förutsätter att det finns starka skäl att tro att sökande löper en reell risk att utsättas för tortyr, omänsklig eller förnedrande behandling i mottagarlandet för att överföringen inte ska vara tillåten. Förbudet omfattar även indirekt refoulering. Kraven på den asylsökande för att uppfylla dessa rekvisit har sänkts betydligt av Europadomstolen.

Dublinförordningen innehåller ett ytterligare rekvisit som stipulerar att risken ska orsakas av systematiska brister i asylförfarandet och i mottagningsvillkoren. Det saknas konsensus gällande hur detta rekvisit ska tolkas, men det finns goda grunder att argumentera för att det ska tolkas på ett sådant sätt att det överensstämmer med EKMR.

Enligt de båda systemen, kan presumtionen att EU-länder är säkra kullkastas. Den överförande staten har en undersökningsplikt gällande de verkliga förhållandena, när det finns tillgänglig information som tyder på brister i respekten för mänskliga rättigheter i mottagarlandet. EU-domstolen anser att presumtionen för säkerhet angår EUs existensberättigande.

Från ett individrättsligt perspektiv är det otillfredsställande att innebörden av systematiska brister är oklar och att undersökningsplikten är beroende av information från tredje part. Den nuvarande Dublinförordningen III saknar ett system för att generellt ställa in överföringar till vissa stater. Detta innebär att varje fall måste bedömas individuellt och att medlemsstaternas myndigheter är tvungna att bedöma huruvida andra medlemsländer lever upp till sina internationella åtaganden.

Abbreviations

CEAS	Common European Asylum System
CFREU	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EU	European Union
ICJ-Statute	Statute of the International Court of Justice
NGO	Non-governmental Organization
UK	United Kingdom
UNHCR	United Nations High Commissioner for Refugees
VCLT	Vienna Convention on the Law of Treaties

1 Introduction

1.1 Background

There is no generally recognized right to asylum, but there is a right not to be returned to persecution, which is known as the principle of non-refoulement.[1] This right is explicitly stated in article 33 of the Refugee Convention[2], but articles of various human rights documents have been interpreted to contain this provision, for example article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms [3] (ECHR).[4]

Since the entry of the principle of non-refoulement into the sphere of human rights law, non-refoulement is an essential part of the protection of individual rights.[5] Lately, there is a tendency for so-called industrialized states to question the reception of refugees. Some challenge whether there is an obligation to receive refugees at all.[6]

The Dublin Regulation is a European Union (EU) regulation that designate which state is responsible to try an application for asylum. It contains a system that allows for the transfer of an applicant to the designated member state, a practice known as a Dublin transfer.[7]

An underlying principle of the Dublin Regulation, and indeed of the EU, is mutual trust and the presumption that member states are safe for asylum-seekers. The principle is essential for the efficiency of the system.[8]

Based on recent jurisprudence this thesis explores the conditions for the legality of a Dublin transfer according to the ECHR and the Dublin Regulation, analysing the issue from an individual rights perspective.

1.2 Purpose

The relationship between the Dublin Regulation and the ECHR highlights the tension between the efficiency of the EU and individual rights protection. With this perspective in mind, the purpose of this thesis is to compare and discuss the individual rights protection within the Dublin Regulation and the ECHR.

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[1] Hathaway 2005 p. 300-301; Kälin, Caroni and Heim 2011 p. 1334-1335.
[2] Convention relating to the Status of Refugees, Geneva 28 July 1951.
[3] Rome 4 November 1950.
[4] Kälin, Caroni and Heim 2011 p. 1350-1354.
[5] Cherubini 2015 p. 7.
[6] Hathaway 2005 p. 3-5.
[7] Seidlitz 2014 s. 31.
[8] Van Den Sanden 2012 p. 162-165. See also recital 3 Dublin III Regulation.

1.3 Research Questions

In the light of the purpose, the research questions are:

1. What are the requirements on the legality of a Dublin transfer according to article 3 ECHR?
2. What are the requirements on the legality of a Dublin transfer according to the Dublin Regulation?
3. Which are the differences and similarities?
4. What are the consequences of the findings in questions 1-3 from an individual rights perspective?

1.4 Material

The legal documents – the Dublin Regulation and the ECHR – together with the jurisprudence of the European Court of Human Rights (ECtHR) and the CJEU (Court of Justice of the European Union) form the basis of this study. M.S.S. v. Belgium and Greece, and Tarakhel v. Switzerland were both delivered by the Grand Chamber of the ECtHR. The joint cases C-411/10 and C-493/10 are the central cases from the CJEU.

Literature is primarily used to provide context, whereas mostly articles give in-depth commentary. A judgement from the United Kingdom (UK) Supreme Court, which was cited in Tarakhel v. Switzerland, has been used for its commentary rather than a as a primary source. Care must be given to the aspect of time, since some commentary was made before the Dublin III Regulation[9] entered into force.

1.5 Method and Theory

The legal dogmatic method discerns the content of the law through the application of its sources.[10] Since this thesis concern the content of EU law and international law, it is necessary to use their sources and means of interpretation.

The sources of EU law are primary and secondary law. CJEU jurisprudence has the same status as primary law, whereas the Dublin Regulation and the EU directives are secondary law. Judgements from the Grand Chamber, such as the joint cases C-411/10 and C-493/10, are particularly important. Literature is not a source of law, but influences its development.[11] Commentary is thus helpful to understand the content of the law.

[9] 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).
[10] Kleineman 2013 p. 21-26.
[11] Bernitz and Kjellgren 2014 p. 178-184, 193.

The CJEU interprets EU law as a coherent system. It uses linguistic interpretation, systemic interpretation, the purpose of the regulation and teleological interpretation hierarchically. According to systemic interpretation, main rules are interpreted broadly, whereas exceptions are interpreted narrowly. Preambles and recitals indicate the purpose of the legislation.[12] This method is used to interpret the Dublin Regulation.

The sources of international law, according to article 38 of the Statute of the International Court of Justice[13] (ICJ-Statute), are conventions, customary law and general principles.[14] Judgements and literature serve as means of interpretation. The starting point of the interpretation of the ECHR are the rules of interpretation of treaties established in articles 31 and 32[15] of the Vienna Convention on the Law of Treaties[16] (VCLT). However, the ECtHR is entitled to interpret the convention according to article 32 ECHR. The judgements and the means of interpretation established by the court are thus given a prominent status.[17]

According to the ECtHR, the ECHR is interpreted coherently and as a dynamic instrument adaptable to changes in society. Furthermore, it is interpreted according to its purpose, which is to provide effective individual rights protection.[18] Article 3 ECHR has been interpreted as prohibiting refoulement through ECtHR jurisprudence. Jurisprudence is central to the thesis, whereas literature is used to discern the content of the law.

Comparative method is used to define similarities and differences and to explain them. The rules compared must regulate the same phenomena and it is necessary to regard that the phenomena may be regulated in different segments of the law.[19] Article 3 ECHR regulate fundamental human rights protection, whereas the Dublin Regulation treats the issue as the procedure to define the responsible member state. Even though this thesis focuses on positive law, which may be subject to change,[20] the underlying conflict of interest goes beyond positive law.

This thesis uses the theory that non-refoulement is the fundament of individual rights protection for asylum-seekers, and that it challenges the principle of mutual trust and the efficiency of the Dublin system.[21] The theory is employed through a critical and analytical method that uses arguments made in literature to compare and discuss the ECHR and the Dublin Regulation.[22]

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[12] Ibid p. 185-189.
[13] San Francisco 26 June 1945.
[14] Article 38 ICJ-Statute corresponds to customary law.
[15] Articles 31-32 VCLT correspond to customary law.
[16] Vienna 23 May 1969.
[17] Helland 2012 p. 71-74.
[18] Danelius 2015 p. 55.
[19] Bogdan 2013 p. 5-6, 34-36, 46-47.
[20] See Sandgren 2006 p. 551.
[21] See subchapter 1.1.
[22] See Sandgren 2015 p. 45-48.

1.6 Limitations

The EU has historically relied on the ECHR and the ECtHR to develop principles for human rights protection.[23] Non-refoulement as interpreted by the ECtHR has a wider applicability than what the Refugee Convention suggests.[24] Consequently, this thesis is limited to the comparison of the Dublin Regulation and the ECHR. Albeit significant, it is beyond the scope of this thesis to discuss other international human rights instruments.

Although other issues are raised by the jurisprudence discussed, and the ECtHR has prohibited expulsion on other grounds than article 3 ECHR,[25] this thesis focuses on non-refoulement according to article 3 ECHR. The thesis focuses on the Dublin Regulation, and it will therefore not discuss other provisions of non-refoulement in EU law. It should be noted, that the CJEU interprets the Dublin Regulation in the light of applicable EU legislation.

1.7 Previous Research

There is extensive literature on the principle of non-refoulement.[26] Cherubini analyses asylum law in the EU,[27] and there is a continuous discussion about the Dublin Regulation in law journals.[28] This thesis has an explicit comparative and individual rights perspective and aims to be a part of this on-going discussion.

1.8 Disposition

Chapter 2 gives a background to the Dublin Regulation, non-refoulement according to the ECHR, and their interrelation. Chapter 3 discusses the lawfulness of Dublin transfers from the ECHR perspective, whereas chapter 4 discusses the same issue from the perspective of the Dublin Regulation and the CJEU interpretation. Chapter 5 compares the systems and presents arguments made in literature. The individual rights perspective permeate the thesis, but it will particularly be discussed in Chapter 5. Finally, the research questions are answered in chapter 6.

The cases are not presented chronologically, but according to the body of law to which they pertain. The judgements C-411/10 and C-493/10 were given prior to Tarakhel v. Switzerland and subsequent to M.S.S. v. Belgium and Greece.

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[23] Cherubini 2015 p. 176-177.
[24] Kälin, Caroni and Heim 2011 p 1353-1354.
[25] See Costello 2012 p. 91.
[26] For example Danelius 2015, Hathaway 2005 and Zimmermann 2011.
[27] See Cherubini 2015.
[28] For example Battjes and Brouwer 2015, Costello 2012, Lübbe 2015, Mallia 2011 and Moreno-Lax 2012, Morgades-Gil 2015.

2 The Dublin Regulation and Article 3 ECHR

This chapter gives a background to the Dublin Regulation, non-refoulement according to the ECHR and their interrelation.

2.1 The Dublin Regulation

The Dublin Regulation designates which member state is responsible to try an application for asylum, and it is applicable in the EU, Norway, Iceland, Switzerland and Lichtenstein. As the Dublin III Regulation entered into force in 2014, it replaced the Dublin II Regulation.[29] Thus, the Dublin II Regulation was in force at the time of the verdicts discussed in this thesis. When referring to the specific legal documents, they will be referred to as the Dublin II Regulation and the Dublin III Regulation respectively. When the system is discussed in abstract terms, it will be referred to as the Dublin Regulation. Together with four minimum directives regulating conditions of reception, qualification, procedure and temporary protection, the regulation make up the Common European Asylum System (CEAS).[30]

The sovereignty clause of the Dublin Regulation[31] is central to the jurisprudence discussed, as it permits states to accept the responsibility of an obligation although they are not obliged to do so. Previously, there were uncertainties whether the clause had a compulsory scope of application and whether the presumption that member states are safe could be rebutted.[32] The jurisprudence discussed subsequently clarified this issue and lead to the altered provisions in the current Dublin III Regulation.[33]

2.2 Non-refoulement According to Article 3 ECHR

Article 3 ECHR prohibits torture and inhumane or degrading treatment. Because the purpose of the convention is effective individual rights protection, it is interpreted as a prohibition of refoulement. If there are substantial grounds for believing that a person faces a real risk of being

[29] 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.
[30] Seidlitz 2014 p. 31.
[31] See article 3.2 Dublin II Regulation and article 17 Dublin III Regulation.
[32] Moreno-Lax 2012 p. 4-5.
[33] See subchapter 4.2.

subject to a treatment contrary to article 3, transfer, expulsion and extradition is prohibited.[34]

Substantial ground for believing that a violation will occur does not require certainty but there should be more than an abstract possibility.[35] It is justified because the transferring state does not directly inflict harm.[36] The risk must be individualized, meaning that a general risk of ill-treatment is insufficient.[37] In response of restrictive state practice, the court has lowered the requirement.[38]

A real risk is a foreseeable risk.[39] The states are liable when they know, or ought to have known, of the risk of a transfer.[40] For ill-treatment to contravene article 3, it must attain a minimum level of severity.[41] Each case is assessed individually.[42]

Reservations and derogations to article 3 are not permitted.[43] Its absolute nature is stressed in cases where exception is not permitted even if the applicant is a threat to national security.[44] The court assess whether future transfers would violate the convention prior to their execution, because the damage for the applicant is irreversible.[45] If there is a risk of a violation, it can be mitigated if the receiving state guarantees the respect for the individual's rights.[46]

2.3 The Relationship Between the Dublin Regulation and the ECHR

According to ECtHR jurisprudence, states are always liable when they exercise their discretion, even if they have transferred some powers to a supranational organization.[47] Since the sovereignty clause of the Dublin Regulation permits state discretion, states are liable for its application. According to the CJEU, member states implement EU legislation when they invoke the sovereignty clause, why they are liable according to the Charter of Fundamental Rights of the European Union[48] (CFREU).[49]

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[34] Soering vs the UK paras. 87-88, 91; Cruz Varas and Others v. Sweden paras. 69-70. See also Danelius 2015 p. 92-93.
[35] Cherubini 2015 p 110.
[36] Costello 2012 p. 90.
[37] Danelius 2015 p. 93.
[38] Mink 2012 p. 136.
[39] Vilvarajah and Others v. the UK para. 108. See also Costello p. 90.
[40] Cherubini 2015 p. 107-108.
[41] Danelius 2015 s. 78.
[42] Soering v the UK para. 100.
[43] Cerna 2015 p. 368; Danelius 2015 p. 78.
[44] Chahal v. the UK paras. 79-80; Saadi v. Italy para. 127. See also Mallia 2011 p. 127.
[45] Soering v. the UK para. 90. See also Cerna 2015 p. 368.
[46] Danelius 2015 p. 93.
[47] Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland paras. 152-157.
[48] Lisbon 13 December 2007.
[49] C-411/10 and C-493/10 para. 69.

Article 6 of the Treaty of the European Union[50] prescribes that the EU shall accede to the ECHR and that the CFREU shall have status as primary law. To the extent that they correspond, the meaning and scope of the rights of the Charter are equal to the ECHR, according to article 52.3 CFREU. Article 4 CFREU corresponds to article 3 ECHR and therefore they have the same meaning. This also implies that ECtHR jurisprudence is applicable to the charter.[51] Recital 39 of the Dublin III Regulation expressly recognizes that the regulation adheres to the Charter.

[50] Lisbon 13 December 2007.
[51] Van Den Sanden p. 157-159.

3 The Legality of Dublin Transfers According to the ECHR

The ECtHR has assessed Dublin transfers in a number of cases. This chapter focuses on the Grand Chamber cases M.S.S. v. Belgium and Greece delivered in 2011, and Tarakhel v. Switzerland delivered in 2014. Indirect refoulement and the presumption of safety will be discussed first.

3.1 Indirect Refoulement and the Presumption of Safety

Indirect refoulement is refoulement via an intermediary. In T.I. v. the UK, which concerned a Dublin transfer, the ECtHR ruled that the transferring state is liable if the receiving state refoules the applicant. The court accepted the presumption that EU member states are safe, but maintained that it cannot be applied automatically.[52] States must consider if the presumption can be rebutted, but the court was unspecific regarding the requirements for its rebuttal.[53] In K.R.S. v. the UK, the court affirmed that the presumption can be rebutted and that indirect refoulement is encompassed by article 3 ECHR. However, it based the presumption largely on Greece's formal obligations and found that there was insufficient evidence to rebut it.[54]

3.2 M.S.S v. Belgium and Greece

Prior to M.S.S. v. Belgium and Greece, there was dissimilar practice among EU member states due to lacking guidance on the application of the sovereignty clause.[55] The case clarified and developed several concepts.

The applicant had entered the EU through Greece before arriving in Belgium. Despite appealing the decision, he was returned to Greece.[56] In Greece, he was imprisoned in substandard conditions, received no help from the authorities in providing for his needs of subsistence and experienced serious shortcomings in the asylum procedure.[57] Both Greece and Belgium were found to have violated the ECHR for exposing him to these conditions.[58]

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[52] T.I. v. the UK p. 15.
[53] Moreno-Lax 2012 p. 7-10.
[54] K.R.S. v. the UK p 16-18.
[55] Moreno-Lax 2012 p. 17.
[56] M.S.S. v. Belgium and Greece paras 9-28.
[57] Ibid paras. 34-37, 43-44, 161-162, 167-193, 300-302.
[58] M.S.S. v. Belgium and Greece paras. 387-389 and M.S.S. v. Belgium and Greece "For these Reasons, the Court" paras. 1-13.

3.2.1 The Limit of Mutual Trust

The presumption of safety is acknowledged, but rendered rebuttable, in T.I. v. the UK. In K.R.S. v. the UK, the ECtHR relied on the formal obligations of Greece as a guarantor of its adherence to those obligations.[59] The principle of T.I. v. UK is revisited and expanded in M.S.S. v. Belgium and Greece.

Although K.R.S. v. the UK was delivered less than six months prior to the transfer of M.S.S,[60] the court held that Belgium knew, or should have known, that the situation in Greece was deficient.[61] The court argued that the deficiencies were known to Belgium because the number of reports indicating deficiencies had increased, the United Nations High Commissioner for Refugees (UNHCR) had requested Belgium to suspend transfers to Greece and there was an ongoing process to revise the Dublin II Regulations to improve its human rights protection.[62] The diplomatic assurances that Belgium had received from Greece were insufficient since they had been issued subsequent to the decision to transfer and lacked individual guarantees.[63]

The court concluded that formal obligations are insufficient guarantees that states will adhere to them in practice, if there is available information indicating human rights infringements.[64] In such cases, the burden of proof cannot rest solely on the applicant, but the transferring state has a duty to investigate.[65] Thus, the state must not only permit the appeal of the decision, but it must also investigate ex officio when the circumstance so warrant.[66]

3.2.2 New Usage of General Evidence

The ECtHR attached importance to reports from non-governmental organizations (NGOs), such as UNHCR and Amnesty International, which described the general situation for asylum-seekers.[67] Although it was never concluded whether the applicant had been detained in the detention centres described in the reports, his accounts were accepted since they were supported by the reports and Greece could not prove that he had not been treated in such a manner.[68] Thus, if the applicant's accounts are supported by general information, they shall be presumed to be true.

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[59] See subchapter 3.1.
[60] M.S.S. v Belgium and Greece Partly Dissenting Opinion of Judge Bratza.
[61] M.S.S. v. Belgium and Greece para. 358.
[62] M.S.S. v. Belgium and Greece paras. 347-352. See also Moreno-Lax 2012 p. 26.
[63] M.S.S v. Belgium and Greece para. 354.
[64] M.S.S. v. Belgium and Greece para. 353. See also Mallia 2011 p. 125; Moreno-Lax 2012 p. 27.
[65] M.S.S. v. Belgium and Greece para. 358-359. See also Moreno-Lax 2012 p. 27-28.
[66] Clayton 2011 p. 762-763.
[67] M.S.S. v. Belgium and Greece paras. 159-160.
[68] M.S.S. v. Belgium and Greece paras. 226-234. See also M.S.S. v. Belgium and Greece Partly Concurring and Partly Dissenting Opinion of Judge Sajó Section I; Costello 2012 p. 86.

The usage of general evidence elaborates on previous jurisprudence where the need to individualize the risk of ill-treatment is lowered. Even if the risk in this case is not directed directly towards the applicant, it does not reduce the ill-treatment experienced.[69]

3.2.3 Lowered Thershold of Minimum Level of Severity

For ill-treatment to amount to a breach of article 3 ECHR, it must reach a minimum level of severity.[70] Article 3 does not entail an obligation to provide for the needs of subsistence, but such an obligation follows from the Reception Directive[71].[72] The ECtHR considered that asylum-seekers are a particularly vulnerable group.[73] Their vulnerability in conjunction with the positive law obligation lead the court conclude that the ill-treatment M.S.S. had been exposed to reached the threshold of minimum level of severity.[74] Consequently, the vulnerability of asylum-seekers together with the positive law obligation lowers the tolerance of ill-treatment of asylum-seekers.[75]

3.3 Tarakhel v. Switzerland

Tarakhel v. Switzerland concerned a family that had been received in Italy, but continued to Switzerland where they applied for asylum. Switzerland ordered their transfer to Italy according to the Dublin Regulation, which the family appealed.[76] The ECtHR ruled that transferring the applicants without receiving detailed guarantees on the reception conditions prior to the transfer, would violate article 3 ECHR.[77] Prior to the judgement, the court had deemed a number of cases regarding Italy inadmissible,[78] why this Grand Chamber case is a significant new assessment of when ill-treatment is a violation. Delivering the judgement subsequent to the CJEU case discussed below, the ECtHR revisited the approach in M.S.S. v. Belgium and Greece.[79]

The presumption of safety underlying the Dublin Regulation is rebuttable, and the standard that should be assessed is whether there are substantial

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[69] M.S.S. v. Belgium and Greece para. 359. See also Moreno-Lax 2012 p. 28.
[70] See subchapter 2.2.
[71] Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers. See also 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).
[72] M.S.S. v. Belgium and Greece paras. 249-250.
[73] Ibid paras. 232-233, 251.
[74] Ibid para. 263.
[75] Costello 2012 p. 85.
[76] Tarakhel v. Switzerland paras. 9-21.
[77] Tarakhel v. Switzerland ”For These Reasons, the Court” para. 2.
[78] See for example Mohammed Hussein and Others v. the Netherlands and Italy decision of 2 April 2013.
[79] Tarakhel v. Switzerland para. 101.

grounds to believe that there is a real risk of a violation. The source of the risk is irrelevant.[80]

As in M.S.S. v. Belgium and Greece, the court relies on reports describing the general reception conditions as insufficient. In the light of the available information, the court holds that the criteria of substantial grounds to believe that there is a real risk is met.[81]

There must be an individual assessment of whether the threshold of minimum level of severity of the ill-treatment is met. The court reiterates that asylum-seekers are particularly vulnerable and emphasize the extreme vulnerability of children. If the reception conditions are such as would cause the children anxiety and stress, the treatment is contrary to article 3.[82]

In order to ascertain that the applicants are not ill-treated, the transferring state must obtain detailed assurances specifying the reception units and its conditions as well as guarantees that family will be kept together.[83] Thus, when the quality of the reception conditions is uncertain and the applicant is especially vulnerable, the transferring state is obliged to obtain detailed assurances for the transfer to be lawful.[84]

[80] Tarakhel v. Switzerland paras. 103-104. See also Morgades-Gil 2015 p. 445.
[81] Tarakhel v. Switzerland paras. 108-115.
[82] Ibid paras. 118-119.
[83] Ibid paras. 120-121.
[84] Morgades-Gil 2015 p. 440.

4 The Legality of Dublin Transfers According the Dublin Regulation

The CJEU tried the permissibility of a Dublin transfer according to the Dublin Regulation in the joint cases C-411/10 and C-493/10 delivered by the Grand Chamber less than a year after M.S.S. v. Belgium and Greece. The CJEU follows the ECtHR largely, but the case is significant as it transfers the reasoning into EU law.[85] It also allowed the CJEU to formulate its own condition for when the presumption of safety can be rebutted.

4.1 Joint Cases C-411/10 and C-493/10

The joint cases C-411/10 and C-493/10 are preliminary rulings regarding asylum-seekers who had entered the EU through Greece and continued to the UK and Ireland respectively. In both cases, the appeal against the transfer was pending before the national courts.[86]

The CJEU maintains that the presumption of safety and mutual trust are fundamental premises for the CEAS and concern the raison d'être of the EU. Even if operational problems of a system may cause rights infringements, the presumption remains a starting point. Slight infringements of the CEAS do not suffice to prevent transfers, as this would undermine the system.[87]

Human rights must be respected in practice, why relying on a conclusive presumption based on the formal obligations of the states is incompatible with EU law.[88] Reports by NGOs concerning the conditions of asylum-seekers make it possible to evaluate the risk of a transfer.[89] The presumption can be rebutted when:

> "[The Member States] 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 subject to inhuman and degrading treatment within the meaning of Article 4 of the Charter."[90]

[85] Costello 2012 p. 92.
[86] C-411/10 and C-493/10 paras. 34-43, 51-52.
[87] Ibid paras. 78-85.
[88] C-411/10 and C-493/10 paras 102-105. See also Mink 2012 p. 145-146.
[89] C-411/10 and C-493/10 paras. 90-91.
[90] Ibid para. 94.

4.2 The Dublin III Regulation

Because of the jurisprudence discussed above, the Dublin III Regulation was modified to include a new wording of the second paragraph of article 3.2, which specifies that a transfer may not occur when:

> "[…] [T]here are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union, […]."[91]

By including the provision under the heading "Access to the procedure for examining an application for international protection", it is clear that the Dublin III Regulation treats it as an exception to the main rule that a transfer should be made to the state made responsible by the regulation. The sovereignty clause remains in the Dublin III Regulation, but it is not linked to the determination of the responsible state.[92]

The regulation sheds some light on the interpretation of systemic failures. Recital 21 states that deficiencies in the asylum system can jeopardize its functioning, which could lead to a risk of a human rights violation. According to recital 39, the Dublin Regulation should be interpreted in the light of the CFREU.

[91] Article 3.2 Dublin III Regulation.
[92] Cherubini 2015 p. 244-246.

5 Comparison and Critique

The judgements discussed above have generated debate in the literature. This chapter reviews the arguments from an individual rights perspective and compares the conclusions of the two systems of law regarding Dublin transfers.

5.1 The ECHR and the ECtHR

As discussed in chapter 3, the ECtHR lowers the requirements on the individualization of the threat as well as the minimum level of severity of the ill-treatment suffered. It also enhances the responsibility of the transferring states to assess the actual conditions of the receiving state.

5.1.1 An Individualized Threat?

Concerning the assessment of the applicant's living conditions in M.S.S. v. Belgium and Greece, the partly dissenting Judge Sajó criticizes the majority for accepting general conditions described in reports as a base for state responsibility, without thoroughly investigating the conditions for the individual applicant.[93]

This view is mirrored in Tarakhel v. Switzerland where the partly dissenting judges are critical that the majority accepts the general risk of mistreatment as sufficient, without establishing whether there is a risk in the specific case. Given the circumstances, there was no foreseeable risk that article 3 ECHR would be breached.[94]

5.1.2 How Ill is Ill-treatment?

Judge Sajó criticizes that the majority in the case M.S.S. v. Belgium and Greece found that the living conditions of M.S.S. breached the ECHR. First, he argues that asylum-seekers are not homogenous and that everyone is not equally vulnerable. Second, he considers the majority a small step from accepting a general and unconditional welfare obligation based on article 3. Third, he argues that the Reception directive cannot affect the scope of article 3 as there is a need to differentiate between EU law and the ECHR.[95]

Clayton, at Middlesex University, considers the positive law obligation from the Reception directive to be influential rather than decisive to the court's

[93] M.S.S. v. Belgium and Greece Partly Dissenting and Partly Concurring Opinion of Judge Sajó Section II.
[94] Tarakhel v. Switzerland Joint Partly Dissenting Opinion of Judges Casadevall, Berro-Lefèvre and Jäderblom.
[95] M.S.S. v. Belgium and Greece Partly Concurring and Partly Dissenting Opinion of Judge Sajó Section II. See also Mallia 2011 p. 119-120.

conclusion. If it were a prerequisite, there would be a different level of tolerance of ill-treatment outside of the EU.[96]

5.1.3 Where is the End of Trust?

Moreno-Lax, at the University of Oxford, argues that the court alters the balance between rule and exception by maintaining the need to verify the respect for human rights in practice.[97] From Tarakhel v. Switzerland, it is clear that there must be an individualized risk assessment prior to a transfer.[98] The responsibility to investigate is a heavy burden on the transferring state.[99]

When are further inquiries warranted? Clayton argues that the regular standard, which is that when there are substantial grounds for believing that there is a real risk of treatment contrary to article 3, must apply. Whether there should be a survey in every case, or only in cases where there is information indicating deficiencies, remains unanswered. In her view, it may be coincidental whether such information is available to the state.[100]

5.2 The Dublin III Regulation and the CJEU

The most controversial part of the CJEU judgement and the subsequent change to the Dublin Regulation discussed above, are the rebuttal of the presumption of safety and the significance of the prerequisite systemic flaws. Both will be discussed below and put into relation with the ECHR.

5.2.1 Presumption of Safety and Mutual Trust

Mutual trust within the EU presupposes that member states share a certain set of values and that they do not diverge considerably from each other. This preposition is not only central to the CEAS, but to the EU as a whole.[101] Trust is important both in principle and in practice, because it is necessary for the system to work.[102] In practice, there are large disparities in the treatment of asylum-seekers and their applications.[103] According to Morgades-Gil, at Pompeu Fabra University, the failure to implement the CEAS and upholding human rights indicate that the presumption is erroneous.[104]

[96] Clayton 2011 p. 767-768.
[97] Moreno-Lax 2012 p. 29.
[98] Battjes and Brouwer 2015 p. 191.
[99] Mallia 2011 p. 125-126.
[100] Clayton 2011 p. 763.
[101] Van Den Sanden 2012 p. 162-164.
[102] R v. Secretary of State for the Home Department para. 40.
[103] Lieven 2012 p. 228.
[104] Morgades-Gil 2015 p. 441.

In the judgement, mutual trust and fundamental rights protection collide. The CJEU considers the raison d'être of the EU to be at stake.[105] Van Den Sanden, at the University of Leuven, argues that the judgement shows the need to differentiate between formal and substantive mutual trust. The latter requires the assessment of the situation in practice.[106] Even if there is formal mutual trust, the inquiry into the specific situation must not be reduced.[107]

Costello at Worchester Collage considers trust to be a regulatory tool rather that the raison d'être of the EU. Even if there is trust, it is not always justified. Asylum-seekers lack the means to hold authorities accountable, which indicates that there is little substantial ground for the confidence. Checks for fundamental rights protection could enhance trust by ascertaining that it is justified.[108]

When is the presumption of safety rebutted? According to the court, it is rebutted when member states cannot be unaware that there are deficiencies.[109] According to Costello, this confirms that there is a presumption and that the courts should assess general information to consider its rebuttal.[110] The CJEU's phrasing corresponds to the ECtHR's contention that states are liable when they knew, or ought to have known, about the risks of a transfer.[111] Cherubini, at LUISS Guido Carli, considers that the court's contention that not every infringement of the CEAS can preclude a transfer indicates that CJEU is eager to safeguard the interests of the EU.[112]

Prior to the CJEU verdict, the extent of the duty of inspection of the states was contested. Some states that intervened in the judgement argued that it would be contrary to EU law for one member state to assess the compliance of another.[113] It remains uncertain whether every transfer must be assessed, or only those where there is information available indicating human rights violations. Regardless, responsibility rests heavily on the transferring state.[114]

5.2.2 Systemic Flaws

There are two main positions regarding the interpretation of the prerequisite systemic deficiencies, or systemic flaws as it is phrased in the Dublin III Regulation. One argues that a flaw must be systemic to preclude a transfer, whereas the other considers the cause of the flaw irrelevant.[115] Lord Kerr of

[105] Van Den Sanden 2012 p. 162.
[106] Ibid p. 168.
[107] See R v. Secretary of State for the Home Department para. 41.
[108] Costello 2012 p. 90.
[109] C-411/10 and C-493/10 para. 94.
[110] Costello 2012 p. 89.
[111] Battjes and Brouwer 2015 p. 188.
[112] Cherubini 2015 p. 246-247.
[113] Costello 2012 p. 92.
[114] Lieven 2012 p. 236-238.
[115] Lübbe 2015 p. 136.

the Supreme Court of the UK argues that it would be curious to permit a transfer contrary to article 3 ECHR because the violation is not systemic. This would create a tension between EU law and the ECHR.[116]

The former position argues that a single fundamental human rights violation is insufficient to rebut the presumption since it is not systemic.[117] Thus, systemic flaws is an additional prerequisite compared to the ECtHR jurisprudence, which raises the threshold.[118]

To reconcile these positions, several commentators argue that systemic flaws should be interpreted in a manner compatible with the ECHR. Lord Kerr argues that when the CJEU referred to the system, it was referring to CEAS as a whole rather than the system in a given state. The source of the risk is operational problems in the state and fundamental rights violations indicate systemic flaws. Systemic flaws are not a prerequisite but an indication that the transferring state is aware of the problems.[119]

Costello thinks that there are two reasons why systemic flaws cannot be a new prerequisite. First, article 52.3 CFREU prohibits divergence from the ECHR when interpreting article 4 CFREU. Second, the CJEU clearly followed the judgement of M.S.S. v. Belgium and Greece.[120]

Lübbe, at Fulda University of Applied Sciences, sees systemic flaws as a means to differentiate between structural problems and accidents. A systemic flaw according to its literal meaning need neither be common nor serious. It is the logical consequence of an error in the system. Accidents are not systemic because they are random and unforeseeable. According to the ECHR, a risk must be foreseeable. There is a fine line between accidents, and accidents that are systemic because they can be prevented. Lübbe draws the line where prevention exceeds what can duly be expected of the asylum system.[121]

5.2.3 Shortcomings of the Dublin III Regulation

The recast version of the Dublin Regulation clarifies the rights of asylum-seekers and contains an early warnings mechanism. However, a procedure to suspend the transfer to member states under certain conditions was rejected.[122] The absence of such a mechanism is problematic since the human rights protection becomes contingent on individual cases. Rather than preventing violations in a systemic and proactive manner, the system acts reactively and ad hoc.[123] A recent study of national jurisprudence of

[116] R v. Secretary of State for the Home Department paras. 37, 42-43.
[117] Van Den Sanden 2012 p. 166.
[118] Morgades-Gil 2015 p. 442.
[119] R v. Secretary of State for the Home Department paras. 51-57.
[120] Costello 2012 p. 89.
[121] Lübbe 2015 p. 136-138.
[122] Morgades-Gil 2015 p. 435-436.
[123] Costello 2012 p. 92.

five member states shows that there are considerable disparities in the interpretation of systemic flaws and the conditions for the rebuttal of the presumption of safety.[124]

[124] Battjes and Brouwer 2015 p. 193-214.

6 Conclusion

Each research question is answered below in its own heading.

6.1 Requirements on the Legality of a Dublin Transfer According to Art 3 ECHR

The ECHR is interpreted according to its purpose, which is to guarantee effective individual rights protection. Article 3 ECHR is interpreted as prohibiting transfers when there are substantial grounds for believing that a person faces a real risk of being subject to a treatment contrary to article 3. It encompasses direct and indirect refoulement, but the ill-treatment must reach a minimum level of severity to amount to a breach.

The ECtHR accepts the presumption that EU member states are safe, but it can be rebutted by information contradicting it. Such information may consists of reports from NGOs, but also of letters directed towards the transferring state or information about ongoing legal development. When the information is available, the transferring state must investigate the actual conditions.

The requirement to individualize the threat is lowered, since the court contends that accounts that are supported by information concerning the general circumstances, shall be presumed to be true. Asylum-seekers are considered vulnerable. Their vulnerability, possibly in conjunction with positive law obligations, lowers the threshold for the level of ill-treatment tolerated. For diplomatic assurances to mitigate the risks to especially vulnerable asylum-seekers such as children, they must be individualized and detailed.

6.2 Requirements on the Legality of a Dublin Transfer According to the Dublin Regulation

According to the Dublin III Regulation, which entered into force subsequent to the CJEU judgement, a transfer is precluded when there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions that result in a real risk of treatment contrary to article 4 CFREU.

The CJEU considers that the presumption of safety concerns the raison d'être of the EU. A conclusive presumption is incompatible with EU law, but the exact circumstances for its rebuttal remain uncertain. When there is

information available indicating deficiencies, the transferring state is obliged to inspect the actual conditions of the receiving state.

6.3 Differences and Similarities

Both the ECtHR and the CJEU recognize the presumption that EU member states are safe as valid, but rebuttable. According to both systems, NGO reports and other reliable information on the actual conditions in the receiving state are instrumental to its rebuttal. The CJEU sees the presumption as linked to the raison d'être of the EU.

Substantial grounds for believing that a person faces a real risk are required in both systems and article 4 CFREU corresponds to article 3 ECHR. According to article 52.3 CFREU the meaning and scope of corresponding right is the same as the ECHR, which implies that ECtHR jurisprudence is applicable.

The ECtHR has significantly lowered the threshold for ill-treatment of asylum-seekers, while the CJEU holds that not any infringement of the CEAS can lead to the suspension of a transfer. It remains to be seen whether the CJEU is inclined to follow the ECtHR's lead.

Systemic flaws is a prerequisite that has caused controversy. Some commentators argue that a violation must have systemic origin to be regarded, whereas others considers it an unacceptable derogation from the ECHR. Finally, some commentators find ways to interpret systemic flaws in a manner that is compatible with the ECHR.

EU law should first be interpreted linguistically. Lübbe suggests such an interpretation where systemic is interpreted as foreseeable, which is compatible with the ECHR. According to systemic interpretation of EU law, exceptions should be interpreted narrowly. If systemic is understood as meaning that only violations with a particular origin can be regarded, it is incompatible with the ECHR. Seen in the light of the purpose of the regulation, recital 21 provide basis to argue that it is not required that the violation has a certain origin. According to recital 39, the regulation should be interpreted in the light of the CFREU.

In conclusion, there is ample ground to argue that systemic flaws should be interpreted in a manner compatible with the ECHR. It would be unfortunate to interpret EU law in a manner that clearly is incompatible with the convention, as this would cause tension between the systems. However, there is a need for clarification on this matter from the CJEU in order to avoid disparate state practice.

6.4 Consequences from an Individual Rights Perspective

The exact conditions that induce a transferring state's responsibility to examine the actual conditions remain obscure. It may be argued that the presumption that EU member states are safe may lead the transferring state to overlook circumstances that amount to a violation. Meanwhile, the ECHR itself may be argued to contain a presumption that receiving states are safe, as there must be substantial grounds to believe that there is a real risk of a violation. This is motivated by the fact that the transferring state is only indirectly responsible for the violation. The requirements on asylum seekers to rebut the ECHR presumption have been reduced. It is problematic from an individual rights perspective if the presumption that EU member states are safe is harder to rebut, as it would create an undue burden of proof for the applicant.

NGO reports have had pivotal importance in all three cases discussed. The duty of inspection is a heavy burden on the transferring state, but there is only such an obligation when there is information indicating that inquiries are needed. It is troubling if the level of protection either depends on the availability of third-party information or on evidence submitted by the applicant. Furthermore, the transferring state is not responsible if the receiving state has issued individual and detailed guarantees.

There is no procedure to suspend transfers to certain member states in the present Dublin III Regulation. The current system lacks a consensus of what conditions are unacceptable on a general level. Therefore, the assessment must be made on a case-by-case basis and there is a substantial risk that the states react first after individual rights have been violated. Furthermore, it is left to national authorities to assess whether other EU member states fulfil their obligations according to EU law and they differ in their interpretation of the prerequisites.

However, once the presumption of safety is rebutted, asylum-seekers are well protected. The requirement to individualize the risk is reduced, their accounts should be presumed to be true if supported by circumstantial evidence and the acceptance for ill-treatment is low given the vulnerability of asylum-seekers. That this marks a paradigm shift is mirrored in the critique of the court for its readiness to accept these reduced requirements. It has also caused uncertainty as to whether positive EU law obligations result in a lower tolerance for ill-treatment in EU member states than elsewhere.

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