DOI: 10.20472/IAC.2015.017.102

LIA VERSTEEGH

University of Amsterdam, European Studies, The Netherlands

THE EUROPEAN COURT OF JUSTICE AND THE EUROPEAN COURT OF HUMAN RIGHTS DETERMNIG THE STATE RESPONSIBLE FOR EXAMINING AN ASYLUM APPLICATION.

Abstract:

Article 6 of the Treaty of the European Union (TEU) as part of the 2009 Treaty of Lisbon states that the European Union recognizes the rights, freedoms and principles set out in the EU Charter of Fundamental Rights. It also states fundamental rights, as guaranteed by the European Convention on Human Rights (ECHR). So, the fundamental rights system of the European Union consists of the constitutional traditions of the Member States of the Union, the rights of the ECHR and the obligatory provisions of the EU Charter. The ECJ refers to these three sources of law, while the ECtHR refers to the ECHR.

Both, the ECJ and the ECtHR give judgments in cases concerning asylum and violation of human rights based on the European Union Regulation (EC) no. 343/2003, the so-called Dublin II Regulation determining the Member State responsible for examining an asylum application, and reviewing compliance with the criteria for determining responsibility for examining the asylum application and the shortcomings of human rights protection.

In the Abdullah case before the ECJ applicant was a Somali national who entered Greece irregularly by boat via Syria and Turkey and without having lodged an asylum application in Greece she travelled to Austria and applied for asylum. She did not apply for asylum in Greece due to deficiencies in the Greek asylum system. The ECJ held that once a Member State takes charge of an application on the basis of the Dublin II Regulation can only be overturned if there are systemic deficiencies in the asylum procedure. She was not able to call into question the conditions for the reception of applicants for asylum in Greece and lost the case.

In the Tarakhel case versus Switzerland before the ECtHR applicants claimed the violation of Article 3 of the ECHR that prohibits torture and “inhuman or degrading treatment or punishment. “ The ECtHR thought that in cases of a family with young children being deported to Italy, suggest that the State normally undertakes a thorough examination of the individual situation. This had not be done and applicants were admissible.

It is obvious that the European Union does not provide for an effective remedy for the applicant who neglects the Dublin II system for asylum seekers.

Keywords:

European Court of Justice, European Court Human Rights, Asylum Proceedings, Right to asylum

1. Introduction

The entry into force of the 1997 Treaty of Amsterdam marked the finalization of the internal market organization and the beginning of the European asylum and immigration system. The primary idea behind this system was to strengthen and safeguard the outer borders of the EU countries against illegal immigrants. Since then a system of asylum rules regarding asylum applications has been developed, culminating in the so-called 'EU Dublin system'. The rules of this system determine which European Union Member State is responsible for examining an asylum application lodged in one of the Member States by a third country national. The protection of the human rights of asylum seekers was originally not the foremost aim of the European asylum system. However, with the introduction of the 2009 Lisbon Treaty, the EU became a 'Union of Values' accepting the treaty status of the EU Charter of Fundamental Rights. The asylum system of the EU is based on the Refugee Convention of Geneva [1] on the status of refugees which defines the circumstances in which a State must grant refugee status to those who request it, as well as the rights and duties of such persons. Its central article is article 33 that states that "no contracting state shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." [2]The European asylum system is also based on the Universal Declaration of Human Rights [3] to which the Geneva Convention refers. Moreover, the European Convention of Human Rights (ECHR) can be applied.

Article 18 of the EU Charter of Fundamental Rights links fundamental rights to the concept of asylum from the Refugee Convention that guarantees the right to asylum, promising individuals seeking protection from persecution that their right to safety and life will be respected.[4] The human rights-based refugee protection is the basis of cooperation between the Member States. Since the entry into force of the 2009 Treaty of Lisbon European Union asylum legal instruments have to be adopted in accordance with the ordinary legislative procedure, the co-decision procedure. Judicial control on asylum cases has been expanded and as a consequence the European Court of Justice (ECJ) has preliminary jurisdiction with respect to primary and secondary asylum law. The ECJ and national courts are obliged to apply the Charter when EU law is applicable. Officially, the European Court of Human Rights (ECtHR) of the Council of Europe is not bound by

[1]Geneva Convention relating to the Status of Refugees, 1951 (RCS).

[2]This principle is called the non-refoulement principle.

[3]The Universal Declaration of Human Rights, United Nations, of 19 December 1948.

[4]Article 18 of the EU Charter of Fundamental Rights states that "The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union".

the EU rules regarding asylum procedures; still, it applies and judges on the EU Dublin asylum rules when dealing with asylum cases in the European Union.

This paper aims at looking at the differences between the verdicts of the ECJ and the ECtHR on the subject of asylum application and the protection of human rights for asylum seekers as regulated by the European Dublin II and the Dublin III Regulation. These regulations are based on the principle of mutual trust between the EU Member States, the presumption of compliance with EU law regarding the protection offered to asylum seekers. Both legal instances seek solutions where European law left question marks regarding the protection of the asylum seeker.

This paper also questions the need to reform the European asylum system where the protection of asylum seekers in the European Union is not guaranteed.

2. Dublin Convention of 1990 and Regulation 343/2003, the so-called Dublin II Convention.

In 1985, a few countries of the European Economic Community, established the Schengen system which holds on the one side that the internal border controls between the cooperating States would be abolished and on the other, that a common asylum policy was to be set up, to protect the outer borders of those countries. This system was established outside the legal framework of the European Union. In order to meet the objective of harmonizing asylum policies a few EU Member States signed in Dublin the so-called Dublin Convention on 15 June 1990, the Convention determining the State responsible for examining application for asylum lodged in one of the Member States of the (then) European Communities.[5] The key aspect of the Dublin Convention was that each application for asylum should be examined subject to this Convention: the Member State in which the asylum seeker applies for asylum should decide which Member State should be responsible in accordance to the criteria of the Convention. The asylum applicant would always be provided with a responsible Member State. In a way, this system aimed to prevent the asylum seeker from asylum-hopping and the Member State which the asylum seeker approaches, from asylum-shopping. The 1997 Treaty of Amsterdam made it possible to replace - inter alia- as between the Member States, with the exception of the Kingdom of Denmark – the Dublin Convention with Regulation No 343/2003, the so called Dublin II Convention, which entered into force on 17 March 2003. This Regulation was needed since the Dublin Convention was drawn up outside the framework of the European Economic Community with the consequence that the rule of law could not be applied due to the lack of a superiority legal institution. Moreover, no provisions were made in the Dublin Convention for any supervisory system by an independent legal authority. [6] The aims of the Dublin II Regulation can be reached at

[5]Dublin Convention, 15 June 1990, OJ 1997, C 254, p. 1; Entry into force at 1 September 1997 for the 12 original signatories, on 1 October 1997 for the Republic of Austria and the Kingdom of Sweden, and on 1 January 1998 for the Republic of Finland.

[6]Regulation 343/2003, OJ 2003 L 50/1.

community level, in accordance with the principle of subsidiarity, as set out in Article 5 of the Treaty of the European Union. [7]

The Dublin II Regulation was one of the first initiatives of the European Commission to regulate a Common European Asylum System (CEAS). The first phase in the creation of a CEAS was intended to lead to a common asylum procedure and a uniform asylum status, valid throughout the Union, for those in need of international protection. [8] In recital number 2 of an additional Council Regulation[9] to the Dublin II Regulation it was affirmed that the Dublin Regulation is based on the presumption that the MemberStates respect the principle of non-refoulement enshrined in the Geneva Convention and that they are considered as safe countries for asylum seekers. The Dublin II Regulation comprises a set of criteria for allocating responsibility which should be followed by the Member States in a hierarchical manner: first, the state in which the applicant has a family member as defined in article 2 (i) of the Regulation, who has refugee status or whose application for asylum is being examined; second, a State which has provided the applicant with a residence permit or a visa or of which the border has been crossed illegally by the applicant or thirdly, in case the first two options are not relevant – if the applicant enters the territory of a Member State in which the need for him/ her to have a visa is renounced. According to Article 13 of Dublin II Regulation, the final situation is that none of these criteria are applicable. Then, the first Member State in which the asylum application is lodged becomes responsible for further examination of the application. Two articles of the Dublin II Regulation, discussed in case-law of the ECJ, are the articles 3 para 2 and Article 15, respectively referred to as the sovereignty and humanitarian clauses. This first article permits Member States to examine an asylum application and thus take responsibility for substantively assessing it even if the Dublin criteria would otherwise assign this responsibility to another Member State. The second article, Article 15 provides the possibility of bringing family members and dependent relatives together for humanitarian reasons. Regarding these humanitarian reasons the EU Member States should be aware of the applicability of the Charter of Fundamental Rights of the European Union and its Article 4 on the prohibition of torture and inhuman or degrading treatment or punishment. Not all provisions of the Dublin II Regulation are clearly formulated. An example of this lack of clarity is where Article 6 of the Regulation states that “where the applicant for asylum is an unaccompanied minor, the Member State responsible for examining the application shall be that where a member of his or her family is legally present, provided

[7]The United Kingdom and Ireland, annexed to the Treaty on European Union and the Treaty establishing the European Community take part in the adoption and application of this Regulation; Denmark, annexed to the Treaty on European Union and to the Treaty establishing the European Community, does not take part in the adoption of this Regulation and is not bound by it nor subject to its application. See para (17) and (18) Preamble of the Treaty; not only the existing EU Member States, but also four non- EU countries associated with the Schengen system, Norway, Iceland, Switzerland and Liechtenstein became member to the Dublin II Regulation.

[8]See the Preamble on Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanism 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 L 180/31.

[9]Council Regulation No. 1560/2003 EC of 2 September 2003, laying down the rules for the application of the Dublin Regulation.

that this is in the best interest of the minor. In the absence of a family member, the Member State responsible for examining the application shall be that where the minor has lodged his or her application for asylum." In a contextual sense it is not clear which Member State the EU meant to make responsible regarding unaccompanied minors, as we will see in the following, when discussing EU Case Law.

3. Treaty of Lisbon and Human Rights

The 2009 Treaty of Lisbon consists of two parts, the Treaty of the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). Chapter 2 of the TFEU, in Articles 77- 80, deals with border, asylum and immigration. The European common asylum policy is based on this chapter and on the Dublin II Regulation. Article 78 TFEU states that the "Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951. " This article serves as a legal base for asylum measures such as the Reception Directive, which sets out the conditions of reception, [10] the Qualifications Directive which set out the rules and principles to be applied by Member States identifying refugees and those seeking subsidiary protection, [11] and the Procedures Directive regarding access to procedures, procedural guarantees, access to appeal, procedure for the withdrawal of refugee status [12], and the Return directive on common standards and procedures for returning illegally residential third country nationals. [13] These directives show that the European Union has been quite cooperative in formulating common minimum standards of protection which should be guaranteed by EU Member States. Likewise, they are all based on the principle of mutual trust between the EU Member States as formulated in the Dublin II Regulation. Nevertheless, member states are allowed to provide for better domestic protection measures than the EU minimum standards on asylum protection. Regarding the attitude of EU Member States on this very subject, the principle of solidarity and fair sharing of responsibility should be taken into consideration, as found in Article 80 of the TFEU: "The policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implication, between the Member States. Whenever necessary, the Union acts adopted pursuant to this chapter shall contain appropriate measures to give effect to this principle."However, the Lisbon Treaty includes

[10]Reception Directive, Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers.

[11]Qualification Directive, Directive 2011/95/EU of the European Parliament and the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection for a uniform status for refugees or for persons eligible for subsidiary protection.

[12]Procedures Directive, Directive 2013/32/EU of the European Parliament and the Council of 26 June 2013 on common procedures for granting and withdrawing international protection.

[13]Return Directive, directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals.

no set deadlines for adopting border and asylum measures. In urgent situations this could cause delays in resolving asylum problems. Moreover, the principle of solidarity is constantly being discussed in the context of political solutions for asylum problems within the EU framework. [14]

Article 6 of the TEU states that the European Union recognizes the rights, freedoms and principles set out in the 2000 EU Charter of Fundamental Rights. Article 6 also states that the European Union shall accede to the ECHR of the Council of Europe and that "fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law." It is obvious that the European Union recognizes the ECHR of the Council of Europe as a player in the European context of human rights which not only safeguards the European human rights laid down in the ECHR but also in the European Social Charter (ESC).

Until now, the EU has not acceded to the ECHR and the negotiations between the European Union and the Council of Europe regarding the accession have not been finalized. In fact, in December 2014 the ECJ stated in Opinion 2/13 that the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms is not yet compatible with Article 2 (2) TEU or with Protocol (No 80) relating to Article 6 (2) of the TEU on the accession of the Union to the European Convention. While the negotiations are still going on between the two instances, regarding compliance of the European Union Member States with human rights, they are supervised by the ECJ, which is obliged to apply the Charter on Fundamental Rights (CFR) when EU law is applicable. It considers the constitutional traditions of the Member States and the provisions of the ECHR. Regarding compliance of the Member States with the ECHR, they are supervised by the ECtHR, the European Social Committee of Social Rights (ECHR) and the Committee of Ministers (COM). Therefore, the fundamental rights system of the European Union to which the ECJ refers, consists of more sources than just the ECHR, to which the ECtHR refers. Both legal instances give their judgments in cases concerning asylum and violation of human rights based on the Dublin II Regulation.

4. Scope of Protection of Human Rights under the Charter of Human Rights

The ECJ has to apply the European Charter when EU law is applicable and in that respect it has decided that asylum seekers may "not be deprived of the protection of the minimum standards concerning respect and protection of human dignity." [15] The possibility of a minimalistic interpretation of the Charter could lead to other human rights sources, for those in need of European human rights protection, since this "constitutional pluralism" offers more favorable provision clauses based on constitutional law of Member States and those stemming from the European Convention. [16] The acceptance of these two

[14]See hereafter under 12. Solidarity Principle

[15]European Court of Justice, case of CIMADE, C-179/11, 27 September 2012, para 56.

[16]Bostjan Zalar (2013), "Comments on the Court of Justice of the EU's Developing Case Law on Asylum", International Journal of Refugee Law, Vol. 25 No. 2, pp. 377-381, p. 381.

different systems for human rights protection were explained by the Advocate General Maduro in his opinion in the Case of Elgafaji where he said " The protection of fundamental rights in the Community legal order exists alongside other European systems of protection of fundamental rights. These include both systems developed within the national legal systems and those stemming from the ECHR. Each of those protection mechanisms certainly pursues objectives which are specific to it and the mechanisms are certainly constructed from legal instruments particular to them, but sometimes they are applied none the less to the same facts. In such a context, it is important, for each existing protection system, while maintaining its independence, to seek to understand how the other systems interpret and develop the same fundamental rights in order not only to minimize the risk of conflicts, but also to begin a process of informal construction of a European protection of the various individual contributions from the different protection systems existing at European level."[17] A strive for uniformity is visible by the European courts in the context of jurisprudence on CEAS.

The relationship between the European Charter and the ECHR becomes visible in Article 52 para 3 of the European Charter that supposes that European Union is able to cope with the ECHR and could provide for more extensive protection. It states that "the Charter contains rights which correspond to rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection. " As regarding the difference in asylum protection between the two legal systems, we could take Article 18 Charter on asylum protection as a reference, stating that "the right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Function of the European Union. " The ECHR is not familiar with a particular provision on asylum protection which means that asylum cases before the ECtHR are based on the relevant provisions of the ECHR, such as on Article 3 of the European Convention, the prohibition of torture and the prohibition of degrading treatment and Article 13 of the European Convention, the right to an effective remedy. We can wonder whether the ECJ applying EU law, in particular the Charter**,** is able to offer the same minimum guaranteed protection as the protection offered by the ECHR to asylum seekers. In order to find an answer to this question we should look at the legal framework for asylum seekers in the EU. In this respect we should consider to look at Article 4 of the Charter that states that "No one shall be subjected to torture or to inhuman or degrading treatment or punishment". This article is related to the concept of human dignity of the human being, and the prohibition against torture certainly expresses some of the very core values of the Member States. The wording of this Article is identical to Article 3 of the ECHR and the Explanations on Article 4 Charter refer directly to this provision. From the text of Article 4 of the Charter it does not become clear whether or not deviation from this provision is permitted. Looking at

[17]Opinion of Advocate General Poiares Maduro, delivered on 9 September 2008, Case C-465/07, M. Elgafaji versus Staatssecretaris van Justitie, paragraph 22.

Article 52 para 3[18] we can assume that it does not allow for derogations to the prohibition against torture.

5. The Position of Asylum seeking Children under the Charter

The difference between the two legal human rights systems in asylum questions will be most visible when the position of children as asylum seekers in the EU is at stake. In the EU the legal position of the child as an asylum seeker should be considered from the perspective of the UN Convention on the Rights of the Child (CRC) which contains in its Article 19 an obligation for the State to protect children against all forms of physical or mental violence. Regarding asylum seekers and their families, Article 24 of the EU Charter[19] based on Article 19 CRC, recognizes the child as an individual. The principle of 'the best interest of the child' has been formulated in Article 24 para 2 Charter to which principle primary consideration should be given. In cases concerning violence and other abuse of children both within and outside the family, Article 4 Charter may be applied horizontally.[20] In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be of primary consideration and are dependent upon particular factual interests. There are many fields in which 'the best interests of the child' should be given primary consideration. Application of Article 24 of the Charter should be 'in the best interest of the child' with respect to education, health, social life, the administration of juvenile justice, the placement and care of children in institutions, adoption, but also when children seek asylum and in immigration matters. According to Article 8 of the ECHR on the rights to family life, the State enjoys a wide margin of appreciation to determine on 'the best interest of the child'.[21] When Article 24 Charter is applied in EU asylum case law, the theory of the margin of appreciation is not applicable, since this theory only applies within the framework of the European Convention. This means that it is the responsibility of the national judge or the ECJ to evaluate what specific national asylum conditions could guarantee ' the best interest of the child'.

6. Case-law of the ECtHR on the Dublin II Convention

[18]Article 52 para 3 states that "Insofar as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention."

[19]Article 24 Charter on the rights of the child: 1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity. 2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interest must be a primary consideration.

[20]See Commentary of the Charter of Fundamental Rights of the European Union, Article 4 Charter, p. 53.

[21]Commentary of the Charter, o.w., Article 24, p. 215.

During the case of M.S.S. versus Belgium and Greece [22] that the ECtHR had to decide on the question arose about whether the EU Dublin II Regulation should be applied for this asylum application. The applicant in the case, an Afghan national who had entered the EU via Greece before arriving in Belgium, applied for asylum in Belgium but the Belgium authorities asked the Greek authorities to take responsibility for the asylum application. Pursuant to the Dublin II Regulation, an order was made by the Belgian authorities that he should be returned to Greece, the country of first arrival in the European Union. The applicant before the ECtHR stated that the living conditions for asylum seekers in Greece were not according to the human rights standards of the European Convention, alleging that he had no effective remedy in Greek law, and he stated that the Belgium authorities had sent him back to Greece while exposing him to the risks arising from the deficiencies in the asylum procedure there. He stated that on his arrival in Greece he was detained in a small place 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 little to eat and made to sleep on a dirty mattress or the bare floor. After his release he was required to report at the police station and to declare where he would Be staying. The renewal of his registration card was not made because the interpreter did not tell him to do so. He mentioned many other problems he encountered during his stay in Greece. He accused Belgium of violation of Article 3 of the ECHR, the provision on prohibition of degrading treatment and the violation of Article 13 of the ECHR, the provision on the right to an effective remedy.

In the opinion of the UNHCR, asylum seekers should not be transferred when, as in the present case- there was evidence that the State responsible for processing the asylum application effected transfers to high-risk countries. The persons concerned encountered obstacles in their access to asylum procedures, to the effective examination of their applications and to an effective remedy. Reception conditions could result in a violation of article 3 of the Convention. “Not transferring asylum-seekers in these conditions was provided for in the Dublin Regulation itself and was fully in conformity with Article 33 of the Geneva Convention and with the Convention’…[23]

The ECtHR confirmed that both Greece and Belgium had trespassed the Articles 3 and 13 of the European Convention because of the deficiencies in the Greek asylum procedure and the poor detention and living conditions for asylum seekers. Regarding Belgium, a violation was found of Article 13 taken together with Article 3 Convention because of the lack of an effective remedy against the applicant’s expulsion order. Also, the ECtHR held that it was incumbent on Greece to proceed with an examination of the merits of the applicant’s asylum request that would meet the requirements of the ECHR and during this procedure to refrain from taking deportation measures for the applicant. So, in this case, the ECtHR neglected the ordering system of Dublin II for the EU Member States and gave priority to the human rights protection of the individual asylum seeker in this case. What becomes clear from this case is that mutual recognition of the asylum

[22]M.M.S. versus Belgium and Greece (no. 30696/09) Judgment of 21 January 2011.

[23]M.M.S. o.w., para 332.

systems of the EU Member States does not automatically entail mutual confidence in one another's human rights systems.

7. Case-law of the European Court of Justice on the Dublin II Regulation

In the following we will look into three cases before the ECJ dealing with applications by asylum seekers, as related to the Dublin II and Dublin III Regulations.

In the N.S. versus Secretary of State for the Home Department[24], the applicant was an Afghan national who came to the United Kingdom after traveling through, among other countries, Greece. He was arrested in Greece on 24 September 2008 but did not make an asylum application. From there he was expelled to Turkey where he was detained in appalling conditions for two months. He stated that he had escaped from his place of detention in Turkey and had travelled from that State to the United Kingdom, where he lodged an asylum application on 12 January 2009, on the day of his arrival. The Secretary of State examined the asylum question and made a request to Greece to take charge of the appellant in order to examine his asylum application. Upon the appellant's claim that his removal to Greece would violate his rights, the Secretary of State certified that this claim was unfounded, since Greece was on the 'list of safe countries' in Part 2 of Schedule 3 to the 2004 UK Asylum Act. The consequence of that certification decision was in accordance with 2004 Asylum Act, that applicant did not have a right to lodge an immigration appeal in the United Kingdom. Appellant asked the Secretary to review his claim for asylum stating that the ECHR and the Geneva Convention would be violated if he was returned to Greece. The State Secretary refused to accept this request. In appeal it emerges from the order of reference "that asylum procedures in Greece are said to have serious shortcomings, that applicant would encounter numerous difficulties in carrying out the necessary formalities and that Greece was not provided with sufficient information and assistance and that claims are not examined with due care. The proportion of asylum applications granted is understood to be extremely low; juridical remedies are stated to be inadequate and very difficult to assess. According to the UK High court of Justice, Queen's Bench Division (Administrative Court), the risk of refoulement from Greece to Afghanistan and Turkey had not been established in the case of persons returning under the Dublin II Regulation. According to the Secretary, the European Union fundamental rights were not applicable when she was exercising her discretion under Article 3 (2) of the Regulation. She also maintained that the scheme of the Dublin II Regulation entitled her to rely on the conclusive presumption that Greece would comply with its obligations under European Union law. The Court of Appeal (England and Wales) asked in essence whether the decision adopted by a Member State on the basis of Article 3(2) of the Dublin II Regulation to examine a claim for asylum which is not its responsibility under the criteria of that Regulation falls within the scope of European Union law for the purposes of Article

[24]European court of Justice, case of N.S. versus Secretary of State for the Home Department and M.E and others versus Refugee Applications Commissioner, C-493/10, Judgment of 21 December 2011.

6 TEU[25] and/or Article 51 of the Charter. [26] In its reply, the ECJ showed an intriguing way of reasoning to make the receiving Member State responsible for the asylum application..: It stated that "Article 51 para 1 of the Charter states that the provisions thereof are addressed to the Member States only when they are implementing European Union law." Scrutiny of Article 3 para 2 of Dublin II Regulation shows that it grants Member States a discretionary power which forms an integral part of the Common European Asylum System provided for by the TEU Treaty and developed by the European Union legislature. Derogation from the principle gives rise to the specific consequences provided for by that regulation. Thus, a Member State which decides to examine an asylum application itself becomes the Member State responsible within the meaning of the Dublin II Regulation. "A Member State exercising that discretionary power must be considered as implementing European Union law within the meaning of Article 51 (1) of the Charter". And to strengthen this point of view the ECJ added: "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. Article 18 of the Charter and Article 78 TFEU provide that the rules of the Geneva Convention are to be respected. "… "According to settled case-law, the Member States must not only interpret their national laws in a manner consistent with European Union law but also make sure they do not rely on an interpretation of an instrument of secondary legislation which would be in conflict with the fundamental rights protected by the European Union legal order or with the other general principles of European Union law…" The ECJ added, referring to the case of M.S.S. versus Belgium and Greece of the ECtHT[27], that it did not accept "a conclusive presumption that the Member State which Article 3 para 1 of Regulation No 343/2003 (the Dublin II Regulation) indicates as responsible, observes the fundamental rights of the European Union". In para 78 of the case the ECJ held that although the Common European Asylum System was based on mutual confidence and a presumption of compliance by other Member States with European Union law and, in particular, with fundamental rights, that presumption was nonetheless refutable. The Court stressed the "slightest infringements of Directive 2003/9, 2004/84 or 2005/85 to be sufficient to prevent the transfer of an asylum seeker to the Member State responsible…… In order to determine the kind of infringement the ECJ referred to the M.S.S. judgment before the ECtHR which had taken into account "the regular and unanimous reports from international non-governmental organizations bearing witness to the practical difficulties in the implementation of the Common European Asylum System in Greece, the correspondence sent by the United Nations High Commissioner for Refugees (UNHCR) to the Belgian minister responsible, and also the Commission reports on the evaluation

[25]The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of the European Union of 7 December 2000, which shall have the same legal value as the Treaties.

[26]Article 51 para 1 Charter states that" The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties."

[27]See ECtHR, Case M.S.S. versus Belgium and Greece, judgment of 21 January 2011, Application no 30696/09, para 358, 360 and 367.

of the Dublin system..” What should be understood by the “circumstances in which the application of the Dublin II Regulation must be suspended on human grounds” was not clarified by this case.

The ECJ elaborated on this same subject in another case, that of the Bundesrepublik Deutschland versus Kaveh Puid[28]. In this case the referring judge was wondering whether there was a judicially enforceable claim in the hands of asylum seekers, to compel a Member State to examine their applications for asylum, based on an official obligation of that Member State, which could imply diversion from the Dublin II Regulation. The facts and circumstances of the case were similar to the N.S. judgment where the court held, inter alia, “that Article 4 of the Charter of Fundamental Rights stops Member States from transferring an asylum seeker to the Member State responsible within the meaning of Regulation No 343/2003, the Dublin II regulation.” The ECJ stated reaffirming its decision of the N.S. case that “the Member State which is determining the Member State responsible has the right referred to in Article 3 (2) to itself examine the application. None the less, the Court did not state that the Member State was required to do so. “[29] The limits of the own choice of the Member State are “where they cannot be unaware that systemic deficiencies in the asylum procedure and in the conditions for reception of asylum seekers in that Member State provide 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….” [30] In those circumstances the Member State determining the Member State responsible is required not to transfer the asylum seeker to the Member State initially identified as responsible and, is subject to the exercise of the right itself to examine the application”. However, this does not mean that “the Member State which is determining the Member State responsible is required itself to examine the application for asylum”. [31] Therefore, in the Puid case, the ECJ did not confirm that there is a duty for a Member State to take in an asylum application unless the Dublin II Regulates so decided.

In the Abdullah case [32] the ECJ took the chance to lighten on the subject. This case was on the request for a preliminary ruling concerning the interpretation of Article 10, 16, 18 and 19 of the Dublin II when there is an “irregular entry”. The irregular entry criterion had been applied to the applicant, who being a Somali national entered Greece irregularly by boat via Syria and Turkey and without having lodged an asylum application in Greece she travelled to Austria where she asked for an asylum application. She crossed the borders of Macedonia, Serbia and Hungary illegally with the help of people smugglers. In Austria, Ms Abdullahi lodged an application for international protection with the Bundesasylamt, the competent authority, that requested Hungary to take charge of Ms Abdullahi in

[28]Bundesrepublik Deutschland versus Kaveh Puid, ECJ, Case C- 4/11, 14 November 2013.

[29]Puid, o.w., para 29.

[30]Puid, o.w., para 30

[31]Puid, o.w., dictum

[32]European Court of Justice, Shamso Abdullah versus Bundesasylamt, C-394/12 , 10 December 2013.

accordance with Article 10(1) of Dublin II Regulation. Hungary agreed to do so because – according to the information provided by Ms Abdullahi, as forwarded to Hungary by the Austrian Republic, there was sufficient evidence that Ms Abdullahi had entered Hungary illegally from Serbia and that she had subsequently travelled directly to Austria. (para 28). Abdullahi appealed against the negative decision of the Austrian authorities in Austria that entailed a number of criticisms of the asylum situation in Hungary in the light of Article 3 of the ECHR prohibiting torture and inhuman and degrading treatment. It was submitted that the Bundesasylamt had assessed the situation prevailing in Hungary on the basis of obsolete sources. Abdullahi had claimed that the Member State responsible for her asylum application was not Hungary but the Hellenic Republic and that it did not observe human rights in certain respects and that, accordingly, it was for the Austrian authorities to complete the examination of her asylum application. Abdullahi had not asked for asylum in the Greece due to deficiencies in the Greek asylum procedure, - inter alia deficiencies in the Geek asylum procedures. She stated that the method for determining the Member State responsible must be based on 'objective, fair criteria both for the Member States and for the persons concerned' (para 43).

The referring court asked, in essence, whether the Dublin II Regulation must be interpreted as obliging Member States to provide that an applicant for asylum is to have the right, in an appeal against a transfer decision under Article 19(1) of that regulation, to request a review of the determination of the Member State responsible, on the grounds that the criteria laid down in that Regulation have been misapplied. The ECJ held that once a Member State takes charge of an application on the basis of the Dublin II Regulation, as the Member State into which the applicant "irregularly crossed by land, sea or air having come from a third country"- this decision can only be overturned if there are systemic deficiencies in the asylum procedure and reception conditions of that Member State (para 60). The ECJ emphasized that the Dublin system is a set of "organization rules governing the relations between the Member States" guided by "the principle of mutual confidence". [33] Thus, Article 3(2) of the Dublin II Regulation (the 'sovereignty' clause) and Article 15(1) of that Regulation (the humanitarian clause) are designed to maintain the prerogatives of the Member States in the exercise of the right to grant asylum, irrespective of the Member State responsible for the examination of an application on the basis of the criteria set out in that Regulation. According to the ECJ these are optional provisions which grant a wide discretionary power to Member States [34] which means that the ECJ affirmed the principle of mutual confidence that the EU legislature adopted in the Dublin Regulation in order to avoid asylum shopping.

The Member State in which Ms Abdullahi's asylum claim was lodged was not to examine that claim and could transfer her to another Member State, Hungary as the Member State of Ms Abdullahi's first entry into EU territory according to Dublin II Regulation. The only way in which Ms Abdullahi could question that choice was by pleading systemic deficiencies in the asylum procedure and in the conditions for the reception of applicants for asylum in Hungary. These had to provide substantial grounds for believing that the

[33]Shamso Abdullah , o.w., para 56.

[34]The ECJ refers to *N.S. and Others*, paragraph 65, and Case C245/11 *K* [2012] ECR, paragraph 27.

applicant for asylum would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter.[35] In that situation the humanitarian clause should prevail over the sovereignty clause. The decision of the ECJ was based on the reception conditions in Hungary which were not considered against the rights of asylum seekers according 4 Charter.[36]

According to the Advocate-General the asylum seeker is allowed to oppose the treatment of his case in a Member State that fails to guarantee the fundamental rights of the asylum seeker, such as providing an ineffective remedy.[37] Actually, the European Commission gave the same opinion as the Advocate-General in this case. It argued that one of "the implications of the principle of an effective remedy, laid down on Article 19 (2) of Dublin II Regulation is that an applicant for asylum may request a review of the legality of his transfer to the requested Member State, which would address the issue of whether the order of priority in which the criteria are listed in the Regulation, or the time-limits laid down therein, have been complied with."[38]

It is obvious that the ECJ did not follow the opinions of the Advocate-General and of the European Commission but stressed that the only way in which the applicant for asylum can call into question the choice of the criterion of Dublin II Regulation is by pleading deficiencies in the asylum procedure and in the conditions for the reception of applicants for asylum in Hungary. It could be that in the opinion of the ECJ the interests of the asylum seeker were guaranteed when Hungary took charge of Abdullahi and the reception by Greece was no longer necessary. The ECJ gave a limited interpretation of the right to complain about the decision of transfer which could be considered as against the right of an effective remedy as formulated in the Dublin III Regulation which had been drafted by then (see hereafter under number 7) and which is against the right of an effective remedy of Article 47 of the Charter.[39]

[35]The ECJ refers to *N.S. and Others*, paragraphs 94 and 106, and Case C4/11 *Puid* [2013] ECR, paragraph 30.

[36]Shamso Abdullahi, final judgment ECJ.

[37]Opinion of Advocate General Cruz Villalon, delivered on 11 July 2013, Case C-394/12, para 45.

[38]Abdullahi, para 45.

[39]Article 47 Charter states concerns the right to an effective remedy and to a fair trial. It states: Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in the Article. Everyone is entitled to a air and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

8. Regulation no. 604/2013, the Dublin III Regulation[40]

The Concern of the European Union with human rights protection for asylum seekers induced the European Union to replace the Dublin II Regulation by the 'Dublin III Regulation', adopted in 2013. [41]This Regulation supersedes Dublin II from 1 January 2014 onwards. After ten years of the Dublin II Regulation, a number of substantive changes were to be made to this Regulation and in the interest of clarity, that Regulation should be recast. The most important aspect of the Dublin system is the rule that an application for asylum should be examined in one of the participating member states of the Dublin system. The criteria for allocation are mentioned in Chapter III of the Dublin II regulation. This Dublin Regulation aims at setting standards of international protection for the reception of applicants and states in its Article 3 (2) that in order to determine the responsible Member State, the first Member State where an application for protection is lodged must examine it. The second paragraph of Article 3 (2) is a completely new article and reflects the case-law of the European Court of Justice, especially the cases of NS and Puid, both based on the judgment of the ECtHR in the case of MSS versus Belgium and Greece, as described earlier in this paper. Article 3(2) states that if it is not possible to transfer an asylum seeker to the responsible Member State "because there are substantial grounds for believing that there are systematic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman and 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 another Member State can be designated as responsible. " Article 3 (2) Dublin III has incorporated Article 4 of the Charter of Human Rights and it stipulates that any Member State has the right to send an applicant to a safe third country.

The Dublin III Regulation contains some areas of improvement, maintaining the underlying principles of the Dublin II Regulation and reflecting the rules of the ECJ in the NS case, where the national discretion in the sovereignty clause was overridden by the Charter. It pays attention to the rights of the child and the respect for family life according to the ECHR and the Charter of Fundamental Rights. In general, the Dublin III procedures include stricter time limits for triggering the Dublin procedure than in the NS judgment. Information should be provided to the applicant in writing, in a language which the applicant understands or may be supposed to understand, and this obligation should be supplemented with an obligation to use a common leaflet to inform the applicant about the objectives of the Regulation. If needed, this information should be given orally. A new important provision is Article 5 that determines that the applicant has the right to a personal interview in the context of the Dublin procedure in order to give information about his personal situation. Member States are obliged to conduct such an interview before transposing applicant to another Member State, although the rules of the timing of the interview are not clearly set. Another new article is Article 6, giving guarantees for minors, ensuring the best interest for the child as a 'primary consideration' as regards the

[40]Dublin III Regulation, Regulation (EC) No. 604/2013 of 26 June 2013.

[41]Regulation 118/2014, OJ 2014 L 39/1

procedures in the Regulation. Member States must cooperate with each other and 'take due account' of family reunion prospects; they take into account the minor's well-being and social development, safety and security and the views of the minor. It is expected that this special provision will have an impact on the interpretation of the rest of the Regulation. [42] Member States must take adequate steps to trace the family members of the asylum seeker according to Article 8. Especially with unaccompanied minors, Member States should show responsibility in assisting them and representing them as regards such procedures. The European Commission may give support by implementing acts to facilitate such actions (art. 6 para 5).

The resources of the European Asylum Support Office (EASO), established in 2010[43]should be available to provide adequate support to the relevant services of the Member States responsible for implementing this Regulation. Not only the well-functioning Dublin system is essential for the CEAS, but "its principles and functioning should be reviewed as other components of the CEAS and Union solidarity tools are built up" and "in order to ensure equal treatment for all applicants and beneficiaries of international protection, and consistency with the current Union asylum acquis," …. "the scope of this Regulation encompasses applicants for subsidiary protection and persons eligible for subsidiary protection. [44]Article 28 gives a detention clause which implies that detention is allowed in case of a significant risk of absconding while indicating the conditions under which detention could take place.

What is new in the Dublin III Regulation is the early warning system. This mechanism should be used wherever there is the 'risk of particular pressure' on a national asylum system, or 'problems in the functioning of the asylum system of a Member State'. The particular Member State will be warned by the Commission and the European Asylum Authority to 'draw up a preventive action plan'. According to Article 33 para 2, the Member State, after reporting has to take " all appropriate measures" and has to deal with the deficiencies or pressure on its asylum system. The Member State has to take a crisis management plan that should be ensuring compliance with the EU asylum law and fundamental rights. The recent influx of asylum seekers over the Mediterranean Sea, could make this provision of importance for all EU Member States, since the Council has the task to monitor the situation and may provide political guidance, as the Council and European Parliament may provide " any solidarity measures" when a warning plan has been drawn up, according to Article 33 para 4 of the Dublin III Regulation.

The needed improvements of the Dublin II system are however not enough to speak of a fundamental change in the Dublin procedures. Dublin III has improved the position of the individual asylum seeker in a EU Member State in line with the jurisprudence of the courts,

[42]S. Peers, o.w., p. 490

[43]European Asylum Support Office (EASO), established by Regulation (EU) No 439/2010 of the European Parliament and of the Council, OJ L 132, 29.5.2010.

[44]Dublin III Regulation, preamble para (9) and (10).

however, there are no fundamental human rights guarantees for all asylum seekers as part of the asylum system in the Dublin III Regulation.

9. Criticism of the Dublin III Regulation

In both Dublin Regulations the criterion of 'irregular border crossing [45] is the dominant criterion and places a burden on Member States located on the EU borders, primarily Greece and Italy. In order to prevent asylum seekers from seeking asylum in several Member States, it was suggested that the indication of 'irregular border crossing' should be replaced by the principle of 'free choice of member state'. This would imply that the refugee's intention "as regards the country he wishes to see asylum … should as far as possible be taken into account". [46] As a consequence, the Member State responsible would be the first one with which the asylum application was lodged[47] unless there were other relevant criteria to define responsibility such as the protection of unaccompanied minors, family reunion and others. This suggestion also implies that the Member State conducting immigration control must allow the asylum seeker to continue his or her journey under an orderly procedure in order to help the asylum seeker to lodge the asylum request in the Member State of his/her choice.

Neither in the procedure, nor in uniform standards of protection in the European Union are there guarantees, so it is obvious that Dublin III Regulation has failed to adequately formulate reception conditions in the EU Member States. The formulation of the humanitarian clause should also be part of the Dublin III Regulation. Currently, Article 15 of the Dublin III Regulation is a discretionary provision to be applied in situations where a strict application of the binding criteria would lead to a separation of family members. It provides for the possibility of bringing together family members as well as dependent relatives, for humanitarian reasons, in particular on family or cultural grounds. Chapter IV of the Implementing Regulation provides guidance on its application including with respect to situations of dependency, unaccompanied children, procedural issues and the possibility of recourse to a conciliation procedure. Article 15 para 3 is incorporated as a legally binding provision under recast Article 8 para 2 for unaccompanied children and their relatives. This article states that: where the applicant is an unaccompanied minor who has a relative who is legally present in another Member State and where it is established, based on individual examination, the relative can take care of him or her, that Member State shall unite the minor with his or her relative and the Member State shall be responsible, provided that it is in the best interest of the minor". Clearly, according to the Dublin Regulation III, minors are seen as vulnerable persons although it contains no explicit provision on vulnerable persons subject to the Dublin procedure, except within Article 15 para 2 where there is reference to persons who may be dependent on the

[45]Article 10 Dublin II and Article 14 Dublin III Regulation.

[46]Memorandum. Allocation of refugees in the European Union : for an equitable, solidarity-based system of sharing responsibility", (2013), published by the German Bare Association and others, p. 5 refers to the 1979 the Executive Committee for the UNHR program, in Recommendation 15 (XXX) on "Refugees without an asylum country".

[47]See Article 13 Dublin II Regulation and Article 3 Dublin III Regulation.

assistance of another "on account of pregnancy or a new born child, serious illness, severe handicap or old age". In many EU Member States there is no formal definition of vulnerable persons, for instance in Austria, Germany and the Netherlands, although unaccompanied children, single or pregnant women, persons with disabilities and victims of torture and sexual and gender-based violence are generally considered as vulnerable persons in these countries . [48]

10. Case law of the ECtHR regarding asylum with reference to minors.

In the 2014 case of Tarakhel versus Switzerland[49] before the ECtHR, applicants claimed the violation of Article 3 of the ECHR by the Swiss authorities that prohibits torture and "inhuman or degrading treatment or punishment." Applicants and their five children had entered Switzerland and asked the Swiss authorities for asylum after leaving Iran for Turkey and from there taking a boat to Italy. The Swiss Federal Migration Office authorities denied the reception since applicants had been in Italy in an asylum center and in Austria where they had lodged an asylum application which was rejected. Austria submitted a request to take charge of the applicant to the Italian authorities, who formally accepted the request. The applicants were to be sent to Italy, the country where they had been registered in the 'Eurodac system' [50] earlier. Applicants stated that they would be subjected to inhuman and degrading treatment linked to the existence of 'systematic deficiencies' of the Italian asylum system; they also submitted that the Swiss authorities had not given attention to their human rights circumstances and their family situation according to Article 8 ECHR, especially the age of the children and that the family would be kept together during the asylum proceedings.

The ECtHR considers the decision to return the applicants to Italy as not strictly falling within Switzerland's international legal obligations. It suggests that the Swiss authorities did not possess sufficient assurances that this family with young children if returned to Italy would be taken in charge of in a manner adapted to the age of the children. Since this had not been done the ECtHR considered applicants admissible in their complaint on an effective remedy under Article 3 of the European Convention. The ECtHR refers to the M.S.S. judgment " having to determine whether a situation of extreme material poverty could raise an issue under Article 3, the Court reiterated that it had not excluded "the possibility that the responsibility of the State might be engaged under Article 3 in respect of treatment where an applicant, who was wholly dependent on State support, found herself faced with official indifference in a situation of serious deprivation or want incompatible with human dignity". In that respect if adds in para 99 "with more specific reference to minors, the Court has established that it is important to bear in mind that the child's extreme vulnerability is the decisive factor and takes precedence over consideration relating to the status of illegal immigrant. Children have specific needs that

[48]European Refugee Fund (2013), Dublin II Regulation. Lives on hold. European Comparative Report, p. 74

[49]ECHR, Tarakhel versus Switzerland, judgment of 4 November 2014, Application no. 29217/12

[50]This system enabled EU countries to identify persons who cross external borders of the European Union by comparing fingerprints. It will be possible to determine whether an asylum seeker has previously claimed asylum in another EU Member State.

are related in particular to their age and lack of independence, but also to their asylum-seeker status. The ECtHR also observed that the Convention on the Rights of the child encourages States to take the appropriate measures to ensure that a child who is seeking a refugee status enjoys protection and humanitarian assistance, whether the child is alone or accompanied by his or her parents: "Considering the personal circumstances of the family, the fact that the reception conditions for children seeking asylum must be adapted to their age, to ensure that those conditions do not "create… for them a situation of stress and anxiety, with particularly traumatic consequences. Otherwise, the condition in question would attain the threshold of severity required to come within the scope of the prohibition under Article 3 of the Convention." (para 119). In the present case in view of the current situation as regards the reception system of Italy, the possibility that a significant number of asylum seekers removed to that country may be left without accommodation or accommodated in overcrowded facilities without any privacy, or even in insalubrious or violent conditions, is not unfound (para 120)". According to the ECtHR, the Swiss authorities had to obtain evidence from the Italian authorities that the applicants would be taken charge of in a manner adapted to the age of the children and that the family would be kept together, if not, there would be a violation of Article 3 of the Convention. The regulation of the responsible country according to the Dublin II Regulation could be neglected.

The joint partly dissenting opinion of Judges Casadevall, Berrolefe`vre and Jäderblom in this case is remarkable. It was stated that the applicants' situation differs substantially from the state of extreme material poverty observed by the ECtHR in M.M.S. Applicants sought to justify their claim by arguing that living conditions in Italy had been difficult and that it would be impossible for the first applicant to find work in that country. The applicants did not invoke any other argument at that time relating to their personal situation or their recent experiences in Italy. " The dissenting judges said that the administrative authority concerned was therefore right, in our view, to consider that 'the…. living conditions in Italy did not render the removal order unenforceable'" . That's why these judges were of the opinion that "the risk for the applicants of being subjected to inhuman or degrading treatment is not sufficiently concrete for Switzerland to be held responsible for a violation of Article 3 if it were to enforce the order for the applicants' expulsion to Italy. They could not see how it could be possible to depart from the Court's findings in recent case-law and to justify a reversal of their very recent case-law. They referred to the case of Mohammed Hussein and Others versus the Netherlands and Italy of 2 April 2013, in which the ECtHR held unanimously that no two systematic failings existed and that there was no reason to believe that an asylum seeker and her two young children would not have received adequate support had they been sent back to Italy from the Netherlands.[51] Their question was whether additional requirements should be put in future on Switzerland – and by extension on any other country in the same situation – despite the fact that neither

[51]Reference to the case of Mohammed Hussein and Others versus the Netherlands and Italy , ECtHR, (dec.) no. 27725/10, 2 April 2013; the same approach was adopted in six other cases concerning returns to Italy (Halimi versus Austria and Italy,18 June 2013, Abubeker versus Austria and Italy, no. 73874/11, 18 June 2013, Daytbegova and Magomedova versus Austria (dec.) no. 6198/12, 4 June 2013, Miruts Hagos versus the Netherlands and Italy (dec.), no. 9053/10, 27 August 2013, Hussein Diirshi and Others versus the Netherlands and Italy, no. 2314/10, 10 September 2013.

systematic deficiencies nor a real and substantiated risk of ill-treatment had been shown to exist. They agreed that it would be too far- reaching to hold the Swiss authorities responsible.

11. Case law of the ECJ regarding minor asylum seekers

In the case of The Queen and others versus the Secretary of State for the Home Department[52], the ECJ had to decide on the question of an asylum seeker who was an unaccompanied minor, with no family legally present in another Member State, with claims for asylum in more than one Member State. Which Member State does the Dublin II Regulation deem responsible for determining the application for asylum? MA, an Eritrean national, born on 24 May 1993, arrived in the United Kingdom on 25 July 2008, where she lodged an application for asylum on arrival. Since she had already applied for asylum in Italy, the United Kingdom authorities requested the Italian authorities to take her back in accordance with the provisions of Dublin II Regulation to which the Italian authorities agreed. The transfer to Italy had not been undertaken since MA had brought an action before the High Court of Justice of England and Wales to challenge the legality of the transfer order.

The referring courts asked in essence whether "the second paragraph of Article 6 of Regulation no 343/2003 must be interpreted as meaning that, where an unaccompanied minor with no member of his family legally present in the territory of a Member State has lodged asylum applications in more than one Member State, the Member State to be designed the 'Member State responsible is that with 'his most recent asylum application there' (para 42). The ECJ assuming that the European Union legislature had intended to designate, the 'first Member State' as responsible, then, according to the ECJ this should have been formulated in the text (para 52); since the focus is on unaccompanied minors, and in the light of the main aim of the Regulation, to guarantee effective assessment of the applicant's refugee status (para 54) it is important to act swiftly to determine the Member State responsible. Therefore unaccompanied minors should not be transferred to another Member State (para 55). According to the ECJ the "second paragraph of Article 6 Regulation no 343/2003, expressly mentions , 'the best interest of the minor' in the first paragraph of Article 6 of the Dublin II Regulation, the effect of Article 24 para 2 of the Charter, in conjunction with Article 51 para 1 Charter thereof, is that the 'child's best interest' must also be a primary consideration in all decisions adopted by the Member States on the basis of the second paragraph (para 59). The ECJ argues that "this taking into account of the child's best interests requires, in principle, that, in circumstance such as those relating to the situation of the appellants in the main proceedings, the second paragraph be interpreted as designating as responsible the Member State in which the minor is present after having lodged an application there." Furthermore the ECJ argues that it is "in the interest of unaccompanied minors, not to prolong unnecessarily the procedure for determining the Member State responsible, and to ensure that unaccompanied minors have prompt access to the procedures for determining refugee

[52]European Court of Justice, C-648/11, 6 June 2013.

status" (para 61). This view differs from that of the Advocate General in this case[53] who stated that the minors' best interest must also be decisive in order to decide which Member State, of all those that have received an asylum application is the Member State responsible, "(para 64) and it continues that "the minor's best interest must constitute the basis for interpreting Regulation No 343/2003 (Dublin II Regulation) and, consequently, where a number of different applications for asylum overlap, this should in principle be resolved in favor of the most recent application, assuming that this enables the minor's best interest to be established more effectively"(para 67). It decides that "the Member State responsible for determining the application for asylum pursuant to the second paragraph of Article 6 of the Regulation must, in principle, have regard to the minor's best interests, and unless those interest require otherwise, be the Member State where the most recent application has been lodged "(para 80). In fact, the Advocate General is a proponent of doing research into the child best interest, assuming that the Member State where the application has been lodged, principally could be the Member State guaranteeing the child's best interest.

12. Solidarity principle

The expected legal improvement of the Dublin III Regulation, - the mechanism of allocating responsibilities to examine asylum applications in the European Union - is not working well. It is said that the Dublin system appears to be highly ineffective since "it fails to prevent so-called 'asylum shopping' and multiple application". On the contrary, it is thought that asylum seekers are encouraged by the system. If the criterion of illegal entry is the main one used, it should be" in asylum seekers' interest to attempt to evade detection in their country of first entry" [54] A comment of the European Parliament says that the Dublin system is leading to serious human rights violations. "Asylum seekers who enter the European Union primarily through Greece are either detained there or force to live in the streets for lack of accommodation. Even families with children receive no social support, and gaining access to the asylum procedure with subsequent guarantee of protection is generally out of the question. "[55]This serious criticism of the ECAS regards the solidarity principle set out in Article 80 TFEU: "the European Union and the EU Member States are bound by the principle of sincere cooperation and sharing responsibility including its financial implications, between the Member States." The ECJ has developed this principle in its jurisprudence, [56] and as a consequence the EU Member States have the responsibility of sharing solidarity according to Article 80 TFEU and to deal with EU policies in the field of asylum. How compliance with Article 8o TFEU can be ensured in asylum cases, is dependent on the concrete questions where Member

[53]Opinion of Advocate General of 21 February 2013, in the case of C-648/11, MA and others versus Secretary of State.

[54]Richard Williams, "Beyond Dublin". A discussion Paper for the Greens/EFA in the European Parliament, 18 March 2015, p. 9.

[55]Memorandum Allocation of refugees in the European Union: for an equitable, solidarity -based system of sharing responsibility", o.w., p. 3.

[56]NS-case, see note 24.

States have to deal with. They can range from financial problems to practical assistance in reaching EU standards regarding providing minimum protection, regarding procedural guarantees, reception conditions, eligibility for international protection, temporary protection and shaping the internal and external dimension of EU's asylum system.[57]

At thisvery moment, thousands of asylum seeker are traveling by boat throughout the Mediterranean. The urgency of the situation was obvious in the European Council statement of 23 April 2015[58] and from the European Parliament Resolution[59] expressing the desire to take rapid action in the area to save lives in accordance with the Common European Asylum System. Member States of the EU are facing an influx of high numbers of asylum seekers, putting enormous pressure on the EU Member States receiving and hosting them. Expectations are that the massive flow of people to frontline Member States will continue in the near future. In order to deal with the situation in the Mediterranean, the Commission has proposed to trigger the emergency response system which is envisaged under Article 78 para 3 TFEU. The idea of the proposal is that there will be a temporary distribution scheme for asylum seekers in order to have all EU Member States participate in the process of providing asylum and to share the financial burden of the reception between all EU Member States. In its Communication on a European agenda on Migration of May 2015, the European Commission announced a "redistribution key based on criteria such as GDP, size of population, unemployment rate and past numbers of asylum seekers of resettled refugees."[60]

All in all the coherent implementation of the Common European Asylum System needs to be ensured by the CEAS. According to the Migration Report of the European Commission, "this will be supported by a new systematic monitoring process, to look into the implementation and application of the asylum rules and foster mutual trust. In addition, the European Commission will improve standards on reception conditions and asylum procedures to provide Member States with well-defined and simple quality indicators, and reinforcing protection of the fundamental rights of asylum-seekers, paying particular attention to the needs of vulnerable groups, such as children."[61] A strong European common asylum policy will require prioritizing of transposition and implementation of asylum legislation and practical cooperation regarding the basis of national decisions on asylum. Moreover, a better approach to abuses of asylum request should be developed.

[57]European Council on Refugees and Exiles (2013), " Enhancing intra-EU solidarity tools to improve quality and fundamental rights protection in the common European Asylum system", p. 15

[58]European Council, 23 April 2015, for the statement see:
http://www.consilium.europa.eu/en/presss/pressreleases/2015/04/23-special-euro-statement/.

[59]European Parliament, Resolution, see:
http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2015/ 2660(RSP).

[60]European Commission, 14 May 2015, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. "A European Agenda on Migration", COM (2015) 240 final, p. 4.

[61]See: A European Migration agenda 2015, p. 12 where is stated that the Commission will develop a comprehensive strategy to follow up on the Action Plan on Unaccompanied Minors (2011- 2014) to cover missing and unaccompanied children.

The European Asylum Support Office (EASO) could be given the task to help national authorities to establish a network of national Dublin Unit as well as the implementation of the Fingerprint Regulation of June 2013[62] on taking migrants' fingerprints.

13. Conclusion

The introduction of the Dublin II Regulation in 2003 gave impetus to a European asylum system from the perspective of the European Union Member States. This in the sense that the application of an asylum seeker had to be be carried out by the Member State to which the responsibility thereof was allocated according to the criteria in the Dublin II Regulation. The clarity of the criteria for the EU Member States ensured for the applicant the carrying out of the application, without any fundamental rights guarantees involved except and in so far the ECHR would be applicable. Since nothing was regulated on the infringement of the ECHR by a Member State with the result of suspension of the Dublin II rules, it was the ECtHR that determined the existence of an infringement of fundamental rights of an asylum seeker in Greece and in Belgium according to the applicable Dublin II Regulation in the M.M.S. versus Greece/Belgium case. Here it decided to suspend the application of this Regulation on grounds of violation of human rights. The ECJ in the cases of NS and Puid, drew inspiration from the M.M.S. case decision and underlined the applicability of the European Charter of Human Rights in EU asylum cases, not explicitly stating in which circumstances the provisions of the Charter would have been violated. In the Abdullahi case however, the ECJ, referring to the ECtHR and to the sovereignty and humanitarian clauses in the Dublin II Regulation, stated that if the "irregular entry" criterion was applicable to the applicant, the transfer of the applicant to another Member State could be challenged according to the grounds set out in the NS judgment. In fact, in the Abdullahi case the ECJ completed the system for the asylum seeker, taking the point of view that the right to ask for asylum in a safe country, the ECJ stating that the asylum seeker needs to have encountered human rights violations in the Member State assigned by the Regulation as the responsible state. In this case the ECJ affirmed the applicability of the Dublin system. The NS judgment is reflected in Article 3 para 2 of the Dublin III Regulation: "if it is impossible to transfer an applicant to the Member State primarily designed as responsible, because of possible violation of Article 4 of the Charter, the determining Member State shall continue to examine what Member State should be indicated as responsible."

Looking at the case law of both courts, we see the courts seeking for justifiable decisions along the lines of the Dublin system and with regard to due human rights protection for the asylum seeker. The clear visibility of the shortcomings of the Dublin II Regulation should have led to a legal framework for the asylum seeker in Dublin III Regulation embedded in a European system of minimum protection of human values. That has not happened. Dublin III remains with the criterion of the Dublin II system and does not provide the asylum seeker with the right to neglect a Member State that is known for its

[62]Regulation (EU) No 603/2013 of 26 June 2013 on the establishment of Eurodac (recast). See: note 34 in A European Migration agenda 2015 where is stated that "The United Kingdom and Ireland have "opted-in" to this Regulation. Denmark participates in the Eurodac system through a separate international agreement it has concluded with the EU in 2006"..

infringement of human rights for asylum seekers. If the ECJ would have decided so in Abdullahi, the effects of this judgment would have been limited by the Dublin III Regulation that supersedes Dublin II Regulation. It is obvious that the European legislator has failed to take initiative in giving a radical turn to the asylum system. Although the position of minor asylum seekers was given attention in Dublin III Regulation on the topic of the 'best interest of the minor', it is disappointing that the European lawmaker has failed in providing assistance in clear definition and formulation of the concept of 'the best interest of the minor'. It will be the task of the ECJ, in judging on the position of children and minors as set out in Article 6 Dublin III Regulation, to decide on the 'best interest of the child' in asylum proceedings. If the ECJ decides on the subject, it has to take into account family reunification, family situations and the views of the minors in asylum cases. We can expect new cases to arise on the Dublin III Regulation before both courts. It is clear that improvement in the application of the Dublin III Regulation alone will not provide harmonized standards of human rights protection. It is also obvious that the European Union lacks the provision of a clear remedy for the applicant who neglects the Dublin II system for asylum seekers. More needs to be done to create a uniform asylum system with human rights protection. The Dublin system can be seen as a cornerstone in the construction of the European Asylum System. An alternative system which is based on the principle of solidarity according to Article 80 TFEU, ensures genuine responsibility from the EU Member States and could lead to an improved solution for the Common European Asylum System.