

The Dublin Regulation and Mutual Trust: Judicial Coherence in EU Asylum Law?

Implementation of Case-Law of the CJEU and the ECtHR by National Courts

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Abstract

In 2011, the ECtHR and the CJEU put an end to blind trust as basis for the ‘Dublin mechanism’ including criteria to determine the responsible Member State for an asylum application. In this contribution, we question whether these decisions, also taking into account the Opinion 2/13 of the CJEU on the accession of the EU to the ECHR, provide clear guidelines for national courts with regard to the rebuttal of proof when fundamental rights are at stake. An analysis of decisions of the highest administrative courts of five countries establish that generally these courts allow rebuttal of trust assessing transfer decisions and that with regard to the burden of proof of ‘vulnerable persons’, they apply stricter rules to the state. The differentiated approach with regard to the content of the burden of proof and the obligations for asylum seekers to provide information on ‘systemic deficiencies’ in the other Member State remains however problematic.

I Introduction

The Dublin Regulation (Regulation 343/2003, replaced by Regulation 604/2013) is part of the Common European Asylum System and includes the criteria to determine which Member State, participating in this Dublin mechanism, is responsible for an asylum application.¹ Generally, only the responsible Member State has the obligation to examine the application. If a third country national applies for asylum in another Member State, the latter can transfer him or her to this responsible state. The Dublin system has been developed in order to identify as soon as possible the state responsible for the asylum application, but also to prevent multiple asylum applications. Responsibility is determined on the basis of criteria, which apply in the order in which they are listed. The Dublin Regulation first mentions and thus gives priority to the protection of minors and the unification of family members of asylum

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¹ ‘Dublin III’ or Regulation 604/2013 entered into force on 19 July 2013, *OJEU* L180, 29.06.2013. The ‘Dublin mechanism’ is applied by the 28 EU Member States and four associated non-EU States (Norway, Iceland, Liechtenstein and Switzerland).

seekers and refugees. However, these criteria are rarely applied. In practice, a criterion lower in the 'Dublin hierarchy' plays the most important role: the state where a person entered the EU is responsible.²

The arrival of many migrants in the Mediterranean area and the death of stowed-away persons at the internal borders of the EU put the functioning and legitimacy of 'Dublin' as described above to the test.³ It shows that in such circumstances the Dublin mechanism fails as an allocation scheme to deal with the processing of asylum applications. The practice in many cases, in which the state where the migrant arrived is held responsible for the asylum application, puts a burden on coastal states which is disproportional in many respects. As result, in these states reception facilities become inadequate and the asylum procedure inaccessible, which in turn leads to asylum seekers trying to travel through these EU-states 'illegally'. In this article, an alternative for Dublin will not be proposed.⁴ This is not because we do not think that the system is dysfunctional, where in practice the registration, rather than the personal situation of the asylum seeker determines where he or she is to stay during the asylum procedure. It however is considered that the underlying principles of Dublin mentioned above are still valid. These principles are to ensure that each asylum application is dealt with by one of the Member States in accordance with the EU asylum laws, and that, when determining the responsible state, the interests of minors and family unity receive priority.

The question is however, whether these principles are sufficiently taken into account in practice and whether recent case-law of the European Courts provides clear guidelines to ensure 'judicial coherence' or a harmonized approach at the national level. Therefore, our contribution takes the reader to the level of the judiciary, confronted with the decisions of states to transfer an asylum seeker to another Member State held responsible for the asylum application in accordance with the Dublin rules. In 2011, both the European Court for Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) dealt with the meaning of mutual trust when applying Dublin.⁵ One of the central questions raised in both judgements was whether and when EU Member States are obliged to refrain from the transfer of an asylum seeker to another Member State. Both European courts made clear that an absolute presumption of trust is unlawful when this would jeopardise the protection of the

² Article 13 of Regulation 604/2013.

³ We refer to the 71 persons who died in a truck found at the Hungarian-Austrian border in August 2015, www.theguardian.com/world/2015/aug/28/more-than-70-dead-austria-migrant-truck-tragedy.

⁴ This is proposed by Elspeth Guild, Cathryn Costello, Madeline Garlick and Violeta Moreno-Lax, in: *Enhancing the Common European Asylum System and Alternatives to Dublin*, CEPS Paper No. 83/September 2015.

⁵ ECtHR *M.S.S. v. Belgium and Greece*, 21 January 2011, appl.no. 30696/09 and CJEU *NS v. Secretary of State for the Home Department*, C-411/10, 21 December 2011.

fundamental rights of the applicant. Accordingly, they ruled that in certain circumstances the normally applying mutual trust must be considered as rebutted. Both judgements have been welcomed by commentators as putting an ‘end to blind trust’.⁶ The aim of this contribution is to establish what exactly the European Court of Human Rights and the Court of Justice of European Union have ruled on the rebuttal of trust and on the burden of proof in *M.S.S. and NS v. SSHD*, and furthermore to establish which criteria national courts have used since then to decide when trust must be considered as rebutted and where the burden of proof lies. In other words, we will not only investigate the existence of ‘judicial coherence’ at the national level, but also between the ECtHR and the CJEU, when dealing with the principle of mutual trust with regard to the implementation of the Dublin Regulation. For this purpose, we explore which criteria have been applied with regard to the burden of proof by national courts and by which factors differences between jurisdictions may be explained. By analysing case-law of the Netherlands, Germany, United Kingdom, France, and Austria we try to answer when or on the basis of which criteria national courts, firstly, place the burden of proof as regards the asylum procedures or reception conditions in the other Member States on the national authorities and, secondly, consider the presumption of trust as rebutted.

In the following paragraphs, we first analyse the aforementioned case-law of the ECtHR and CJEU on the meaning of rebuttal of trust, also taking into account the 2014 judgement of the ECtHR in *Tarakhel* and the controversial Opinion 2/13 of the CJEU. We will briefly describe the content of the new Dublin Regulation 604/2013 in which the criteria of the 2011 judgement of the CJEU have been incorporated. In the second part, we will analyse case-law published since 20 January 2011 (date of the ECtHR *M.S.S.* judgement) until mid-2015 in the aforementioned Member States. We will limit our research in the first place to case-law of the highest administrative courts, but where relevant for our analysis, we will include judgements of lower or other courts (for example the Constitutional Court in Germany). The selected Member States in general receive many asylum applications of persons who entered the EU via other Member States. Furthermore, the choice of countries is based on the fact that whereas in Germany, France and the Netherlands, where Dublin claims are dealt with by general administrative courts, in Austria and the UK specialised courts have been established to deal with immigration law cases, which triggers the question of whether the assessment of these cases are different in these

⁶ See Cathryn Costello, Dublin-case NS/ME: ‘Finally, an end to blind trust across the EU?’, *A&MR* 2012 Nr. 02, p. 83-92; Violeta Moreno-Lax, ‘Dismantling the Dublin System: M.S.S. v. Belgium and Greece’, *European Journal of Migration and Law* 14 (2012) 1-31; and in reaction to the opinion of the AG in the Case *NS v. SSHD*: Steve Peers, *Court of Justice: The NS and ME Opinions – The Death of ‘Mutual Trust’?*, Statewatch opinion no. 148.

countries. Lastly, the choice is based on a more practical reason, which is that the authors are able to read the judgements of these countries.

2 Dublin and the Story of Mutual Trust

2.1 2011: End of Blind Trust. *M.S.S. v. Belgium and Greece* (ECrHR) and *NS v. SSHD* (CJEU)

In what may be considered as landmark cases, in 2011 both the ECrHR and the CJEU dealt with the application of mutual trust within the framework of the Dublin II Regulation (Regulation 343/2003). In earlier cases, the ECrHR declared claims against Dublin transfers inadmissible, because (in brief) as the responsible states were party to the ECHR, the rights of the asylum applicant were considered to be protected in that country as well.⁷ In *M.S.S. v. Belgium and Greece*, the ECrHR for the first time decided that this ‘trust’ is not always justified. The *M.S.S.* case concerned an Afghan asylum seeker transferred by Belgium to Greece. Both Belgium and Greece were found to have violated the rights under Article 3 and 13 ECHR. With regard to the claim against Greece, the ECrHR found a violation of Article 3 ECHR because of the poor living and detention conditions of asylum seekers and of Article 3 in conjunction with Article 13 because of deficiencies in the asylum procedures and the risk the applicant faced of being returned directly or indirectly to Afghanistan without any serious examination of the merits of his asylum application and without access to an effective remedy.⁸

More relevant for our subject is the condemnation of Belgium for violation of Article 3 and 13 ECHR. According to the Strasbourg Court, at the time of the applicant’s transfer to Greece the Belgian authorities ‘knew or ought to have known that he had no guarantee his asylum application would be seriously examined by the Greek authorities’, and ‘it was in fact up to the Belgian authorities ... not merely to assume that the applicant would be treated in conformity with the Convention standards but, on the contrary, to first verify how the Greek authorities applied their legislation on asylum in practice.’⁹ In contrast to earlier decisions in similar cases, the ECrHR now concludes that in such circumstances, even the safety net of international law, such as the possibility to appeal under Article 34 ECHR and to request for an interim measure on the

⁷ See its previous rulings ECrHR, 7 March 2000, *T.I. v. United Kingdom*, Decision as to the admissibility of the claim no. 43844/98. ECrHR, 2 December 2008, *K.R.S. v. United Kingdom*, Decision as to the admissibility of the claim no. 32733/08.

⁸ *M.S.S. v. Belgium and Greece*, para. 321.

⁹ *M.S.S.* para. 358.

basis of Rule 39 of the Rules of Court, did not provide adequate protection.¹⁰ The ECtHR specifically criticised the systematic application by the Belgian Aliens Office of the Dublin Regulation for transferring asylum seekers to Greece, ‘without so much as considering the possibility of making an exception.’¹¹

In *NS v. SSHD*, the CJEU answered preliminary questions of UK and Irish courts dealing with transfers of Afghan asylum seekers to Greece under the Dublin Regulation. One of the questions was whether the discretionary power in Article 3(2) of the Dublin Regulation, allowing a Member State to assume responsibility and examine a claim even though the Dublin criteria does not require so, could turn into an obligation under certain circumstances. This question was answered in the affirmative by the CJEU: if necessary to protect the fundamental rights of the applicant, a Member State must itself examine the application in accordance with the so-called ‘sovereignty clause’ in Article 3 (2) of the Dublin Regulation.¹² Following the reasoning of the ECtHR in *M.S.S.*, the CJEU stated that the mere ratification of conventions by a Member State cannot result in the application of a conclusive presumption that the applicant’s fundamental rights will be observed, even if: ‘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.’¹³ The CJEU concluded that the non-refoulement principle, also protected in Article 4 of the EU Charter on Fundamental Rights, prohibits Member States to transfer asylum seekers to another Member State where ‘they cannot be unaware that systemic deficiencies in the asylum procedures and in the reception conditions of asylum seekers’ amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter’.¹⁴ In these circumstances, the discretionary power of Article 3 (2) of the Dublin Regulation becomes, according to the CJEU, an obligatory power.

The conclusions in the *M.S.S. v. Belgium and Greece* and the *NS v. SSHD* judgement did not alter the general rule that the burden of proof lies with the asylum seeker. As the ECtHR stated earlier, it is in principle for the applicant ‘to adduce evidence capable of proving that there are substantial grounds’ for believing he or she, when expelled will be exposed to a real risk of being subjec-

¹⁰ See the analysis of Hemme Battjes in Hemme Battjes, Evelien Brouwer, Paulien de Morree & Jannemieke Ouwerkerk, *The Principle of Mutual Trust in European Asylum, Migration and Criminal Law. Reconciling Trust and Fundamental Rights* (Utrecht: Forum Institute for Multicultural Affairs 2011), p. 9-18.

¹¹ *M.S.S.* para. 352.

¹² *NS v. SSHD* para. 98 and 108.

¹³ *NS v. SSHD* para. 75.

¹⁴ *NS v. SSHD* para. 94. See also para. 106

ted to treatment contrary to Article 3 ECHR, and ‘where such evidence is adduced, it is for the Government to dispel any doubts about it’.¹⁵ However, in particular circumstances, a more active role is required of the national authorities with regard to the burden of proof even if the asylum seeker does not provide any evidence. First, general information may trigger this more active role of the transferring state. In *M.S.S.*, the ECtHR explicitly rejected the claim by the Belgian government that the asylum seeker did not state reasons against his transferal to Greece: as the general situation was known to the Belgian authorities, it was the task of the Belgian authorities to verify how the Greek authorities applied their asylum law in practice and the applicant should not be expected ‘to bear the entire burden of proof’.¹⁶ The Luxembourg and Strasbourg Courts mentioned a similar criterion, albeit differently phrased. Whereas the CJEU used the notion ‘where they cannot be unaware’ of systemic deficiencies in the asylum procedure and in the reception conditions in the second Member State, the ECtHR considered that with regard to the situation in Greece, the Belgian authorities ‘knew or ought to have known’ that the asylum seekers application would not be seriously examined by the Greek authorities. Second, national procedures, as we will explain below, should make it possible for the applicant to submit evidence during his or her application. Therefore, one could argue that where national law or practices do not provide sufficient guarantees for the applicant to submit evidence for the rebuttal of trust, a more active role can be expected from the administration.

Both judgements underlined the necessity of the availability of procedural guarantees for asylum seekers to submit evidence against his or her transfer to another Dublin state. According to the ECtHR in *M.S.S.*, states must ‘make sure that the intermediary country’s asylum procedure affords sufficient guarantees to avoid an asylum seeker being removed, directly or indirectly, to his country of origin without any evaluation of the risks he faces from the standpoint of Article 3 of the Convention’.¹⁷ The procedure followed by the Belgian Aliens Office left no possibility for the applicant to state the reasons militating against his transfer to Greece, also because the form the Aliens Office filled in contained no section for such comments.¹⁸ Dealing with the claim based on Article 13 in conjunction with Article 3 ECHR, the ECtHR also referred to the problems inherent to the ‘extremely urgent procedures’ as applied in Belgium with regard to the Dublin transfer to Greece. According to the ECtHR the examination of the Article 3 ECHR complaints by the Aliens Appeal Board was not thorough, the examination being limited ‘to verifying whether the persons concerned had

¹⁵ ECtHR *N. v. Finland*, 26 July 2005, appl. no. 38885/02, para. 167; *Saadi v. Italy*, 28 February 2008, appl.no. 37201/06, para. 129.

¹⁶ See *M.S.S. v. Belgium and Greece*, paras 346, 352 and 359.

¹⁷ Para. 342.

¹⁸ Para 351.

produced concrete proof of the irreparable nature of the damage that might result from the alleged potential violation of Article 3, thereby increasing the burden of proof to such an extent as to hinder the examination on the merits of the alleged risk of a violation.’ Furthermore, the ECtHR found that ‘even if the individuals concerned did attempt to add more material to their files along these lines after their interviews with the Aliens Office, the Aliens Appeals Board did not always take that material into account. The persons concerned were thus prevented from establishing the arguable nature of their complaints under Article 3 of the Convention.¹⁹

The CJEU in *NS v. SSHD* referred, as we saw above, only in general terms to systemic deficiencies in the asylum procedure. It furthermore remarked (when addressing the question of what a Member State should do once it had found that Article 4 of the Charter prohibits transfer) that Member States should not ‘worsen a situation where the fundamental rights of that applicant have been infringed’, for example by using a procedure determining the responsible state ‘which takes an unreasonable length of time’.²⁰ Despite this emphasis on speedy procedures to protect the human rights of the asylum seeker, the CJEU issued in 2013 quite a remarkable judgement with regard to the scope of these procedural rights. In *Abdullahi v. Bundesasylamt*, it provided a narrow definition of the right to appeal against a decision to transfer an asylum seeker to another Member State as included in Article 19 of the Dublin II Regulation.²¹ While emphasising the principle of interstate trust, the CJEU ruled that if a second state had accepted responsibility on the grounds that the asylum seeker entered the Union over its territory, the asylum seeker can appeal against the choice for this criterion only if the asylum reception and procedure in the second state show systemic deficiencies as meant in *NS v. SSHD*. CJEU did not answer the key issue of the preliminary questions of the national court, namely on how in a particular case the Dublin criteria had to be applied and whether the Dublin Regulation provides a subjective right of appeal against incorrect application of the Dublin criteria. Furthermore, the CJEU ignored the conclusions of AG Cruz Villálón emphasising the importance of a correct application of the Dublin criteria to protect fundamental rights of asylum seekers and affirming a subjective right to appeal.²²

To sum up, it can be questioned whether the judgements of the ECtHR and the CJEU provided clear criteria for national courts to assess in which specific situations a transfer to another Member State under the Dublin Regulation must be considered unlawful: Firstly, when Member States are to verify

¹⁹ Para. 389.

²⁰ *NS v. SSHD* para. 108.

²¹ *Abdullahi v. Bundesasylamt*, C-394/12, 10 December 2013, see critical annotation E.R. Brouwer *JV* 2014/32.

²² Conclusions AG Cruz-Villálón in C-394/12 of 13 July 2013.

the reception conditions or asylum procedures in another Member State, the criteria from the ECtHR, ‘where they cannot be unaware’, and ‘knew or ought to have known’, do not seem to be very functional. Secondly, the CJEU, by using the requirement of ‘systemic deficiencies’, developed a high threshold to rebut trust.²³ As we will see *infra* 2.5, the CJEU emphasised even more the predominance of mutual trust in its Opinion 2/13 of December 2014.

2.2 Follow up to *NS v. SSHD*: Amendments in the Dublin III Regulation

In 2013, the Dublin II Regulation has been replaced by the ‘Dublin III Regulation’ or Regulation 604/2013 that applies to all asylum applications lodged after 1 January 2014. In general, this new Regulation includes more obligations for Member States to protect the position of children while deciding on a Dublin transfer. Furthermore, in the new Regulation, the conclusions of the CJEU in the *NS v. SSHD* judgement of 2011 have been incorporated. According to Article 3(2), the determining state is in principle responsible for an asylum application if the asylum seeker cannot be transferred to another Member State because of ‘substantial grounds for believing that there are systemic flaws in the asylum procedure and the reception conditions’ in that Member States resulting in a risk of inhuman and degrading treatment as understood in Article 4 of the EU Charter.²⁴ Somewhat implicitly the clause thus prohibits transfer if that would amount to a breach of Article 4 of the Charter. Further, the Dublin III Regulation retained a general sovereignty clause (in Article 17 (1)) according to which a Member State has discretionary power to take the responsibility for an asylum application, despite the applicable rules on allocation.

The new provision on legal remedies in Article 27 of the Dublin III Regulation obliges Member States to allow for suspensive effect of the right to appeal against or review of a transfer decision. Member States may decide whether this suspensive effect follows automatically once an appeal or review has been lodged against a transfer decision, or whether the asylum seeker has to request a tribunal or court to suspend the implementation of the transfer decision pending the outcome of the procedure.

²³ See Costello (2012), p. 89.

²⁴ It is also possible that the determining state, applying the Dublin allocation criteria, finds that another Member State is responsible for the asylum application: in that case the person may be transferred to that Member State.

2.3 A New Criterion of the ECtHR? *Tarakhel v. Switzerland* and Individual Guarantees

The ‘systemic breaches’ requirement, developed by the CJEU in the *NS v. SSHD* judgement and incorporated into the Dublin III Regulation, has been criticised by several authors not only as being too high a threshold for rebutting trust, but also because of the lack of precise standards on the basis of which national courts must consider trust as rebutted.²⁵ In a number of cases on Dublin transfers, the ECtHR seemed to endorse the approach taken by the CJEU as it also applied a requirement of ‘systemic failure’.²⁶ However, in 2014, the case *Tarakhel v. Switzerland*, concerning the transfer of an Afghan family with minor children to Italy, the ECtHR rejected the ‘systemic breaches’ test as an additional requirement for finding a violation of Article 3 ECHR.²⁷ In this judgment, the ECtHR emphasised that in all expulsion cases, the test is real risk of ill-treatment and in this particular case, an assessment of the individual circumstances was required. Even if the overall situation in the other Dublin state (in this case Italy) does not warrant a general prohibition on Dublin transfers (as was the case with Greece after *M.S.S.*), reception conditions might still amount to a violation of Article 3 ECHR for particular categories of asylum seekers.²⁸ The ECtHR thus held that a more individualised test is needed to establish the risk of violation of Article 3 ECHR for the asylum seeker when deported to another Member State. In the *Tarakhel* judgement, the ECtHR decided that prior to the transfer the Swiss government should have requested and obtained guarantees from the Italian authorities with regard to the adequacy of reception conditions for children and to the unity of the family.²⁹ To support its conclusions, the ECtHR elaborately cites an earlier judgement of the UK Supreme Court in which the high threshold of proof of the *NS v. SSHD* ruling had been rejected (see infra 3.3).³⁰ Endorsing the national court’s explicit dismissal of an additional ‘systemic breaches-test’, the ECtHR seems to have

²⁵ See above, the authors mentioned in fn. 4 and Evelien Brouwer, Mutual Trust and the Dublin Regulation: Protection of Fundamental Rights in the EU and the Burden of Proof, *Utrecht Law Review* Vol. 9, Issue 1 January 2013. p. 135-147.

²⁶ E.g. ECtHR 2 April 2013, *Mohammed Hussein a.o. v. the Netherlands and Italy*, ECLI:CE:ECHR:2013:0402DEC002772510, para. 78; ECtHR 13 June 2013 *Halimi v. Austria and Italy*, ECLI:CE:ECHR:2013:0618DEC005385211, para. 68 and ECtHR 10 September 2013, *Nuur Hussein Diirshi v. the Netherlands and Italy*, ECLI:CE:ECHR:2013:0910DEC000231410, para. 138.

²⁷ ECtHR 4 November 2014, *Tarakhel v. Switzerland*, appl.no. 29217/12. See annotation H. Battjes in *JV* 2014/384.

²⁸ Para. 100-105.

²⁹ Para. 120-122.

³⁰ Judgement of 19 February 2014, *EM (Eritrea) v. Secretary of State of the Home Department* (2014) UKSC 12.

emphasised its own interpretative hegemony with regard to the non refoulement principle in Article 3 ECHR.³¹

2.4 The CJEU Strikes Back? Opinion 2/13 and the Supremacy of Mutual Trust

In its Opinion 2/13, published in December 2014, the CJEU rejected the proposed accession agreement of the EU to the ECHR.³² Although this Opinion did not address the Dublin Regulation as such, nor other aspects of EU migration policy in general, the CJEU made some far-reaching statements with regard to the meaning of mutual trust relevant to the subject. The CJEU concluded that the draft agreement is incompatible with EU law, amongst other reasons, because it does not provide clear rules on the relationship between the EU Charter on Fundamental Rights and possible higher standards of Member States and the ECHR. It also found that the co-respondent mechanism before the ECtHR as provided in the draft-agreement would give the ECtHR the power to interpret EU law, when assessing requests by Member States to apply this procedure. In this opinion, the CJEU explicitly referred to the fundamental importance of mutual trust between Member States in the Area of Freedom, Security and Justice, in line with previous case-law in which it held mutual trust as the 'raison d'être' of the European Union.³³ According to the CJEU, one of the possible consequences of the accession agreement (and therefore one of the reasons to reject this treaty), would be that it requires a Member State 'to check that another Member State has observed fundamental rights, even though EU law imposes an obligation of mutual trust between those Member States'. This would, in the words of the CJEU, 'upset the underlying balance of the EU and undermine the autonomy of the EU'.³⁴ Therefore, according to the CJEU, national authorities (including courts) would have a limited role to assess the level of protection of fundamental rights in other Member States. Furthermore, the CJEU seeks to guarantee its exclusive com-

³¹ See also Cathryn Costello & Minos Mouzourakis, 'Reflections on Tarakhel: Is "How Bad is Bad Enough" Good Enough?' *Asiel&Migratierecht* 2014, Nr. 10, p. 404-411, see p. 408.

³² Opinion 2/13 of the CJEU, 18 December 2014.

³³ CJEU 22 December 2010 C-491/10 PPU (*Aguirre Zarraga*); CJEU 30 May 2013, C-168/13 PPU (*Jeremy*); CJEU 26 Februari 2013, C-399/11 (*Melloni*). See for an analysis of this (and other) case-law, V. Mitsilegas, 'The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual', *Yearbook of European Law*, vol. 31, no 1, (2012).

³⁴ Para. 191-195 of the opinion.

petence with regard to the application of EU law and the interpretation of the Charter of Fundamental Rights.³⁵

The reason this interpretation may be considered problematic, not to say dangerous, is that with its emphasis on mutual trust, the CJEU neglects one of the pillars of the legitimacy of the European legal order, which is the protection of human rights. As provided in the EU Charter on Fundamental Rights, and recognised many times by the CJEU itself, the level of this protection should not go below the protection as provided by the ECHR, and its interpretation by the ECtHR.³⁶ In different judgements, the ECtHR established that it is not blind to the inherent goals of EU instruments and the importance of mutual recognition.³⁷ The reason for this ‘competitive’ signal of the CJEU in Opinion 2/13 is not only difficult to understand, but seems also to be a wrong signal to Member States and an example of ‘distrust’ in their ability to cope with the fact that EU law is based on the protection of fundamental rights.³⁸

3 Case Law of Selected Member States

3.1 The Netherlands

Before *M.S.S.*, the highest Dutch administrative court on migration law cases, the Council of State, used to confirm the deputy minister’s policy rules (for the most part based on its own jurisprudence) on the possibility to assume responsibility on the grounds that transfer would be at odds with Article 3 ECHR. These policy rules stated that:

‘on the basis of the principle of mutual trust, Member States of the EU are assumed to comply with their obligations from the Refugee Convention and Article 3 ECHR, unless there are specific indications that the state where to the person concerned will be transferred does not comply with its obligations. [...]

³⁵ See para. 186-189, where the CJEU emphasizes the ‘primacy, unity and effectiveness of EU law’ and also deals with the relationship between Article 53 of the Charter and Article 53 of the ECHR.

³⁶ In accordance with Article 51 (1) of Charter, Member States are bound by the provisions of the Charter only when implementing EU law. The scope of protection of the fundamental rights as included in the Charter may extend, but at the least must be the same of corresponding rights of the ECHR (see Article 52 (3) of the Charter).

³⁷ Evelien Brouwer, ‘Mutual Trust and Judicial Control in the Area of Freedom, Security, and Justice: An Anatomy of Trust’, in: Evelien Brouwer, Damien Gerard (eds), *Mapping Mutual Trust* EU Working Paper 2015 (forthcoming.)

³⁸ See also Adam Lazowski & Ramses A. Wessel, ‘When Caveats Turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR’, 16 *German Law Journal*, No. 1, 2015, p. 179-212.

It is for the asylum seeker to show that in his case, facts or circumstances occur that rebut the presumption of compliance by States party to the Refugee Convention and the ECHR. This is the case if the foreigner shows that in the asylum procedure of the responsible Member State no examination of a breach of the Refugee Convention or Article 3 ECHR will take place³⁹

Thus, the burden of proof was entirely on the asylum seeker. The criterion for rebutting mutual trust was the plausibility that no examination of the request of this particular asylum seeker would take place. Consequently, reports on the general situation in the other Member State were insufficient to rebut the presumption. For example, in a case decided on 9 April 2010, the Council of State dismissed an appeal by a minor based on a report of the Norwegian Organisation for Asylum Seekers (NOAS) on Greece which stated that due to deficiencies in the Greek asylum system, asylum seekers run a real risk of expulsion at odds with Article 3 ECHR. The Council of State stated amongst other things that ‘neither from the report nor from the examples mentioned there it follows that its conclusions are based on experiences by persons transferred on the basis of the Dublin Regulation’.⁴⁰ As a result, before *M.S.S.* the Council of State never ruled that transfer would be at odds with Article 3 ECHR or the Refugee Convention.

After *M.S.S.*, the Council of State revised its position. It observed that detention and living conditions are relevant for the assessment of the compatibility of transfer with Article 3 ECHR. Furthermore,

‘the judgement means that in a situation where information on these aspects has been produced that does not specifically concern the particular foreigner, a Member State wishing to transfer an asylum seeker must ascertain that the laws of the member state whereto the foreigner is being transferred in these respects are being applied in a way that is in accordance with the ECHR.’⁴¹

Thus, the initial burden of proof is still on the asylum seeker in the sense that it is up to him or her to produce a ‘document that may or may not be of a general character’⁴² If this ‘document’ raises ‘serious doubts’ in regard to one of the aspects mentioned in *M.S.S.* (detention, living conditions or procedure), the burden shifts to the state, which then must ‘ascertain’ that the other member state applies its laws in accordance with Article 3 ECHR. The Council of State

³⁹ E.g. ABRvS 26 July 2010, 201002225/1/V3. The translation of this quote as well as other quotes from national case-law is ours, HB and EB.

⁴⁰ ABRvS 9 April 2010, 201001194/1/V3.

⁴¹ ABRvS 14 July 2011, L/JN BR3771.

⁴² *Ibid.*

did not coin a particular criterion for rebutting trust. It did clarify that if it is evident that some report is not relevant, it need not to be taken into account.⁴³ Furthermore, ill-treatment previously suffered in the receiving Dublin state could be relevant.⁴⁴ Meanwhile, in 2011 and the years following, asylum seekers adduced reports allegedly disclosing shortcomings regarding procedure, detention and reception in Italy, but until *Tarakhel* the Council of State did not accept that these reports disclosed the required ‘serious doubts’.⁴⁵ The Council of State found support for this conclusion in the ECtHR judgements following *M.S.S.* (but predating *Tarakhel*).⁴⁶ Thus, an asylum seeker with a medical condition could be transferred as he had not suffered ill-treatment before and as the Dutch authorities would give notice to the Italian authorities in advance.⁴⁷

The Council of State did develop its case-law, though, in two respects. Firstly, it addressed the implications of the CJEU ruling of *Abdullahi* of 2013 in a judgement of 4 September 2014: in appeal, a decision to transfer the asylum seeker cannot dispute application of ‘a criterion’, unless shortcomings related to the system of procedure and reception apply.⁴⁸ It should be observed that in *Abdullahi*, the Court of Justice had merely stated that a decision on the application of Article 10(1) of Regulation 343/2003 on the responsibility for the state where the third country national entered the Union, could not be appealed against. The Council of State applied this finding to all criteria, including, as in the case before it, Article 7 Dublin Regulation II – responsibility for the state where a family member is present. As far as that provision serves to secure observance of human rights, *Abdullahi* was hence interpreted as denying asylum seekers that protection. The Council of State later ruled that the same applies to the recast Dublin Regulation 604/2013; a first instance court referred questions for preliminary ruling on that.⁴⁹

Secondly, it addressed the consequences of *Tarakhel* in a series of judgements. It ruled several times that the decision to transfer a family with minor children to Italy was illegitimate, because previous to the actual transfer, no

43 ABRvS 15 October 2013, ECLI:NL:RVS:2013:1615 concerning Italy; in a similar vein ABRvS 6 May 2013 201206965/1/V4 [LJN: CA012] on a Dublin transfer to Hungary.

44 ABRvS 8 May 2013 201301190/1/V4 [LJN: CA0125].

45 ABRvS 4 January 2012, 201010283/1/V4; ABRvS 5 September 2012, 201201024/1/V4; ABRvS 21 February 2013, 201211925/1/V4; ABRvS 18 March 2013, 201201669/1/V4; ABRvS 19 March 2013, 201204977/1/V4; ABRvS 1 July 2014, ECLI:NL:RVS:2014:2578.

46 ABRvS 26 February 2014 ECLI:NL:RVS:2014:803, referring to *Halimi v. Austria* and Italy and *Husein Diirshi v. The Netherlands and Italy* (see footnote *supra* 28).

47 ABRvS 8 May 2013, 201301190/1/V4 [LJN: CA0125].

48 ABRvS 4 September 2014, ECLI:NL:RVS:2014:3344, repeated in a.o. ABRvS 16 October 2014, ECLI:NL:RVS:2014:3810.

49 Rb. Den Haag zp Den Bosch 2 February 2015, ECLI:NL:RBDHA:2015:1004.

sufficient guarantees had been obtained from the Italian authorities. That did not mean, though, that the transfers could not proceed

‘assuming that the deputy minister will at least 15 days in advance inform the Italian authorities about the actual transfer of the alien and her children, that the Italian authorities will then communicate in which specific accommodation the family will be received and that the deputy minister will not proceed the actual transfer as long as that information has not been received, the Council of State now sees no reason to decide that the deputy minister could not decide that transfer of the alien and her minor children would not lead to a situation at variance with Article 3 ECHR.’⁵⁰

Thus, based on a whole series of ‘assumptions’ about expected behaviour by the Dutch and Italian authorities, the Council allows for the transfer.

The Council of State has applied the same approach to persons in a delicate medical position (without labelling them in so many words as particularly vulnerable):

‘Different from the foreigners in the judgement *Tarakhel*, the foreigner has not shown that without additional guarantees that he will not be able to receive adequate care and reception facilities – neither the evidence the foreigner submitted nor his previous experiences there shows that. Furthermore, the deputy minister has sufficiently guaranteed that the foreigner also after his transfer will receive the facilities he needs, as the deputy minister has in accordance with Article 32 Dublin Regulation sent information about the foreigner’s special needs and explained that he will suspend the actual transfer if the Italian authorities inform him that they cannot meet these needs at the moment.’⁵¹

The Council of State has not deemed the requirement of previous guarantees to be given by the responsible state applicable to cases where no minor children were involved. As regards the Italian procedure, it decided that (despite an International Commission of Jurists (ICJ) report of 2014 stating otherwise) the Italian judiciary can offer sufficient protection against refoulement to the country of origin.⁵² In appeals against Dublin transfers to France, Hungary, Poland, Malta and Cyprus, the Council of State has assessed various aspects of

⁵⁰ ABRvS 20 May 2015, ECLI:NL:RVS:2015:1677.

⁵¹ ABRvS 17 April 2015 ECLI:NL:RVS:2015:1304.

⁵² ABRvS 1 June 2015 ECLI:NL:RVS:2015:2178.

reception and procedure, never finding a ground for the rebuttal of trust.⁵³ This case-law does not add new insights as regards the test applied.

In sum, since *M.S.S.* the presumption of trust still applies to all Dublin states except for Greece, and it is for the foreigner to rebut this assumption. They can do so by relying on either personal previous experiences in the other state, or on general information (or the combination of both). If they do submit those types of evidence the burden of proof then shifts to the authorities: it then falls upon the deputy minister to ascertain whether trust is still warranted. This shift occurs with all evidence if it is not without scrutiny evident that that information cannot lead to rebuttal ('niet op voorhand uitgesloten'). After *Tarakhel*, the Council of State ruled that transfer of families with minor children to Italy is not allowed unless specific guarantees as to adequate reception has been obtained as well as regard to preservation of family unity. However, appeal in cases where the authorities decided to transfer although sufficient guarantees had not yet been obtained have been unsuccessful, as the assumption that the deputy minister would act in accordance with the requirements spelled out by the Council of State is considered as sufficient. Why the Council of State deemed this assumption sufficient it did not explain (it may be added that denial of appeal due to the assumption that some branch of administration will observe the law is, to our knowledge, unique to Dutch law). It should be observed that in these *Tarakhel* cases, the obligation to ascertain whether trust is warranted that lies with the Dutch authorities according to the Council's main rule as we saw above is in effect replaced by reliance on the check by the Italian authorities whether facilities are available and whether they are suitable for minor children. We may further observe that the wide interpretation of *Abdullahi* (no appeal against the refusal of the Dutch authorities to apply the criterion on family unity) by the Council of State also results in supremacy of mutual trust over human rights protection.

3.2 Germany

Before 2011, the Constitutional Court of Germany had decided that as Dublin-transfers to Greece might be unconstitutional, transfers to Greece

⁵³ ABRvS 4 February 2015 ECLI:NL:RVS:2015:411 (France has acknowledged pressure on its reception facilities and taken emergency measures); 24 September 2014, no 201404227/1/V3 (reception by Hungary has its shortcomings, but not to a degree that Article 3 issues arise); ABRvS 2 February 2012, 20111099/1/V4 (procedure and reception system in Malta warrants trust); 23 January 2014, ECLI:NL:RVS:2014:254 (detention in Malta is not so bad that the presumption of trust has been rebutted); 4 April 2014 ECLI:NL:RVS:2014:1278 (the Polish asylum system has its shortcomings but the deputy minister still may have trust in Poland); 6 May 2013 20111757/1/V4 JV 2013/234 (trust in Cyprus has not been rebutted).

had to be suspended.⁵⁴ The Constitutional Court also deliberated on the main question, whether the transfers were indeed in accordance with the German Constitution, but it decided not to issue a ruling⁵⁵ as the Ministry of Internal Affairs announced (three days before the European Court of Human Rights published *M.S.S.*!) that it would not execute transfers to Greece for a year.⁵⁶ In Germany, transfers to Greece have been suspended since the *M.S.S.* judgement. In cases where Greece is found to be the responsible state according to the Dublin criteria, the sovereignty clause has been applied. The sovereignty clause has also been applied in cases where Malta was determined as the responsible state, but only when concerning particularly vulnerable people.⁵⁷

The highest court for administrative law cases in Germany, the Bundesverwaltungsgericht or Federal Administrative Court, gave a quite narrow reading of the implications of the *M.S.S.* judgement of the ECtHR and the Court of Justice ruling in *NS v. SSHD*. In the leading case of 19 March 2014, it emphasised the importance attached to the principle of mutual trust by the Court of Justice and characterised the threshold for rebutting the presumption as ‘high’.⁵⁸ It observed that the ECtHR had found in *M.S.S.* that the Greek procedure and reception indeed showed the required ‘systemic failure’. It furthermore stated that the ECtHR in later case-law ‘explicitly’ had applied the ‘systemic failure’ criterion as well.⁵⁹ It also remarked that in *Abdullahi* the CJEU had ruled that an asylum seeker could not appeal against application of the criterion laid down in Article 10 of Dublin Regulation 343/2003, unless the destination country showed a systemic failure; the recast Dublin Regulation 604/2013 implied the same.⁶⁰

The Federal Administrative Court further dwelled on the nature of the threshold for the asylum seeker to rebut the presumption, set in *NS v. SSHD* by the CJEU:

‘the judge of fact must establish a certainty at the level of conviction [...] that there is a considerable – i.e., a strong – probability [...] that the asylum seeker

⁵⁴ BVerfG 9 September 2009, 2 BvQ 56/09;

⁵⁵ BVerfG Beschluss of 25 January 2011, 2 BvR 2015/09.

⁵⁶ Innenministerium 18 January 2011, AL 4 - 2011/1, available at <http://dublin2.info/files/2011/01/BAMF-Selbsteintritt-GR-18.1.2011.pdf>. This decision has been extended since.

⁵⁷ National Country Report ECRE-AIDA on Germany, May 2014, p. 31.

⁵⁸ BVerwG 19 March 2014, 10 B. 6.14. In a few earlier cases the Bundesverwaltungsgericht did mention the cases *M.S.S.* or *N.S.*, but these cases did not concern the issue of inter state trust. E.g. in 10 B 17.13 it stated that *M.S.S.* was not relevant for expulsion of a third country national to Hungary where he was in the possession of a residence permit.

⁵⁹ BVerwG 19 March 2014, 10 B 6.14, para. 8. It mentioned *Mohammed Hussein v. The Netherlands and Italy*, *Daytbegova v. Austria*, *Halimi v. Austria and Italy*, *Mohammed Hassan v. The Netherlands and Italy* and *Hussein Diirshi v. The Netherlands and Italy*.

⁶⁰ BVerwG 19 March 2014, 10 B 6.14, para. 7.

will be exposed to inhuman or degrading treatment because of systemic deficiencies. [...] focusing the prognosis on systemic deficiencies is founded upon the foreseeability of such deficiencies inasmuch as they are inherent in the legal system of the Member State having responsibility or structurally characterise its enforcement practices.⁶¹

Thus, the standard of proof is the ‘considerable or strong probability’ that the asylum seeker will suffer ill-treatment due to shortcomings in the procedure and the reception system of the receiving state. The Federal Administrative Court did not address explicitly how it could be shown that the presumption no longer applied to Italy – it does not in principle address issues of fact. But as it ruled that in the Higher Administrative Court’s decision under consideration the criteria had been correctly applied, we may assume that the chosen approach was in order. The Higher Administrative Court came to the conclusion that Italy showed no systemic failure on the basis of general country reports submitted by the asylum seeker.⁶² In a ruling a month later the Federal Administrative Court added that there was no need to ask the CJEU for clarification of the term ‘systemic failure’, and in particular not whether alleged shortcomings as regards medical facilities in the Italian reception centres could amount to such a failure.⁶³

A few months later, the Federal Administrative Court again confirmed this interpretation in the strongest possible terms. After a lengthy quote of its judgement of March 19th, 2014, it stated:

‘It is evident from the cited case law of the Court of Justice of the European Union that an asylum seeker can counter a return to the Member State that has responsibility for him or her under the Dublin II Regulation, with regard to inadequate reception conditions for asylum applicants, only by pleading systemic deficiencies in the asylum procedure and reception conditions, and that it is not relevant whether in individual cases, below the threshold of systemic deficiencies, there may be inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights or Article 3 of the European Convention on Human Rights, or whether an applicant has already been exposed to such treatment at one time in the past.’⁶⁴

⁶¹ BVerwG 19 March 2014, 10 B 6.14, para 9; translation provided for by the Court (see www.bverwg.de/entscheidungen/pdf/en/190314B10B6.14.o.pdf).

⁶² OVG Sachsen-Anhalt 13 November 2013, OVG 4 L 44/13.

⁶³ BVerwG 15 April 2014, 10 B 16.14; BVerwG 15 April 2014, 10 B 17.14.

⁶⁴ BVerwG 6 June 2014, 10 B 35.14, para. 6; translation provided for by the Federal Administrative Court, at www.bverwg.de/entscheidungen/pdf/en/060614B10B35.14.o.pdf.

It added that ‘such individual experiences’ could only be taken into account with a ‘limited scope’ to establish whether or not a systemic failure occurred. Consequently, the Federal Administrative Court explicitly accepted a higher risk criterion for Dublin transferals than for other Article 3 ECHR cases, for apparently the real risk of ill-treatment due to special distinguishing features (and not due to a systemic failure) would not be relevant. A systemic failure being absent, the Federal Administrative Court found there was no impediment to transfer the applicant to Italy.

Shortly thereafter, the Federal Administrative Court dealt with a case in which the asylum seeker referred to the conclusion of the Supreme Court judgement in *R v. SSHD* in the UK (see *infra* 3.3) showing that the criterion of systemic failure did not apply.⁶⁵ The Federal Administrative Court stated that the asylum seeker did not take into account its latest rulings, nor the CJEU rulings in *Abdullahi* which confirmed that only in case of systemic failure, Article 4 Charter would block Dublin transfers. Thus, the German court implicitly dismissed the Supreme Court ruling as being incompatible with Union law. In the same case, it furthermore ruled that the start of an infraction procedure against Italy by the European Commission did not lead to a different conclusion. The Federal Administrative Court has not yet ruled on the implications of the ECtHR judgement *Tarakhel*.

Most second tier Higher Administrative Courts (Oberverwaltungsgerichte), following the approach of the Bundesverwaltungsgericht denied that Germany may be required to assume responsibility for asylum seekers due to systemic failures in Italy.⁶⁶ Some first tier courts however decided already, before *Tarakhel*, that the case may be otherwise for families with children.⁶⁷ In September 2014, two months before the ECtHR issued its judgement in *Tarakhel*, the Constitutional Court decided that where the transfer of families with children who are three years of age or less to Italy is concerned, the German authorities must obtain confirmation that family unity will be maintained and that reception facilities are adequate.⁶⁸ The Constitutional Court further clarified that the German authorities must take ‘account’ of the existence (as in this case) of reports by internationally recognised refugee protection organisations or by the ministry of foreign affairs. The Constitutional Court did not discuss either

⁶⁵ BVerwG 14 juli 2014, 1 B 09/14.

⁶⁶ E.g. OVG Niedersachsen 30 January 2014, 4 LA 167/13 OVG Lüneburg 27 May 2014, 2 LA 308/13; OVG Nordrhein-Westfalen 06 May 2014, 9 A 233/13.A.

⁶⁷ VGH Bayern 16 July 2014, 13a ZB 14.50007.

⁶⁸ BVerfG 17 September 2014, 2 BvR 1795/14; this judgement (Urteil) was preceded by an interim measure preventing transfer until the issue was decided (BVerfG 27 May 2015, 2 BvR 3024/14, 2 BvR 177/15 and 2 BvR 601/15).

the judgements of the Bundesverwaltungsgericht or the ‘systemic failure’ requirement. Instead, it related the prohibition on transfer to another branch of case-law: cases where the German courts had decided that transfer would ‘risk’ the health of the foreigner (either because traveling itself or, for example, lack of adequate medical facilities in the receiving state would lead to health damage). In such cases, the authorities must contact the authorities of the receiving state in order to make sure that the required help is available there. It may be observed that the Constitutional Court in no way linked this test to Article 4 Charter or Article 3 ECHR, nor did it couch this subject in terms of the prohibition of *refoulement* under those provisions.

As to the question whether a similar approach is warranted as regards others, the German case-law is divergent. One higher administrative court merely observed that there is no obstacle to the transfer of single young men.⁶⁹ A number of first tier courts however decided that asylum seekers are at risk in reception facilities in Italy due to, amongst other reasons, hygienic problems. That amounts to a systemic failure,⁷⁰ with the implication that no one can be transferred.

In sum, there are two lines of case-law in Germany, developed by two of the highest courts. The highest administrative court (Bundesverwaltungsgericht) has opted for a narrow interpretation of *NS v. SSHD, M.S.S.* and later Strasbourg case-law (not including *Tarakhel*), stating that demonstration of ‘systemic failure’ is required in order to rebut trust. This implies that the criterion there should be a ‘strong probability’ that an asylum seeker will suffer ill-treatment. Individual circumstances, such as ill-treatment in the past, are not relevant. Thus, the Federal Administrative Court quite explicitly accepted that for Dublin transfers the Article 3 ECHR threshold is higher than for other expulsions.

The Federal Constitutional Court has not addressed the implications of *NS v. SSHD*, but applied by analogy the previously existing obligation for the German authorities to obtain assurances from the receiving state in cases of transfer of persons whose health is at risk. Accordingly, assurances regarding family unity and availability of reception facilities must be obtained in transfer cases of families with children up to three years. The result is close to the (somewhat later) findings of the ECtHR in *Tarakhel*.

⁶⁹ OVG Nordrhein-Westfalen 24 April 2015, Az. 14 A 2356/12.A.

⁷⁰ VG Hannover 25 March 2015, Az. 10 B 1479/15; VG Hannover 31 March 2015, Az. 3 B 505/15. The newsletter of *fluchtpunkt* mentions more cases, see www.fluchtpunkt-hh.de/scroll/aktuelles_neuigkeiten_detail.php?id=374.

3.3 United Kingdom

Before we look into the case-law of UK courts which followed the aforementioned 2011 judgements of the ECtHR and CJEU, it is useful to point out a specific limitation in UK laws with regard to the ‘rebuttal of proof’ at the time of the UK judgement. The reason why the UK courts submitted in 2010 their preliminary questions to the CJEU in *NS v. SSHD* was related to the notion of ‘irrebuttable statutory presumption that EU Member States are safe for the purpose of refusal’, which was added by the UK legislator in 2004 to the Asylum and Immigration Act.⁷¹ This provision did not allow national courts to assess the situation in the second state when dealing with appeals against Dublin transfers. Although, based on the *M.S.S.* judgement of the ECtHR, all Dublin transfers to Greece were generally suspended, decisions to return asylum seekers to Greece were still issued.⁷² This meant that each asylum seeker whose transfer to Greece had been ordered had to appeal individually against this decision. As mentioned *supra* 2.1, in *NS v. SSHD*, the CJEU made clear that any ‘conclusive presumption of trust’, as applied in the UK, was unlawful. After this judgement, the UK courts were obliged to consider evidence submitted by the asylum seeker stating that other EU states were not safe in order to apply Dublin.

However, before 2014, the threshold to rebut trust remained high. In a 2012 judgement, the Court of Appeal applied the criterion of systemic deficiencies of the CJEU to assess whether Eritrean asylum seekers could be returned to Italy under the Dublin Regulation II.⁷³ The Court of Appeal found that the CJEU narrowed the conclusions of the ECtHR in *M.S.S.*, to a more stringent criterion:

‘...what the CJEU has consciously done in *NS* is elevate the finding of the ECtHR that there was in effect, in Greece, a systemic deficiency in the system of refugee protection into a sine qua non of intervention. What in *M.S.S.* was held to be a sufficient condition of intervention has been made by *NS* into a necessary one. Without it, proof of individual risk, however grave, and whether or not arising from operational problems in the state’s system, cannot prevent return under Dublin II.’⁷⁴

The Court of Appeal held it was obliged to apply this more stringent criterion, requiring systemic deficiency of the asylum system, also because the reasoning

⁷¹ Costello (2012), p. 84-85.

⁷² AIDA (Asylum Information Database) national country report on the UK, April 2014, p. 27.

⁷³ England and Wales Court of Appeal 17 October 2012 [2012] EWCA Civ 1336.

⁷⁴ Para. 47.

of the CJEU in *NS v. SSHD* ‘plainly calls for a uniform approach to the present cases’.⁷⁵ According to the Court of Appeal,

‘the sole ground on which a second state is required to exercise its power under Article 3(2) Regulation 343/2003 to entertain a re-application for asylum or humanitarian protection, and to refrain from returning the applicant to the state of first arrival, is that the source of risk to the applicant is a systemic deficiency, known to the former, in the latter's asylum or reception procedures. Short of this, even powerful evidence of individual risk is of no avail.’⁷⁶

In 2014, the Supreme Court overruled the aforementioned judgement of the Court of Appeal. In this case, later referred to in the *Tarakhel* judgement by the ECtHR (supra 2.3), the Supreme Court ruled that for an asylum seeker to establish that his or her transfer to another Member State would be a breach of Article 3 ECHR, it was not necessary to prove the systemic deficiencies in that country.⁷⁷ Applying the criteria of the ECtHR in the earlier *Soering* case, the Supreme Court held that ‘a real risk of a violation of their rights’ would be enough to prevent their removal.⁷⁸ Underlining the need of a presumption of trust to make Dublin or the cooperation between EU Member States ‘workable’, the Supreme Court emphasised at the same time that rebuttal of trust should remain possible:

‘It is entirely right, however, that a presumption that the first state will comply with its obligations should not extinguish the need to examine whether in fact those obligations will be fulfilled when evidence is presented that it is unlikely that they will be. There can be little doubt that the existence of a presumption is necessary to produce a workable system but it is the nature of a presumption that it can, in appropriate circumstances, be displaced. The debate must centre, therefore, on how the presumption should operate.’⁷⁹

According to Lord Kerr, giving the judgement, the purpose of the presumption is to

‘set the context for consideration of whether an individual applicant will be subject to violation of his fundamental rights if he is returned ... [It] should not operate to stifle the presentation and consideration of evidence that this will be

⁷⁵ Para. 47-48.

⁷⁶ Para. 61-63.

⁷⁷ Judgement of 19 February 2014, *EM (Eritrea) v. Secretary of State of the Home Department (SSHD)* (2014) UKSC 12.

⁷⁸ ECtHR, 7 July 1989 (*Soering*), appl.no. 14038/88.

⁷⁹ *EM (Eritrea) v. SSHD* (2014) UKSC 12, para. 41.

the consequence of enforced return. Nor should it be required that, in order to rebut it, it must be shown, as a first and indispensable requirement, that there is a systemic deficiency in the procedure and reception conditions provided for the asylum seeker.’

In other words, the UK Supreme Court strongly opposed systemic deficiency as a ‘hurdle to be surmounted’ in order to prove rebuttal of trust when applying Article 3 ECHR. According to the Supreme Court, a rigorous evaluation of both general situations and individual circumstances remains necessary.

This line as set out by the Supreme Court was followed in 2014 by the High Court of Justice (Queens Bench Division Administrative Court).⁸⁰ In this decision, the High Court assessed the question of whether or not the claims of six asylum seekers are ‘clearly unfounded’, in order to decide whether an in-country right of appeal against their Dublin transfer to Italy before the First-tier Tribunal (Asylum and Immigration Chamber) should be allowed. The High Court applied the ‘systemic deficiencies’ test for Italy, but at the same time questioned the availability of individual circumstances for the applicants under Article 3 ECHR, opposing their transfer to Italy. Deciding that both tests failed for the six applicants, the High Court declared their claim unfounded. In this decision, the High Court affirmed that although the absence of a call of the UNHCR to halt removals to Italy should be taken as starting point by the first tier tribunals, it could not be decisive for the decision whether or not to block transfers to that country.⁸¹ Interestingly, in this decision the High Court explicitly deals with the relationship between the CJEU, the ECtHR and Supreme Court, recognising the sensitivity of the dialogue between both the CJEU and the ECtHR, and the CJEU and the Supreme Court. The High Court clearly chooses to evade conflict of law between the judiciaries, by stating it ‘must assume’ the ruling of the Supreme Court is consistent with the decision of the CJEU in *NS v. SSHD*, and that national courts should be encouraged not to depart from the *NS v. SSHD* case-law.⁸²

3.4 France

In France, the right to asylum is protected as a constitutional right, which has as a corollary the right to seek asylum. As a result, in their case-law French courts will assess whether this right is violated when transferring an asylum seeker to a responsible Member State (‘une atteinte grave et

⁸⁰ High Court 11 June 2014 *Tabrizagh & Ors v. SSHD* [2014] EWHC 1914 (Admin).

⁸¹ Para. 76.

⁸² See para. 151-152.

manifestement illégale au droit d'asile'). In testing whether this right to asylum is sufficiently protected, the French highest administrative court, Conseil d'État generally refers to the obligations of Member States under the Geneva Convention and the ECHR. Nevertheless, dealing with Dublin cases after *M.S.S.* or *NS v. SSHD*, it does not once mention the conclusions of the European Courts. Following the *M.S.S.* judgement of the ECtHR, France decided since March 2, 2011 to suspend until further notice the transfer of asylum seekers to Greece and to apply the sovereignty clause in Article 3(2) of the Dublin II Regulation.⁸³ Therefore, most of the case-law found after 2011 dealt with the claims of asylum seekers against transfers to other Member States.

In one of the first judgements dealing with Dublin after the *M.S.S.* judgement, the Conseil d'État rejected the claim of a Russian (Chechen) asylum seeker against her transfer to Poland and who alleged that when returned to this state, she and her family would risk expulsion to Russia.⁸⁴ Even though it points extensively to the right to asylum and international obligations, the Conseil d'État did not mention the (at that time) recent judgement of the ECtHR. Emphasising that Poland is a Member State of the EU and had ratified both the Geneva Convention and the ECHR, the Conseil d'État found no evidence that the asylum seekers would be subjected to inhuman or degrading treatment contrary to Article 3 ECHR. Furthermore, that there was no evidence that Poland would expel the asylum seekers to Russia, 'without examining seriously their applications'.

In 2013, French administrative courts did occasionally suspend the transfer of asylum seekers under the Dublin Regulation to Hungary, based on individual information as submitted by the applicants. The case-law found with regard to transfers to Hungary, shows however a differentiated outcome in cases concerning families with children. A decision of a French administrative court to suspend the transfer of a Mauritanian asylum seeker to Hungary was confirmed by the French Conseil d'État on 16 October 2013, arguing that

'bearing in mind the treatment this person had received during his detention at the Debrecen centre, there was a serious risk that his asylum application would not be examined by the Hungarian authorities in a way complying with the safeguards required by the respect for the right to asylum.'⁸⁵

⁸³ http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/ad-hoc-queries/374_emn_ad-hoc_query_transfers_to_greece_26jan2012_wider_dissemination_en.pdf.

⁸⁴ CE 21 March 2011, no 347232.

⁸⁵ Conseil d'État (CE), 16 October 2013, no 372677. Source: ECRE-AIDA report on France, 2014, p. 29.

In this decision, the Conseil d'État therefore relied on both the individual experience of the applicants, as well as the findings of the lower French court with regard to the general availability of asylum procedures in Hungary in accordance with the international and European standards. The Conseil d'État held that the administration had failed to counter these allegations, therefore implicitly arguing that the burden of proof was now with the French authorities to rebut 'the rebuttal of trust'. Less than two weeks after this judgement however, the Conseil d'État concluded differently, reviewing the decision to transfer Kosovan asylum seekers to Hungary.⁸⁶ Also in this case, the asylum seekers had claimed they had been maltreated in a Hungarian detention centre (the Békéscsaba centre). Rejecting their appeal, the Conseil d'État referred to the fact that Hungary was a member of the European Union and bound by both the Geneva Convention and the ECHR. The highest French administrative court found that general documents were insufficient to establish that re-admission of asylum seekers in Hungary would result in a serious breach of the right to asylum ('atteinte grave'). Furthermore, no specific information was submitted by the asylum seekers, nor referred to in court, providing evidence that their asylum applications would not be dealt with by the Hungarian authorities conforming with the guarantees which apply to the right to asylum. According to the Conseil d'État, although the asylum seekers claimed during appeal that they had been detained for four days in the detention centre and had left Hungary because of the bad conditions there, they had not submitted any precise elements of how they had been treated, allowing the first tier administrative court to assess whether their rights had been breached. Therefore, even if these cases seem comparable, in the latter case the burden of proof lies with the asylum seeker and no longer with the French administration.

In several cases dealing with Kosovan families with children opposing their transfer to Hungary, the Conseil d'État also reached a differentiated outcome, depending on the fact of whether or not the asylum seekers submitted individualised information in order to consider 'proof to be rebutted' and to block transfers to the other state. In a judgement published in December 2013, the Conseil d'État annulled a lower court decision refusing the transfer to Hungary.⁸⁷ This annulment was based on the lack of evidence with regard to their claims, that their rights have been violated during their prior stay in Hungary, and would be violated again when returned. Referring to the fact that Hungary as a EU Member State is bound by the recast Reception Directive 2013/33⁸⁸, the

⁸⁶ CE 29 October 2013, no 372998.

⁸⁷ CE 18 December 2013, no 373914.

⁸⁸ Directive 2013/33 entered into force 21 July 2015, *OJEU* L180, 29.06.2013. It includes minimum standards for the reception of asylum seekers and replaced the former Reception Directive 2003/9.

Conseil d'État found that information of a general character ('documents d'ordre générale') is insufficient proof that the right to asylum will be breached.⁸⁹ One week later, also in a case concerning another Kosovan family, the Conseil d'État however decided that their transfer to Hungary would be a violation of their right to asylum, referring to the medical certificates and testimonies on the situation of the asylum seekers and their (minor) children, especially considering the way they were treated during their transfer through Hungary.⁹⁰ Here, apparently, the submission of individualised documents was considered sufficient to rebut trust. This approach is clearly different than the one taken later in *Tarakhel*, in which the ECtHR found the transferring state must obtain individualised guarantees the rights of the asylum seekers and their children would not be violated in the second state.

In addition, the decisions of the Conseil d'État in dealing with transfers to Italy are based on a case to case approach and without explicit references to the case-law of the European Courts. In August 2011, the Conseil d'État dealt with the appeal of an Ivorian asylum seeker, opposing her transfer to Italy. Taking into account the facts that she had stayed for several years in Italy, that she did not submit any information on a possible breach of rights when returned to Italy, and considering 'the high level of protection granted to asylum seekers in that Member State' the Conseil d'État decided the transfer decision was not to be annulled.⁹¹ Dealing with the transfer of an Algerian national to Italy, the Conseil d'État found there was no rebuttal of proof that his right to asylum would be violated or his rights under the ECHR would be violated, despite his claim that his state of health required continuation of medical care in France.⁹²

In another judgement of March 2011, so immediately after *M.S.S.*, the Conseil d'État annulled the judgement of the administrative court of Rouen not allowing the transfer of a Nigerian asylum seeker to Malta.⁹³ The Conseil d'État concluded that the Rouen court had been wrong to conclude that in Malta the applicants would not obtain sufficient guarantees to have their asylum application examined. To support this decision, the Conseil d'État referred to Eurostat statistics of 2009 and a 2012 report of the Commissioner on Human Rights (Council of Europe), establishing that the number of asylum statuses provided by the Maltese authorities was relatively high compared to other European states. The fact that asylum seekers who entered Malta on an irregular basis were not detained 'manifestly' contrary to the provisions of the EU rules on the reception of asylum seekers (at that time Directive 2003/9) meant that

⁸⁹ See also CE 24 December 2013 no 374073, allowing the transfer of Kosovans to Hungary.

⁹⁰ CE 26 December 2013, no 374139.

⁹¹ CE 12 August 2011, no 351513.

⁹² CE 5 June 2012, no 359888.

⁹³ CE 7 July 2011, no 350369.

the Dublin transfer by the French authorities to Malta would not constitute a manifest and serious breach of the right to asylum.

In the aforementioned case-law, the French administrative courts applied a marginal review, relying on the presumption of trust and using a high, although differently applied, threshold for the individual to rebut proof. More recently however, the Administrative Court of Nantes applied a more rigorous test in a decision of 22 June 2015.⁹⁴ Dealing with the transfer of an asylum seeker to Italy, the French court referred to the new criterion in Article 3 (2) the Dublin III Regulation, obliging a Member State to avoid transfers of asylum applicants to the designated responsible country if there are ‘substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions’. The Court concluded that given the delicate and evolving situation in Italy regarding migrant reception, every transfer decision under the Dublin Regulation, ‘should be cautiously taken, after a full and rigorous examination of the consequences for the applicant upon transfer’. In this case, the court found that the prefecture had not carried out a full and rigorous examination, as it limited justifications to ‘general and stereotyped motivations’, including the statement ‘that the applicant had not declared being at risk of inhuman and degrading treatment if returned to Italy’, and referring to the absence of circumstances preventing the applicant to stay in Italy, such as the fact that the applicant was celibate without children thus having no family or relatives in the European Union. On this basis, the administrative court concluded that the decision to transfer the applicant to Italy should be annulled. It is to be awaited whether this line of the Nantes tribunal will be followed by other lower courts, and, more importantly, by the Conseil d’État.

3.5 Austria

This section is based on judgements of the highest Austrian administrative court in asylum cases (‘Asylgerichtshof’) and the Constitutional Court (‘Verfassungsgerichtshof’), found for the period of 2011-2013. In this period, the highest administrative court in asylum cases rarely blocked the transfer of asylum seekers to other Member States. In 2011, the Asylgerichtshof decided that based on individual grounds, no transfer was allowed to Italy, whereas as we will see below, in other cases with regard to Italy, transfer of the asylum seeker was held possible. With regard to Hungary, only in one particular case did the Asylgerichtshof prohibit the Dublin transfer. In three cases found, the Constitutional Court annulled decisions of the Asylgerichtshof allowing for transfer to other Member States.

⁹⁴ Tribunal Administratif Nantes, 22 June 2015, no. 1505089. Source: www.asylumlawdatabase.eu.

In a decision of November 2013, allowing the transfer to Bulgaria, the Asylgerichtshof held it ‘unlikely that in Bulgaria, asylum seekers will find themselves in an emergency situation because of ‘a lack of governmental support.’ The Austrian court emphasised that Bulgaria was bound by Articles 13 of the (former) EU Reception Directive 2003/9 and therefore was obliged to provide adequate material reception conditions and medical care to ill asylum seekers. In this particular case, the Asylgerichtshof found no indications that Bulgaria would not fulfil these obligations and furthermore, that Bulgaria had explicitly accepted the request for re-admission of the applicant on the basis of Article 16 of the Dublin Regulation.⁹⁵ According to the Austrian court, information during the procedure established that Bulgaria respects the non refoulement principle and that from the country reports on Bulgaria it cannot be concluded ‘mit massgeblicher Wahrscheinlichkeit’ that in Bulgaria asylum seekers risk to be treated in violation of Article 3 ECHR. The Asylgerichtshof found that on the basis of the available information there existed no situation of systemic deficiency of the asylum system or reception conditions in Bulgaria, comparable to the situation of Greece. Furthermore, the court held that the applicant could submit complaints with regard to the possible or current violation of his rights under 3 ECHR to the competent authorities of Bulgaria and ultimately to the ECtHR, eventually using the interim measure procedure of Article 39 Rules of Court.⁹⁶ With regard to the burden of proof, the Asylgerichtshof however explicitly refers to the weaker position of the asylum seeker compared to the position of the Austrian administration. According to the Asylgerichtshof, in order to assess whether the required credibility or ‘Glaubhaftmachung’ has been accomplished, the particular situation of the asylum seeker should be taken into account, underlining that asylum seekers often have no possibility to obtain the necessary proof. If the asylum seeker succeeds to make the aforementioned grounds credible, this would rebut the presumption of safety from persecution in the other Member State, as required by Austrian Asylum law.

In a decision of 2011, the Asylgerichtshof found that no transfer to Italy was allowed based on personal circumstances, namely the illness of the asylum seeker.⁹⁷ In this case, the Austrian court referred to specific responsibility of transferring state to assess conditions in the other Member State when dealing with ‘particularly vulnerable’ individuals (‘besonders vulnerablen Personen’). Considering current problems of medical care and accommodation in Italy, and possible waiting periods for the housing of vulnerable individuals, the Austrian court found that the Bundesasylamt failed to obtain appropriate

⁹⁵ Asylgerichtshof, S3 438.2011-1/2013/5E, 28 November 2013.

⁹⁶ ECRE reaffirms its call for the suspension of transfers of asylum seekers to Bulgaria under the recast Dublin Regulation, Brussels, 7 April 2014.

⁹⁷ Asylgerichtshof, S16 422.756-1/2011-5E, 6 December 2011.

guarantees from the Italian authorities. As we have seen, *supra* 2.3, the necessity to ask and to obtain individual guarantees in these circumstances was later affirmed by the ECtHR in the *Tarakhel* judgment.

In dealing with the question of burden of proof, the Asylgerichtshof concluded in 2013, that to decide whether a transfer to another Member State is possible, ‘serious deficiencies’ in the asylum system are relevant, and deficiencies should be established on the basis of a general check (‘Grobprüfung’) of the situation in the other state.⁹⁸ According to the court, such deficiencies could involve the fact that all applications of asylum seekers with a certain nationality or ethnicity are generally rejected, or whether that state offers no protection against persecution by third parties, or the absence of legal remedies. In this case, concerning a Dublin transfer to Poland, the Asylgerichtshof held that those deficiencies had not been established (‘erkennbar’), underlining that evidence on serious shortcomings in the asylum procedures in other EU Member States must be specifically submitted by the applicant. The Austrian court found no indications that the conditions in the (former) Reception Directive were breached and found that Poland offered the same social protection to asylum seekers as to those who obtained a residence permit. To consider the situation in Poland, the Asylgerichtshof used information provided by Eurostat and considerations (‘Einschätzungen’) from the US State Department and the liaison officer from the Austrian embassy in Warsaw. Based on comparable reasoning of decisions from cases concerning Dublin transfers to Italy, the Asylgerichtshof found no breach of Article 3 ECHR.⁹⁹ In these latter cases, the Austrian court also referred to several decisions of German courts.

In 2012, the Asylgerichtshof decided against Dublin transfer to Hungary.¹⁰⁰ Before deciding so, the Austrian court underlined that the threshold for rebuttal of trust is high: Based on European law, this rebuttal would require substantive information and available information provided by the applicant on the exceptional circumstances which could rebut the ‘security’ of protection in the other EU Member State in individual cases.¹⁰¹ According to the Asylgerichtshof, in the assessment of the security of asylum seekers in another Member State, evidence provided by the head of a governmental department of that state should be given extra weight, especially if statistical data had been submitted. Despite this stringent criterion with regard to the proof to rebut trust, the Asylgerichtshof

⁹⁸ Asylgerichtshof, S1 437948-1/2013 29 November 2013.

⁹⁹ Asylgerichtshof 28 November 2013, S6 437739-2/2013/3; 9 December 2013, S6 439036-1/2013.

¹⁰⁰ Asylgerichtshof S1 424244-1/2012, 7 February 2012.

¹⁰¹ ‘Es bedarf sohin europarechtlich in der Regel eines im besonderen Maße substantiierten Vorbringens und des Vorliegens besonderer vom Antragsteller bescheinigter außergewöhnlicher Umstände, um die grundsätzliche europarechtlich gebotene Annahme der “Sicherheit” der Partnerstaaten der Europäischen Union als einer Gemeinschaft des Rechts im individuellen Fall erschüttern zu können.’

concluded in this case that the Austrian administration failed to provide founded and factual information concerning the claim of the asylum seeker that he, once transferred to Hungary, would be expelled to Serbia. The court referred in this decision to information the UNHCR submitted during the procedure on the current situation in Hungary.¹⁰²

One year later, in December 2013, the Asylgerichtshof upheld the decision of the Austrian government to transfer an asylum seeker to Hungary.¹⁰³ According to the court, even taking into account the serious criticisms considering the situation in Hungary, the problems for asylum seekers in Hungary could not be compared with the systemic deficiencies as established in Greece. The Asylgerichtshof referred to the fact that in November 2012, the Hungarian parliament had adopted different laws to improve the asylum system and that these amendments had been welcomed by the UNHCR. Furthermore, according to the Austrian court, the asylum seeker failed to submit evidence that Hungarian authorities were not willing and capable to provide sufficient protection. In this judgment, the Austrian court also referred to case-law of German courts. In another judgement of December 2013, the Asylgerichtshof also allowed transfer to Hungary, stating that neither the general situation in Hungary was as such that there would be 'systematic violations' of the rights protected in the ECHR, nor that a 'real risk' or 'massgebliche Warscheinlichkeit' that such violation would occur for the individual concerned.¹⁰⁴ For this conclusion, the court also used information of the UNHCR and referred to both the judgements of the CJEU and the ECtHR in *Mamatkulov v. Turkey* and *Mohammed v. Austria*.

The Austrian Constitutional Court annulled in three cases the decisions of the Asylgerichtshof allowing the transfer of an asylum seeker to another Member State (Italy, Hungary, and Poland). In the case dealing with the transfer to Italy, the Constitutional Court found that the mere silence of the responsible state, which in accordance of Article 20 (1) of the Dublin II Regulation could be considered as an implied acceptance of the Dublin claim, was insufficient as basis for the transferal to Italy.¹⁰⁵ According to the Austrian Constitutional Court, the highest administrative court in asylum cases failed to make an individual assessment of whether the Dublin criteria had been correctly applied. In 2012, the Constitutional Court annulled a decision of the Asylgerichtshof allowing the transfer to Hungary, because the highest admin-

¹⁰² Letter of UNHCR ('Situation von Asylsuchenden in Ungarn – Aktualisierte Version'), Wien of 3 February 2012 to the Asylgerichtshof and 'Kritische Beschreibung der Lage in Ungarn' UNHCR Wien, 17 October 2011.

¹⁰³ Asylgerichtshof, S7 438947-1/2013, 2 December 2013.

¹⁰⁴ Asylgerichtshof, S2 438941-1/2013, 4 December 2013.

¹⁰⁵ Verfassungsgerichtshof 27 June 2012 U462/12.

istrative court had failed to submit preliminary questions to the CJEU on the correct application of the Dublin criteria, and thus had violated Article 267 TFEU.¹⁰⁶ In this case, in which the Constitutional Court referred to the two judgments of the European Courts in 2011, the applicant claimed that because of his traveling route through Greece, this state rather than Hungary would be responsible for the asylum application.¹⁰⁷ Finally, in 2012, the Verfassungsgericht also annulled a decision of the Asylgerichtshof to allow transfer of a minor asylum seeker to Poland.¹⁰⁸ The Constitutional Court found a violation of Article 8 ECHR, because the Austrian government should have considered the application of the sovereignty clause, as the aunt of the applicant who could take care of the minor was legally resident in Austria.

To summarise, the Austrian Asylgerichtshof bases its case-law with regard to the application of the Dublin system very much on the presumption of trust between the EU Member States. However, referring in different cases explicitly to the *N.S. v. SSHD* judgment of the CJEU and *M.S.S.* and other judgements of the ECtHR, the Asylgerichtshof underlines that when applying Dublin, mutual trust should be rebuttable. The Asylgerichtshof takes into account both general and individualised information and emphasises the ‘weaker’ position of the asylum seeker when gathering evidence on the situation on the other Dublin State. As in Germany and the UK, even before the *Tarakhel* decision of the ECtHR, the Asylgerichtshof granted special protection to vulnerable persons, also with regard to the standard of proof. Nevertheless, in practice, relying on general statistics and information about amendments in laws, the highest Austrian administrative court makes it difficult for the claimant to prove there are ‘systemic deficiencies’ within the asylum system of other Member States (with exception to Greece, to which Dublin transfers have been suspended since 2011). Comparable to its counterpart in Germany, the Austrian Constitutional Court adopts a more ‘human rights’ approach, requiring more rigorous judicial scrutiny when assessing Dublin transfers to other Member States.

4 Conclusions

In dealing with the interpretation and implementation of the Dublin Regulation against the background of the protection of fundamental rights, one can perceive a horizontal judicial dialogue between the two European courts and to a certain extent also between national courts, and a vertical dialogue

¹⁰⁶ Verfassungsgerichtshof 27 June 2012 U330/12.

¹⁰⁷ This case ultimately resulted in the aforementioned *Abdullahi*-judgment, C-394/12, see *supra* 2.1.

¹⁰⁸ Verfassungsgerichtshof 11 June 2012 U653/12.

between European courts and national courts. The ‘judicial dialogue between ECtHR and CJEU’ is illustrated by the fact that in 2011, the CJEU awaited the outcome of the Strasbourg court in a Dublin case before delivering its own ruling in *NS v. SSHD*. With the *Tarakhel* judgement in 2014, the ECtHR seems to give a clear sign that when it comes to safeguarding the non refoulement principle included in Article 3 ECHR it claims to have the last word, and that the guarantees of Article 3 ECHR are not principally different when dealing with Member States applying the EU Dublin III Regulation as compared to expulsions to non-Member States. This dialogue between the ECtHR and the CJEU and the question of hegemony on the meaning of fundamental rights within the EU legal order is far from solved. It seems to have even changed into a competition with the publication of the Opinion 2/13 of the CJEU in 2014. In our view, the emphasis of the CJEU on the self-evidence of mutual trust, also when it may affect the protection of human rights is difficult to understand from a strategic point of view, considering the previous dialogue between the two European Courts to ensure a uniform interpretation of human rights protection under the ECHR and the EU Charter on Fundamental Rights.¹⁰⁹ We also consider the emphasis of the CJEU on mutual trust a dangerous development, leaving national courts in the dark when dealing with individual cases where the principle of mutual trust is involved, not only in the field of Dublin and asylum law, but in the whole Area of Freedom, Security and Justice. As to the horizontal judicial dialogue, we see that especially the German (supra 3.2) and the Austrian courts (supra 3.5) do refer to court decisions in other Member States. Furthermore, it is meaningful that the German Federal Administrative Court publishes English translations of the judgments on its website, making them more accessible for foreign courts.

Considering the vertical dialogue between the European Courts and national courts, different conclusions can be drawn. Firstly, it can be established that in the national judgements investigated for this contribution, the decisions of both ECtHR and CJEU have been taken into account by the national courts, both explicitly and implicitly. With regard to the suspension of Dublin transfers to Greece, national courts generally took into account the decisions of ECtHR and CJEU with regard to the necessity to allow in national procedures the possibility of rebuttal of proof of mutual trust. Secondly, national case-law shows a differentiated approach with regard to the content of the burden of proof and

¹⁰⁹ Hemme Battjes, ‘Pas de deux – De samenwerking tussen Luxemburgse en Straatsburgse jurisprudentie bij de harmonisatie van het asielrecht’, *Nederlands Tijdschrift voor Europees Recht*, April 2012, nr. 3, p. 83-93. And with regard to the Area of Freedom, Security and Justice in general: Evelien Brouwer, ‘Wederzijds vertrouwen en de samengestelde rechtsorde van Dublin: grondrechten op losse schroeven?’, in: H.R.B.M. Kummeling e.a. (red.), *De samengestelde Besselink: Bruggen bouwen tussen nationaal, Europees en internationaal recht* (Nijmegen: Wolf Legal Publishers 2012), p. 63-73.

the obligations for asylum seekers to provide information on the ‘systemic deficiencies’ within the other Member State. Particularly the Dutch, French, and Austrian highest administrative courts apply a high threshold, requiring the submission of individualised information by the asylum seeker, even if general information on the poor (procedural and reception) conditions in the responsible state is available. These conclusions seem problematic, considering the conclusions of the ECtHR in *M.S.S.* that if general information is available, a more active role of the national administration may be necessary (*supra* 2.1). Furthermore, the Supreme Court of the UK and the German and Austrian Constitutional Courts seem to opt for a more human rights oriented approach than the administrative courts in the five selected countries. This does not surprise, considering the marginal review generally applied by administrative courts in migration law cases.¹¹⁰ However, also the not so clear (and since 2014) diverging interpretations on the rebuttal of trust and burden of proof by the ECtHR and the CJEU, might add to the differentiated approach by national courts.

Thirdly, where it concerns particular categories of asylum seekers, ‘vulnerable persons’, like children or families with small children, national courts generally impose in their case-law stricter rules with regard to the burden of proof for the state. In Germany, UK and Austria, these decisions even originate from before the *Tarakhel* judgement of the ECtHR in 2014. The reference to the UK Supreme Court in *Tarakhel* also suggests that there is not only a top-down, but also bottom-up vertical dialogue, in which national courts are being heard by the ECtHR. For the continuation of judicial dialogues as described above, but also to enhance judicial coherence in the EU, it is hoped that the CJEU will remain willing to listen to others and will take the interpretations of human rights by the ECtHR and national courts seriously into account.

¹¹⁰ This role of administrative courts in asylum law cases is at times problematic role, if seen against the background of European and international law, as Dana Baldinger argues in *Vertical Judicial Dialogues in Asylum Cases. Standards on Judicial Scrutiny and Evidence in International and European Asylum Law* (Boston/Leiden: Brill/Nijhoff 2015).