UNHCR Information Note on National Practice in the Application of Article 3(2) of the Dublin II Regulation in particular in the context of intended transfers to Greece

A. Introduction

1. Article 3(2) of the Dublin II Regulation,[1] known as the "sovereignty clause", allows Member States[2] to examine an asylum application and thus take responsibility for assessing it in substance even if the Dublin criteria would otherwise assign this responsibility to another Member State. The European Commission has reported that "Member States apply the sovereignty clause for different reasons, ranging from humanitarian to purely practical".[3]

2. Data on the application by Member States of this "sovereignty clause" of the Regulation is not readily available, but States are in general reported to be reluctant, at the level of the administrative authorities, voluntarily to apply Article 3(2). According to information gathered by Office of the United Nations High Commissioner for Refugees (UNHCR), there is nevertheless greater willingness in some countries to apply Article 3(2) in cases involving unaccompanied or separated child asylum-seekers,[4] persons with specific vulnerabilities including single women, the elderly, and families with minor children,[5] or persons with serious health concerns.[6]

[1] Council Regulation No. 343/2003 of 18 Feb. 2003 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Asylum Application Lodged in One of the Member States by a Third-Country National ("Dublin II Regulation"), 25 Feb. 2003, No. 343/2003, at http://www.unhcr.org/refworld/docid/3e5cf1c24.html.

[2] In this context, Member State refers not only to the Member States of the European Union, but also to Iceland, Norway and Switzerland as they also participate in the Dublin system.

[3] See, European Commission, "Report From the Commission to the European Parliament and the Council on the Evaluation of the Dublin System", 6 June 2007, COM(2007) 299 final, at http://www.unhcr.org/refworld/docid/466e5a082.html, p. 7.

[4] As, for instance, in Belgium, Denmark, Germany, Iceland, Spain, Sweden, and Switzerland. In such cases it may well be Article 6 dealing with unaccompanied and separated children rather than Article 3(2) that is applied. In Germany, Article 3(2) was nevertheless used in the case of a minor asylum-seeker who had reported abuse by another asylum-seeker in a reception centre in Hungary.

[5] As, for instance, in Germany, Iceland, Spain, and Switzerland. In the latter case, apart from the assumption of responsibility for claims under Article 3(2), there are also cases of the deliberate non-transfer of such vulnerable persons within the six-month time limit, resulting in responsibilities attaching to the State electing not to transfer.

[6] As, for instance, in Belgium, where the Conseil d'Etat upheld the appeal against the transfer to Poland of a Russian asylum-seeker suffering from acute asthma, allergies, and cardiac and anaemia problems. See Judgment No. 167.238, 29 Jan. 2007. Individuals with serious health concerns have sometimes nevertheless been transferred from Belgium on the basis of assurances by the embassy of the receiving State that treatment would be available, although in one case medicines given to a transferee suffering from Hepatitis C were taken from him at the border on arrival in Poland and he later died. In other cases, however, the mere fact that a transfer would result in the interruption of treatment has been found to constitute serious damage that would be difficult to remedy ("*un prejudice grave difficilement réparable*"). See Judgment No. 32515, Council for Aliens' Law Litigation (appeal instance, CEE/RVV), 8 Oct. 2009. In Finland, the sovereignty clause is used for vulnerable applicants e.g. applicants with health problems where transfer would cause serious harm or where medical treatment is ongoing in Finland. In Germany, an appeal

3. In light of concerns in many Member States regarding Dublin transfers to Greece,[7] UNHCR has gathered information focusing on the practice of some Member States as regards their exercise of Article 3(2) in relation to transfers to that country. This survey does not include information on situations where Member States have freely assumed responsibility for assessing claims. Rather, it is based on caselaw in Member States where proposed transfers have been contested in the courts, which have then ruled on the legitimacy of such transfers. Information has been provided by UNHCR offices and partners in various countries in Europe and collected through related research. References to relevant decisions are provided wherever possible. References to jurisprudence and State practice with regard to particular issues are examples rather than exhaustive.

B. Member State practice regarding Article 3(2) in the context of transfers to Greece

4. In addition to the more general humanitarian situations mentioned above, some Member States have decided to use Article 3(2) to suspend transfers to Greece.[8] The sections below outline recent developments in Member States regarding transfers to Greece under the Dublin II Regulation. Section B.1 outlines policy instructions which exist in Denmark, Iceland and Luxembourg. Section B.2 sets out the jurisprudence of highest level courts in Austria, France, Hungary, Italy, and Romania, which have ruled against transfers to Greece in certain cases. By contrast, section B.3 shows that in Belgium, Finland, the Netherlands, Norway, and Sweden, high-level courts have endorsed transfers to Greece, although Sweden explicitly rules out the transfer to Greece of child asylum-seekers. Finally, section B.4 reports on countries where appeals or decisions regarding Dublin transfers to Greece are pending as of this writing. Such appeals are currently before the Federal Constitutional Court in Germany, the Supreme Court in Ireland, and the High Court in the United Kingdom. In Switzerland a Federal Administrative Court (FAC) judgment of February 2010 set out the criteria regarding returns to Greece used by the Federal Office for Migration (FOM), the Swiss refugee status determination authority, while an appeal is pending before the FAC regarding the circumstances under which it might be mandatory to apply Article 3(2) in the context of Dublin transfers to Greece.

5. In several of these cases, UNHCR's April 2008 "Position on the Return of Asylum-Seekers to Greece under the 'Dublin Regulation'" and its December 2009 “Observations on Greece as a Country of Asylum”,[9] as well as reports by other organizations, were cited. Decisions also regularly refer not only to the European Court of Human Rights' judgment in *T.I. v. UK*, confirming that indirect removal does not affect a State's

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proceeding is pending as to whether the sovereignty clause must be applied if medical reasons do not allow a Dublin transfer, which had been approved by AC Braunschweig, judgment of 23 Jan. 2010. (See Niedersachsen Higher Administrative Court, order of 9 March 2010 to admit the appeal - 2 LA 97/09.)

[7] For further details, see "UNHCR Position on the Return of Asylum-Seekers to Greece under the 'Dublin Regulation'", 15 April 2008, at http://www.unhcr.org/refworld/docid/4805bde42.html and its “Observations on Greece as a Country of Asylum”, Dec. 2009, at http://www.unhcr.org/refworld/docid/4b4b3fc82.html.

[8] Germany, for instance, generally makes use of the sovereignty clause where particularly vulnerable persons would toehrwise face transfer to Greece. In addition, in Germany, the majority of transfers to Malta were stopped, after the German authorities were persuaded to use Article 3(2) by reference to inhumane conditions in reception facilities in Malta, the overstretched Maltese asylum system, and the need to show solidarity with Malta.

[9] See above footnote 7.

responsibility not to return anyone to torture, inhuman or degrading treatment,[10] but also to the Court's admissibility decision in *K.R.S. v. United Kingdom*.[11]

B.1. Instructions and policy regarding Dublin transfers

6. Government instructions or policy regarding Dublin transfers are not often public, but those in Denmark, Iceland and Luxembourg are outlined below.

7. In **Denmark**, the Ministry of Refugees, Immigration and Integration announced on 26 May 2010 that it was amending its policy under which it had previously assumed responsibility for assessing claims where it had requested Greece to do so but the latter had not responded. Thus, it was previously only where Greece had explicitly accepted responsibility that a transfer took place, with the result that Denmark ended up processing most such claims. While adults would thus now be more likely to be transferred to Greece, even if the latter had not responded to a request to assume responsibility, unaccompanied and separated children continue to be considered a particularly vulnerable group and would continue not to be transferred to Greece under the Dublin Regulation. The Ministry also requested the Immigration Service to pay particular attention to the humanitarian situation of families with minor children when assessing their case.

8. In **Iceland**, a report by the committee appointed by the Minister of Justice on 21 April 2009 for the purpose of reviewing laws and regulations on the processing of asylum applications issued on 17 July 2009, stresses that

> despite the clauses of the Dublin Regulation, regarding sending back asylum seekers to the Member State which is responsible for the asylum application, it is imperative that each case be individually examined. Should it be deemed hazardous to send asylum seekers back to other Member States of the Dublin Regulation, Article 3(2) of the regulation should be applied, and asylum applications should be processed in Iceland. This specifically applies to cases regarding vulnerable individuals, e.g. unaccompanied minors or families with children under the age of 18 or if the ill health of asylum seekers argues against sending said individual back.[12]

These recommendations are currently being reviewed by the Ministry of Justice, but the Icelandic Directorate of Immigration appears already to take the recommendations into account in practice.

9. In **Luxembourg**, no actual cases of transfer to Greece are known to UNHCR. Rather, in 2009 the Grand Duchy is known to have assumed responsibility under Article 3(2) for assessing the claim of an Iraqi asylum-seeker rather than transferring her to Greece, following an intervention by a non-governmental organization on her behalf.

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[10] See *T.I. v. UK*, Appl. No. 43844/98, 7 March 2000, at http://www.unhcr.org/refworld/docid/3ae6b6dfc.html, in which the Court stated that "the indirect removal in this case to an intermediary country, which is also a Contracting State, does not affect the responsibility of the United Kingdom to ensure that the applicant is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention", p. 15. Reaffirmed in *Salah Sheekh v. The Netherlands*, 11 Jan. 2007, at http://www.unhcr.org/refworld/docid/45cb3dfd2.html, para. 141; *K.R.S. v. UK*, *K.R.S. v. UK*, Application No. 32733/08, admissibility decision, 2 Dec. 2008, at http://www.unhcr.org/refworld/docid/49476fd72.html, p. 16; and *Abdolkhani and Karimnia v. Turkey*, Appl. No. 30471/08, 22 Sept. 2009, at http://www.unhcr.org/refworld/docid/4ab8a1a42.html, paras. 88–89.

[11] *K.R.S. v. UK*, above footnote 10.

[12] "Report by the Committee appointed by the Minister of Justice on 21 April 2009 for the purpose of reviewing laws and regulations on the processing of asylum applications", 17 July 2009, para. 19 (unofficial UNHCR translation).

B.2 Dublin States where courts have blocked transfers to Greece

10. Highest level courts in Austria, France, Hungary, Italy and Romania have ruled against proposed Dublin transfers to Greece. Grounds for such rulings include where such transfer would constitute or result in a violation of Article 3 or 8 of the European Convention on Human Rights (ECHR), where it would result in serious and irreparable harm; where asylum legislation and practice does not offer sufficient safeguards to ensure that persons in need of protection have access to a fair and efficient asylum procedure; where inadequate reception conditions constitute inhuman treatment; where access to healthcare is lacking; where procedural guarantees under the Dublin Regulation were not respected; and where procedural guarantees of the right to asylum were violated. Spanish practice and jurisprudence have focussed on not transferring persons with specific vulnerabilities.

11. In **Austria**, while the Federal Asylum Agency reportedly stated that it would make use of the sovereignty clause in particularly vulnerable cases, the Asylum Court does not systematically allow such persons to stay in Austria but has an increasingly restrictive approach. The Constitutional Court and the Higher Administrative Court nevertheless ruled as long ago as 2001 that responsibility for assessing the claim shall be assumed where it is determined that a transfer would result in or constitute in itself a violation of Article 3 or 8 of the 1950 European Convention on Human Rights (ECHR).[13] In application of this settled case law, the Higher Administrative Court in November 2009 upheld the appeal against transfer of an asylum-seeker from the Russian Federation who had, during his stay in Austria, married a recognized refugee in Austria and who had a sister living in Austria. The Court stated that it was necessary to weigh the public interest in the enforcement of the Dublin II Regulation against the applicant's rights under Article 8 of the ECHR and found that Article 3(2) had to be applied in this case so as not to violate Article 8 ECHR.[14]

12. In **France**, the practice of the Conseil d'Etat, while generally endorsing Dublin transfers to Greece in 2009, became more nuanced in 2010. In September and November 2009, it endorsed such transfers, deeming that, given Greece is party to the 1951 Convention and the ECHR, the transfer does not in itself constitute a violation of the right to asylum.[15] It stated that the Afghans concerned had only raised general difficulties, not personal ones, suggesting that those who had encountered particular problems in Greece might be able to prevent transfer to Greece. Despite the position taken by the Conseil d'Etat, the (lower) Administrative Tribunal in Paris has registered its "resistance" and continues to find that Greece does not offer transferees the possibility of accessing an effective asylum procedure.[16]

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[13] See Decision of the Constitutional Court No. 117/00, 8 March 2001, as well as Decision of the Higher Administrative Court No. 98/18/0306, 18 May 2001. While these judgments were issued in relation to the Dublin Agreement, both Courts ruled that this jurisprudence was *mutatis mutandis* applicable to the Dublin II Regulation (see e.g. Decision of the Constitutional Court No. B 336/05 of 17 June 2005).

[14] See Decision No. 2008/19/0532, Austria, Higher Administrative Court, 6 Nov. 2009, in German at http://www.ris.bka.gv.at/Dokumente/Vwgh/JWT_2008190532_20091106X00/JWT_2008190532_20091106X00.pdf. The case concerned a proposed transfer to Poland but the principles set out therein apply to all transfers.

[15] Conseil d'Etat (CE), Judgments No. 332310, 30 Sept. 2009; No. 332309, 30 Sept. 2009; No. 332917 6 Nov. 2009; No. 332918, 6 Nov. 2009, at http://www.conseil-etat.fr/cde/.

[16] See e.g. Decisions of the Administrative Tribunal of Paris, No. 0908427/9-1, 25 May 2009; No. 0908427, 25 May 2009; No. 0911567/9, 17 July 2009; No. 0912492-3/3, 15 Dec. 2009; No. 0912495 4, Arya, 15 Dec. 2009, and Decision No. 0905925, 28 May 2009 of the Administrative Tribunal of Cergy-Pontoise.

13. On 1 March 2010, however, the Conseil d'Etat (*juge des référés*) ruled that the French administration should review each individual case taking in consideration any concrete evidence produced by the claimant in order to assess whether the way s/he had been treated by the Greek authorities permitted access to an effective asylum procedure.[17] On 17 March, the Conseil d'Etat also ordered the suspension of the transfer of an asylum-seeker to Greece based on the non-respect of Article 3 of the Dublin II Regulation i.e. because the procedural guarantees set out therein had not been respected since the asylum-seeker had not been informed, in writing and in a language that he understood, of the administration's refusal to allow him to stay in France in application of the Dublin II Regulation.[18] Furthermore, in May 2010, the Conseil d'Etat (*juge des référés*) while continuing to consider that the general situation prevailing in Greece did not require the suspension of all transfers to Greece and reaffirming the necessity to demonstrate, on a case by case basis, the particular breach of the right to asylum, assessed for the first time that, in the specific circumstances of the case, the production of medical certificates as well as numerous detailed testimonies concerning the treatment of the claimants and their children by the Greek authorities during their stay in that country constituted a violation of the procedural guarantees of the right to asylum. The Conseil d'Etat concluded that their readmission to Greece would be tantamount to a serious and manifestly illegal violation of the fundamental right to asylum.[19]

14. In **Hungary**, seven cases where transfers to Greece have been blocked by the courts have come to UNHCR's attention. The first two concern an Afghan boy who had been homeless for three years in Greece and a Somali man who had tuberculosis. In September and December 2009, the municipal court of Budapest, the highest level appeal body in Dublin cases in Hungary, ruled against their transfer to Greece.[20] Both judgments refer to Article 3 of the European Convention on Human Rights and state that, since available country information indicates that adequate reception conditions are not available in Greece, a transfer would clearly put them in danger and expose them to inhuman treatment. Since then, the municipal court in Budapest has issued five further rulings that Hungary should assume responsibility for assessing five different cases (involving a total of 21 individuals).[21] Another case concerned an Afghan minor, who had arrived in Hungary in December 2009, having lived in Greece for almost three years, during which time he had received no support from the State or NGOs, even though he had applied for asylum. He had therefore had to live on the streets, had been a victim of police brutality, and had become infected with hepatitis B, for which he had received no treatment. An application for interim measures under Rule 39 to prevent his transfer to Greece was granted, but on 26 February, the Office of Immigration and Nationality agreed to assume responsibility for assessing the case under Article 3(2).

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[17] CE, Judgment No.336857, *Ministre de l'Immigration v. Tahir*, 1 March 2010. In this case, the European Court of Human Rights had ordered the suspension of the claimant's transfer to Greece based on Rule 39, a fact which may have influenced the Conseil d'Etat's decision.

[18] CE, Judgments No. 332585, *Larkhawi* and No.332586, *Wahidi*, 17 March 2010.

[19] CE, *Section du Contentieux*, Judgments Nos. 339478 and 339479, 20 May 2010, at http://www.unhcr.org/refworld/docid/4bfd170a2.html.

[20] See respectively *Golam Ali Jawad v. Office of Immigration and Nationality*, Case No. 6.Kpk.45.883/2009/4, 2 Sept. 2009; *Zaki Toohaw Ali v. Office of Immigration and Nationality*. Case No. 6.Kpk.46.273/2009/4, 8 Dec. 2009.

[21] Budapest municipal court rulings Ref. Nos. 15.Kpk.45.312/2010/2, 18 March 2010; 15.Kpk.45.516/2010/2, 26 March 2010; 17.Kpk.45.448/2010/2, 8 April 2010; 17.Kpk.45.433/2010/3, 8 April 2010; 15.Kpk.45.501/2010/2, 26 April 2010.

15. In **Italy,** the Italian Council of State (*Consiglio di Stato*, the supreme administrative court) on 3 February 2009 upheld the appeals of three Afghan asylum-seekers.[22] The court suspended their transfer to Greece "in light of the harm feared by the claimant[s], which appears to be serious and irreparable having regard to the situation described in the report issued by the United Nations High Commissioner for Refugees on 15 April 2008". As a result, the competent body will assess the claims in light of Article 3(2) of the Dublin II Regulation. There were similar court decisions in the past by lower courts. In one, for instance, the Tribunal explicitly mentioned UNHCR positions and argued in particular that "the problems related to the Greek asylum system, already detected by UNHCR since November 2007, imply that the assessment made by the Administration considering Greece as a 'safe third country' is not adequately reasoned; UNHCR's recommendations should thus have led the Administration to carry out a more in-depth assessment of the applicability to the case in question of Article 3(2) of the EC Regulation 343/2003".[23] The February 2009 decisions by the *Consiglio di Stato* are particularly important, however, as they come from the higher national Rome-based administrative court.

16. In **Romania** in mid-2009, the first and only instance deciding Dublin cases (i.e. the court in Bucharest) blocked the proposed transfer of four asylum-seekers to Greece.[24] Article 3(2) of the Dublin II Regulation was invoked as a legal ground in all four appeals on the grounds that available information regarding the asylum system in Greece, including the UNHCR position on Greece, reports issued by Amnesty International and the Norwegian Helsinki Committee, showed that the "Greek asylum legislation and practice does not offer sufficient safeguards to ensure that persons in need of protection have access to a fair and efficient asylum procedure". The Court therefore cancelled the transfer to Greece and granted the four appellants access to the Romanian asylum procedure.

17. In **Spain**, the Eligibility Commission agreed in mid-2008 that it would refrain from transferring vulnerable cases to Greece under Dublin, including families with young children. On this basis, Spain decided in two subsequent cases not to transfer to Greece a woman who had been ill-treated by her husband in her country of origin and in Greece and had suffered psychological problems as a result, as well as an Afghan unaccompanied and separated child and assumed responsibility for assessing these two claims. A July 2009 judgment of the National High Court (*Audiencia Nacional*) ruled that it was necessary to focus on the specific circumstances of each individual case and less on the conditions of the responsible State.[25] The judge stated that the spirit of the Dublin II Regulation would otherwise not be respected and that this did not absolve the responsible State of its responsibilities. Finally, he found that exceptions should be made where applicants had specific vulnerabilities, including children or sick persons.

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[22] These three decisions (*Ordinanze* 666, 667, and 668) are available in Italian respectively at http://www.giustizia-amministrativa.it/DocumentiGA/Consiglio%20di%20Stato/Sezione%206/2009/200900223/Provvedimenti/CDS_200900666_OO.DOC; http://www.giustizia-amministrativa.it/DocumentiGA/Consiglio%20di%20Stato/Sezione%206/2009/200900224/Provvedimenti/CDS_200900667_OO.DOC; and http://www.giustizia-amministrativa.it/DocumentiGA/Consiglio%20di%20Stato/Sezione%206/2009/200900225/Provvedimenti/CDS_200900668_OO.DOC.

[23] See e.g. Decision No. 1870/2008 (Sentences Register)/ 656/2008 (General Register), Italy, Regional Administrative Tribunal for Apulia, Third Section, 14 May 2008, annulling the decision to transfer him to Greece taken by the Dublin II Unit of the Ministry of Interior, for "violation of strong humanitarian reasons".

[24] See e.g. Decisions No. 4068, 5 June 2009 and No. 4700, 1 July 2009 (both by Court Sector 4 in Bucharest).

[25] Case No. 1016/2008, National High Court, Chamber of Appeals, Madrid, 15 July 2009.

Since then, the Spanish authorities have generally assumed responsibility for such vulnerable cases. In one case, however, the National High Court ruled in April 2009 that UNHCR reports and recommendations regarding Greece were not binding and that, since Greece had expressly accepted its responsibilities in this case involving a woman and her child, they could be transferred to Greece. This judgment was upheld by the appeal chamber of the National High Court in January 2010.[26] Most recently, the Eligibility Commission decided on 11 June 2010 not to carry out the Dublin transfer of an Afghan family with four very young children to Greece. The number of vulnerable cases where the question of a transfer to Greece under Dublin arises is, however, very low and transfers are in any case rarely made against the person's will.

B. 3 Dublin States where courts generally do not block transfers to Greece

18. In contrast with the judicial practice in the States mentioned in the preceding section, the practice of Belgium, Finland, the Netherlands, Norway and Sweden has tended not to oppose Dublin transfers to Greece or has recently permitted transfers to resume. The practice of the Council for Aliens' Law Litigation (CALL) in Belgium had varied, but since March 2010 has found that such transfer decisions should be based on a rebuttable presumption that Greece will abide by its obligations. In both Finland and Norway, courts ruled in February 2010 that transfers to Greece could resume, except for vulnerable groups. In the Netherlands, the Council of State has regularly ruled in favour of transfers to Greece, although transfers of Somalis were halted in June 2010 until further notice after reasoned Rule 39 interim measures were issued by the European Court of Human Rights in a case involving Somalis. In Sweden, Swedish Migration Board (SMB) guidelines do not permit transfers of unaccompanied children to Greece, although the Migration Court of Appeal found in October 2008 that serious humanitarian reasons are required to preclude other transfers.

19. As indicated above, the practice in **Belgium** where cases are appealed to the Council for Aliens' Law Litigation (CALL) had varied, but since March 2010 the Council has confirmed that Dublin transfer decisions should be based on a rebuttable presumption that Greece will abide by its obligations under relevant regional and international instruments.[27] The difficulties of lodging an asylum claim in Greece were first raised before the CALL in April 2008, in a case where a transfer request had remained unanswered by the Greek authorities.[28] The court noted that the Aliens Office had not sought to obtain any guarantee that the asylum-seeker would be able to lodge an asylum claim and follow an asylum procedure in Greece and required the Aliens Office to seek such guarantees in each individual case. In January 2009, however, the Aliens Office abandoned the practice of asking for a specific guarantee of treatment upon the arrival in Greece and the CALL endorsed the change, noting the transposition into Greek law of the European "Qualification" and "Asylum Procedures" Directives.[29] Since then, only a few transfers have been suspended by the CALL due to a possible failure on the part of the Greek authorities and the absence of a guarantee that the asylum claim would be effectively registered in Athens.[30] Otherwise, Belgian jurisprudence in Dublin cases

[26] Case No. 381/09, National High Court, Chamber of Appeals, Jan. 2010.
[27] For further details on Belgian practice, see UNHCR, *Submission by the Office of the United Nations High Commissioner for Refugees in the case of M.S.S. v. Belgium and Greece*, June 2010 (forthcoming).
[28] CALL Judgment No. 9 796, 10 April 2008.
[29] CALL Judgment No. 21 980, 26 Jan. 2009.
[30] CALL Judgments Nos. 25 959 and 25 960, 10 April 2009; No. 28804, 17 June 2009; No. 35 658, 10 Dec. 2009; and No. 35 752, 12 Dec. 2009.

remained constant throughout 2009. The CALL strengthened the reasoning of its decisions by referring to the December 2008 decision of the European Court of Human Rights in *K.R.S. v. UK*[31] and maintained its position that an applicant had "to submit tangible information from which could be deduced *prima facie* that his assertion regarding the 'serious damage difficult to remedy' is more than a mere hypothesis".[32]

20. In the face of some divergence in the CALL's decision-making, it decided to meet in general assembly of both language chambers to harmonize its position. This resulted in judgments in three Dublin Greece cases on 26 March 2010.[33] These decisions confirm the earlier position taken by the Dutch-speaking chambers. The reasoning is as follows: Greece is an EU Member State, is a State of law, is a party to the ECHR and the 1951 Convention, and is moreover bound by EU instruments on asylum and migration. Based on the principle of inter-State trust, the presumption must be that Greece will abide by its obligations under these instruments. This presumption is in principle rebuttable, but it is up to the asylum-seeker to produce elements of proof showing there are serious reasons to believe she/he will be exposed to a real risk of treatment violating Article 3 of the ECHR if transferred to Greece. If such elements of proof are produced, it is up to the government to raise eventual doubts.

21. On 10 June 2010, the CALL found that, in the case of an Iraqi national suffering from serious anxiety, the rebuttable presumption that Greece would abide by its obligations could not be upheld and ruled against his transfer to Greece.[34] Medical reports showed that he needed to continue to take medication for his condition and required continuing psychological and psychiatric follow-up. The court found that the Aliens' Office had not made an evaluation in the individual case of the accessibility for him, as asylum-seeker transferred to Greece under Dublin, of treatment in Greece, including non-medical aspects. While the Aliens' Office had argued that medical treatment would be available in public hospitals in Greece and that a social security system existed, the CCE endorsed the argument of claimant that this was not relevant for him as an asylum-seeker transferred to Greece, as he would find himself in a closed or open reception centre or, worse, on the streets without any right to medical assistance, and that he would lack financial means.

22. In **Finland**, the Supreme Administrative Court on 26 February 2009 decided to change its policy dating from 2008 of not transferring vulnerable asylum-seekers to Greece. The case concerned an applicant of Iraqi origin, who had invoked poor reception conditions, human rights violations and inability to work as grounds for withholding transfer. Referring to the decision of the European Court of Human Rights

[31] See above footnote 10.
[32] CALL Judgment No. 35 222, 1 Dec. 2009.
[33] CALL Judgments Nos. 40 963 (in Dutch), 40 964 and 40 965 (in French), 26 March 2010. The two latter judgments note that the European Court of Human Rights does not exclude that an applicant may belong to a group which is systematically exposed to mistreatment and that such persons are not required to establish the existence of any other particular characteristics which would distinguish them personally, if to do so would render illusory the protection afforded by Article 3 ECHR (see also *Saadi v. Italy*, Appl. No. 37201/06, 28 Feb. 2008, para. 132). These two judgments also elaborate on the position with regard to the risk of *refoulement* and reaffirm a transferring State remains responsible for considering a "risk of indirect *refoulement*" and cannot renounce its responsibility by referring to the Dublin system. They state that the transfer of an asylum-seeker from Belgium to Greece could only constitute a violation of Article 3 ECHR if the double condition that the asylum-seeker can demonstrate (i) the existence of serious grounds for a real risk that he/she will be victim of torture or inhumane treatment in his/her country of origin or in any other country and (ii) that he/she cannot find protection from *refoulement* to that country in the intermediary State responsible for the examination of his/her refugee claim.
[34] CALL Judgment No. 44 722 (in Dutch), 10 June 2010.

in *K.R.S. v. United Kingdom*,[35] the Court concluded that, despite serious shortcomings in the Greek asylum procedures and reception conditions, the return of the applicant to Greece would not breach Article 3 of European Convention on Human Rights. Despite this judgment, the Finnish Immigration Service still refrains from transferring certain vulnerable groups (women, medical cases, unaccompanied children) to Greece. Families with children and unaccompanied children registered as adults in Greece were nevertheless transferred until May when the Finnish Administrative Court decided seven cases regarding the transfer of families to Greece and ruled that families with children should not be returned. The Finnish Migration Board assesses the possible application of the sovereignty clause in each individual case and gives the legal representative the opportunity to submit reasons and evidence against such a transfer.

23. In **the Netherlands**, Article 30(1)(a) of the Aliens' Act gives practical effect to the Dublin II Regulation in the Netherlands, while an Aliens' Circular, a set of policy guidelines, stipulates that the Netherlands may assume responsibility for asylum applications, even though another State is deemed to have primary responsibility for doing so, if there are "tangible or specific indications" that a Member State is not fulfilling its international obligations and in order to reunite family members on humanitarian basis.[36] There is, however, a lack of information on how the IND interprets these criteria.

24. Regional Courts have in many cases ruled that transfers to Greece under Dublin should not take place, but these have been overruled by the Council of State. Thus, Regional Courts in recent years have granted interim measures and upheld appeals because of deficits in the Greek asylum procedure. Reasons for such decisions include violations of the *non-refoulement* principle, low recognition rates in Greece, the unavailability of legal aid or interpreters, the length of procedures, the lack of reception facilities, and the previous (now discontinued) Greek interruption procedure.[37] These Courts have viewed the shortcomings in the Greek asylum procedure as tangible or specific indications that Greece was not respecting its international obligations as required by the Aliens' Circular for the transfer of responsibility. They have held on a number of occasions that the State Secretary could not rely upon "inter-State trust" without further and proper justification.

25. The Dutch Council of State[38] has, however, consistently annulled such Regional Court decisions, generally finding that applicants have not provided tangible or specific indications that Greece would violate the obligation of *non-refoulement* and that the Secretary of State may thus rely on the principle of inter-State trust vis-à-vis Greece. Leading caselaw of the Council of State currently holds that reports on conditions in Greece for asylum-seekers and the difficulties they face in accessing an asylum procedure generally do not contain tangible or specific indications that Greece will, in the specific case of the applicant in question, violate the *non-refoulement* principle of

[35] *K.R.S. v. United Kingdom*, above footnote 10.
[36] Aliens' Circular *(Vreemdelingencirculaire)*, C3/2.3.6.2.
[37] Numerous Regional Court decisions in favour of the applicant have been issued. See e.g. the Regional Court decisions in Zwolle, Awb 06/49925, 11 Jan. 2007; Awb 06/46365, 22 Jan. 2007; Awb 06/50884, 18 March 2007; Awb 07/2757, 19 March 2007; Awb 08/40340, 10 Feb. 2009; in Assen, Awb08/8134, 25 March 2008; in Rotterdam, Awb 08/6599, 26 Feb. 2008; in Almelo, Awb 08/44697, 27 Feb. 2009; in Haarlem, Awb 10/7283, 6 May 2010.
[38] Aliens' Act 2000, establishing the Dutch Council of State as the highest court of appeal in the Netherlands in such cases from 2001.

the 1951 Convention relating to the Status of Refugees or Article 3 of the ECHR.[39] In addition, the Council of State has found that condemnation of Greece by the European Court of Human Rights for violations of Articles 3 and 5 of the ECHR is not in itself an indication that the human rights of an asylum-seeker who is to be transferred under the Dublin Regulation will him- or herself suffer a human rights violation.[40] The Council of State has also found that the incomplete transposition and implementation by Greece of the relevant EU Directives is not in itself a ground not to rely on the principle of inter-State trust. It has stated that complaints that Greece has not completely or properly implemented EU law ought to be raised in Greece with the Greek authorities.[41] There are currently several cases against the Netherlands and Greece pending before the European Court of Human Rights.[42] In May 2010, the Dutch Immigration and Naturalization Service reported that 30 Dublin transfers to Greece had been made in the last six months and that some 1,880 persons identified as possible transferees to Greece remained in the Netherlands.

26. Dublin transfers from the Netherlands to Greece were, however, put on hold after the European Court of Human Rights on 3 June 2010 issued Rule 39 interim measures in a case involving a number of Somali asylum-seekers facing transfer under Dublin to Greece.[43] Unusually, the Court issued a reasoned decision referring to: (i) the applicants' assertion that they might be returned (directly or indirectly) to Somalia without a rigorous scrutiny by the Greek authorities of their claim that such a return would expose them to treatment prohibited by Article 3 of the ECHR; (ii) the alleged

[39] See e.g. Council of State, *Case No. 20085917/1*, 29 Dec. 2008, "2.5.1 The general documents on which the Regional Court based its decision … describe in general terms the position of foreigners who seek international protection in Greece, the conditions under which they are being received, the way in which they are treated, and the functioning of the Greek asylum procedure. These documents do not, however, contain tangible or specific indications that the shortcomings as described result in a violation of Greece's *non-refoulement* obligations vis-à-vis such aliens, including aliens transferred on the basis of the (Dublin) Regulation." See, similarly, Council of State, 2 Feb. 2009, 200806716/1, "2.6 … If, despite existing shortcomings in the asylum procedure of the Member State concerned, there are no tangible or specific indications that that Member State will take action with a view to the forced removal of the asylum-seeker concerned, then there are no grounds to believe that that Member State will act contrary to the *non-refoulement* obligations mentioned in the Aliens Circular" (unofficial UNHCR translation).

[40] Council of State, *Case No. 200905828/1/V3*, 3 Nov. 2009, "2.7.1 The Section considers that … the general documents submitted by the alien do not contain tangible or specific indications that Greece will remove Iraqi asylum-seekers, such as the applicant, in contravention of its *non-refoulement* obligations. … 2.8.7 While from the documents submitted by the alien it can be inferred that on occasion transferred asylum-seekers have been detained in Greece under undesirable, and in certain aspects worrisome, conditions, yet these documents do not imply that asylum-seekers who are to be transferred by the Netherlands to Greece under the Regulation will be systematically subjected to treatment which can be qualified as inhuman" (unofficial UNHCR translation).

[41] Council of State, 25 Nov. 2009, 200905898/1V3, "2.5.1 With reference also to the decision of the European Court of Human Rights of 2 Dec. 2008 in Appl. No. 32722/08, *K.R.S. v. UK*, the Section considers that in principle the alien has to bring this complaint forward to the Greek authorities. Moreover, the Directives invoked by the alien do not give rise to the conclusion, contrary to what is stated by the alien, that the State Secretary can no longer rely on the principle of inter-State trust if and when Greece does not fully respect or implement these Directives. This would only be different if the defects in implementation were of such a nature, also taking into account the personal situation of the alien, that he, after the transfer, would find himself in a position contrary to the prohibitions on *refoulement* as laid down, in particular, the 1951 Convention and ECHR, Article 3, while not having access to an effective remedy. The alien has not made such a situation plausible on the basis of the documents submitted by him" (unofficial UNHCR translation).

[42] See e.g. *Ahmed Ali v. the Netherlands and Greece* and 13 other cases lodged against the Netherlands and Greece (Appl. Nos. 26494/09, 28631/09, 29936/09, 29940/09, 30416/09, 31930/09, 32212/09, 32256/09, 32729/09, 32758/09, 33212/09, 34565/09, 36092/09, 37728/09). For UNHCR submission in this case, see UNHCR, *Ahmed Ali and Others v. Netherlands and Greece*, Feb. 2010, at http://www.unhcr.org/refworld/docid/4b8d14fb2.html, which provides further details on the operation of the Dutch asylum procedure in Dublin cases.

[43] Application No. 30383/10, 3 June 2010. A letter from Justice Minister Ernst Hirsch Ballin to the European Court of Human Rights dated 11 June 2010 confirms that as a result of this reasoned Rule 39 letter "the minister of Justice has decided that, until further notice, applicants from South or Central Somalia will not be transferred to Greece" under the Dublin II Regulation.

risk of expulsion from Greece without the applicants having a proper opportunity to request the European Court of Human Rights to intervene; (iii) the current security situation in South and Central Somalia; and (iv) the fact that the Court was considering in a number of cases the compatibility of transfers to Greece (of persons who claimed they originate from South or Central Somalia) with Article 3 of the ECHR.

27. In **Norway**, the Aliens' Act contains written criteria on when to apply Article 3(2).[44] One criterion relates to ties to Norway which are closer than those to other Dublin States. Ties which can be considered include family ties, previous stay in Norway, health considerations as part of an overall assessment, and the best interests of the child. In the context of the transfer of asylum-seekers to Greece, Norway had on 7 February 2008 suspended such transfers "on the basis of the latest information about the possible violations of the rights of asylum-seekers in Greece, and on the basis of the need for more information about the conditions of the asylum-seekers in this country".[45] Transfers to Greece were thereby halted until September 2009, when some returns resumed, although around 1,000 transfers to Greece were nevertheless held back in the ensuing months.

28. On 2 February 2010, however, a majority of the Grand Board of the Norwegian Immigration Appeals Board ruled that an Iraqi asylum-seeker could be transferred to Greece, for the case to be assessed on the merits by Greek authorities.[46] The question that had been referred to the Board was whether there were obstacles to a transfer to Greece and if there were "special circumstances" which might require the Norwegian authorities to take up the case on its merits in Norway. In its decision, the a majority of the Grand Board found that Greece was, like Norway, bound by the European Convention on Human Rights, that it had transposed the EU Procedures Directive into national law, that the Greek authorities had stated in an email that the individual would have access to the asylum procedure in Greece, that despite certain vulnerabilities he would have access to healthcare, and that, having considered various reports including UNHCR's Observations of 2009, no system of forcible return operated in Greece. The Grand Board recognised that the situation as regards asylum in Greece was a cause for concern, but found this was not so great that Dublin mechanisms could not be used.

29. In **Sweden,** the Director General of the Swedish Migration Board (SMB) considers that Article 3(2) must be used in the case of unaccompanied minors otherwise facing transfer to Greece. SMB guidance of May 2008, which continues to apply, states:

> There is an evident risk that the children [transferred under the Dublin II Regulation] will immediately be placed in the reception unit at Amygdaleza, closed and barred premises from which the children are not allowed to leave. The placement in these premises can be compared to detention and is an intrusive measure. To the SMB's knowledge, there is no judicial assessment of the need for detention and the detention can last for up to three weeks without such an assessment. It can be added that the principle of the best interest of the child (Articles 1(9) and 10 Swedish Aliens' Act) should be taken into account.

[44] See, Aliens' Act, Article 32(B).
[45] Norwegian Immigration Appeals Board, Press Release, 7 Feb. 2008.
[46] See, Case No. 20100208-01, 1 Feb. 2010, at http://www.une.no/upload/PDF%20dokumenter/20100208-01.pdf and http://www.une.no/Praksis2/Stornemnd/Stornemndvedtak-om-Dublin-II-og-retur-til-Hellas-/ for press release (in Norwegian).

For these reasons, I consider that all transfers of unaccompanied minors to Greece should be prevented until further notice.[47]

30. In October 2008 the Migration Court of Appeal in Sweden, the highest level appeal court in such cases, rejected an appeal against the transfer of an adult to Greece, finding that serious humanitarian grounds are required to override responsibilities otherwise applicable under the Dublin II Regulation.[48] The court presumed that all EU Member State are able and willing to fulfil their agreed EU obligations, found that it was primarily for EU institutions, notably the European Commission and the Court of Justice of the EU, to ensure rules are followed, and reported that the Swedish Migration Board on a three-day visit to Greece in April 2008 had found that 26 randomly selected asylum-seekers it had transferred to Greece had all been granted access to the Greek asylum procedure.

B.4 Dublin States where court decisions are pending

31. The judicial practice regarding Dublin transfers to Greece in Germany, Ireland, Switzerland, and the United Kingdom is currently unresolved and leading cases are pending or subject to appeal in all these countries. It is possible that a court in one or other of these countries will shortly make a reference to the Court of Justice of the EU requesting it to determine the proper implementation of the Dublin Regulation in light of other international and European legal obligations.

32. In **Germany**, the German Federal Constitutional Court (FCC) decided on 8 September 2009 to issue a temporary suspension of a transfer to Greece so as to enable the court to assess precisely what legal standards apply to interim measures in Dublin cases so as to guarantee the right to asylum and to an effective legal remedy.[49] UNHCR submitted an intervention before the FCC in mid-March 2010 and a ruling by the Court is expected in the coming months.

33. Between September and December 2009, the Court issued four further almost identical suspensions of transfers to Greece.[50] In December 2009, the FCC granted interim measures suspending transfers to Greece in three further cases.[51] In these latest decisions, the court refers specifically to the Lisbon Treaty and the principle of solidarity among States[52] and emphasizes that it might also be an obligation for the transferring country to abstain from transfers to Greece under the principle of solidarity

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[47] Swedish Migration Board, Generaldirektörens riktlinjer avseende tillämpningen av Dublinförordningen i förhållande till Grekland, 7 May 2008, at http://www.migrationsverket.se/lifos/dok.do?dtyp=&amnesord=dublinf%F6rordningen+grekland&sidStorlek=10&sorteringsOrdning=-UDAT,-DOKN&mode=&currDokument=8.

[48] See, Case No. UM 2397-08, 28 Oct. 2008.

[49] See FCC Decision (*Bundesverfassungsgericht Beschluss)* 2 BvQ 56/09, 8 Sept. 2009 at www.bverfg.de/entscheidungen.html, (applicant's bundle document No. 59, folder 2) ; this decision was extended for another six months on 25 Feb. 2010 - 2 BvR 2015/09.

[50] See FCC Decisions 2 BvQ 68/09, 23 Sept. 2009; 2 BvQ 72/09, 9 Oct. 2009; 2 BvQ 77/09, 5 Nov. 2009; 2 BvR 2603/09, 13 Nov. 2009, at www.bverfg.de/entscheidungen.html.

[51] See FCC Decisions 2 BvR 2780/09 of 8 Dec.2009; 2 BvR 2767/09 of 10 Dec. 2009; 2 BvR 2879/09 of 22 Dec. 2009, at www.bverfg.de/entscheidungen.html.

[52] See Treaty on the Functioning of the European Union (Consolidated Version), 13 Dec. 2007, 2008/C 115/01, at http://www.unhcr.org/refworld/docid/4b17a07e2.html, Article 80 of which states: "The policies of the Union set out in this Chapter [on policies on border checks, asylum and immigration] and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle."

among Member States. These cases do not concern applicants that are regarded as particularly vulnerable persons (e.g. minors, families with young children, elderly persons, pregnant women, people that need medical treatment including people that suffer from trauma). With regard to Greece, the Federal Office for Migration and Refugees (the German asylum authority) generally makes use of the sovereignty clause if a person falls within this category.[53]

34. Until the September 2009 FCC ruling, a majority (around 60 per cent) of the lower courts had been rejecting appeals and applications for interim measures against Dublin transfer decisions regarding Greece, either because the application for interim measures is prohibited by German law[54] or because they assessed the situation in Greece to be such that access to the asylum procedure was guaranteed. Several lower Courts[55] have nevertheless ruled in full decisions that Germany must, given the situation in Greece, including on the basis of inadequate reception and procedural conditions there, make use of the sovereignty clause. These latter cases have, as far as is known, been appealed by the Federal Office for Migration and Refugees (Federal Office) and the decisions of the Higher Administrative Courts are pending. Since the issuance of the new FCC decisions, the number of decisions to suspend transfers has significantly risen.[56] There are also administrative courts granting interim legal remedies and deciding to return asylum-seekers from Greece to Germany after they had already been transferred to Greece in the past.[57] But there are still a number of administrative court decisions of the recent months rejecting interim legal remedies against Dublin transfers to Greece by relying on the legal provision in German law that excludes interim legal remedies against Dublin transfers without seeing a necessity to suspend the Dublin transfers on the basis of the pending FCC proceedings. Consequently, the FCC forestalled again in May 2010 a transfer to Greece in what is now at least its ninth decision.[58]

35. Since applications for interim legal remedies in Dublin II/Greece cases have generally been successful in recent cases, the German Federal Court of Justice (FCJ) – the highest German Court responsible for detention cases – ruled in its first decision

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[53] In 2009, Germany submitted a total of 2,288 requests to Greece to take charge of or take back asylum-seekers under the Dublin Regulation, Greece accepted 1,362 requests, 200 asylum-seekers were actually transferred, and Germany applied the sovereignty clause in 871 cases. In January and February 2010, 420 requests were submitted to Greece, 312 requests were accepted by Greece, in 257 cases the sovereignty clause was applied, and seven asylum-seekers were transferred to Greece. Remaining cases are either pending, suspended by courts or the transfers failed for other reasons. See BT-Drucksache 17/1340, at http://dip21.bundestag.de/dip21/btd/17/013/1701340.pdf. In 2009 as well as in the first three months of 2010, the largest proportion of requests by Germany to other Dublin States were those submitted to Greece (over 25 per cent).

[54] German Asylum Procedures Act, Section 34a (2).

[55] See the judgments of the courts of Frankfurt, 7 K 4376/07.F.A, 8 July 2009 and 7 K 269/09.F.A, 29 Sept. 2009; Würzburg, W 4 K 08.30122, W 4 K 08.30198, 10 March 2009, and W 6 K 08.30170, 28 April 2009; Sigmaringen, A 1 K 1757/09, 26 Oct. 2009; Osnabrück, 5 A 59/10, 19 April 2010; and Wiesbaden 7 K 1389/09.WI.A, 10 May 2010; assuming that Germany would have to make use of the sovereignty clause because of the situation in Greece but not finally deciding Neustadt a.d. Weinstraße, 5 K 1166/08.NW, 16 June 2009 (all judgments at www.asyl.net).

[56] Some Federal States in Germany have advised their respective aliens' authorities to change the previous practice of using administrative detention for Dublin transfers and to stop doing so in Greek cases, on the grounds that such detention is no longer warranted as the prospects for a "successful" transfer are very small.

[57] See e.g. Frankfurt/Oder AC, order of 3 Feb. 2010 - VG 5 L 314/09.A; Augsburg AC, order of 1 Feb. 2010 - Au 5 S 10.30014; Arnsberg AC, order of 14 Dec. 2009 - 8 L 699/09.Aab; Karlsruhe AC, order of 20 Oct. 2009 - A 3 K 2399/09; Minden AC, order of 2 Oct. 2009 - 1 L 533/09.A (judgements at www.asyl.net). Also in the proceeding of Frankfurt/Main AC, which decided that the sovereignty clause had to be applied (see footnote 55), the applicant had been transferred to Greece before and therefore had to be returned back from Greece to Germany.

[58] See FCC Decision 2 BvR 1036/10 of 21 May 2010, at http://www.asyl.net/fileadmin/user_upload/dokumente/17055.pdf. In this case, the Kassel Administrative Court (AC) had rejected interim legal remedies and did not see a necessity to suspend the Dublin transfer of a Syrian asylum-seeker and his 11-year-old son to Greece by order of 14 May 2010 - 3 L 629/10.KS.A.

about detention to secure Dublin transfers to Greece that detention must not be ordered in these cases and referred to the FCC decisions which stopped Dublin transfers to Greece.[59]

36. In **Ireland**, the High Court ruled in October 2009 that absent a risk of a violation of Article of the ECHR, a Member State is not obliged to refuse transfer where here is evidence that another Member State is not complying with its obligations and that it was for the European Commission to address this matter.[60] On 11 February 2010, three applicants contesting their transfer to Greece were granted leave to appeal to the Supreme Court.[61] The key point of contention between the parties is the content of the "sovereignty clause", which according to counsel for the Minister is relevant only if Article 3 of the ECHR is in play, and according to counsel for the applicants is also in play for broader concerns about reception conditions, access to the procedure, and the asylum procedure itself. On 2 March 2010, the High Court approved the wording of the point of law to be appealed to the Supreme Court as follows:

> On the assumption that issues relevant to Article 3 of the ECHR do not arise, what is the extent of the obligation or entitlement on the part of the Office of the Refugee Applications Commissioner, pursuant to Council Regulation (EC) No. 343/2003, to assess whether the Member State prima facie responsible for taking back an applicant for asylum status operates an asylum system which fails to accord with the obligations of that Member State pursuant to that Regulation?

Numerous injunctions against transfers from Ireland to Greece have been put in place pending a decision in this case.

37. Pending a decision from the Supreme Court and in view of the growing number of injunctions against transfers to Greece, another case was brought before the High Court in May 2010 with a hearing scheduled for 22–24 June.[62] This case joins those of four single men in their 20s from Afghanistan, Algeria and Iran who had secured injunctions preventing their transfer to Greece since the *Mirza* judgment. UNHCR is intervening as *amicus curiae* in this case.

38. In **Switzerland**, a judgment of the Federal Administrative Court in February 2010 stated that the practice of the Federal Office for Migration (FOM) on the use of Article 3(2) in the context of transfers to Greece, was as follows:

> … [T]he FOM uses the sovereignty clause for certain categories of vulnerable persons, because there is evidence that Greece neither identifies these persons nor takes necessary steps to protect them. Older persons, families with minor children, unaccompanied minors, and persons who are dependent on considerable medical aid are seen as particularly vulnerable. This modus operandi is in line with current practice on the use of the sovereignty clause for

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[59] See Bundesgerichtshof (Federal Court of Justice–FCJ). Order V ZB 172/09, 25 Feb. 2010, at http://www.asyl.net/fileadmin/user_upload/dokumente/16807.pdf. Some Federal States in Germany have already advised their respective aliens' authorities to change the previous practice of using administrative detention for Dublin transfers and to stop doing so in Greek cases, on the grounds that such detention is no longer warranted as the prospects for a "successful" transfer are very small.

[60] *Mirza and Others v. Office of the Refugee Applications Commissioner (ORAC) and the Minister for Equality, Justice and Law Reform*, Ireland, High Court, 21 Oct. 2009, at http://www.unhcr.org/refworld/docid/4bfd08022.html.

[61] *Tigist Mamo (AKA Eden Mamo) v. ORAC & Anor* / Record No. 2008/1243/JR; *Ramazan Hussein Mirza v. ORAC & Anor* / Record No. 2008/1242/JR; *Bryalay Abrahimi v. ORAC & Anor* / Record No. 2008/1278/JR, Ireland, High Court, 11 Feb. 2010.

[62] *M.E. and Others v. ORAC and the Minister for Justice, Equality and Law Reform*.

specific groups of persons of other Dublin States, such as Germany, Austria, Finland, Belgium and Norway.[63]

39. UNHCR was subsequently informed that a leading decision is pending before the Swiss Federal Administrative Court as to whether and under what conditions it is mandatory for Switzerland to apply Article 3(2) in the context of Dublin transfers to Greece. While this appeal is pending, the court has suspended all such transfers to Greece if applicants lodge an appeal. This has led to a series of court decisions suspending transfers to Greece.

40. In the **United Kingdom**, there is a statutory presumption of safety that stipulates that various listed States (encompassing Dublin States) will not persecute or remove an individual in breach of the 1951 Convention and that all listed States are to be regarded for the purpose of the determination by any person, tribunal or court as countries that will not subject an individual to torture or inhuman or degrading treatment or remove an individual in breach of the ECHR.[64] There is no appeal right against a designation of a case as a third country case, but an applicant can challenge the decision by way of judicial review, which in practice suspends transfer while the judicial review is being considered. Given the statutory presumption of safety, courts which have concerns can only issue a declaration of incompatibility with the Human Rights Act 2008 and wait for Parliament to remove Greece from the list of safe countries. There is no policy or formal guidance by the Secretary of State for the Home Department on the use of Article 3(2) of the Dublin II Regulation.

41. In May 2009, the House of Lords ruled in the case of *Secretary of State for the Home Department (Respondent) v. Nasseri* [65] that in order for removals from the UK to be held to be in breach of the UK's ECHR obligations the UK courts require evidence of removals from Greece contrary to Article 3 of the ECHR and are not necessarily concerned with treatment within Greece.

42. A further case, *R. (Najibullah Saeedi) v. Secretary of State for the Home Department*, brought before the England and Wales High Court in early 2010, is based on developments since this judgment and is concerned with both risk of *refoulement* from Greece and treatment within Greece.[66] In his judgment on 31 March, the judge declared himself unable to impugn the admissibility decision in *K.R.S. v. UK*[67] and the House of Lords' judgment in *Nasseri*. He found that the Secretary of State was

[63] Judgment of the Swiss Federal Administrative Court, 2 Feb. 2010, E-5841/2009, in German at http://relevancy.bger.ch/pdf/azabvger/2010/e_05841_2009_2010_02_02_t.pdf, at p. 8 (unofficial UNHCR translation), summarizing in its statement of facts the input of the FOM and stating that the applicant in question would not fall under these categories. The court in its decision did not go into the substance of the case as it ruled that the Swiss administrative practice already violates Article 29a of the Swiss Federal Constitution and Article 13 of the European Convention on Human Rights so that a decision on the substance was not necessary at this stage of the procedure. The reason for this was that the applicant disappeared in Greece after his removal in September and neither UNHCR nor the Greek Refugee Council nor the Greek authorities had been able to trace him. In this regard the court stated that the fact that it was impossible to trace the person after the transfer brought the court to the conclusion that an effective legal remedy would in these cases include the effective possibility to be granted an interim measure prior to the transfer.

[64] Asylum and Immigration (Treatment of Claimants) Act 2004, Sch 3, Part 2, para. 3.

[65] *Secretary of State for the Home Department (Respondent) v. Nasseri (FC) (Appellant)*, [2009] UKHL 23, 6 May 2009, at http://www.unhcr.org/refworld/docid/4a0183342.html.

[66] *R. (on the application of Saeedi) v. Secretary of State for the Home Department*, [2010] EWHC 705 (Admin), High Court (England and Wales), 31 March 2010, at http://www.unhcr.org/refworld/docid/4bb374b62.html, with UNHCR's submission of 15 Feb. 2010 in the case at http://www.unhcr.org/refworld/docid/4b83fceb2.html .

[67] See above footnote 11.

"generally entitled" to transfer an asylum-seeker to the Member State identified under the Dublin Regulation as the State responsible for determining the claim for asylum. Three exceptions to this general entitlement were (i) where the transfer "would be incompatible with the European Convention on Human Rights, for example, because of the risk that the Member State will onwardly *refoule* them in breach of their Article 3 rights"; (ii) where "the asylum seeker makes a human rights claim, on grounds other than an alleged risk of onward *refoulement* from the Member State in question and the Secretary of State is satisfied that the human rights claim is not clearly unfounded"; and (iii) where it is necessary to assume responsibility for assessing the case to avoid a breach of "fundamental rights as recognized in the European Union".[68] He found that these exceptions did not apply in the case at hand.

43. Regarding "the Dublin Regulation, in particular the sovereignty clause, Article 3(2)", the judge found that it "must be interpreted and applied in the context of the Common European Asylum System and of fundamental rights as recognised in European Union law", but that:

> It is Greece's responsibility to implement the provisions of the constituent instruments in its own territory just as it is the United Kingdom's. To require the Secretary of State to exercise the Article 3(2) discretion to make good any deficiencies in Greece's compliance with the different aspects of the Common European Asylum System would be, in a sense, inimical to the purpose of the Dublin Regulation. As indicated earlier one of its purposes is to prevent secondary movements of asylum seekers caused by differences in the conditions in different Member States. If a failure of a Member State were a reason to exercise the Article 3(2) discretion, it would encourage forum shopping and lead to delay in the determination of claims.[69]

44. An appeal to the Court of Appeal and a possible reference to Court of Justice of the EU is due to be heard in July. In the meantime, it was announced in early May 2010 that the Government had proposed to forestall further transfers to Greece in cases that were already lining up behind *Saeedi*, pending the outcome of the appeal.

C. Use of Rule 39 interim measures before the European Court of Human Rights to stall Dublin transfers to Greece

45. A growing level of concern regarding the legitimacy of Dublin transfers to Greece can perhaps also be shown by the increasing number of Rule 39 requests made to the European Court of Human Rights for interim measures to stay transfers to Greece. In 2009, there were approximately 500 such requests, the vast majority of them being made from May 2009 onwards, and approximately 65 per cent of them were granted.[70] Between January 2010 and the end of April 2010, around 265 Rule 39 requests to stay transfers to Greece were made and approximately 71 per cent of them were granted.

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[68] See *Saeedi* judgment, *ibid.*, paras. 159–160. The judgment is among a number of recent judgments referring to the right to asylum as set out in Article 18 of the Charter of Fundamental Rights of the EU, which became legally binding when the Treaty of Lisbon entered into force on 1 Dec. 2009.

[69] See *Saeedi* judgment, *ibid.*, para. 151, citing as authority *Salahadin Abdulla and Others v. Bundesrepublik Deutschland*, C-175/08, C-176/08, C-178/08 and C-179/08, Court of Justice of the EU, 2 March 2010, at http://www.unhcr.org/refworld/docid/4b8e6ea22.html.

[70] Some requests may be renewed requests regarding the same person.

46. At the beginning of June 2010, there were some 760 cases relating to Dublin transfers to Greece pending before the European Court of Human Rights. Among these are four cases in which UNHCR is intervening: (i) *Sharifi and others v. Italy and Greece*;[71] (ii) *X.B. v. France and Greece* (October 2009); (iii) *Ahmed Ali v. Netherlands and Greece*;[72] and (iv) *M.S.S. v. Belgium and Greece*. The latter case is due to be heard by the Court's Grand Chamber in September 2010 and is understood to be the lead case on this issue.[73]

D. Member State practice in assuming responsibility for cases under the "humanitarian clause"

47. Member States may also assume responsibility for assessing a claim under the "humanitarian clause" set out in Article 15 of the Regulation, although some States appear reluctant to accede to requests that family members and other dependent relatives be brought together and that one State assume responsibility for examining their asylum claims.

48. In **Belgium**, the appeal against the transfer to the Netherlands of a Rwandan asylum-seeker, whose two sisters had been living in Belgium for 10 years, had been recognized as refugees and had Belgian nationality, was rejected on the grounds that these family members did not fall within the family definition set out in Article 2 of the Regulation.[74] Similarly, the appeal of a Congolese asylum-seeker with an uncle and sisters in Belgium was rejected with reference to caselaw of the European Court of Human Rights on Article 8 ECHR, requiring that family links be pre-existing, real, sufficiently close and involving a life in common, financial dependence, or continued relations between a father and his children.[75] In another case, two adult sisters, one of whom reportedly had a history of brain cancer requiring continuing medical treatment, were twice transferred from Belgium to Poland under Dublin II, despite interventions by UNHCR and the Belgian Committee for Aid to Refugees (CBAR), and even though a dozen members of their family including their mother and brother were recognised in Belgium. On the third occasion, after further interventions, the Aliens' Office decided in autumn 2009 not to seek to transfer the sisters, who had once again returned to Belgium.[76]

49. In **France**, it should be noted that the sole clarification for the implementation of the Dublin II Regulation is a *circulaire* issued by the Interior Affairs Ministry in December 2003. Considering the complexity and inherent technicality of the Regulation which have since become evident, this situation has in practice resulted in a discrepancy of interpretation of the provisions of the Regulation by different French prefectures, in particular, but not exclusively, concerning the implementation of Article 15 of the Regulation. As regards jurisprudence, the Conseil d'Etat has upheld the appeal of an

[71] UNHCR, *Written Submission by the Office of the United Nations High Commissioner for Refugees in the Case of Sharifi and others v. Italy and Greece (Application No. 16643/09)*, October 2009, Appl. No. 16643/09, at http://www.unhcr.org/refworld/docid/4afd25c32.html.
[72] See above, footnote 42.
[73] In this context, it was reported in early May that the Belgian State Secretary for Asylum and Migration had decided temporarily to halt Dublin transfers of Afghans to Greece with the result that Afghans currently held in closed centres in Belgium pending such transfers began to be released.
[74] Judgment No. 151.203, Belgium, Conseil d'État, 10 Nov. 2005.
[75] Judgment No. 167.145/24.855, Belgium, Conseil d'État, 10 Nov. 2005, rejecting the appeal of someone with an uncle and sisters in Belgium.
[76] Aliens' Office, Belgium, Cases No. OV 5.853.005 and No. OV 5.853.006, daughters of Case No. OV 5.825.396 and step daughter of case No. OV 6.433.791.

asylum-seeker facing transfer to Austria on the grounds that to do so would constitute a violation of his right to respect for family life and/or to his right to benefit from an assessment of his asylum claim in a procedure in conformity with necessary guarantees.[77] The Conseil d'Etat has also ruled that the notion of "family member" for the application of Article 15 of the Dublin Regulation can be broader than the restrictive definition set out in Article 2 of the Regulation, but that the appellant must demonstrate the reality and the intensity of the existing family links.[78] It seems, however, that the prefectures do not always take into consideration the jurisprudence of the Conseil d'Etat and *tribunaux administratifs* regarding Article 15.

50. In **Germany**, the sovereignty clause or interim measures against Dublin transfers have also been applied in cases where medical issues or extended family links were at stake especially in cases where Article 15(2) and (3) applies.[79] Recently, the Berlin Appeal Court argued that the fact the applicant was receiving psychotherapy and was dependent on the support of his brother who lived in Germany could be a reason for Germany to make use of the sovereignty clause.[80] Currently, an appeal is pending on the question as to whether the sovereignty clause must be applied if medical reasons do not allow a Dublin transfer.[81]

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[77] See *Nikoghosyan c. Préfet du Rhône*, N° 261913, France, Conseil d'Etat (CE), 25 Nov. 2003,"… considering on the other hand that both the Dublin Convention and the Dublin Regulation allow any Member State, on humanitarian grounds and with the individual's consent, to examine a request for asylum which would not fall to that Member State under the applicable criteria and that when M.Y. was faced with the alternative either of leaving his family to pursue his asylum claim in Austria, or of having his claim assessed in his absence for an indeterminate period of time, the above-mentioned reasoning of the Rhone authorities constituted a serious and manifestly illegal violation either of his right to respect for family life or his right to a full examination of his asylum claim in conformity with the guarantees which should be applied." Unofficial UNHCR translation of "... Considérant d'autre part que tant la Convention de Dublin que le règlement communautaire du 18 février 2003 réservent la faculté de tout Etat membre de procéder pour des raisons humanitaires avec l'accord de l'intéressé, à l'examen d'une demande d'asile qui ne lui incombe pas en vertu des critères applicables: qu'en plaçant M.Y. devant l'alternative, soit de quitter sa famille pour soutenir sa demande d'asile en Autriche, soit de voir celle-ci examinée en son absence pendant une durée indéterminée, les raisons susmentionnées du préfet du Rhône ont porté une attente grave et manifestement illégale, selon le cas, soit à son droit au respect de la vie familiale soit à son droit de bénéficier d'une procédure d'examen de sa demande d'asile conforme aux garanties qui doivent s'y attacher." This position was confirmed in the Conseil d'Etat's Judgment No. 263501, 15 July 2004.

[78] See e.g. Judgment No. 281001, France, Conseil d'Etat, 3 June 2005; Judgment No. 326997, France, Conseil d'Etat, 17 April 2009. In the latter case, the court found that the applicant could be transferred to Poland because he had failed to show an effective family life with his wife and he was not the father of her three children.

[79] This has been a regular but limited practice in recent years. See e.g. the judgment of the administrative court (AC) of Düsseldorf, 18 K 718/09.A, 10 Dec. 2009 ruling that Germany must make use of the sovereignty clause with respect to family life and AC Saarland, 2 L 1558/08, 21 Oct. 2008, which ordered an interim measure because the family links had not been taken duly into account in the context of the sovereignty clause. In another decision, a court ordered an interim measure against a Dublin transfer to the Czech Republic because the decision not to make use of the sovereignty clause had not taken duly into account that in this particular case there was an access barrier to the asylum procedure in the Czech Republic which would not be in compliance with the ECHR, AC Schleswig-Holstein, 6 B 32/09, 7 Sept. 2009. Interim measures against Dublin transfers for humanitarian reasons without linking these reasons to the use the sovereignty clause have been ordered e.g. by AC Düsseldorf, 1 L 40/10.A, 21 Jan. 2010 (respect of family life; re-entry to Germany), Higher Administrative Court Niedersachsen, 4 ME 14/10, 13 Jan. 2010 (respect of family life), AC Hanover, 13 B 6047/09, 10 Dec. 2009 (best interest of the child), AC Würzburg, W 5 K 07.30121, 26 July 2007 (respect of family life), AC Weimar, 7 E 20173/09 We, 11 Dec. 2009 and AC Düsseldorf, 21 K 3831/07.A, 30 Oct. 2007 (both medical reasons). The Federal Office for Migration and Refugees (the German refugee status determination authority) has likewise made use of the sovereignty clause in such situations in a limited number of cases.

[80] See Berlin AC, Order of 23 April 2010, VG 34 L 88.10 A, at http://www.asyl.net/fileadmin/user_upload/dokumente/17020.pdf.

[81] This had been approved by AC Braunschweig, judgment of 23 Jan. 2010, see Niedersachsen Higher Administrative Court, order of 9 March 2010 to admit the appeal, 2 LA 97/09, at http://www.asyl.net/fileadmin/user_upload/dokumente/16988.pdf.

51. In **Iceland**, the Directorate of Immigration decided on 9 February 2010 not to transfer a father and daughter from Iran to Latvia but to assume responsibility for assessing their claims. Transfer of the pair, who claimed to have been detained and subject to physical and sexual violence in Iran, would have resulted in their separation under reception arrangements applying in Latvia and in their possible detention, which UNHCR indicated in an intervention on their behalf would cause them, as victims of torture, undue hardship.

52. In **Switzerland**, the Federal Administrative Court has identified a need for clear and transparent criteria regarding the use of the sovereignty clause for humanitarian reasons. In several decisions, it has therefore overturned the first instance decision where the Federal Office for Migration (FOM) had not given sufficient reasoning as to why the sovereignty clause was not used and ordered the FOM to reassess the case.

E. Conclusion

53. This Note indicates that States accept that asylum-seekers with particular vulnerabilities require special scrutiny. In such cases, transfers of such individuals under the Dublin II Regulation are much less likely to take place. Additional concerns also arise in the Greek context, given the lack of a functioning asylum procedure and the lack of reception facilities there, as well as the risk of return to Turkey from Greece. National practice regarding Greek transfers varies quite widely. Some courts have generally endorsed transfers to Greece on grounds including that the country must be presumed to uphold its international obligations, that relevant EU Directives have been transposed into national law, and that it is for the European Commission to address shortcomings in implementation of the Regulation in Greece. Others have ruled against transfers to Greece on grounds including that to do so would constitute, or result in, violations of international and ECHR human rights obligations, both as regards possible onward *refoulement* and as regards treatment in Greece, and/or that transfer would not permit access to a fair and efficient asylum procedure with sufficient safeguards to ensure respect for the right to asylum.

54. Court decisions appear increasingly to refer to the broader context of the operation of the Dublin Regulation. This includes not only references to the presumed proper implementation of the Regulation and especially the responsibilities of the State deemed *prima facie* responsible under the Regulation, but also to a possible need for solidarity among EU States and for respect for the right to asylum under Article 18 of the Charter of Fundamental Rights and the right to an effective legal remedy. The jurisprudence nevertheless remains unsettled. Judgments by both the European Court of Human Rights and the Court of Justice of the European Union may be necessary to clarify the proper interpretation of both bodies of law, as well as obligations under international refugee law. In the meantime, a growing number of transfers to Greece have been postponed, whether as a result of government policy or through interim measures before the European Court of Human Rights.

UNHCR Brussels, 16 June 2010