



**Updated 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
31 January 2011**

A. Introduction

1. This Note updates the information given in the "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",¹ which was issued in June 2010 in light of concerns in many Member States regarding such transfers.

2. Since that time, the number of cases brought against proposed transfers to Greece under the Dublin II Regulation² has increased, including before the European Court of Human Rights (ECtHR). The latter delivered a Grand Chamber judgment on 21 January 2011 in the case of *M.S.S. v. Belgium and Greece*,³ which is likely to affect the way the Regulation is applied in respect of this country and possibly beyond. As a result, in the ensuing days, a number of Member States⁴ participating in the Dublin system decided to suspend transfers to Greece,⁵ while several others had already done so pending the ECtHR's judgment.⁶ Three cases have also been brought before the Court of Justice of the European Union (CJEU) regarding the interpretation of Article 3 of the Dublin II Regulation.⁷

¹ See "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", 16 June 2010, at <http://www.unhcr.org/refworld/docid/4c18e6f92.html> (hereinafter "the June 2010 Information Note").

² See 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>.

³ *M.S.S. v. Belgium and Greece*, Application No. 30696/09, Council of Europe, ECtHR, 21 January 2011, at <http://www.unhcr.org/refworld/docid/4d39bc7f2.html>.

⁴ 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.

⁵ Denmark, Finland, Switzerland, as explained in paras. 23–26 below.

⁶ Belgium, Germany, Iceland, Netherlands, Norway, UK, as explained in paras. 13–22 below.

⁷ CJEU, *N.S. and Others*, Joined Cases C-411/10 and C-493/10, OJ C 274 of 09/10/2011, p. 21, at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:274:0021:0022:EN:PDF> and OJ C 13 of 15/01/2011, p. 32, at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:013:0018:0019:EN:PDF>; Reference for a preliminary ruling from the Hesse Higher Administrative Court, 22 December 2010.

3. The developments set out below on the practice of some Member States as regards their exercise of Article 3(2) of the Dublin II Regulation⁸ in relation to transfers to Greece are based on information gathered by UNHCR offices and partners in various countries in Europe and collected through related research. As with the June 2010 Information Note, this survey does not include information on situations where Member States have freely assumed responsibility for assessing claims. Rather, it is based on recent policy announcements by various Member States and on caselaw in Member States where proposed transfers have been contested in the courts, which have then ruled on the legitimacy of such transfers. 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. Cases pending before the ECtHR and CJEU regarding Dublin transfers to Greece

4. At the end of January 2011, there were some 666 cases relating to Dublin transfers to Greece pending before the ECtHR. In the case of *M.S.S. v. Belgium and Greece* before the Court, a hearing was held on 1 September 2010 and the judgment was delivered on 21 January 2011 as a leading judgment.⁹

5. Pending the handing down of the judgment and an apparent growing level of concern regarding the legitimacy of Dublin transfers to Greece, an increasing number of Rule 39 requests were made to the ECtHR for interim measures to stay transfers to Greece. In 2009, there were approximately 500 such requests from Member States and approximately 65 per cent of them were granted. In 2010, some 850 requests were made of which about 82 per cent were granted. More significantly, since 1 October 2010, the Court has received some 190 requests, of which only four were rejected, meaning that almost 98 per cent were granted. Letters from the Court sent to legal representatives in these cases in late 2010 systematically referred to the *M.S.S.* case and stated that the applicant should not be removed to Greece until further notice. In addition it should be noted that, in quite a number of countries, higher national courts were by then suspending all Dublin transfers to Greece upon appeal automatically, as was for instance the case in Germany, Romania and Switzerland, so that there were no Rule 39 requests from these countries.

6. This trend has been consolidated since the ECtHR delivered its Grand Chamber judgment in the *M.S.S.* case. The Court found, inter alia:

- a violation by Greece of Article 3 of the 1950 European Convention on Human Rights (ECHR) because of the applicant's detention conditions
- a violation by Greece of Article 3 ECHR because of the applicant's living conditions in Greece;

⁸ Article 3(2) of the Dublin II Regulation, known as the "sovereignty clause", allows Member States 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.

⁹ For UNHCR's oral intervention before the ECtHR in this case on 1 September 2010, see <http://www.unhcr.org/refworld/docid/4c7fbf052.html>. UNHCR has also made written interventions in three other cases regarding Dublin transfers to Greece which are pending. See UNHCR's Written Submissions in the cases of *Sharifi and others v. Italy and Greece* (Application No. 16643/09), October 2009, at <http://www.unhcr.org/refworld/docid/4afd25c32.html>; (ii) *X.B. v. France and Greece*, October 2009; and (iii) *Ahmed Ali v. Netherlands and Greece*, Feb. 2010, at <http://www.unhcr.org/refworld/docid/4b8d14fb2.html>.

- a violation by Greece of Article 13 ECHR taken in conjunction with Article 3 ECHR because of the deficiencies in the asylum procedure followed in the applicant's case and the risk of his expulsion to Afghanistan without any serious examination of the merits of his asylum application and without any access to an effective remedy;
- a violation by Belgium of Article 3 ECHR because, by sending him back to Greece, the Belgian authorities exposed the applicant to risks linked to the deficiencies in the asylum procedure in that State;
- a violation by Belgium of Article 3 ECHR because, by sending him back to Greece, the Belgian authorities exposed the applicant to detention and living conditions in that State that were in breach of that Article;
- a violation by Belgium of Article 13 ECHR taken in conjunction with Article 3 ECHR;

7. In the European Union (EU) context, the Court of Appeal of England and Wales and the High Court in Ireland have each made a request to the CJEU for a preliminary ruling in accordance with Article 267 of the Treaty on the Functioning of the European Union (TFEU) concerning the correct interpretation of Article 3 of the Dublin II Regulation.

8. In the **UK**, an order for reference by the Court of Appeal was made in the case of *N.S. v. Secretary of State for the Home Department* on 18 August 2010¹⁰ and presented seven questions to the court. In **Ireland**, a reference for a preliminary ruling was made by the High Court on 11 October in the case *M.E. and Others v. Office of the Refugee Applications Commissioner and the Minister for Justice, Equality and Law Reform*.¹¹ In both cases, UNHCR,¹² Amnesty International Ltd and the AIRE Centre (Advice on Individual Rights in Europe)¹³ were parties at national level and, as such, also parties to the case before the CJEU.¹³

9. In addition, in **Germany**, the Higher Administrative Court in Hesse on 22 December 2010 requested a preliminary ruling from the CJEU in another Dublin-Greece case on appeal against a July 2009 ruling of the Administrative Court in Frankfurt.¹⁴

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

¹⁰ *N.S. v. Secretary of State for the Home Department (Case C-411/10)*, above at note 7.

¹¹ *M. E. and Others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform* (Case 493-10) at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:013:0018:0019:EN:PDF>.

¹² For UNHCR's submission before the High Court (England and Wales), see UNHCR, *R. (Saeedi) v. Secretary of State for the Home Department (SSHD) - Submissions by UNHCR*, 15 February 2010, at <http://www.unhcr.org/refworld/docid/4b83fceb2.html>; for the judgment of the High Court see *R. (on the application of Saeedi) v. SSHD*, [2010] EWHC 705 (Admin), 31 March 2010, at <http://www.unhcr.org/refworld/docid/4bb374b62.html>, after which the case went to the Court of Appeal. For UNHCR's intervention before the Court of Appeal, see *R. (on the application of Saeedi) v. SSHD and Others - Submissions by United Nations High Commissioner for Refugees*, 6 July 2010, at <http://swigea56.hcrnet.ch/refworld/docid/4c3358a12.html>.

¹³ The Equality and Human Rights Commission was also a party to the case before the Court of Appeal in the UK.

¹⁴ See *Case No. 7 K 4376/07.F.A*, Administrative Court, Frankfurt a.M, judgment of 8 July 2009. For further background information, see also the June 2010 Information Note, para. 43.

10. The sections below outline recent developments in a number of Member States regarding transfers to Greece under the Dublin II Regulation. Section C.1 outlines policy instructions which have been issued in recent months in Austria, Belgium, Denmark, Finland, Germany, Iceland, the Netherlands, Norway, Switzerland, and the United Kingdom. Section C.2 sets out recent jurisprudence of high-level courts in Austria, France, Germany, Hungary, Italy, the Netherlands, Norway, Poland, Spain, Sweden, and Switzerland.

11. 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",¹⁵ as well as public reports by various organizations, were cited. Decisions also regularly refer not only to the ECtHR' judgment in *T.I. v. United Kingdom*, confirming that indirect removal does not affect a State's responsibility not to return anyone to torture, inhuman or degrading treatment,¹⁶ but also to the Court's admissibility decision in *K.R.S. v. United Kingdom*.¹⁷

C.1. Instructions and policy regarding Dublin transfers including as a result of requests by the ECtHR

12. Although Government instructions or policy regarding Dublin transfers are not often public, a number of Governments have recently made policy announcements regarding the handing of Dublin transfers to Greece (in addition to those in Denmark, Iceland and Luxembourg already outlined in the June 2010 Information Note). These latest announcements – first by the United Kingdom in September, by Belgium, Finland, Iceland, the Netherlands and Norway in October, by Austria in November, and by Germany in January 2011 – have all been in the direction of suspending transfers to Greece, pending a judgment by the ECtHR.¹⁸ Some of these States have gone further in stating specifically that they will use Article 3(2) of the Dublin II Regulation to assume responsibility for assessing the asylum claims of those concerned, while others have

¹⁵ 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>.

¹⁶ 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.

¹⁷ *K.R.S. v. UK*, above footnote 16.

¹⁸ In Spain, where the Eligibility Commission had agreed in mid-2008 to refrain from transferring vulnerable cases to Greece under Dublin, including families with young children, the Spanish authorities have generally assumed responsibility for assessing the claims of vulnerable asylum-seekers. The number of vulnerable cases where the question of a transfer to Greece under Dublin arises is, however, very low. Asylum-seekers are not detained in Spain and if they do not agree to the transfer, transfers are very rarely carried out either to Greece or other Dublin States against the person's will. Those who remain in Spain are, however, left with no access to reception facilities. Their case is not assessed and they are left without legal residence and in limbo. For further information regarding earlier Spanish jurisprudence see the June 2010 Information Note, para. 17.

been less specific. In addition, Denmark, Finland, Norway and Switzerland also announced a change in policy after the publication of the *M.S.S.* judgment on 21 January 2011. Further details are given below.

13. In the **United Kingdom**, the UK Border Agency (UKBA) announced on 20 September 2010 that it was temporarily assuming responsibility for assessing the asylum claims of some 1,300 applicants in the UK who might otherwise face transfer to Greece under the Dublin II Regulation. In view of the referral of the *N.S. v. SSHD* case to the CJEU, the UKBA stated that it was concerned that the time before the CJEU determined the case could be up to two years and would lead to an increase in the backlog of stayed cases for which Greece was deemed responsible, but which could not be effected until *N.S.* was resolved. The decision to invoke Article 3(2) of the Dublin II Regulation applied to existing cases (except that of *N.S.* himself). The UKBA stated that its intention was also to apply Article 3(2) to asylum-seekers arriving through Greece in future until the CJEU judgment was given, although the Home Secretary reserved the right to reinstate removals in respect of new cases at any time. It was emphasized that the decision was a purely pragmatic one, taken in order to avoid the costs that would otherwise be incurred and did not reflect any change in the government's strong support for the Dublin II Regulation.

14. In late September, in view not least of a growing number of Rule 39 applications to the ECtHR for interim measures to prevent Dublin transfers to Greece, the Court wrote to the governments of **Belgium, Finland, the Netherlands, and Norway** asking them to suspend such transfers pending a decision in the case in *M.S.S. v. Belgium and Greece* being considered by the Court's Grand Chamber.¹⁹ The Court affirmed that pending the adoption of its judgment in that case, interim measures would in future be applied in any case where an asylum-seeker in another Dublin State challenged his or her return to Greece.

15. In **Norway**, the Ministry of Justice and the Police responded to this request by announcing on 12 October 2010 that it was instructing the Directorate of Immigration (UDI) for the time being to process on the merits applications from asylum-seekers otherwise facing transfer to Greece under the Dublin II Regulation. Until further notice, the Immigration Appeals Board (UNE) also decided to suspend the transfer of asylum-seekers to Greece under the Dublin Regulation. The Ministry of Justice emphasized that for the most part the Dublin system worked well, that a common European solution was needed to resolve the situation in Greece, and that Norway would work to assist Greece to be able to process asylum cases in line with other EU Member States.

16. In mid-October, UNHCR learnt that **Iceland** had also decided to suspend all Dublin transfers to Greece and process the cases, referring to the Norwegian decision.

17. In the **Netherlands**, the then Minister of Justice, Mr Hirsch Ballin, stated in a letter to the House of Representatives on 13 October that the transfer of some 1,900 asylum-seekers facing transfer to Greece from the Netherlands would be temporarily suspended. He nevertheless stated that Greece remained responsible for assessing their claims under the Dublin II Regulation. Reporting on the sequence of events leading to this decision, Minister Ballin indicated that it followed a reasoned Rule 39 decision issued by the

¹⁹ Although an unusual step, the ECtHR made a similar request in October 2007 when it asked member States not to send Tamil Sri Lankans back to their country of origin.

ECtHR on 3 June requiring the temporary suspension of transfers of South- and Central-Somali asylum-seekers to Greece.²⁰ In addition, he stated that following the preliminary questions referred by the England and Wales Court of Appeal to the CJEU in August, the Council of State had announced on 3 September that rulings on Dublin-Greece matters would be postponed until the CJEU ruling had been delivered and asked courts to do the same. When Minister Ballin was informed by the ECtHR in late September 2010 that, in all future cases involving Dublin transfers to Greece, a Rule 39 would be issued until the Court had issued its judgment in the case of *M.S.S. v. Belgium and Greece*, he said that this meant that actual future transfers to Greece could not be implemented unless the applicant failed to exercise his or her legal rights. He said that he expected courts to temporarily suspend such transfers. As and when jurisprudence permitted, he reported that the transfers, including in principle of the current group of 1,900 asylum-seekers, would be resumed.

18. In **Finland**, UNHCR was informed in mid-October that the Finnish authorities had decided they would not yet systematically stop transfers to Greece, but would wait a couple of months before reconsidering the situation. If no judgment had been published by the ECtHR by the beginning of 2011, they would reconsider the situation in light of available information. In the meantime, they would continue to make a case-by-case assessment, while all transfers of unaccompanied or separated child asylum-seekers and vulnerable asylum-seekers would continue to be suspended.

19. In **Belgium**, State Secretary for Migration and Asylum Policy, Mr Melchior Wathelet, announced on 20 October that in response to the letter from the ECtHR all transfers of asylum-seekers to Greece would be temporarily suspended. He announced that he wished to keep the financial consequences of this decision to a minimum and avoid any pull factor and that it had therefore been decided to treat asylum applications from such persons on a priority basis. Persons found not to be in need of international protection would be obliged to return to their country of origin rather than being transferred to Greece.²¹

20. Facing an increase in the number of Rule 39 applications from asylum-seekers opposing their transfer to Greece from **Austria**, the ECtHR sent a similar letter to Austria on 27 October. This resulted in a fall in the number of first instance decisions to transfer asylum-seeker to Greece as well as of Rule 39 applications submitted to the Court to suspend transfers. In mid-November the Ministry of the Interior stated that transfers to Greece would continue to be assessed on a case-by-case basis, thus stopping short of announcing a general suspension of transfers to Greece. The Ministry stated that the proper application of the Dublin II Regulation was the responsibility of all Member States and that Greece was obliged to assume its responsibilities within the EU asylum system. UNHCR observes that in practice since mid-November no transfers to Greece were being carried out, not least to support the beginning of the European solidarity measures under the Greek action plan, in which Austria is taking an active part. There was reportedly also an increased examination of the possibility of, and resort

²⁰ For further information, see the June 2010 Information Note, para. 26.

²¹ In June 2010, the Aliens' Office indicated that in 2009, Belgium had made 420 requests to Greece that it assume responsibility for cases. More generally regarding the application of Articles 3(2) and 15 of the Dublin II Regulation, the Aliens' Office also stated that in 2008 it had assumed responsibility in 105 cases in 2007, 151 in 2008, for 166 in 2009 and for 87 in the first four months of 2010. These statistics do not indicate which of the two clauses had been used in a given cases and included also cases where responsibility was assumed as a result of the expiry of deadlines as set out in the Dublin II Regulation.

to, the use of the sovereignty clause of the Dublin II Regulation for particularly vulnerable persons.

21. In **Germany**, the Federal Ministry of the Interior (MOI) announced its decision on 19 January 2011 to stop all Dublin transfers of asylum-seekers to Greece until 12 January 2012 and to apply the sovereignty clause under Article 3(2) of the Dublin Regulation in all these cases.²² The announcement included cases that were pending before various courts or where transfers had already been stopped by the courts. The MOI stated that this was a temporary measure to allow further strengthening of the Greek asylum system and that it can be expected that there would be substantial improvements in a year's time in Greece. At the same time, the MOI explicitly stated that it would still regard Greece as a safe third country and that the Dublin system as such would not be put into question. The Federal Office for Migration and Refugees (BAMF) had the day before already informed the Federal States of this new practice and recommended that all Dublin detainees whose transfer to Greece had been envisaged should be released.

22. More generally, in 2010, Germany submitted 2,458 transfer requests to Greece, 15 requests were rejected by Greece, 2,122 requests accepted by Greece, and 55 transfers to Greece conducted. In comparison, Germany received eight requests from Greece, three requests were rejected, four requests accepted, and five transfers were carried out from Germany to Greece. In the context of its 19 January announcement, the MOI also stated that in 2010 the sovereignty clause was applied in Germany in a total of 1,281 cases in which Greece would have been responsible. In response to a parliamentary question, it was also reported on 3 January 2011 that the number of cases in which the sovereignty clause had been applied with respect to Greece was 871 cases in 2009 and 1,064 in the first ten months of 2010.²³ In addition, a 54-year old Afghan woman and her adult son, who had been transferred to Greece in June 2010 without having informed the Interior Ministry of the Rhineland-Palatinate beforehand, contrary to an internal instruction from that Ministry, could be contacted through UNHCR and the Greek Refugee Council. When it was confirmed that their situation in Greece was difficult, including that they had not received any accommodation, they were readmitted to Germany in October 2010.

23. Following the ECtHR's publication of the *M.S.S.* judgment on 21 January 2011, a number of States made further announcements, including changes of policy in Denmark, Finland and Switzerland.

24. In **Denmark**, the Minister of Refugee, Immigration and Integration Affairs, Ms Birthe Rønn Hornbech, asked the Danish Immigration Service to process the cases which had been pending transfer to Greece. As a result, some 340 asylum-seekers were expected now to have their claims determined in Denmark.

²² For further information (in German), see Bundesministerium des Innern, "Deutschland übt Selbsteintrittsrecht aus", 19 January 2011, at http://www.bmi.bund.de/cln_174/SharedDocs/Kurzmeldungen/DE/2011/01/selbsteintrittsrecht.html. For more on the Dublin case before the FCC, which was closed on 25 January 2011, see para. 38 below.

²³ "Kleine Anfrage der Abgeordneten Ulla Jelpke u.a. und der Fraktion Die Linke, Aktuelle Berichte zur Situation des griechischen Asylsystems und Konsequenzen der Bundesregierung hieraus", Drucksache 17/4356, 3 January 2011 (in German).

25. In **Norway**, where the asylum authorities had temporarily stopped transfers to Greece in mid-October 2010 pending the outcome of the *M.S.S.* case, as mentioned in paragraph 15 above, the Immigration Appeals Board (UNE) confirmed during the weekend of 22–23 January 2011 that the halt on transfers to Greece would continue. Around 280 individuals had reportedly been returned to Greece in 2010.

26. In **Finland**, the Finnish Immigration Service (MIGRI) announced on 24 January that it would stop all transfers to Greece under the Dublin Regulation "for the time being". MIGRI stated that the decision was a consequence of the *M.S.S.* judgment and estimated that this would result in Finland hearing an estimated 100 to 150 asylum cases this year for which Greece would normally be responsible. In addition to these, the Finnish Immigration Service would also examine the applications that had been lodged earlier and for which Greece was also responsible on the basis of the Dublin Regulation, provided that the applicant was still in Finland. MIGRI estimated that there were approximately 100 such applications at most. Some of these had been appealed and were pending before administrative courts, while others were pending before the ECtHR. In 2010, Finnish police implemented 28 MIGRI decisions to transfer an asylum-seeker to Greece.²⁴

27. In **Switzerland**, the Federal Office for Migration (FOM) announced on 26 January that it was assuming responsibility for assessing most asylum claims where Greece might be considered responsible under the Dublin II Regulation.²⁵ The decision took immediate effect and took into account both the current unsatisfactory situation as regards asylum in Greece, which had been confirmed by many independent organizations, and the difficult situation to which asylum-seekers were exposed in Greece. The FOM stated that the Dublin II Regulation would only continue to be applied to asylum-seekers who already had access to the asylum procedure in Greece and access to shelter in Greece. The press release reported that the FOM had since February 2009 decided no longer to apply the Dublin II Regulation to particularly vulnerable asylum-seekers coming through Greece. It reported that from 12 December 2008 until the end of 2010 a Dublin procedure had been initiated for nearly 940 individuals, but that the FOM had abstained from applying the procedure in nearly 400 cases involving particularly vulnerable individuals. In total, around 150 individuals had been transferred to Greece during this period.

28. In **Belgium**, the Aliens' Office confirmed following the publication of the *M.S.S.* judgment that all asylum applications made since the October 2010 announcement where a possible transfer to Greece has arisen were now being processed in Belgium. With respect to the approximately 200 applications made before the announcement, who had submitted a Rule 39 application to the ECtHR, the Aliens' Office had not as of 27 January decided whether it would assume responsibility for processing their applications. In addition, the Aliens Appeals Board (CCE/RVV, the asylum appeal body) has scheduled a general assembly session of both divisions of the Council under an extremely urgent procedure for 1 February 2011 to hear five appeals against

²⁴ Finnish Immigration Service, "Asylum seekers will not be returned to Greece for the Time Being", 24 January 2011, at <http://www.migri.fi/netcomm/content.asp?article=4098>.

²⁵ See Swiss Federal Office for Migration, Communiqué, 26 Jan. 2011, (in French) at <http://www.bfm.admin.ch/content/bfm/fr/home/dokumentation/medienmitteilungen/2011/2011-01-26.html>.

decisions to transfer asylum-seekers to various Member States under the Dublin II Regulation.

29. Following these developments, it appears that not only are transfers effectively stalled in these countries; but, in addition, responsibility for assessing Dublin-Greece cases substantively has in effect been assumed by Belgium, Denmark, Finland, Germany, (possibly Iceland), Norway, Switzerland, and the UK, although Austria and Finland appear still to be assessed whether or not to assume responsibility for determining claims on a case-by-case basis.

C.2 Jurisprudence regarding transfers to Greece in Dublin States

30. As mentioned in the June 2010 Information Note, highest level courts in Austria, France, Hungary, Italy, Romania, and Spain 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 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.

31. By contrast, at that time, the judicial practice of Belgium, Finland, the Netherlands, Norway and Sweden had tended not to oppose Dublin transfers to Greece or had permitted transfers to resume. The practice of the Council for Aliens' Law Litigation (CALL) in Belgium had since March 2010 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 ECtHR 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. At that time, the judicial practice regarding Dublin transfers to Greece in Germany, Ireland, Switzerland, and the United Kingdom was unresolved and leading cases were pending or subject to appeal in all these countries.

32. Further jurisprudential developments since June 2010 are described below and are listed in alphabetical order according to country. (Developments in Ireland and the UK have been outlined briefly in section B above.)

33. In **Austria**, the Constitutional Court (CC) has established settled case law in Dublin cases 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 8.²⁶ In its most recent jurisprudence, the CC ruled on 7 October 2010 that transfers of vulnerable asylum-seekers to Greece may violate Article 3 of the ECHR due to the undisputedly

²⁶ See the June 2010 Information Note, para. 11.

inadequate accommodation capacity and reception assistance there.²⁷ The ruling concerned a single Afghan mother with three minor children, of whom the youngest was nine months old. In its judgment, the Court stated that in order to be able to conclude whether or not the sovereignty clause had to be applied so as to comply with Article 3 ECHR, the Austrian authorities were obliged to obtain a formal individual assurance from the Greek authorities that care for vulnerable asylum-seekers would be provided to each individual asylum-seeker. The Court ruled that in such cases a general notification of the transfer to the Greek authorities via the “DublinNet” was insufficient. It also determined that, if such an individual assurance could not be obtained, the Austrian authorities were obliged to make use of the sovereignty clause. The case concerned the transfer to Greece of a single Afghan mother with three children aged six months, three and six years.

34. In December 2010, the Austrian CC issued two further judgments overturning expulsion orders to Greece. The ruling issued on 1 December 2010 concerned an Afghan family comprising a father, a mother suffering from a psychiatric condition and three minor children who had had to live on the streets for 20 days while they were in Greece.²⁸ That of 13 December concerned an Afghan family with three minor children at the time of the issuance of the second instance decision by the Austrian Asylum Court (AC), whose transfer back to Greece had already taken place when their appeals were still pending with the AC.²⁹ In each case, the CC overturned the earlier decision of the AC, on the grounds that it was necessary in the case of vulnerable persons to seek and receive assurances in the individual case from the Greek authorities to ensure that they would have access to the reception and care needed. In none of these cases had such individual assurances been sought, resulting in a violation of the individual's rights under Article 3 of the ECHR.

35. In **Denmark**, in the face of continued assertions by the Danish Government that the Dublin II Regulation must be upheld, the Danish Refugee Council (DRC) in the second of 2010 increasingly supported asylum-seekers facing transfer to Greece to make successful Rule 39 requests to the ECtHR. This appeared to mark a change of practice by the Court regarding Rule 39 requests from Denmark, since several such requests had been declined in June 2010, when the lack of reception accommodation and the absence of adequate asylum procedures in Greece were not then found to be sufficient to grant the Rule 39 request and the Court had asked the DRC to provide detailed information on the merits of the claim. Since then, however, the Court appeared only to require the name and file number of the applicant. The DRC also resubmitted the cases declined in June, which were then approved by the Court. In all in 2010, the DRC reported that it had supported Rule 39 applications to the Court for 301 cases, all of which were

²⁷ See *Decision No. U 694/10-19*, Austria, Constitutional Court, 7 October 2010, available in German at http://www.vfgh.gv.at/cms/vfgh-site/attachments/9/4/3/CH0003/CMS1288163791433/dublin_ii_-_griechenland_-_u694-10.pdf and press release of the Constitutional Court, 27 October 2010, available in German at http://www.vfgh.gv.at/cms/vfgh-site/attachments/9/4/3/CH0003/CMS1288163791433/dublin_ii_-_griechenland_-_pressemittteilung.pdf.

²⁸ *Decision No. U1523/09*, Austria, Constitutional Court, 1 December 2010, in German at http://www.ris.bka.gv.at/Dokumente/Vfgh/JFT_09898799_09U01523_3_00/JFT_09898799_09U01523_3_00.pdf.

²⁹ *Decision No. U 1441/10ua*, Austria, Constitutional Court, 13 December 2010, in German at http://www.ris.bka.gv.at/Dokumente/Vfgh/JFT_09898787_10U01441_2_00/JFT_09898787_10U01441_2_00.pdf.

eventually approved by the Court, with further submissions continuing to be made in early 2011.

36. In **France**, the Council of State (*Conseil d'Etat*) confirmed its 2010 jurisprudence, which generally endorsed transfers to Greece, in a further judgment on 4 November 2010.³⁰ In this decision, the Council of State dismissed the appeal of a Guinean asylum-seeker facing transfer to Greece under the Dublin II Regulation on the grounds that he had only provided very general information regarding the operation of the Greek asylum process and that this was not sufficient to come to the conclusion that his right to asylum in Greece would be violated if he were returned there.

37. In **Germany**, a case pending before the Federal Constitutional Court (FCC) since 2009 concerned Dublin transfers to Greece and in particular the legal standards applicable to interim legal remedies in Dublin cases to ensure that the right to asylum and to an effective legal remedy can be guaranteed.³¹ A hearing in this case was held on 28 October 2010, at which UNHCR was among those intervening. Following the 19 January 2011 decision of the MOI to apply the sovereignty clause in all Dublin-Greece cases for a year,³² however, the FCC announced on 25 January that it was closing the case and that it would not be taking a decision on the merits. The Court stated that the closure of the case seemed appropriate, not only because responsibility for assessing the individual case had already been assumed by Germany by applying the sovereignty clause, but also because the transnational problems involved needed to be addressed at EU level. In this respect, the Court stated that the MOI had in its oral interventions on 28 October convincingly set out the efforts being made to resolve the shortcomings of the Greek asylum system "in the near future". As a result, the Court preferred to refrain from ruling on the question of access to interim measures as an element of an effective legal remedy. For the time being, the German legal situation thus remained open under German constitutional law.³³

38. With regard to rulings at Administrative Court (AC) level in Germany on the application of Article 3(2) of the Dublin II Regulation in Dublin-Greece cases, courts have recently generally been reluctant to decide on the merits, pending the FCC decision. UNHCR is, however, aware of two more decisions from the AC in Braunschweig requiring Germany to assume responsibility for assessing the claim.³⁴

39. In **Hungary**, where seven rulings blocking transfers to Greece had come to UNHCR's attention from 2009 to mid-2010,³⁵ three additional decisions have been

³⁰ *Judgment No. 344009*, France, Conseil d'Etat, 4 November 2010, at <http://www.conseil-etat.fr/cde/fr/base-de-jurisprudence/>. For information regarding earlier French jurisprudence see the June 2010 Information Note, paras. 12–13.

³¹ *Case No. 2 BvR 2015/09*, Germany, Federal Constitutional Court. For UNHCR's written submission in this case see, "Stellungnahme an das Bundesverfassungsgericht zur Verfassungsbeschwerde 2 BvR 2015/09", February 2010, at <http://www.unhcr.org/refworld/docid/4b9f750c2.html>.

³² See above para. 21.

³³ For the FCC decision of 25 January 2011 to close the case, see http://www.bverfg.de/entscheidungen/rs20110125_2bvr201509.html and for the related press release, see <http://www.bverfg.de/pressemitteilungen/bvg11-006> (both in German).

³⁴ See *Case No. 2 A 182/10*, AC Braunschweig, 17 November 2010, at http://www.asyl.net/fileadmin/user_upload/dokumente/17939.pdf and *Case No. 2 A 187/10*, AC Braunschweig, 27 December 2010, at http://www.asyl.net/fileadmin/user_upload/dokumente/18023.pdf (both in German only).

³⁵ See the June 2010 Information Note, para. 14.

issued by the Municipal Court of Budapest since then (affecting a total of nine people). These all rule that responsibility for assessing the cases should be assumed by Hungary. In each case, the Court found that, although the applicants, who were all from Afghanistan, came via Turkey to Greece, they had then travelled on from Greece and had actually entered Hungary via Serbia, a third country not participating in the Dublin system. The Court therefore ruled in each case that the Hungarian authorities had been wrong to contact Greece and that Hungary and not Greece was responsible for assessing the claims.³⁶ This line of reasoning is new in Hungary.

40. In **Italy**, both lower courts and the Council of State (*Consiglio di Stato*, the supreme administrative court) have blocked Dublin transfers to Greece on numerous occasions,³⁷ although the Government continued to say that it had not formally suspended transfers to Greece. In what appears to be an isolated case, the Dublin Unit of the Ministry of the Interior appealed to the Council of State on 12 November 2010 against a judgment by the Regional Administrative Tribunal (TAR) in Lazio.³⁸ The TAR ruling had halted the transfer of an Afghan asylum-seeker to Greece, who had reportedly been seriously traumatized in Greece and in Italy and was in a vulnerable situation. The ECtHR has granted interim measures suspending any transfer to the individual concerned. The Ministry of the Interior argued that UNHCR's 2009 report on Greece³⁹ acknowledges the commitment of the Greek Government to resolving the shortcomings of the national asylum procedure and that the situation in Greece has been evolving positively, since the main EU Directives on asylum matters have been transposed into national law.

41. In **the Netherlands**, the Council of State had consistently annulled lower court decisions blocking Dublin transfers to Greece, although it has not issued a judgment in such a case, since the ECtHR's reasoned Rule 39 decision issued on 3 June 2010, suspending the transfer of a number of Somali asylum-seekers to Greece.⁴⁰ A case was, however, heard before the Council of State on 1 July 2010. While UNHCR was not able to become a party to such a case under Dutch law, it wrote a letter to the lawyer defending the asylum-seeker, whose transfer to Greece under the Dublin II Regulation had been opposed by the lower or district court in Almelo.⁴¹ In another case, the lower or district court in Maastricht⁴² found on 9 July 2010 that the Minister of Justice had not sufficiently refuted the applicants' statement that if transferred to Greece they would risk expulsion in violation of Article 3 of the ECHR and the 1951 Refugee Convention and that Greece did not offer sufficient guarantees to prevent expulsion in breach of those provisions.

42. In **Norway**, transfers to Greece had been halted from February 2008 until September 2009, when some transfers had resumed. The situation had changed in February 2010 when the Grand Board of the Norwegian Immigration Appeals Board

³⁶ Municipal Court of Budapest, judgments in *Qurban Hasan, wife and child (Afghan)*, Ref. No. 6. Kpk. 45.500/2010, 28 May 2010; *Shamsullah Ahmadi, wife and three children (Afghan)*, Ref. No. 17.Kpk. 45.642/2010/3, 7 June 2010; and *Mohmand Sinwari (Afghan)*, Ref. No. 6.Kpk.45.765/2010/2, 9 July 2010.

³⁷ See June 2010 Information Note, para. 15.

³⁸ Decision No. 32398, Italy, TAR Lazio, 22 September 2010.

³⁹ See above footnote 15.

⁴⁰ See the June 2010 Information Note, para. 26.

⁴¹ UNHCR, *Hassan v. Staatssecretaris van Justitie*, Letter to counsel (Mr Schuller), 18 June 2010, at <http://swigea56.hcrnet.ch/refworld/docid/4c21d74e2.html> (internal document).

⁴² Lower Administrative Court, Maastricht, Awb 10/941, 9 July 2010.

(UNE) had ruled that the transfer of an asylum-seeker to Greece could go ahead.⁴³ Following the ruling legal proceedings appealing against the decision were filed before the Oslo City Court on 18 June 2010. The appellant relied heavily on the dissenting opinion of one of the judges and argued that the Greek asylum system was suffering a systemic breakdown and did not offer any credible procedure to deal with asylum applications. The appellant argued that the applicant's claim should be removed from the Dublin procedure and that the Norwegian authorities should assume responsibility for assessing the case. He argued that the UNE decision must be declared void, based on errors of assessment of facts and law and invoked Section 32 of the Aliens' Act in conjunction with Section 7-4 of the Aliens' Regulation, as well as the 1951 Convention and the ECHR, which have both been duly incorporated into Norwegian domestic law with preferential status. In addition, the appellant argued that Section 73 of the Aliens' Act was a barrier to transfer to Greece, as there was a danger he could be expelled back to Iraq via Turkey.

43. In **Poland**, the Refugee Board (second asylum instance) on 16 August 2010 revoked a decision of the Aliens' Office which had approved the transfer to Greece of an Afghan asylum-seeker and returned the case to the first instance for reconsideration. Referring to the UNHCR positions on Greece as a country of asylum of April 2008 and December 2009, the Refugee Board ruled that the first asylum instance had not considered whether the applicant would be provided with access to a fair and effective asylum procedure if transferred to Greece.

44. In **Sweden**, the Swedish Migration Court of Appeal (MCA), the highest level appeal court in such cases, changed its previous established practice and ruled on 10 December 2010 that all transfers to Greece under the Dublin II Regulation should be stopped and that such cases should be decided on the merits in Sweden, thus reassessing its October 2008 decision which had found that serious humanitarian reasons are required to preclude the transfer of adult asylum-seekers to Greece.⁴⁴ In its December 2010 decision, the Court referred to current circumstances and alarming reports of both the shortcomings in the Greek asylum procedure and the sub-standard reception conditions. As sources, the Court referred to information from a fact-finding mission by the Swedish Migration Board to Greece in October 2010 and the preliminary findings of the UN Special Rapporteur on Torture on his Mission to Greece issued on 20 October 2010.⁴⁵ Other recent developments mentioned included the *M.S.S. v. Belgium and Greece* before the ECtHR, the requests to the CJEU for a preliminary ruling made by UK and Irish courts and the cooperation with Frontex on the RABIT project in Greece. The Court examined the purpose of the Dublin II Regulation and the possibilities for States not to apply the criteria it sets out. The Court emphasized that the starting point was, firstly, the principle of *non-refoulement* and, secondly, to determine which State was responsible for assessing the claim. In order to do so, objective criteria needed to be employed which were fair to both the Member States and the individuals concerned. The Court affirmed that the procedure should be fast and should focus on actual access to asylum procedures. It referred to Sweden's international obligations under the 1966

⁴³ For further details, see the June 2010 Information Note on National Practice, para. 28.

⁴⁴ For further information see the June 2010 Information Note, paras. 29–30. Swedish Migration Board (SMB) guidelines do not in any case permit transfers of unaccompanied children to Greece.

⁴⁵ See, "UN Special Rapporteur on Torture presents preliminary findings on his Mission to Greece, 20 October 2010, available at <http://www2.ohchr.org/english/issues/torture/rapporteur/>.

International Covenant on Civil and Political Rights, the 1984 Convention against Torture and the ECHR.

45. In the current case, the MCA found that Greece was responsible for determining the case under the Dublin II Regulation. It referred to the October 2008 ruling which stated that the Dublin II Regulation should be upheld to the extent possible. In the 2008 ruling, the MCA had, however, rejected an appeal for a transfer to Greece to be stopped, had presumed that all EU Member States could and wanted to uphold EU standards, and had stated that it was up to the EU institutions to monitor their compliance. In its December 2010 decision, the MCA, however, stated that this should not mean that Sweden should fail its obligations under the ECHR or the Swedish Aliens' Law and recalled that Article 3(2) of the Dublin II Regulation ensured that this will not happen. The Court referred to the fact that all reports confirm that the situation for asylum applicants in Greece is unacceptable in several respects. Therefore, to transfer an asylum applicant under the Regulation was not in accordance with the Aliens' Law and might also be a violation of Article 3 of the ECHR in individual cases. The MCA referred to the current obvious deficits in the Greek asylum procedure and reception conditions which violate the EU Directives. In particular, detention conditions amounting to inhumane treatment were mentioned. The MCA stated that its consideration was valid until Greece could guarantee that asylum-seekers can access their rights and there would be an asylum procedure in line with the EU acquis. The Court decided to issue its judgment, since it found that it was not reasonable for asylum-seekers to have to wait for an outcome by the CJEU or the ECtHR.

46. In **Switzerland**, a leading judgment is still pending before the Swiss Federal Administrative Court (FAC) 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.⁴⁶ It is expected that this will follow the lines of the recent *M.S.S.* judgment of the ECtHR. Pending the issuing of a decision and until the FOM's announcement of 26 January 2011 mentioned at paragraph 27 above, the FAC automatically suspended all Dublin transfers to Greece upon appeal, if suspensive effect was requested.

D. Conclusion

47. There is a significant disparity in the practice of Member States regarding transfers to Greece under the Dublin II Regulation. Certain Member States have in recent months decided to suspend all transfers to Greece, while others have not. Some States have decided to suspend them for specific categories of asylum-seekers, such as unaccompanied children or other vulnerable applicants. In January 2011, notably after the ECtHR's decision in *M.S.S. v. Belgium and Greece*, several additional States have announced their intention to suspend transfers, and in some cases, specifically to take responsibility for determining the claims. Higher Courts in Austria, France, Hungary, Italy, Poland, Romania, Spain, and Sweden have increasingly ruled against proposed Dublin transfers to Greece, in particular but not only where specific vulnerabilities are involved. Higher courts, including in Austria, Belgium, Finland, France, Ireland, the Netherlands, Norway, and the UK, by contrast, have allowed them in a number of cases, especially where no such vulnerability is present.

⁴⁶ See Information Note on National Practice, para. 39. The case number is E-5852/20010.

48. Thus, a significant number of Dublin States have suspended transfers to Greece as a result of government policy or as a result of rulings by the ECtHR. As of the time of writing, while national Member State jurisprudence remained divergent, it appears likely that the recent ECtHR decision in *M.S.S.* will lead national courts to decide in favour of suspension in many relevant pending and future cases.

UNHCR, 31 January 2011