



UNHCR

United Nations High Commissioner for Refugees
Haut Commissariat des Nations Unies pour les réfugiés

UNHCR Regional Representation for Western Europe

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Dear Mr. Schüller,

I refer to your request for UNHCR's opinion on the issue of the transfer of asylum-seekers to Greece under the Dublin II Regulation.

According to its Statute, UNHCR fulfils its mandate *inter alia* by “promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto.” (UNHCR Statute, GA Res. 428(v), Annex, UN Doc A/1775, para. 8(a)). UNHCR's supervisory responsibility is also reflected in both the Preamble and Article 35 of the 1951 Convention relating to the Status of Refugees (“the 1951 Convention”) and Article II of the 1967 Protocol relating to the Status of Refugees (“the 1967 Protocol”), obliging States Parties to cooperate with UNHCR in the exercise of its functions, including in particular to facilitate its duty of supervising the application of these instruments. UNHCR's supervisory responsibility has also been reflected in European Union law, i.e., Article 78(1) of the Treaty on the Functioning of the European Union.

For your information, and in order to place this letter in a wider perspective, I would like to inform you that UNHCR, in exercising its mandate and supervisory responsibility, on a regular basis provides information, or makes its views known, to decision-makers and courts of law in cases concerning the proper interpretation and application of provisions of the 1951 Convention and the 1967 Protocol. This may extend to cases involving the interpretation and application of other instruments that have a bearing on international refugee protection.

Recent examples of such UNHCR practice are several interventions in cases before the European Court of Human Rights (“ECtHR”), including in a number of cases of particular relevance to the present case, e.g. *Xb v. France and Greece*, App. No. 44989/08, *Sharifi & Ors v Italy and Greece*, App. No. 16643/09, *Ahmed Ali and Others v. the Netherlands and Greece*, February 2010, App. 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, and 37728/09, and *M.S.S. v. Belgium and Greece* (App. No. 30696/09).

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In light of the upcoming session of the Council of State in the case of your client, on July 1 next, involving similar issues, I attach two documents to this letter. The first attachment, entitled "*The legal status and material situation of asylum-seekers in Greece, including under Dublin II*", elaborates on the shortcomings of the current situation of asylum in Greece, as assessed by UNHCR. This document is expected to become publicly available in the near future. The second attachment, entitled "*UNHCR Information Note on National Practice in the Application of Article 3(2) of the Dublin II Regulation in particular relating to transfers to Greece*", describes the diverse practice of several EU Member States in relation to transfers of asylum-seekers to Greece. It is publicly available at <http://www.unhcr.org/refworld/docid/4c18e6f92.html>. Both documents have been used for our interventions in the above mentioned ECtHR cases.

UNHCR reiterates its advice that until respect for international and EU refugee and asylum law principles is assured, Governments ought to refrain from returning asylum-seekers to Greece under the Dublin II Regulation, or otherwise. UNHCR recommends that Governments make use of Article 3 (2) of the Dublin II Regulation, allowing States to examine an asylum application even if such examination is not its responsibility under the criteria laid down in the Dublin II Regulation.

Taking into account the serious shortcomings in the Greece asylum procedure including lack of access, the poor reception conditions and the risk of *refoulement*, as described in the first attachment, as well as the divergences in the practice of EU Member States in applying Art. 3 (2) of the Dublin II Regulation as described in the second attachment to this letter, UNHCR considers it desirable that preliminary questions be submitted to the Court of Justice in Luxembourg. The purpose of such questions would be to clarify whether and how the non-implementation of relevant international legal standards, including obligations under EU law by one Member State, affects the implementation by other Member States of the Dublin II Regulation.

We hope to revert to you soon with some proposals for such questions.

Yours sincerely,



Gert Westerveen
Deputy Regional Representative

Annex 1



The legal status and material situation of asylum-seekers in Greece, including under Dublin II

1. The legal status and material situation of asylum-seekers in Greece

1. UNHCR is concerned that asylum-seekers face serious challenges in enjoying protection in Greece in line with international and European standards.¹ Asylum-seekers in Greece, including those returned to Greece under Dublin II, face multiple hurdles securing access to asylum procedures and international protection. Reception arrangements are grossly inadequate, including for children and other vulnerable persons, leaving large numbers of asylum-seekers to live in destitution. Asylum-seekers lack access to interpretation services, legal advice and representation, are almost certain to have their claims rejected at first instance,² are rarely able to secure an effective remedy against negative decisions, and consequently do not have adequate protection against *refoulement*. Further, asylum-seekers in Greece experience obstacles in trying to secure access to international complaint mechanisms.³ In addition, in UNHCR's view, the changes in the asylum procedure introduced in July 2009⁴ have further diminished the prospects of asylum-seekers, including Dublin II transferees, having their claims determined in a fair and adequate procedure in Greece. While the Greek Government elected in late 2009 is working on proposals to set up a new asylum system, these measures have yet formally to be legislated and implemented.

2. Dublin transferees face the same difficulties as others arriving in Greece in search of international protection. Asylum-seekers with legal permission to remain in Greece, including transferees, are not exempt from arrest and the risk of possible summary deportation. They are exposed to the same long waiting periods before a decision is made on their asylum claims. In the very likely event that a final negative decision has been taken⁵ in the asylum case of a Dublin transferee or deadlines for appeal have expired, then the transferee is detained and receives a deportation order, with no opportunity in practice to re-open the case or challenge the negative first instance decision.

¹ For further details see below and UNHCR's *Observations on Greece as a Country of Asylum*, Dec. 2009, at <http://www.unhcr.org/refworld/docid/4b4b3fc82.html>.

² See para. 17 below.

³ Council of Europe (CoE) Commissioner for Human Rights, CommDH (2010) 9, Third Party Intervention under Article 36, paragraph 2 of the European Convention on Human Rights, in the case of *Ahmed Ali and others v. the Netherlands and Greece*, 10 March 2010, at <https://wcd.coe.int/ViewDoc.jsp?id=1595689&Site=CommDH>, para. 28.

⁴ Presidential Decree No. 81/2009 modifying Presidential Decree 90/2008 on the transposition into Greek legislation of Council Directive 2005/85/EC of 1 Dec. 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (Official Gazette A' 99, 30 June 2009).

⁵ See para. 23 below.

2. Access to asylum procedures in Greece

3. Persons transferred to Greece under Dublin II⁶ face problems which may hinder or preclude their efforts to register (or re-register) their application for international protection.⁷ As a result, access to asylum procedures cannot be guaranteed for transferees. In particular, if a negative decision has been issued prior to or during the individual's absence from Greece and this has been notified to an asylum-seeker registered as of "unknown residence," an applicant returned to Greece is likely to have missed all deadlines for appealing against this decision. With almost all asylum applications rejected at first instance, this practice affects many Dublin transferees. If all deadlines for appeal have lapsed during the person's absence from Greece, the transferee will be served with a deportation order at the airport, without access to the asylum procedure.⁸

4. Information about the relevant procedures and rights and/or interpretation in languages that asylum-seekers understand is not readily available. Under the process in place from 2008, according to a report by ATIMA,⁹ Dublin transferees may be detained upon arrival at the airport up to four days without a detention order and thereby without legal basis. Since mid-2009, when new procedures entered into force,¹⁰ the transferee is released after 24 hours with a police notice informing him/her to appear at the Attica Aliens' Immigration Directorate of the Police ("Petrou Ralli") in Athens within three days to declare his/her address and receive a date for his/her asylum interview. This obligation to register a claim (or report in connection with a previous claim) at Petrou Ralli exposes transferees, like other asylum applicants, to significant problems of access to asylum procedures which may prevent them from registering their claims in the short period of time required. These problems are outlined in greater detail in UNHCR's "*Observations on Greece as a Country of Asylum*" and include inadequate capacity to meet demand at Petrou Ralli, where applications of non detainees are registered only one day a week, dropping from 300-350 before October 2009. At present, approximately 30-40 applications are registered on each of these days,¹¹ although up to 300-400 persons may be queuing to register their claims.

5. At the same time, applications outside Athens, as well as applications by persons in detention in Athens, have increased.¹² In addition to the registration of initial asylum claims, access to Petrou Ralli is hindered also for other requests by the asylum-seekers, i.e. renewals of "pink cards"¹³ or declaration of residence address.¹⁴ An aggravating factor with regard to the

⁶ This is so whether or not they have previously applied for asylum there. People who had not done so in Greece may be transferred there under Dublin II on the grounds, among others, that Greece is deemed responsible on the basis of proof through Eurodac or by other means that they entered the EU irregularly via Greece or held a Greek visa or other residence document. See, Dublin II Regulation, Arts. 10 and 9 respectively. If such persons subsequently claim asylum in Greece after transfer, they are treated as new claimants.

⁷ See, UNHCR, *Asylum Processes (Fair and Efficient Asylum Procedures)*, Global Consultations on International Protection/Third Track, 31 May 2001, EC/GC/01/12, at <http://www.unhcr.org/refworld/docid/3b36f2fca.html>, para. 23.

⁸ UNHCR, *Observations on Greece as a country of asylum*, above footnote 1, at pp. 21.

⁹ ATIMA (Greek Civil Society Organisation), "Programme for the Provision of Legal and Social Support to Asylum Seekers Transferred to Greece under Dublin II Regulation: First Conclusions and Recommendations" (22 February – 14 April 2010), 12 May 2010. During the project, which ran from 22 February up to 14 April 2010, ATIMA team was in daily contact with the Athens Airport Police.

¹⁰ Presidential Decree No. 81/2009, see note 4 above.

¹¹ By contrast, the total number of claims registered in other parts of Greece is greater than in the past.

¹² In four police directorates -- Patras and Evros Region included -- the increase in registration coincides with the introduction of the new decentralized asylum procedures: a sharp increase is noted for the last four months of 2009. However, in all the 49 other police directorates the increase is noted since the beginning of 2009, a phenomenon that may have as one of its reasons the enhancement, in 2009, of the border monitoring activities and presence of various external actors (e.g., UNHCR, the AEGEAS Project, NGOs, etc.) at the regions/borders. As regards individuals who apply for asylum while in detention in Athens, the number has increased to approximately 300 asylum claims per month, due to the change of the procedures at 1st instance.

¹³ The "pink card" documents the registration of an asylum claim and as such provides proof of the holder's legal residence. The issuance of the "pink card" is provided for in art. 5 of Presidential Decree 220/2007.

lack of access to the asylum procedure is the fact that according to the research conducted between February and April 2010, all the Dublin transferees covered by the research were homeless, despite the existing legal obligation to provide them with accommodation.¹⁵ Being homeless affects their access to the asylum procedure as applicants for international protection are required to provide an address in Greece. Given the difficulties asylum-seekers face in securing accommodation, this proves impossible for many people. Consequently, it is difficult for the authorities to notify homeless asylum-seekers of developments in their case, and for asylum-seekers to meet deadlines for important procedural steps, including the filing of an appeal.¹⁶

6. The difficulties for asylum-seekers effectively to access the procedure in Greece are currently being scrutinized by the European Commission, which has opened an infringement procedure, on the issue of access to asylum procedure and respect for fundamental rights.¹⁷

7. In UNHCR's view, these procedural and practical obstacles to securing access to asylum procedures are evidence of an asylum system which currently falls well below international and European standards¹⁸, and which might lead to *refoulement*. Even though UNHCR in 2010 has not received further reported instances of the former practice of refusing entry or informally removing unregistered asylum-seekers to Turkey at border points, other means of returning people have been intensified, namely through the readmission protocol between Greece and Turkey. Under this agreement, the Greek authorities are able to return detained third country nationals illegally staying in Greece (including asylum-seekers who were unable to file an application and rejected asylum-seekers) originating from countries neighbouring Turkey, such as Iraq, Iran and Syria.¹⁹

8. The continuing lack of guarantees for asylum-seekers, including lack of information regarding rights and procedures, as well as legal aid and the practices deterring asylum-seekers from entering the procedure (prolonged detention, accelerated examination of the claim, extremely low recognition rates) might lead to the return of a significant number of asylum-seekers under the readmission agreement with Turkey, and subsequently to *refoulement*. The same concerns apply to official deportations directly to main countries of origin (e.g., Iraq, Pakistan, Iran, Sri Lanka, Syria, etc.) for that purpose.

3. Access to reception assistance and its quality

9. Accommodation for registered asylum-seekers, including Dublin transferees, is officially available in just 12 reception centres throughout Greece. These are generally understaffed, under-resourced, and lacking appropriate support services and material conditions. Seven of the 12 centres are intended for unaccompanied and separated children. With 865 reception places in total available²⁰ and 15,925 asylum applications made in 2009 alone, capacity is clearly grossly insufficient. As a result, many asylum-seekers have no shelter or

¹⁴ UNHCR has intervened in written to the authorities on the issue of access to Petrou Ralli, UNHCR letter to Secretary General for Public Order, Ministry of Civil Protection, ref. no. GRATH/HCR/056, 21 April 2010.

¹⁵ ATIMA, First Conclusions and Recommendations. See note 9 above.

¹⁶ UNHCR, *Observations on Greece as a country of asylum*. See note 1 above, p. 7.

¹⁷ See Answer given by Mr Barrot on behalf of the European Commission, to the European Parliament: <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2009-5426&language=LV>.

¹⁸ For international standards see, UNHCR Executive Committee, Conclusions No. 8 (XXVIII), 1977, para. (c); No. 15 (XXX), 1979, para. (i); No. 71 (XLIV), 1993, paras. (i), (k), (l); No. 74 (XLV), 1994, para (i) and generally UNHCR, "*Asylum Processes (Fair and Efficient Asylum Procedures)*", above footnote 7. For European standards, see Council Directive 2005/85/EC of 1 Dec. 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, 2 Jan. 2006, 2005/85/EC, at <http://www.unhcr.org/refworld/docid/4394203c4.html>; Council of Europe, Parliamentary Assembly Resolution 1471 (2005), "*Accelerated Asylum Procedures in Council of Europe Member States*", Oct. 2005, at <http://www.unhcr.org/refworld/docid/43f349e04>.

¹⁹ Under this Protocol, returns are allowed through the land border in Evros and recently also through the port of Izmir.

²⁰ 340 places for unaccompanied minors and 525 places for adults and families.

other State support. Single adult male asylum-seekers have virtually no chance of staying in a reception centre, as places there are reserved for families or vulnerable individuals. Registered asylum-seekers do not receive any financial allowance to cover daily living expenses, despite relevant provisions to this effect in Greek law.²¹

10. Among Dublin transferees, UNHCR has recorded a number of vulnerable cases²² where no accommodation was offered, even though the few places available are intended for such persons. Transcripts of interviews by the Austrian Red Cross and Caritas Austria²³ indicate that only one out of 14 Dublin transferees managed to obtain accommodation in a reception centre. The others were left unassisted and were living on the streets, in parks, in public gardens, and in abandoned houses, or in overpriced and overcrowded shared rooms.

11. Like other asylum-seekers, Dublin transferees may be subject to round-ups and detention, including in police detention centres, even though these are inappropriate for holding people for longer than a few days. The European Committee for the Prevention of Torture (CPT) has reported allegations of ill-treatment and poor general conditions.²⁴ Detainees do not have access to information, legal counselling or interpreters, except in the few facilities where services are provided by NGOs or others through limited EC-funded projects. Even in these locations, services are not available to all who need them.

12. In 2009, the European Court of Human Rights twice found violations of both Articles 3 and 5 of the European Convention on Human Rights. In *S.D. v. Greece*,²⁵ concerning a Turkish asylum-seeker detained in holding centres for foreigners in Greece while his asylum application was pending, the Court ruled that the conditions in which he was held were unacceptable, constituted degrading treatment and thus a violation of Article 3.²⁶ The Court also found there had been a violation of Article 5 because his detention was unlawful and he had been unable to challenge its lawfulness under Greek law. In *Tabesh v. Greece*, the Court found that the detention of the applicant, an Afghan asylum-seeker, in a police detention facility for three months in 2006–07, constituted degrading treatment under Article 3.²⁷

²¹ Presidential Decree 220/2007, transposing the EU Reception Conditions Directive, Art. 1, para. 16, and Art. 12.

²² This includes persons with mental health problems and a female victim of trafficking.

²³ Austrian Red Cross/Caritas Austria, "The Situation of Persons Returned by Austria to Greece under the Dublin Regulation: Report of a joint Fact-Finding Mission to Greece May 23–28 2009", Aug. 2009, at <http://www.unhcr.org/refworld/pdfid/4a93fbbf2.pdf>, pp. 50–81.

²⁴ Report to the Government of Greece on the visit to Greece carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 23 to 29 Sept. 2008", CPT/Inf (2009) 20, 30 June 2009, at <http://www.unhcr.org/refworld/pdfid/4a49fb732.pdf>, p. 12. See also, Council of Europe, *Recommendation Rec(2003)5 of the Committee of Ministers to Member States on Measures of Detention of Asylum-seekers*, 16 April 2003, at <http://www.unhcr.org/refworld/docid/3f8d65e54.html> for further information on applicable standards.

²⁵ *S.D. v. Greece*, Appl. No. 53541/07, 11 June 2009, at <http://www.unhcr.org/refworld/docid/4a37735f2.html> (in French only).

²⁶ The Court found that detention conditions in Greece, particularly for foreigners, have violated Article 3 of the ECHR also in *Peers v. Greece (2001)*, Appl. No. 28524/95, 19 April 2001, para. 75; *Dougoz v. Greece*, Appl. No. 40907/98, 3 March 2001, paras. 48 and 49; *Kaja v. Greece*, Appl. No. 32927/03, 27 July 2006, paras. 49 and 50.

²⁷ *Tabesh v. Greece*, Appl. No. 8256/07, 26 Nov. 2009, at <http://www.unhcr.org/refworld/pdfid/4b1e58e72.pdf> (in French only), para. 44. The latter practice appears to continue. Recent reports from Amnesty International, Médecins Sans Frontières, the Council of Europe Commissioner for Human Rights, UNHCR and the Hellenic League for Human Rights (HLHR) have shown concern over the situation of asylum-seekers in Greece, namely due to detention conditions. In its report "The Dublin II Trap: Transfers of Asylum Seekers to Greece" (March 2010), Amnesty International claimed that detained asylum-seekers or irregular migrants were held in conditions of severe overcrowding and that the material conditions of detention were inadequate, lacking hygiene and security. Amnesty International, "The Dublin II Trap: Transfers of Asylum Seekers to Greece", March 2010, p. 14, at: <http://www.amnesty.org/en/library/info/EUR25/001/2010/en>. Following a visit to the detention facility in the Athens International Airport on 30 April 2010, Médecins sans Frontières (MSF) have also highlighted the extreme overcrowding of the facilities, to the point that detainees often sleep seated on the floor, as there is not enough space to lie down. Detainees have no direct access to toilets or showers; they are allowed to visit the toilets twice per day. These conditions were considered "inhumane" by MSF, due to the utter lack of personal hygiene and extremely poor sanitary conditions. Press Release (in Greek only) at:

http://www.msf.gr/index.php?option=com_content&task=view&id=2283&Itemid=235.

13. During his visit to detention facilities in Greece in February 2010, the Council of Europe Commissioner for Human Rights concluded that asylum-seekers, including those transferred under the Dublin Regulation, “face extremely harsh living conditions in Greece”.²⁸ UNHCR has found evidence that asylum-seekers are systematically detained in mostly overcrowded facilities, where alleged ill-treatment by police officers occurs.²⁹ Following a very recent visit to the detention facility in the Athens International Airport on 20 May 2010, UNHCR observed appalling detention conditions. UNHCR described the atmosphere as suffocating, noting the detainees had no access to any open space and there was no toilet inside the cells.³⁰

14. Since July 2009, a new legislative framework regulating administrative detention of irregularly staying foreigners adopted in Greece³¹ has allowed for a maximum detention period of six months, with the possibility of an extension to 12 months. Around the time the law came into force, the police made large-scale arrests of undocumented migrants. The combination of the new provisions and mass arrests strained existing facilities, resulting in unprecedented overcrowding and material shortcomings in police and coast guard detention centres.

4. The effectiveness of Dublin transferees' access to asylum procedures in Greece and to international complaint mechanisms

15. Dublin transferees face the same problems as other asylum-seekers regarding the asylum procedure and quality of decisions. These include difficult and limited access to the asylum procedure, shortcomings in training and expertise of the examining authorities,³² long waiting periods for interviews, inadequate availability and use of country of origin information by the examining authorities,³³ lack of access to legal advice,³⁴ severe deficiencies in the provision of interpretation,³⁵ and interviews conducted with inadequate confidentiality.³⁶

²⁸ See note 3 above.

²⁹ UNHCR, *Observations on Greece as a country of asylum*, see note 1, at pp. 8 – 9.

³⁰ After a survey of the detention conditions of migrants in the regions of Evros and Rodopi in November 2009, the Hellenic League for Human Rights concluded that “all the detention facilities in the prefectures of Evros and Rodopi lack the basic infrastructures and thus fall below minimum standards required by the law, concerning the number of detainees, their feeding, healthcare, cleaning etc.” Hellenic League of Human Rights, *Report on the detention of immigrants without legal documents in Rodopi and Evros*, December 2010, at <http://www.hllhr.gr/papers/report-hllhr2009-detention.pdf>.

³¹ Greek Law 3772/2009, Art. 48, para. 2, amending the General Migration Law 3386/2005 concerning administrative deportation and detention procedures, Art. 76, para. 3.

³² Greece does not require interviewers to hold a specific qualification in refugee and/or human rights law or to have relevant experience upon recruitment and do not provide compulsory training for them upon recruitment. UN High Commissioner for Refugees, *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice. A UNHCR Research Project on the Application of Key Provisions of the Asylum Procedures Directive in selected Member States*, March 2010, available at: <http://www.unhcr.org/refworld/docid/4bab55752.html>, Section 5, page 17.

³³ “In ADA in Greece, during the 49 interviews observed, no interviewer asked any specific question which was indicative of prior knowledge of the relevant circumstances relating to the application, and country of origin maps were not referred to.” UN High Commissioner for Refugees, *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice*, note 45, Section 5, footnote 229, page 50.

³⁴ See Anagnostou and Psychogiopoulou, “Supranational Rights Litigation, Implementation and the Domestic Impact of Strasbourg Court Jurisprudence: A Case Study of Greece”, *Juristras*, 2008, at <http://www.juristras.eliamep.gr/wp-content/uploads/2008/09/casestudygreece.pdf>, p. 7.

³⁵ In its research published in 2010, UNHCR observed that in several cases, without guidance from the interviewer, the interpreter advised applicants and instructed them as to how to complete the application form. For example, UNHCR witnessed an interpreter instruct the applicant to write on the application form that she came to Greece “for a better life”. During nine interviews observed, the interpreter was not able to ensure appropriate communication because of the interpreter’s poor language and interpreting skills. There is no official procedure for the recruitment of interpreters in Greece, nor job description setting out minimum qualifications. UNHCR was informed that in Aliens Directorate in Athens, prospective interpreters submit a Curriculum Vitae and are recruited without any interview to assess their suitability for the job. Moreover, the Asylum and Security Departments outside Athens confront severe shortages of interpreters and reportedly use any available interpreter who can understand applicant’s language. See UN High Commissioner for Refugees, *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice*, note 45, Section 5, pages 35, 40, 43.

Generally, decisions contain neither sufficient references to the facts nor detailed legal reasoning, but rather standardized grounds for rejection, referring to economic motivations for leaving the country of origin. Such reasoning is cited in a large majority of cases, including for persons from countries in conflict which generate significant numbers of refugees.

16. In research published by UNHCR in 2010, an audit of 202 case files and decisions found that all but one of the first instance decisions reviewed were negative, and contained a standard phraseology (not exceeding three paragraphs). The 201 negative decisions did not set out a summary of the material facts; did not reference any relevant country of origin information or other oral or documentary evidence considered; did not specify what aspects of any evidence gathered was considered to be credible or to lack credibility; and did not apply any legal reasoning with regard to any facts. There was no other information in the case files which provided any evidence of the application of legal reasoning to the facts; and the facts, as stated in the application form, were severely limited. The only difference between one decision and another was the name of the applicant, the named country of origin and the stated time limit for lodging an appeal.³⁷ In the framework of its monitoring activity, UNHCR has often noted that in some negative first instance decisions, the fact that the claimant for international protection asked for asylum in another EU country and has been returned to Greece under Dublin II Regulation is used as a reason to reject the claim as abusive.³⁸

17. Overall protection rates remain extremely low in Greece. In 2008, 0.06 per cent of cases decided at first instance were afforded protection.³⁹ The same year, the Appeals Board reached a positive decision in 24 per cent of cases reviewed at appeal.⁴⁰ The figure of 0.06 per cent at first instance in 2008 diverges significantly from practice at first instance in other EU Member States receiving similarly large numbers of applications. By comparison, in the five countries (France, the UK, Italy, Sweden and Germany) which, along with Greece, received the largest number of applicants in Europe in 2008, the average protection rate at first instance was 36.2 per cent.⁴¹ The situation did not improve significantly in 2009. Eurostat data for 2009 first instance decisions in Greece show a small increase in the protection rate to 0.98 per cent,⁴² in contrast to a first instance protection rate for the five countries listed above of 25.33 per cent over the same period.

18. Unhindered access to international complaint mechanisms such as those under the European Convention on Human Rights, including access to Rule 39 interim measures, is in UNHCR's view not effectively guaranteed for asylum-seekers or Dublin transferees in Greece. UNHCR considers that the conditions described above which hinder or prevent asylum-seekers from pursuing their protection claims also create obstacles to the pursuit of applications to the

³⁶ "UNHCR observed 49 personal interviews at the ADA in Athens, Greece. It was clear that no steps were taken to ensure the confidential conditions of interviews. Three to four interviews were conducted simultaneously in one large noisy room measuring approximately 20 x 10 metres. The room contained the four desks of the interviewers and about 13 more desks belonging to other police officers responsible for fingerprinting and interpreters of the Department. There were approximately 30 persons present in the room whilst interviews were being conducted. 50 People were moving around for fingerprinting and other procedural matters. On occasions, the noise was so loud that communication between the applicant and the interpreter or the interpreter and the interviewing police officer was difficult." See UN High Commissioner for Refugees, *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice*, note 45, Section 5, page 10. See also note 1, UNHCR, *Observations on Greece as a country of asylum*.

³⁷ See note 45, Chapter 3, page 18, March 2010, available at: <http://www.unhcr.org/refworld/docid/4bab55752.html>.

³⁸ One of the formulations used is the following: "Having been in X country in breach of his/her obligation as an asylum-seeker and having applied for asylum there, shows that the claim is abusive".

³⁹ The "protection rate" is the percentage of positive decisions for refugee status and subsidiary protection against the total number of substantive first instance decisions for a given period. See UNHCR statistics at <http://www.unhcr.org/pages/49c3646c4d6.html>.

⁴⁰ See note 39 above.

⁴¹ UNHCR, 2008 Global Trends, Annexes, at <http://www.unhcr.org/4a375c426.html>.

⁴² In 2009, in Greece out of the 14,355 first instance decisions taken, only 165 were positive (35 decisions granting refugee status, 105 decisions granting subsidiary protection and 25 granting humanitarian status). Eurostat, http://epp.eurostat.ec.europa.eu/portal/page/portal/population/publications/migration_asylum.

European Court of Human Rights, including requests for interim measures. The situation is particularly acute for persons in detention or those who have to live in the streets, as is the case for many transferees.

19. In 2009, there were just nine Rule 39 requests to the Court introduced by applicants present in Greece, of which four were successful. Of these four, only one was introduced by a lawyer in Greece. This case concerned a Turkish national of Kurdish origin who had applied for asylum in Greece. Of the other three successful requests, one was made to the Court by a lawyer in Italy for six out of 32 applicants who had been trying to seek asylum in Greece and Italy.⁴³ The other two cases were lodged by lawyers outside Greece on behalf of persons in Greece, and involved Afghan asylum-seekers transferred from the Netherlands to Greece under Dublin II. Dutch lawyers acting for those asylum-seekers had unsuccessfully applied for Rule 39 measures while they were still in the Netherlands, but were able to obtain such measures for their clients by the time they arrived in Greece. From 1 January to 3 May 2010, there is no record of a request by an applicant present in Greece aimed at suspending his expulsion from Greece. Eurostat data nevertheless indicate there were 15,925 persons who applied for asylum in Greece in 2009, putting the country among the “top 7” countries in terms of asylum applications in Member States. Given the relatively high number of applications, one would expect a proportionately higher number of Rule 39 requests to be made from Greece in line with the situation in other Member States.⁴⁴

20. In the context of Dublin transfers to Greece, the Court has affirmed that Greece is required to ensure that the right of a transferee to lodge an application with the Court and request interim measures under Rule 39 are “both practical and effective”.⁴⁵ As the Court has also ruled in other cases “the remedy required by Article 13 must be “effective” in practice as well as in law” and must take “the form of a guarantee and not of a mere statement of intent or a practical arrangement”.⁴⁶ It has further found that it must have automatic suspensive effect.⁴⁷

21. UNHCR respectfully submits that any presumption that Greece is able to fulfil its international obligations vis-à-vis Dublin transferees and asylum-seekers must be assessed in light of the information above. Further, as asylum-seekers readmitted to Greece do not enjoy “practical and effective” access to international remedies. In the light of the foregoing information, UNHCR believes that Dublin II transfers to Greece should be suspended until such time as such access is assured.

5. The existence of a risk of *refoulement* or expulsion from Greece

22. The obligation of states not to expel or return (*refouler*) a person to territories where his or her life or freedom would be threatened is a cardinal protection principle enshrined in Article 33 of the 1951 Convention. In addition, international and European human rights law prohibits the return of a person to a risk of torture and cruel, inhuman or degrading treatment or punishment. The duty not to *refouler* applies, *inter alia*, to asylum-seekers whose status has not yet been determined. It encompasses any measure attributable to a state which could have the effect of returning a person to the frontiers of territories where his or her life or freedom would

⁴³ See *Sharifi v. Italy and Greece* (Appl. No. 16643/09).

⁴⁴ From 1 January 2009 to 03 May 2010, approximately 765 Rule 39 requests were made to the Court for interim measures to stay Dublin transfers to Greece. Sixty-seven per cent were granted.

⁴⁵ *K.R.S. v. UK*, Appl. No. 32733/08, 2 Dec. 2008, para. 18 at <http://www.unhcr.org/refworld/docid/49476fd72.html>. See also *Soering v. UK*, 1/1989/161/217, 7 July 1989, at <http://www.unhcr.org/refworld/docid/3ae6b6fcc.html>, para. 87.

⁴⁶ *Conka v. Belgium*, Appl. No. 51564/99, 5 Feb. 2002, at <http://www.unhcr.org/refworld/docid/3e71fdfb4.html>, paras. 75 and 83.

⁴⁷ *Gebremedhin [Gaberamadhien] v. France*, Appl. No. 25389/05, 26 April 2007, at <http://www.unhcr.org/refworld/docid/46441fa02.html>, para. 66. See also, *Mamatkulov and Askarov v. Turkey*, Appl. No. 46827/99 and No. 46951/99, 4 Feb. 2005, at <http://www.unhcr.org/refworld/docid/42d3ef174.html>, para. 124.

be threatened, or where he or she would risk persecution. This includes refusal of entry at the border, interception, and indirect *refoulement*.⁴⁸

23. In the case of Greece, UNHCR has stated that problems in respect of poor access to and quality of the asylum procedure and inadequate reception conditions may give rise to the risk of direct or indirect *refoulement*.⁴⁹ It is against this background that UNHCR continues to recommend that governments refrain from returning asylum-seekers to Greece under the Dublin II Regulation.⁵⁰

24. As well, while reports of refusal of entry and removal of unregistered asylum-seekers to Turkey at border points have decreased, UNHCR in the past has documented its significant concerns regarding the practice of removals from Greece to Turkey. Between April 2008 and September 2009, UNHCR has received numerous reports of attempted or actual deportation to Turkey and documented 27 such cases (involving a total of over 550 persons). Over 500 of those concerned were subsequently located by UNHCR, its partners, relatives or friends of the removed individuals. Some (including Turkish nationals) were in Turkey, some had been removed from Turkey to their country of origin, and some had re-entered Greece. There is evidence that until May 2009, Greece has engaged in removing individuals to Turkey and from there they have been removed to Afghanistan.⁵¹

25. In four cases recorded by UNHCR, the individuals affirmed that they had expressed their wish to seek asylum to the Greek authorities, but were not registered as asylum-seekers. It appears that many of those affected did not receive information about their right to seek asylum or about procedures for doing so. During his visit to Greece in February 2010, the Council of Europe Commissioner for Human Rights was informed by Greek refugee lawyers of collective expulsions to Turkey that have reportedly occurred in December 2009, January and February 2010. There is concern that asylum-seekers returning to Greece by virtue of the Dublin II Regulation may face such risks, jeopardizing their rights under the Convention.⁵²

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⁴⁸ UNHCR, "Note on International Protection", 13 Sept. 2001, A/AC.96/951, pp. 5-6. See also, "Summary Conclusions: The Principle of *Non-Refoulement*", July 2001, at: <http://www.unhcr.org/refworld/docid/470a33b00.html>; UNHCR Submission in *T.I. and the UK*, Appl. No. 43844/98, 4 Feb. 2000, at: <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=42f7737c4&page=search>

⁴⁹ The prohibition of indirect or "chain *refoulement*" has been recognised by the Court, see *T.I. v. UK*, Appl. No. 43844/98, 7 March 2000, at: <http://www.unhcr.org/refworld/docid/3ae6bbdfc.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; See also note 57, *K.R.S. v. UK*, para. 16; *Abdolkhani and Karimnia v. Turkey*, Appl. No. 30471/08, 22 Sept. 2009, at <http://www.unhcr.org/refworld/docid/4ab8a1a42.html>, paras. 88–89.

⁵⁰ See note 14.

⁵¹ UNHCR, *Observations on Greece as a country of asylum*, see note 14, pp. 4-5.

⁵² See note 3.



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 States² 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

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

treatment is ongoing in Finland. In Germany, an appeal 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 otherwise 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.

affect a State's 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.

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).

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.

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

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/>.

its “resistance” and continues to find that Greece does not offer transferees the possibility of accessing an effective asylum procedure.¹⁶

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

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.

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.

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).

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

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.

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. 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

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.

be effectively registered in Athens.³⁰ Otherwise, Belgian jurisprudence in Dublin cases 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

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.

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.

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 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 State³⁸ 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

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.

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 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

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. 200905828/1V3*, 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.

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 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

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).

child (Articles 1(9) and 10 Swedish Aliens' Act) should be taken into account. 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 States⁵² and emphasizes that it might also be an obligation for the transferring country to abstain from transfers to Greece under the principle of solidarity

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 law⁵⁴ or because they assessed the situation in Greece to be such that access to the asylum procedure was guaranteed. Several lower Courts⁵⁵ 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

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.

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 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:

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/4bfd0802.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 Abrahami v. ORAC & Anor* / Record No. 2008/1278/JR, Ireland, High Court, 11 Feb. 2010.

⁶² *Mohammed Edris and Others v. ORAC and the Minister for Justice, Equality and Law Reform*.

“... [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 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. Nasser*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*

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. Nasser (FC) (Appellant)*, [2009] UKHL 23, 6 May 2009, at <http://www.unhcr.org/refworld/docid/4a0183342.html>.

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 "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

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.

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>.

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.

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

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

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.

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 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

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 atteinte 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 of 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.

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

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

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.

postponed, whether as a result of government policy or through interim measures before the European Court of Human Rights.

UNHCR Brussels,
16 June 2010