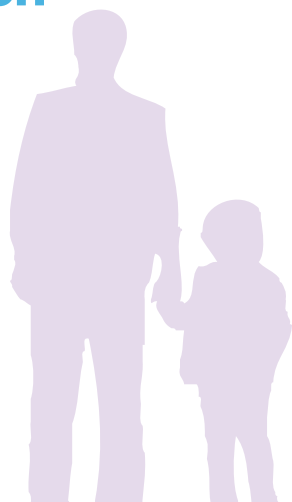




DUBLIN II Regulation National Report

**European network for technical
cooperation on the application
of the Dublin II Regulation**



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THE NETHERLANDS

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Acronyms

Only acronyms that are used in this report without explanation

AC: Aanmeldcentrum, Application Centre (for asylum seekers)

DT&V: Dienst Terugkeer en Vertrek, Service for Repatriation and Departure, (governmental agency)

ECHR: European Convention for Human Rights

ECtHR: European Court for Human Rights

IND: Immigratie- en Naturalisatiedienst, Immigration and Naturalisation Service (governmental agency)

IOM: International Organization for Migration

MS: Member State (of the Dublin Regulation)

NAV: Nieuwsbrief Asiel- en Vluchtelingenrecht, Newsletter Asylum and Refugee Law

UAM: Unaccompanied Minor

1.1 The Dublin II System: Perspectives and Challenges at the European Level

The Dublin Regulation¹, like its predecessor the Dublin Convention, was designed to ensure that one Member State is responsible for examining the asylum application of an asylum seeker and to avoid multiple asylum claims and secondary movement. It is confined to setting uniform grounds for the allocation of Member State responsibility on the basis of a hierarchy of criteria, binding on all EU Member States as well as Iceland, Norway, Switzerland and Liechtenstein. On the ten year anniversary of its entry into force this research provides a comparative overview of national practice in selected Member States on the application of this Regulation.

Our research shows that the operation of the Dublin system continues to act to the detriment of refugees, causing families to be separated and leading to an increasing use of detention. The Dublin procedure leads to serious delays in the examination of asylum claims and by doing so, effectively places peoples' lives on hold. The hierarchy of criteria is not always respected, while Art. 10 is the predominant criterion used in connection with Eurodac. State practice demonstrates that asylum seekers subject to this system may be deprived of their fundamental rights *inter alia* the right to be heard, the right to an effective legal remedy and the very right to asylum itself, as access to an asylum procedure is not always guaranteed. Reception conditions and services may also be severely limited for asylum seekers within the Dublin system in a number of Member States. There is an increasing use of bilateral administrative arrangements under Art. 23 and most States resort

¹ Council Regulation (EC) No. 343/2003 of 18 February 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, L 50/1 25.2.2003.

to informal communication channels to resolve disputes over the allocation of responsibility. Evidentiary requirements are very strict in some Member States, which in turn creates difficulties for asylum seekers in substantiating family links or demonstrating time spent outside the territories of the Dublin system. A number of Member States also apply an excessively broad interpretation of absconding, thereby extending the time limits for Dublin transfers and further increasing delays in the examination of asylum claims. Furthermore, the problems inherent in the Dublin system are also exacerbated by varying levels of protection, respect for refugee rights, reception conditions and asylum procedures among Member States, creating an 'asylum lottery'.

The national reports provide an insight into the application of this Regulation at the national level, while the comparative report outlines the main trends and developments at the European level. This research comes at a time when the Grand Chambers of both the European Court of Human Rights and the Court of Justice of the European Union have questioned the compatibility of the Dublin system with asylum 'seekers' fundamental rights. In addition, the EU institutions have recently reached a compromise agreement upon a recast Dublin III Regulation that introduces significant reforms including the creation of a mechanism for early warning, preparedness and crisis management. Despite these significant advances, the findings of this research demonstrates the continuous need to carefully evaluate the foundational principles of the Dublin system and its impact, both with respect to asylum seekers' fundamental rights and Member States. It is hoped that this research will assist the Commission's review of the Dublin system within the forthcoming launch of a 'fitness check', and for any future dialogue on the assignment of responsibility for the examination of asylum claims.²

² European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on enhanced intra-EU solidarity in the field of asylum, An EU agenda for better responsibility-sharing and more mutual trust, COM 2011 (835), 2.11.2011 p.7.

1.2 Overview of the Dublin II Regulation in the Netherlands

Methodology of this report

This report describes the application of the EU Dublin Regulation (No. 343/2003) in Dutch policy and practice. This report is based on desk-based research, interviews with officials of the Dutch authorities Immigration and Naturalisation Service ('Immigratie-en Naturalisatiedienst', hereafter IND) and the Service for Repatriation and Departure ('Dienst Terugkeer en Vertrek') hereafter DT&V)³ and information from employees of the Dutch Council for Refugees who encounter Dublin cases in daily practice. New developments were included until 1st December 2012.

Distinctive aspects

Firstly a few distinctive aspects of the implementation of the Dublin Regulation in Dutch practice will be presented. The Dublin Regulation is transposed into national law, primarily in Article 30(1) (a) Aliens Act, which states that an asylum application is *rejected* if another country can be held responsible for examining the asylum application due to 'a binding decision under international law', i.e., the Dublin Regulation. The Aliens Circular contains an extensive description of asylum policy, and is subject to frequent revisions. It is a binding legal instrument: a departure from the Circular is allowed only in exceptional cases.⁴

Dutch asylum policy stipulates that Dublin applicants receive assistance from a lawyer during the entire asylum procedure. They also receive support from the Dutch Council for Refugees. The Dublin applicant is informed about the Dublin procedure (with an interpreter) by a representative of the Dutch Council for Refugees and through information leaflets. They are also kept informed during the procedure through receiving written reports of their interviews with the IND. The Dublin claimant has access to accommodation, health care, education, financial and social benefits during the entire procedure. However, if an individual makes a subsequent

³ Interviews were conducted with IND official Mr. S. de Gans (June 2012), and with DT&V official Ms C. van der Horst (April 2012).

⁴ Art. 4:84 General Administrative Law Act (Awb).

asylum application no support is available during the period that the asylum seeker is waiting for their appointment with the IND, nor if the asylum application is rejected after substantive examination. This also applies if the asylum seeker was returned under Dublin to the Netherlands between the first and the second asylum application, both in the Netherlands (see chapter 3.5.2 for cases in which Dublin claimants are subject to subsequent asylum procedures).

The Netherlands seeks to maintain family unity as defined in Article 7 Dublin Regulation where possible. In order to do this, Article 7 is extended and not only includes family members who are recognised as refugees in the Netherlands, but also family members who have been granted asylum on the basis of subsidiary protection. Whereas the Netherlands applies Article 7 inclusively, Article 15 Dublin Regulation is applied restrictively, as chapter 3.2.1 illustrates.

The lengthy detention at the border of Dublin claimants arriving from non-Schengen countries (e.g. the UK) via Schiphol airport is a problematic issue within Dutch practice. Dublin claimants subject to border detention may remain in detention during the entire Dublin procedure. On the other hand, Dublin claimants who have arrived from another Schengen country are also generally detained, albeit for a relatively short period (a maximum of five working days) prior to the actual transfer (see chapter 3.6.3 on Detention).

Contents of this report

The second chapter of this report provides an overview of the national legal framework regarding the asylum and Dublin, in the Netherlands, including the competent bodies within the asylum procedure, as well as the realisation of Dublin transfers in practice. Chapter 3 looks in depth at the practical application of the Dublin Regulation in the Netherlands in a number of fields and describes good practices as well as the challenges still faced by the Netherlands. The final chapter lists a number of national recommendations.

The National Legal Framework and Procedures 2

2.1 Legal background

The Dublin Regulation is transposed into national law by Articles in the Aliens Act (Vreemdelingenwet, Vw),⁵ and the Aliens Decree (Vreemdelingenbesluit, Vb).⁶ The Aliens Circular (Vreemdelingendecret, Vc)⁷ also contains a number of policy rules.

Article 30(1)(a) Aliens Act states that an application for asylum is *rejected*⁸ if another country is responsible for examining the application due to a 'binding decision under international law', in this case, the Dublin Regulation. Chapter 3 of the Aliens Circular C regulates the grounds for refusal of an asylum application under the Dublin Regulation. Rejection of an asylum application on the basis of Article 30(1)(a) Aliens Act is only possible if another Member State has either implicitly or explicitly agreed to take charge or take back the asylum application, and responsibility for handling the application has in fact been transferred to the other Member state.

Although the Netherlands grants a single asylum status, there are four different grounds on which it may be issued (aside from family members). These grounds are refugee status, subsidiary protection, humanitarian and categorical protection, respectively Article 29(1)(a), (b),(c)or(d) Aliens Act. These are assessed in the general asylum procedure or the extended asylum procedure.

⁵ The Aliens Act is accessible (in Dutch), at <http://wetten.overheid.nl/zoeken>.

⁶ The Aliens Decree is accessible (in Dutch), at <http://wetten.overheid.nl/zoeken>. There is also an Aliens Regulation (Voorschrift Vreemdelingen, VV) in this field, but this doesn't contain rules that directly address Dublin issues.

⁷ The Aliens Circular is accessible (in Dutch), at <http://wetten.overheid.nl/zoeken>.

⁸ In the Netherlands, the IND states that an asylum request is 'rejected' when examination of the asylum application is refused on the basis of the Dublin Regulation. Also in statistics this is registered as a refusal for asylum.

Article 29 Aliens Act is likely to be altered, as categorical and humanitarian protection will be removed as grounds for granting protection.⁹

2.1.1 Brief overview of the asylum procedure in the Netherlands

All asylum seekers – including Dublin applicants – who enter the Netherlands over land have to apply for asylum at the Application Centre ('Aanmeldcentrum') in Ter Apel. The same applies to asylum seeker arriving from another Schengen country by air or sea. However, asylum seekers who enter through the air- and seaport, and arrive from non-Schengen countries, are formally denied access to the Dutch and Schengen territory during (the start of) their asylum procedure. They have to apply for asylum at the Application Centre Schiphol, near the international airport.

The asylum procedure does not start immediately upon arrival in the Netherlands. Firstly, the asylum seeker is granted a 'rest and preparation period' ('rust en voorbereidingstermijn') of at least six days in Ter Apel, and two days in Schiphol. This is also applicable for those who may potentially be placed in a Dublin procedure. If an asylum seeker has applied for asylum in the Netherlands before, they do not receive a rest and preparation period.

At the start of the Rest and Preparation period the asylum seeker registers their personal information during a brief interview with the Aliens Police. The Aliens Police will search their clothes and luggage as well as taking their picture and fingerprints which are checked in a Eurodac search. Documents that could provide information on the individual's identity, travel route or reason for requesting asylum are authenticated by experts. During the rest and preparation period, the asylum seeker is also tested for tuberculosis, and offered a medical examination to determine whether the asylum seeker has psychological and/or physical issues that might interfere with or influence their interviews with the IND.

⁹ The minister lodged a proposal to amend Article 29 Aliens Act on 8 June 2012 [See: Tweede Kamer der Staten-Generaal, Wijziging van de Vreemdelingenwet 2000 in verband met het herschikken van de gronden voor asielerlening, 3333 293, nr. 2]. If the amendment is accepted, the new Article 29 will only enter into force in 2013 at the earliest.

In the first instance, all asylum seekers are subject to the general asylum procedure in which a final decision should be made within eight working days.¹⁰ If on the fourth day it is evident that the IND can't make a well founded decision in this time, the application is transferred to the extended asylum procedure. The IND then has 6 months to reach a decision on the asylum application.

During the procedure, all asylum seekers are assisted by a lawyer using an interpreter (present in person or by telephone) and there is also an interpreter present during interviews.¹¹ After receiving a negative decision the asylum seeker is requested to leave the Netherlands 'of their own accord' within – in general - four weeks, or 28 days.¹² However, if a second or subsequent application for asylum is rejected,¹³ the departure period is 0 days, or 24 hours.

-
- 10** The *general asylum procedure* in the Netherlands is as follows. Once an individual has asked for asylum, the rest and preparation period (a minimum of either 2 or 6 days) starts, during which they are provided with information by a representative of the Dutch Council for Refugees, receive a medical screening and speak with their appointed legal aid lawyer. On day 1 of the general asylum application, the asylum request is officially registered, and the IND conducts the first interview to ascertain their identity, nationality and travel route to the Netherlands. On day 2, the asylum seeker and their lawyer review the first interview and any corrections and/or additions are submitted. On day 3, the second interview with the IND takes place ('nader gehoor'). The second interview is more extensive, and the asylum seeker is questioned about their motives for seeking asylum. On day 4, the lawyer and the asylum seeker review the report of the second interview and submit any corrections and additions. On day 5, the IND assesses the asylum application. The IND can decide to grant asylum. If not, the IND can either continue the general asylum procedure or refer the application to the extended asylum procedure. Here the IND must decide on the asylum application within a maximum of 6 months. If the application is to be continued within the general procedure the IND issues a written 'intention to reject' the asylum application in a 'concept decision'. On day 6 the lawyer submits their response to the intention on behalf of the asylum seeker. On days 7 and 8 the IND decides to either grant or refuse asylum. The IND can also decide to transfer the application to the *extended asylum procedure*. During the extended asylum procedure, the IND may conduct an additional interview. The asylum seeker and their legal representative then have two weeks to submit corrections and additions to the report. With regard to the intention to reject the asylum application, the lawyer may submit their views on behalf of the asylum seeker within four weeks (instead of 1 day in the general asylum procedure).
- 11** Interpretation is often done via telephone. The Legal Aid Board ensures that the asylum seeker receives assistance from a lawyer, if they cannot afford one. The Legal Aid Board pays a fee to this lawyer for his assistance to the asylum seeker. However, the lawyer is not employed by the Legal Aid Board and is an independent provider of legal assistance.
- 12** Under certain circumstances, e.g. risk of absconding, the IND may give a shorter term. See Article 62 Aliens Act.
- 13** If the deadlines for transfer (Articles 19(4) and 20(2) Dublin Regulation) are not respected and the responsibility for the asylum application is transferred to the Netherlands, the asylum seeker may submit a new request, which is

All asylum seekers may appeal against a negative decision with the general administrative regional court ('rechtbank') in The Hague. (This court also has divisions in other cities.) A further appeal against the decision of the regional court can be lodged with the Council of State, Administrative Section ('Afdeling Bestuursrechtspraak Raad van State', ABRvS).

The asylum seeker is expected to submit, immediately at the start of the asylum procedure, any documents concerning their identity, nationality and travel route to the Netherlands, as well as any documents relevant to determining whether another country could be responsible under the Dublin Regulation.¹⁴ However, documents submitted during an appeal against a negative decision will usually be taken into account.¹⁵

2.1.2 Dublin Procedure

During the rest and preparation period, the IND starts investigating whether another country is responsible for examining the asylum application. This is done on the basis of any information collected by the Aliens Police (through the searching of clothes and luggage, and taking fingerprints). This Dublin investigation can be extended after the rest and preparation period and can continue for a few weeks to a few months. If there are indications that another country is responsible for examining the asylum application, the IND starts a Dublin procedure.

A Dublin procedure differs from the general and extended asylum procedure as the asylum application is not dealt with substantively. A 'Dublin interview' is held instead of the 'second interview' on the motivation for seeking asylum ('nader gehoor').¹⁶ Nevertheless, the same framework and time-frames for conducting interviews and submitting opinions apply during the Dublin Procedure. As long as the Dublin Procedure is ongoing, the IND will not substantively process the application for asylum.

considered as a subsequent application [see chapter 3.5.2].

14 ABRvS [Council of State], 31 October 2003, case no. 200305235/1; ABRvS [Council of State], 18 December 2008, case no. 200802320/1.

15 Based on the revised version of Article 83 Aliens Act [entered into force on 1 July 2010], which provides for an ex nunc judgment by the Court [see chapter 3.5.3].

16 Aliens Circular C13/3.4.

The Dublin claimant has access to free legal aid¹⁷ from the day before (day -1) the official lodging of the asylum application on day 1. The legal representative may attend the interview with the IND though this does not normally happen in practice. If the Dublin claimant wishes, a representative of the Dutch Council for Refugees can sometimes attend instead, although their role during the interview is minimal.

The Dublin Procedure is as follows:

- On day 1 the asylum seeker officially lodges their asylum application with a signed declaration. The IND then conducts the first interview with the asylum seeker to ascertain their identity, nationality and travel route to the Netherlands. The IND has three months in which to request that another Member State takes charge or takes back the asylum seeker.¹⁸
- On day 2 the asylum seeker and their lawyer review the first interview and can submit any corrections and/or additions.
- On day 3 the IND conduct a 'Dublin Interview' with the Dublin applicant. During the Dublin interview the IND informs the asylum seeker of the outcome of the examination of their documents and fingerprints. The asylum seeker is also informed if the Netherlands intends to, or already has, made a Dublin claim to another Member State. The IND files a Dublin claim as soon as it has good reason to believe that another Dublin country is responsible for an asylum request. A Dublin interview and subsequent steps up to and including the final decision can be conducted while the IND is waiting for a response from the EU State where a claim has been filed.
- During the Dublin interview the asylum seeker can present any arguments why they believe that the Netherlands should handle their application. After this interview the IND will decide whether the other country can still be held responsible for processing the application for asylum. The asylum seeker and their lawyer receive a copy of the interview report after the Dublin interview.

¹⁷ See footnote in chapter 2.1.1.

¹⁸ This has been confirmed by the Council of State, see e.g. ABRvS [Council of State], 20 March 2012, case no. 201007428/1/V4.

- On day 4 the asylum seeker and their lawyer discuss the report of the Dublin interview and submit any corrections and additions
- On day 5 the asylum seeker receives a letter stating that the IND 'intends to reject' the application for asylum on the basis of the Dublin procedure. This 'concept decision' also states the reasons for this intended rejection and its consequences. The asylum seeker and their legal representative respond to this IND 'concept decision' ('voornemen').
- On day 6 the IND reassess the initial decision to reject, taking into account the written response from the asylum seeker and their legal representative.¹⁹ If the other country is still considered responsible, the IND will ask the responsible country to take over the application (if it has not already done so).
- The decision to refuse asylum due to the Dublin Regulation (Article 30(1)(a) Aliens Act) is only taken after the referral or return request has been (tacitly or otherwise) accepted by the other Dublin State. If this condition is fulfilled, the final decision can be made on day 8.
- After this decision, the IND will ask the Service for Repatriation and Departure (DT& V)²⁰ to organise the transfer to the responsible country. The transfer should occur within six months after that country has agreed with the transfer request. It is also possible for the Dublin claimant to voluntarily return to their country of origin with assistance from the International Organisation for Migration (IOM). The Dublin claimant receives information about their departure from the Netherlands, in which the support offered by the IOM is also described. It often takes some time until the responsible country has responded to the transfer request, – especially when the claim is based on an irregular border crossing (Article 10 Dublin Regulation) – Therefore if the transfer request is accepted only after the term of the general asylum procedure has already finished, the Dublin claimant's asylum application

19 At this stage, the IND does not necessarily know yet whether the other country accepted the referral or return request.

20 See chapter 2.2.1.

is rejected (referring the asylum seeker to another Dublin country within the framework of the extended asylum procedure (see footnote in chapter 2.1.1)). Within this framework, the IND must decide on the asylum application within six months.

The IND tries to deal with as many Dublin cases as possible in the 8-day *general* asylum procedure. To accomplish this, some Dublin claimants get a lengthy rest and preparation period, while the IND awaits the outcome of the Dublin claim by the responsible country. Only by waiting for this outcome before starting the asylum procedure can the IND be sure that the asylum application can be dealt with quickly, within the framework of the general asylum procedure.

Appeal procedure for Dublin claimants

It is possible to appeal against the decision to reject an asylum application because another country is considered responsible for the claim under the Dublin Regulation (Article 30(1)(a) Aliens Act). The appeal procedure in Dublin cases has no automatic suspensive effect.²¹ Therefore the Dublin claimant has to apply for a provisional measure ('*voorlopige voorziening*', *vovo*) allowing them to await the courts' decision in the Netherlands as well. To avoid any risk of being transferred, this application for a provisional measure must be made within 24 hours after the IND decision.

Finally, both the applicant's lawyer and the IND may appeal against the decision of the regional court to the Council of State, Administrative Section ('*Afdeling Bestuursrechtspraak Raad van State*', ABRvS). This procedure does not have suspensive effect, and a provisional measure from the president of the Council of State may be necessary to prevent transfer to the other Member State. Chapter 3.5.3 will further examine the effective remedies available for Dublin claimants.

²¹ Art. 82(2)(c) Aliens Act.

2.2 Procedural background

There is no information available on the (administrative) costs of the Dublin procedure and the costs of actual transfers under the Dublin Regulation. Because there is no centralised administration and all the bodies mentioned below keep their own records, it is difficult to obtain comprehensive information on costs, in particular ‘Dublin costs’.²²

2.2.1 Competent bodies in the Dublin procedure

Immigration Police

The Immigration Police (‘Vreemdelingenpolitie’) are part of the Dutch police service and supervise the stay of asylum seekers in the Netherlands. They focus on preventing abuses and disturbance of the public and legal order.

When an individual claims asylum, or if an irregular migrant is apprehended, officials of the Immigration Police or the Royal Netherlands Military Police (‘Koninklijke Marechaussee’, KMar) register their personal information, such as name, date of birth, and nationality. In addition to taking fingerprints, they also search clothes and luggage, and take photographs.

Central Agency for the Reception of Asylum Seekers²³

The Central Agency for the Reception of Asylum Seekers (‘Centraal Orgaan Opvang Asielzoekers’, COA) is responsible for the reception of asylum seekers. The COA is responsible for accommodation, meals, and health insurance. The COA can also help an asylum seeker find a doctor.

Immigration and Naturalisation Service (IND)²⁴

The Immigration and Naturalisation Service (‘Immigratie- en Naturalisatiedienst’, IND) is part of the Dutch Ministry of Security and Justice. The government that came into power in November 2012 has appointed a Junior Minister at this Ministry with responsibility for the IND, instead of appointing a Minister for

²² Interview IND official (18 June 2012).

²³ COA website in English accessible (<http://www.coa.nl/en>)

²⁴ IND website in English accessible (<http://english.ind.nl>)

Immigration. In the recent past, most of the time a minister was responsible for national policy on asylum affairs.

The officials of the IND interview the asylum seekers about their identity, nationality, travel route and the reason for leaving their country of origin. The documents that are handed over (such as proof of identity, travel route or reason for requesting asylum) are checked for authenticity by experts.

The IND has a special unit that focuses on Dublin cases, the so-called Unit Dublin located in Zevenaar. The IND also has a special registration desk - the 'claimkamer' - at the application centre in Ter Apel to identify Dublin cases. Before starting the Dublin procedure, the staff of the 'claimkamer' investigate whether there are indications for a Dublin claim on the claim can then be filed before starting the Dublin procedure.

If another country is responsible for the asylum application, the IND requests that they assume responsibility for the asylum application. If the claim is accepted or if the deadline for responding passes, the asylum request is rejected (unless Article 3 (2) and/or 15 Dublin Regulation are applied to take over the responsibility for an asylum case).

Service for Repatriation and Departure (DT&V)

The Service for Repatriation and Departure (Dienst Terugkeer en Vertrek, DT&V)²⁵ is part of the Ministry of Security and Justice (as is the IND). After the rejection of an asylum request has become irrevocable, the IND asks the DT&V to organise the return of the asylum seeker, if necessary by force (expulsion).

The DT&V is also responsible for enforcing Dublin transfers and has a special 'subdepartment on Dublin' in the city of Den Bosch since September 2011.

²⁵ DT&V website in English accessible via <http://english.dienstterugkeerenvertrek.nl/>

2.2.2 *Dublin transfers in practice*

During the process of transferring an asylum seeker to another Dublin country, DT&V works closely with the Immigration Police. The Immigration Police detain Dublin claimants and hand them over to the DT&V for transfer.²⁶

The preparation of a transfer starts immediately after the asylum application is rejected because another country has accepted the Dublin claim, unless an appeal procedure is started within 24 hours (see chapter 3.3.4). In general, a rejected asylum seeker is given 28 days to depart from the Netherlands of their own accord²⁷ and in Dublin cases a term of 28 days for departure is also common. Nevertheless, transfers sometimes take place within 28 days after the negative decision on the asylum request.

If there are no obstacles for transfer, the asylum seeker can be held in immigration custody at the deportation centre ('Uitzetcentrum', UC) in Rotterdam.²⁸ The DT&V then books a flight to the responsible country which should take place within 5 working days from the moment that the asylum seeker was detained (if this flight is not delayed).²⁹ All detained Dublin claimants await transfer in the deportation centre in Rotterdam. This centre has a special unit for families with children under 18.³⁰ Families with children under 18 are detained in the deportation centre for a maximum of 3 or 4 days. In general unaccompanied minors, whose age is not disputed, are not detained.³¹

26 The expiry of the departure period is important in this regard. The DT&V will not take action within 30 days after the Dublin claimant requested assistance for voluntary return from the International Organisation for Migration (IOM). Interview DT&V official [26 April 2012].

27 See chapter 2.1.1.

28 See chapter 3.6.3 on the difference between 'aliens custody' and 'border detention'.

29 Interview DT&V official [26 April 2012]. The flight is booked 5 days after the moment the asylum seeker is apprehended, unless the flights are fully booked, or the responsible Member State indicates that it does not wish to receive applicants on that date. In such a case, the DT&V will try to book the flight a day earlier, or after 6 working days.

30 About detention see chapter 3.6.3.

31 If it is accepted that an unaccompanied minor is under 18 in either the Netherlands or the other Dublin country, the minor will not stay in the deportation centre, but will come with their guardian directly to Schiphol Airport before the transfer. If the age of an unaccompanied minor is disputed

A few days before actual transfer, after having received official refusal of asylum due to the Dublin Regulation (see chapter 2.1.2), the asylum seeker and their lawyer receive notification of the exact date and means of transfer.³² On the day of the transfer the asylum seeker receives a *laissez passer*³³ and any identity document, and/or money or other personal belongings they may have had in their possession on arrival.³⁴ Before the asylum seeker is transferred to the deportation centre in Rotterdam, they receive a folder with information on the transfer procedure and the possibility of repatriation with the assistance of IOM, which has been translated into various languages.³⁵

On arrival at the deportation centre in Rotterdam, three days are dedicated to preparing the asylum seeker for transfer, during which time the asylum seeker undergoes medical examinations, has an appointment with a DT&V official for discussing the transfer procedure and has their luggage checked.³⁶

There are two Dutch IND Dublin Liaison Officers stationed in Belgium (also responsible for the United Kingdom and France) and Germany (also responsible for Switzerland, Austria and the Czech Republic). Dublin Liaison Officers are responsible for conducting research and staying informed on developments in Dublin policy in their respective countries.³⁷

or if there are compelling grounds for detention (such as aggression, police reports, or because the unaccompanied minor previously departed to 'an unknown destination'; see chapter 3.6.2 on absconding) they are detained in Rotterdam deportation centre. Interview DT&V official (26 April 2012).

32 According to a recent decision from the Council of State, the notification of the date of transfer must leave enough time for the asylum seeker and their lawyer to request an interim measure from a national court as well as a decision from the court on this request (ABRvS 26 March 2012, no. 201202050/4/V4).

33 In cases where the asylum seeker travels independently to the responsible country, the *laissez passer* is given directly to the asylum seeker. If the asylum seeker travels under supervision, the supervisor will keep the *laissez passer* with them. When transferred by airplane, the *laissez passer* is given to the aircraft commander, who will hand over the document to the border authorities upon arrival.

34 Aliens Circular A4/6.8

35 Interview DT&V official (26 April 2012).

36 Interview DT&V official (26 April 2012).

37 Interview IND Official (18 June 2012).

Although they do not travel with the asylum applicant when transfers take place over land, the Liaison Officers can make extra arrangements. For example when an asylum seeker had to be transferred from the Netherlands to France in an ambulance, the Dublin Liaison Officer in Brussels arranged permission to transfer them via Belgium territory.³⁸

If the Dublin claimant indicates that they want to return to their country of origin, IOM can offer support for voluntary repatriation, and may also provide the asylum seeker with a financial contribution.³⁹ DT&V is favourably disposed towards voluntary repatriation if it can take place within 30 days after applying for repatriation. However the DT&V holds to Dublin transfer if the asylum seeker concerned returned with IOM before, or if they have a record of applying for asylum in several countries.⁴⁰ Between September 2011 and April 2012, of the Dublin related files received by the DT&V, 10-15% returned voluntarily to their country of origin with IOM.⁴¹

The Aliens Circular ensures that when an asylum seeker is transferred by plane, the DT&V checks whether the asylum seeker has a valid flight ticket, their money and other personal belongings, valid (substitute) travel documents, personal luggage (maximum 20 kg) and, if necessary, a fit-to-fly statement at least 48 hours before departure.⁴² A fit-to-fly statement that there are no medical objections to transfer is requested in cases where the medical situation of the Dublin applicant requires it (see also chapter 3.4.1).

38 Interview DT&V official (26 April 2012).

39 This amounts to a minimum of €200 and a maximum of €500 for an adult or unaccompanied minor. The asylum seeker may also be eligible for a supplementary reintegration contribution of €1750. Some nationalities are excluded from receiving a subsistence allowance and reintegration grant due to alleged abuse. Recently, the minister halted this procedure for asylum seekers from Belarus who arrived in the Netherlands after 16 November 2011 and for Russian Dublin claimants as of August 2012. The relief contribution has also been stopped for asylum seekers from Macedonia and Georgia. See: http://www.iom-nederland.nl/english/Programmes/Return_Reintegration (last visited August 2012).

40 This only applies if the Dublin claim is still valid if the asylum seeker withdraws their asylum request. See about this subject chapter 3.5.3 about the Kastrati judgment.

41 During this period the DT&V received 1.750 Dublin related files. 1.235 of these files were closed during this period, of which approximately 160 departed voluntarily with IOM. Interview DT&V official (26 April 2012).

42 Aliens Circular A4/6.4.

The application of the Dublin II Regulation in the Netherlands

3

In 2011, a total of 14,600 asylum applications were submitted in the Netherlands, of which 11,565 were first applications. The Netherlands transfers more asylum applicants to other EU States than it receives under the Dublin Regulation. In 2010, 4160 outgoing requests were issued, whereas 1190 incoming requests were received.⁴³ This is mainly due to the geographical position of the Netherlands, as asylum seekers rarely enter the European Union through the Netherlands. Another possible contributing factor is that the IND is very thorough when investigating whether it can ask another Dublin country to examine an asylum application. Of the number of closed Dublin cases submitted to the DT&V for transfer to another Dublin Member State between September 2011 and April 2012, the majority were effectively transferred to the responsible Member State (approximately 56%).⁴⁴ Approximately 25% absconded, while around 13% departed voluntarily with IOM to their country of origin.⁴⁵

⁴³ EMN Bulletin, June 2012., see annex II.

⁴⁴ Of the 1750 files that the DT&V received between September 2011 and April 2012, 1235 were closed during this period. Of these 1235 Dublin applicants, 690 were effectively transferred to the responsible country. See Annex II on statistics.

⁴⁵ Of the 1235 Dublin files that the DT&V closed during September 2011 and April 2012, 310 Dublin applicants departed to 'an unknown destination', and 160 persons departed voluntarily with IOM. See Annex II on statistics.

Eurostat statistics suggest that the Netherlands is not often responsible for the examination of an asylum application on the basis of the visa criterion in Article 9.⁴⁶ An explanation for this may be that the Netherlands applies very strict criteria when issuing tourist visas. If there is any indication that the applicant may ask for asylum in Europe, the visa is refused.

3.1 The Application of the Dublin II Regulation Criteria

3.1.1 Application of the irregular border crossing, visa and residence permit criterion within the Dublin Regulation (Articles 9 and 10)

The hierarchy stipulated by the Dublin Regulation is observed in practice. The irregular border crossing criterion⁴⁷ and a previous application in another Member State⁴⁸ are the most common grounds for determining that another Member State is responsible. For asylum seekers arriving at AC Schiphol from a non-Schengen country and entering the Netherlands via airport or sea port, responsibility is often established on the basis of the visa criterion.⁴⁹ If these asylum seekers have been granted a visa by a particular Dublin Member State, it is apparent from the moment of entry that a Dublin procedure can be started.

⁴⁶ Eurostat contains a table of numbers of accepted taking charge requests based on Articles 9, 10, 11 and 12 DR taken all together. However figures are not available for all Dublin partner countries. [See Annex II for further details about Eurostat.] The available figures suggest that the total number in this table in 2011 for all Dublin partner countries together is less than 100.

⁴⁷ [Statistics from Eurostat to be added].

⁴⁸ [Based on general information from DCR staff members. Eurostat (see reference in Annex II) does not contain a table only about claims based on art. 10 DR. The table on accepted taking back requests shows that the total number in 2011 exceeds 700. A few potentially important partner countries were not included yet and the number may be above 1.000.

⁴⁹ Based on general information from DCR staff members at AC Schiphol.

The residence permit criterion is not applicable when an asylum seeker is recognised as a refugee in another Member State (see 'transfer of persons with recognized refugee status' below).⁵⁰

As will be described in chapter 3.4.1, postponement of transfer due to medical reasons on the basis of Article 64 Aliens Act is considered a 'residence permit' in the sense of Article 16(2) Dublin Regulation. As a consequence, the Netherlands becomes responsible for the examination of asylum applications of Dublin claimants whose transfer is postponed on the basis of Article 64 Aliens Act.⁵¹

3.1.2 *Heterogeneity of application within the country*

In the Netherlands – as in most Dublin countries – there is only one Dublin office within the Immigration Service. This office makes all decisions regarding Dublin transfers. This results in a high level of uniformity in decisions concerning Dublin.

3.1.3 *Unaccompanied minors*

A minor asylum seeker is considered an 'unaccompanied minor' when they are younger than 18 years old, are not married and have not been registered as such.⁵² Furthermore, the minor must be unaccompanied, and without supervision by an adult who is responsible for the unaccompanied minor, or could be regarded as having this responsibility.⁵³

⁵⁰ (Concept) decision from IND Zevenaar in Eritrean case, 18 August 2011. Interview IND official (18 June 2012).

⁵¹ ABRvS [Council of State], 12 July 2010, case no. 201000724/1. (See Annex III for a summary of this court decision).

⁵² The minority of an unaccompanied minor is determined in accordance with national law, laid down in Article 1:233 Civil Code.

⁵³ In the Netherlands, an unaccompanied minor is eligible for a non-asylum temporary residence permit if they are a minor, unaccompanied, not able to maintain themselves in the country of origin, there is no adequate reception available for them in the country of origin, and there are no contra-indications, such as a criminal record. See: Aliens Circular B14/2.2.1.-2.2.4.

Unaccompanied minors may lodge an asylum application themselves. However, in the case of unaccompanied minors younger than 12 years of age, their lawyer or their legal guardian has to sign the asylum application form on their behalf. A guardian is assigned to every unaccompanied minor by the guardianship organisation 'Nidos'. Unaccompanied minors are transferred to the application centre in Den Bosch and they are not detained if their age is not disputed. Children under the age of 12 are given a first interview with the IND which takes place in a special child-friendly interview room.

Age assessment

Whether or not an unaccompanied asylum seeker is a minor has consequences for the decision on the asylum request and treatment during the asylum procedure, and also in relation to the Dublin Regulation (particularly art. 6), as the Netherlands has protection measures that only apply to UMAs (particularly a residence permit that - if certain conditions are met - is issued to a UMA).

During the rest and preparation period, employees of the IND and the Aliens Police assess whether there is reason to doubt that the unaccompanied asylum seeker is a minor. If the minority claim is questioned and the unaccompanied minor cannot submit documents to prove minority, they may undergo an age test to determine their age. During the age test, X-ray examinations are made of the wrist joints and – if necessary – also of the collarbones. If the applicant refuses to undergo an age assessment, the IND will consider the applicant an adult in their asylum application.⁵⁴ The method of age determination is criticised because of concerns about its reliability and the risks of exposing people to radiation.⁵⁵

In Dublin cases the IND also takes information from other Dublin countries about the age of the asylum seeker into consideration. In a recent case the regional court of Den Bosch found that the IND shouldn't assume that the asylum seeker who claimed to be a minor was an adult, just because he had presented himself as an adult in Austria.⁵⁶

54 EMN Study, 'Unaccompanied Minors in the Netherlands: Policy on reception, return and integration arrangements for and numbers of unaccompanied minors', February 2012, accessible http://www.emnnetherlands.nl/EMN_rapporten/2010/Alleenstaande_Minderjarige_Vreemdelingen_in_Nederland (last visited October 2012).

55 Commissie Leeftijdsonderzoek [Age Testing Committee], Report April 2012, p. 12.

56 Rechtbank Den Bosch [Regional court Den Bosch] 22 May 2012, case no. 12/9988.

Article 6 Dublin Regulation

In accordance with Article 6 Dublin Regulation, the Netherlands examines the asylum application of an unaccompanied minor if a member of their family is legally present in the Netherlands, provided that this is in the best interest of the minor. According to the Aliens Circular, 'the best interests of the minor' in Article 6 should be understood as follows:

- **a.** a core family connection needs to have been established; it is not in the best interest of the minor to place them with someone of whom it is not certain that they are the father, mother, or guardian of the minor;
- **b.** there is no presumption of mistreatment (physically, mentally or sexually) of the minor by this family member;
- **c.** the family member is able to provide the minor with sufficient care.⁵⁷

The family connection is established through legal documentation to demonstrate the family bond. If there is no such documentation available, the IND may conduct an interview with 'identifying questions' to establish the family connection. If there is still doubt a DNA test can be conducted. The guardian needs to give permission, and should consider whether it is in the interest of the minor to request a DNA test. In case of a negative result of the DNA test, the minor must cover the costs of the DNA test.⁵⁸

- The IND tries to trace family members if the unaccompanied minor claims to have family in Europe (see about tracing below). However the IND has not always adhered to the principle stipulated in preamble points 6 and 7 that family unity should be preserved and that an unaccompanied minor should be reunited with their family members. In a particular case,⁵⁹ the Netherlands had requested Spain to take back an unaccompanied minor on the basis of Article 13 Dublin Regulation, while the mother of the child resided in the Netherlands, where she was naturalised. However, the Dutch authorities had not notified the Spanish authorities that the mother was staying in the Netherlands on a legal basis.

⁵⁷ Aliens Circular C3/2.3.5. 'Artikel 6 : niet-begeleide minderjarige asielzoeker'. There are no policy rules on what constitutes sufficient care.

⁵⁸ Interview IND official (18 June 2012); Aliens Circular B2/8.6; 'IND work instruction 2011-12, DNA-onderzoek en identificerende vragen' (3 August 2011) p. 4.

⁵⁹ Rechtbank Zwolle [Regional court Zwolle], 27 January 2005, case no. 04/51294.

- The regional court of Zwolle ruled that the Netherlands should examine the asylum application of the unaccompanied minor, and that he may not be transferred to Spain.

Chapter 3.4.2 on vulnerable persons in the asylum procedure elaborates on the transfer of unaccompanied minors under the Dublin Regulation.

3.1.4 Family unity and the definition of Family Members

The Netherlands recognises married couples and registered partners as ‘family members’ for the purposes of the Dublin II Regulation as well. Biological children under 18 are included in the legal definition of a family, as are ‘legal’ adopted children who were part of the family in the country of origin, and who are under the legitimate authority of the family member. Unmarried (homo- and heterosexual) couples with a ‘sustainable and exclusive relationship’ are also considered a family under Dublin.⁶⁰ The authorities take into account, *inter alia*, whether the unmarried couple lived together in the country of origin, the length of the relationship, and whether they had a shared household.⁶¹

During the first interview with the IND the asylum seeker – not only UMAs is asked whether they have family members in another EU Member State. If the asylum seeker declares that this is the case, the IND may contact the authorities in the other Member State and conduct a ‘personal-check’ of the family member (on the basis of Article 21 Dublin Regulation). The Dutch Council for Refugees may assist in tracing family members within the Netherlands and the Red Cross can help to trace family members in the country of origin.

The IND will only attempt to trace a family member if there is enough concrete information about the family member’s identity and/or their whereabouts.⁶² During the tracing effort the IND is aware that particular data such as names, may be written and recorded differently in other Member States.⁶³ Both parties have to agree to the tracing, a victim of abuse for example may not wish to be reunited. Also, difference in opinions between Member States may exist as to whether it is in the

⁶⁰ Article 3.14 Aliens Decree.

⁶¹ Article 3.17 Aliens Decree; Aliens Circular B2/4.2 and B2/4.9.

⁶² Additional information from IND official (23 August 2012).

⁶³ Interview IND official (18 June 2012).

best interest of a child to be reunited with their family member, if for example the child has previously been mistreated.⁶⁴

The family connection is established through documentation and identifying interviews with the IND. It is also possible to conduct a DNA test to establish a family connection. If the DNA test is negative, the asylum seeker has to cover the costs of the test. If the DNA test proves positive, the Netherlands pays for the test of the asylum seeker in the Netherlands.⁶⁵

Article 7 Dublin Regulation

According to Article 7 Dublin Regulation the Netherlands is responsible for handling the asylum application of a family member of a legally residing 'refugee'. This provision is applied not only to refugees (Article 29(1)(a) Aliens Act), but also to asylum seekers with a asylum-related residence permit on the basis of Article 29(1) (b),(c)or(d) Aliens Act (subsidiary, humanitarian and categorical protection). Because Article 7 Dublin Regulation does not allow for a broader interpretation, Article 3(2) in conjunction with Article 15 Dublin Regulation are invoked to fill this 'gap'. Formally it is therefore not by virtue of Article 7 Dublin Regulation but by virtue of Articles 3(2) and 15 Dublin Regulation that family members are (re)united with asylum seekers enjoying subsidiary, humanitarian and categorical protection (see also chapter 3.2.1). It doesn't matter whether the family existed in the country of origin. The persons concerned have to express their consent with the intended reunification in writing.⁶⁶ This broader application of Article 7 DR is based on the principle in the Dutch asylum system that there is no distinction between all four asylum-based residence permits as far as the rights and provisions that they offer to the beneficiary are concerned. This includes possibilities of family reunification.

⁶⁴ Interview IND Official (18 June 2012). See chapter 3.7.2 on how disputed cases are settled.

⁶⁵ Interview IND Official (18 June 2012).

⁶⁶ Aliens Circular C3/2.3.5.

Article 8 Dublin Regulation

In accordance with Article 8 Dublin Regulation, the Netherlands accepts responsibility for the asylum request of a family member of an asylum seeker whose application in the Netherlands has not yet been substantively decided on by the IND. (Because the IND only decides once about an asylum request there is no need to distinguish between first and second instance governmental decisions in the Dutch context.) The Aliens Circular adds that responsibility is only accepted in cases where the asylum seeker in the Netherlands had already requested asylum before the family member applied for asylum in another Member State.⁶⁷ This of course is in conformity with the principle that the circumstances at the moment of the (first) asylum request are decisive for determining responsibility under the Dublin Regulation (art. 5(2)).

3.1.5 Transfer of persons with recognized refugee status

Those recognised as a refugee are not transferred to another Member State under the Dublin Regulation.⁶⁸ Sometimes the 'European Agreement on Transfer of Responsibility for Refugees' is applied. There has been controversy about the applicability of this agreement. In a case of Russian asylum seekers who had been recognised as refugees in Poland,⁶⁹ the IND requested Poland to take over the asylum applicants on the basis of the 'European Agreement on Transfer of Responsibility for Refugees'. The court found that Article 4(1)(2) of this agreement allows a transfer on the initiative of the state authorities only in exceptional cases, and the asylum seeker in that case could not be transferred.

⁶⁷ Aliens Circular C3/2.3.5. 'Artikel 8 : stand van de procedure'.

⁶⁸ Concept decision from IND Zevenaar in Eritrean case, 18 August 2011. Interview IND official (18 June 2012). Although it is a concept decision the IND can still be called to account for its contents (See explanation of concept decision in chapter 2.1.2 under day 5 of the Dublin Procedure).

⁶⁹ Rechtbank Zwolle [Regional court Zwolle] 20 March 2012, case nos. 12/5985, 12/6001 and 12/6005.

Another case about accepting on other grounds – though not necessarily about a person with a refugee status – concerns a case of transfer to Malta which led to a decision from the Regional court in Den Bosch in June 2012.⁷⁰

Malta accepted the transfer on the basis of Article 6(2) of the Returns Directive. The Maltese authorities argued that the Returns Directive had user replaced art. 23 and 24 of the Schengen Implementation Agreement. According to information the IND received from the Maltese authorities, the asylum seeker concerned had a right to stay (status) in Malta. The Dutch court found that the IND had produced sufficient reason for rejecting the asylum request. However, the court decision did not address the issue of whether the transfer to Malta could be directly based on the Returns Directive.

⁷⁰ Rechtbank Den Bosch, [Regional court Den Bosch] 29 June 2012, case no. 12/11697.

3.2 *The Use of Discretionary Provisions*

3.2.1 *Application of the humanitarian clause (Article 15)*

In the Netherlands, the application of the humanitarian clause of Article 15 DR always coincides with the application of Article 3(2) Dublin Regulation. Also, in cases where the conditions for applying Article 15 are met, the asylum seeker concerned always has to lodge an asylum request in the Netherlands and then, on the basis of Article 3(2), the asylum seeker is not referred to the responsible country.

The Dutch policy rules contain a number of conditions for applying Article 15 DR that cannot be found in the text of this Article and as a result this Article is applied in a restrictive way.

According to the Aliens Circular,⁷¹ reunification of family members and other dependent relatives, as meant in the humanitarian clause, only applies to *asylum seekers*. This means that all family members and/or relatives must have applied for asylum.⁷² Therefore, the humanitarian clause is not applicable to family reunification with a family member who is in the Netherlands on the basis of a regular residence permit. In this case, other regulations for family reunification are considered applicable.⁷³

With regard to Article 15(3) Dublin Regulation, it is not required that the family member with whom a minor wishes to be reunited is an asylum seeker.⁷⁴

⁷¹ Aliens Circular C3/2.3.6.3.

⁷² The regional court in Zwolle (Rechtbank Zwolle, 14 December 2007, case no. 07/37047), however, held that 'other dependent relatives' in Article 15 Dublin Regulation should not be understood as being limited to asylum seekers, or persons who are staying in the Netherlands on the basis of a permit (in the sense of Article 28 Aliens Act).

⁷³ Aliens Circular C3/2.3.6.3. With 'other regulations' the circular refers to rules in immigration legislation that allow for family reunification. Thus, the humanitarian clause is not applicable in the following cases:

- family members and/or relatives applying for asylum after their application for a (provisional) residence permit was rejected.
- a family member and/or dependent relative applying for asylum, intending reunification or continuation of the family relationship with a family member and/or dependent relatives who have applied for a residence permit, or hold a residence permit in the Netherlands.

⁷⁴ ABRvS [Council of State], 19 July 2010, case no. 200904938/1/V3 (See Annex III for a summary of this court decision).

Dependency of family members

The humanitarian clause is also applicable to dependent family members. According to the Aliens Circular, dependency includes pregnancy, birth of a child, serious illness, severe disability or old age. In accordance with Article 11(1) Dublin Implementation Regulation (1560/2003), Article 15(2) Dublin Regulation is applied where the asylum seeker is dependent on the assistance of a relative present in another Member State and in cases where a relative in another Member State is dependent on the assistance of the asylum seeker.

According to the text Aliens circular, Dependency is only taken into account if the asylum seeker concerned is already in the Netherlands.⁷⁵ However, because this requisite is only mentioned in a specific subparagraph, this is arguably not meant as a general condition for applying Article 15 DR. Another condition is that there is no decision on the asylum application from another Member State, as regulation 343/2003 is based on the assumption that an application will be processed in just one country.⁷⁶

Furthermore, the criteria in Article 11(2)to(5) of the Dublin Implementation Regulation (1560/2003) are applicable. In order to determine whether unification is necessary and desirable, the following points, integral to Article 11(3) Dublin Implementation Regulation, shall be taken into account:

- (a) the family situation existed in the country of origin;
- (b) the circumstances in which the persons concerned were separated;
- (c) the status of any asylum procedures or legislation on immigrants under way in the Member States.⁷⁷

⁷⁵ Aliens Circular C3/2.3.6.3 'Gezinsleden'.

⁷⁶ Aliens Circular C3/2.3.6.3, 'Gezinsleden' and 'Andere afhankelijke familieleden'.

⁷⁷ Aliens Circular C3/2.3.6.3. 'Andere afhankelijke familieleden'; Article 11 Dublin Implementation Regulation (1560/2003).

Minors and the Application of the Humanitarian Clause

The following is stated in the Aliens Circular with regard to minors and the humanitarian clause:⁷⁸

‘Member States reunite minors, if possible, with relatives in another Member State who are able to care for him/her on the basis of Article 15(3) Dublin Regulation, unless this is not in the best interests of the child. It should be noted that, if the unaccompanied minor has a family member and/or relatives in the country of origin, and therefore there is a possibility of care for the minor, the minor is in principle not eligible for reunification on the basis of Article 15 Dublin Regulation. After all, *if* reunification of the child with members of the core family is possible, as meant in Article 2(i) of the Dublin Regulation, reunification in the country of origin is preferred.

‘If possible’ should, inter alia be understood to mean:

- a. it should be made sufficiently plausible, or demonstrated, that there really is a family tie (the relative not being a member of the core family as defined in Article 2(i) Dublin Regulation);
- b. depending on the asylum procedure of the relative(s) in the Netherlands, there should be a review to determine whether reunification is still possible, also in the light of the interests of the unaccompanied minor.

After all, it would be undesirable to process asylum applications of other relatives in the Dutch asylum procedure when it has already been decided that the family member for whose application the Netherlands is indeed responsible, will not be granted asylum and will have to leave the Netherlands.’

Furthermore, the Aliens Circular refers to the condition that there has not as yet been a decision on the substance of the asylum application from another Dublin country.

⁷⁸ Informal translation by the author into English.

'This is an implication of the basic assumption of the Dublin Regulation, that asylum applications will be processed in one country only.'⁷⁹

The assumption within the Aliens Circular, that 'if the unaccompanied minor has a family member and/or relatives in the country of origin, they are in principle not eligible for reunification on the basis of Article 15 Dublin Regulation', has led to ambiguity in practice. For example, the IND requested Malta to examine the asylum application of an unaccompanied minor from Somalia with a sister residing in the Netherlands.⁸⁰ As his mother and grandmother were still living in Somalia, the IND decided not to apply Article 15 Dublin Regulation, and transfer him to Malta.

The Council of State rejected this interpretation of the Aliens Circular, and ruled that it was in the best interest of the minor to stay with his sister in the Netherlands – instead of being transferred to Malta – and that the Netherlands was responsible for examining his asylum application.

The Aliens Circular, however, continues to prescribe that the humanitarian clause be applied to minors in the manner described above. Although the IND generally does not apply the humanitarian clause in this way, they reached a similar decision in a recent case involving a Somali minor. However, the regional court in The Hague overturned this decision.⁸¹ The court confirmed the Council of State's ruling that the Aliens Circular is contrary to Article 15(3) Dublin Regulation on this point.⁸² Accordingly, it is not required that the relative (in this case the minor's cousin in the Netherlands) is an asylum seeker for Article 15(3) Dublin Regulation to be applicable.⁸³

⁷⁹ Aliens Circular C3/2.3.6.3. 'Minderjarigen'.

⁸⁰ ABRvS [Council of State], 15 September 2010, case no. 201000393/1/V3.
[See Annex III for a summary of this court decision].

⁸¹ Den Haag, 11 July 2012, case no. 12/4386.

⁸² ABRvS [Council of State], 15 September 2010, case no. 201000393/1/V3.
[See Annex III for a summary of this court decision].

⁸³ ABRvS [Council of State], 19 July 2010, case no. 200904938/1/V3.
[See Annex III for a summary of this court decision].

3.2.2 *Application of the sovereignty clause (Article 3(2))*

The Netherlands rarely invokes the right to substantively process an application for asylum on the basis of Article 3(2) Dublin Regulation. The authorities generally exercise restraint with regard to application of the sovereignty clause.⁸⁴

Firstly, based on the principle of mutual trust between states, it is assumed that Member States comply with their obligations under the Refugee Convention and Article 3 ECHR, unless there is concrete evidence to the contrary. If this is the case, the Netherlands can take charge of the asylum application on the basis of Article 3(2) Dublin Regulation. The Aliens Circular states that it does not matter whether this concerns a request to take back or to take charge of an asylum application.⁸⁵

It is the asylum seeker's responsibility to refute the presumption that a signatory state of the Refugee Convention and Article 3 ECHR complies with its international obligations in their particular case, for example, that a violation of the Refugee Convention or Article 3 ECHR will not be investigated within the asylum procedure of the responsible Member State.⁸⁶ The policy rules in the Aliens Circular have not yet been brought into line with the MSS⁸⁷ and/or ME and NS⁸⁸ -judgments and there is no indication that a revision of the Aliens Circular is forthcoming. The courts, including the Council of State, often reverse IND decisions, which continue to rely on these policy rules. In these cases, the courts insist that general documentation concerning other Dublin Member States should also be taken into consideration in addition to information directly related to the individual case (see chapter 3.8.2).

As far as 'take back' procedures are concerned, according to the Council of State, if the authorities of another Dublin country have already substantively examined and decided on an asylum request, the Dutch judiciary should not examine whether these authorities

84 Aliens Circular C2/3.6.1.

85 Aliens Circular C2/3.6.1.

86 Aliens Circular C2/3.6.1.

87 ECtHR 21 Jan. 2011, *M.S.S. vs Belgium and Greece*, No. 30696/09.

88 Court of Justice EU, 21 Dec. 2011, *N.S. vs UK C-411/10* and *M.E. c.s. vs Ireland C-493/10*.

made a substantively correct assessment, nor review whether the Netherlands would have come to a different conclusion on the same asylum request.⁸⁹

Other humanitarian reasons: disproportionate harshness

If the applicant, with reference to special and individual circumstances, provides sufficient evidence that their transfer will be disproportionately harsh, the Member State may use its discretion as stipulated in Article 3(2) Dublin Regulation. Individual circumstances are decisive in determining which aspects of the request to remain in the Netherlands are taken into account. The applicant must demonstrate the extent to which these special circumstances make the Dublin transfer procedure 'disproportionately harsh'. It should be noted that medical aspects alone, for example the availability or lack of medical treatment, do not demonstrate 'special individual circumstances'. In principle medical facilities in Member States are considered comparable; based on the principle of mutual trust between states it is also assumed that these facilities in Member States are available to Dublin claimants. An exception is made if the applicant shows, with substantial evidence, that this principle is not applicable to their case.⁹⁰ Chapter 3.8.2 describes the application of the disproportionate harshness in cases no. 201002874/1 (30 August 2010) and nos. 11/23402 and 11/23401 (2 November 2011) with regard to transfers to Italy.

⁸⁹ W J Van Bennekom en J H van der Winden *Asielrecht* p. 93. ABRvS [Council of State], 9 December 2009, case no. 200902770/1/V3.

⁹⁰ Dutch policy in Aliens Circular C3/2.3.6.4.

3.2.3 *Use of accelerated procedures*

In the Netherlands, there is no accelerated procedure. The general asylum procedure, which lasts 8 days, is the shortest asylum procedure. The general asylum procedure is not considered an accelerated procedure and it has to satisfy the criteria in the Asylum Procedures Directive.

3.3 *The Practicalities of Dublin Procedures*

3.3.1 *Transfer of responsibility in the event of non-respect of deadlines (Articles 19(4) and 20(2))*

If the deadline for transferring an asylum seeker to the responsible Member State has passed, the Netherlands becomes responsible for the asylum application. The asylum seeker may then request asylum, which will be treated as a 'subsequent asylum application' (see chapter 3.5.2).⁹¹ Hence, there is no rest and preparation term, only one interview with the IND on the reasons for requesting asylum, and if the asylum request is rejected, the asylum seeker should leave the Netherlands within 24 hours.

If the asylum request is granted, the residence permit begins on the date of the subsequent asylum application, not the date of the first asylum request.⁹² The date of commencement is important because a permit can be withdrawn within five years if, for example, the situation in the country of origin improves.

⁹¹ As described in chapter 3.5.2, there is no rest and preparation period in a subsequent asylum application. When an asylum request is rejected, the departure term is 24 hours. (Article 62(3)(c) Aliens Act).

⁹² Article 44(2) Aliens Act.

3.3.2 *Stay outside the EU within the timeframe of Dublin and circumstantial evidence*

When an asylum seeker has left the territory of the Member States for at least three months Article, 16(3) Dublin Regulation stipulates that a Member State's responsibility for examining an asylum application ceases. In the Netherlands, an asylum seeker is rarely considered to have proved that they left the territory of the EU Member States for at least three months.⁹³ Evidence consists *inter alia* of credible and consistent statements made by the asylum seeker, as well as hard evidence such as flight tickets, or municipal registration in a non-Dublin country.⁹⁴

Implementing Rules Regulation 1560/2003/EC provides a list of indicators for circumstantial evidence that the IND takes into account, such as detailed statements. As the Council of State ruled,⁹⁵ it does not follow from this Regulation and Annex II that "other circumstantial evidence of the same kind" should only be derived from an 'objective source', i.e. that the (source) person concerned should not have any interest in the outcome of the proceedings. Also information from a family member, for example, who is not considered an objective source, should be taken into account.

The list of indicative evidence for departure from the territory of the Member States⁹⁶ mentions 'detailed and verifiable statements by the asylum applicant' as well as 'reports/confirmation of the information by family members, travelling companions, etc.' The statements of a friend are concrete enough to be considered 'other circumstantial evidence of the same kind' and as a basis for evidence.

⁹³ See *inter alia*: ABRvS [Council of State], 28 June 2005, case no. 200502662/1; Rechtbank Leeuwarden [Regional court Leeuwarden], 18 May 2006, case no. 06/19446 and 06/19448; Rechtbank Zwolle [Regional court Zwolle], 30 November 2006, case no. 06/42461; ABRvS [Council of State], 10 December 2010, case no. 201006794/1/V3; ABRvS [Council of State], 19 June 2009, case no. 200808783/1/V3; ABRvS [Council of State], 28 April 2011, case no. 201002493/1/V2 [see Annex III for a summary of this court decision].

⁹⁴ Interview IND official (18 June 2012).

⁹⁵ ABRvS [Council of State], 19 June 2009, case no. 200808783/1/V3.

⁹⁶ Annex II, list B(I.9) and II.3 of Regulation 1560/2003.

On 28 April 2011⁹⁷ the Council of State ruled that the employer's statement and pay slips submitted were concrete enough to be considered as "other circumstantial evidence of the same kind" in the sense of annex II list B(I.9) and II.3 of Regulation 1560/2003/EC.⁹⁸

3.3.3 Eurodac

Immediately after entering the Netherlands, the Immigration Police or Royal Marechaussee (Military police) take fingerprints, and enter them in the Eurodac system. The IND uses Eurodac to investigate whether another country is responsible for the application, before starting the general asylum procedure. In cases of an irregular border crossing, the IND also looks for other evidence which could indicate that another country is responsible for the asylum application, such as statements made by the asylum seeker, airline tickets and receipts. This is one of the reasons for searching asylum seekers' luggage upon arrival in the Netherlands.⁹⁹

According to the IND, the EURODAC hit does not get precedence if it is established in the course of the Dublin procedure that other grounds for determining the responsible country are applicable, for example Article 8 Dublin Regulation.

The Netherlands belongs to one of the three countries where the largest number of 'category 3' transactions were made in 2011, namely 11,154 or 14%.¹⁰⁰ In 2011, more than 50% of multiple applications in the Netherlands were local hits; of a total of 8057 hits, 4145 hits were 'local', thus corresponding to the number of applications that were previously registered in the Netherlands.¹⁰¹

The average delay of transmissions by member states (the time elapsed between the taking and sending of fingerprints to the

⁹⁷ Case No. 201002493 [See Annex III for a summary of this court decision].

⁹⁸ See Annex III for a summary of this court decision.

⁹⁹ Article 55(3) Aliens Act.

¹⁰⁰ Category 3 hits consists of persons who were found illegally present on the territory of a Member State.

¹⁰¹ European Commission, 'Annual report to the European Parliament and the Council on the activities of the EURODAC Central Unit in 2011', COM[2012] 533 final, p. 7.

Central Unit of Eurodac) is between 0 and 4 days. The Netherlands, however, had an average delay of 8.83 days in the transmission of CAT2 fingerprints in 2011.¹⁰²

3.3.4 *Timeframes and suspensive effect transfer term (see also chapter 3.5.3)*

There is no national policy, other than that demanded under Dublin, for accepting responsibility for the examination of asylum claims if the Dublin procedure takes too long.

In such cases, the Netherlands only waives a Dublin transfer if the terms of art. 17 – 20 Dublin Regulation for claiming or transferring an asylum seeker are not met.

Even if there is an indication that the Dublin country that (tacitly) accepted the claim is not responsible under Article 5 – 14 DR, the IND may persist in transferring the asylum seeker to this Dublin country. In 2006, the Council of State accepted that the IND didn't check the responsibility of this country under Article 5-12 DR.¹⁰³

It follows from Article 20(1)(d)(e) Dublin Regulation that the transfer shall be carried out at the latest six months after the acceptance of the request by the responsible Member State, or upon decision on an appeal or review where there is suspensive effect. A provisional measure issued to allow an applicant to await a decision on appeal, as well as a provisional measure to await a decision on a request for a provisional measure (see chapter 3.5.3 on effective remedies), suspends the transfer term of six months in accordance with Article 20(1)(d) Dublin Regulation.¹⁰⁴ However, as long as there is no decision from the court on a request for a provisional measure, the appeal procedure has no suspensive effect and the time limit continues to run. If the time limit of six months is surpassed, the IND will be reluctant to continue waiting for the court's decision and can plan a

102 European Commission, 'Annual report to the European Parliament and the Council on the activities of the EURODAC Central Unit in 2011', COM(2012) 533 final, p. 9.

103 ABRvS [Council of State], 24 April 2006, case no. 200510543/1.

104 ABRvS [Council of State], 14 February 2005, case no. 20040889/1.

transfer. The asylum seeker then has to ask the court to rule on the provisional measure before the planned transfer ('spoed-vovo'). If the judge grants the provisional measure, the transfer term of six months will begin again after the court has ruled on the appeal procedure¹⁰⁵ (see also chapter 3.5.3 on effective remedies).

The Council of State has held that an interim measure under Rule 39 of the procedures of the Court issued by the ECtHR suspends the transfer term in Article 20.¹⁰⁶ Once an interim measure has been issued, an asylum seeker enjoys lawful residence in the Netherlands,¹⁰⁷ and may therefore not be transferred under the Dublin Regulation. An interim measure from the ECtHR is regarded as a factual barrier relating to the postponement of the moment of transfer.¹⁰⁸

3.4 *Vulnerable Persons in the Asylum Procedure*

3.4.1 *Vulnerable persons and medical cases*

As there is no definition of vulnerable persons in national legislation, the following list is not exhaustive. However, unaccompanied children, single or pregnant women, persons with disabilities and victims of torture and sexual and gender-based violence are generally considered as vulnerable persons in need of special care.

Normally, vulnerable and sick persons will also be transferred under the Dublin regulation. The IND will examine from the outset whether someone should be considered a vulnerable person in need of special

105 In accordance with paragraph 46 of Petrosian judgment (EU Court of Justice, 29 January 2009, no. C—19/08): 'In order to ensure the effectiveness of Article 20(1)(d) (...) that period must begin to run not as from the time of the provisional judicial decision suspending the implementation of the transfer procedure, but only as from the time of the judicial decision which rules on the merits of the procedure and which is no longer such as to prevent its implementation'.

106 ABRvS [Council of State], 22 February 2012, case no. 201105103/1/V4. [See Annex III for a summary of this court decision].

107 ABRvS [Council of State], 25 May 2004, case no. 200400863/1.

108 ABRvS [Council of State], 11 November 2011, case no. 201007173/1/V4. [See Annex III for a summary of this court decision].

care. The IND determines the vulnerability of Dublin claimants through the medical check during the rest and preparation period, and through information provided by the applicant during interviews. The DT&V ensures the transfer of vulnerable persons by providing a 'customised' transfer. This means that the DT&V assesses in every individual case which care is needed, for example on the basis of information provided through medical examinations before the actual transfer (see chapter 2.2.2).¹⁰⁹

If it is established that an asylum seeker may not be expelled (or transferred) due to a psychological or physical illness, Article 64 of the Aliens Act is applied.¹¹⁰ On the basis of Article 64, expulsion is halted if it is not medically safe for the asylum seeker – or one of their family members – to travel. For example, if stopping their treatment will result in a medical emergency, and if medical treatment is not available in the country the asylum seeker is to be transferred to. In this case transfer will be temporarily postponed, and the right to accommodation and other support is extended.¹¹¹

In the case of a Dublin claim, the transfer suspension due to a medical situation on the basis of Article 64 Aliens Act, is considered a 'residence document' in the sense of Article 16(2) Dublin Regulation.¹¹² The Council of State therefore judged that the responsibility for the examination of asylum application in these cases should lie with the Netherlands.¹¹³

109 Interview DT&V official (26 April 2012).

110 If the asylum seeker disagrees with the medical report produced by the Office for Medical Consulting ('Bureau Medische Advisering', BMA), they may challenge the expert report by carrying out a 'contra-expertise'. The costs for such a contra-expertise must be paid for by the asylum seeker, which is a major obstacle in asylum procedures according to the Advisory Committee on Migration Affairs (ACVZ). See: ACVZ, 'Evaluating expertise: The role of expert advice in the asylum procedure' (6 July 2012). Accessible via <http://www.acvz.org/en/index.php>.

111 However, Article 64 Aliens Act does not provide the person concerned with a residence permit. The expulsion or transfer is only suspended for the period during which travelling on medical grounds is deemed irresponsible. An appeal may be lodged in court against a decision by the IND not to apply Article 64 of the Aliens Act. The asylum applicant can request a provisional measure at this court, preventing expulsion until a decision on his appeal has been reached. There is a special residence permit available for medical reasons, for which there are strict conditions.

112 ABRvS [Council of State], 12 July 2010, case no. 201000724/1. (See Annex III for a summary of this court decision).

113 That is after the transfer is suspended on the basis of art. 64 Aliens Act. As this suspension is not really a residence permit, the asylum seeker still has every interest in getting a positive decision on his asylum request. If the asylum procedure has a negative outcome after medical recovery, the asylum

Examinations to determine whether a person is fit for transfer – ‘fit to fly’ – will take place when there are indications that the medical situation of an asylum seeker stands in the way of transfer. In such cases, the DT&V seeks medical advice from a physician to determine whether the asylum seeker is ‘fit to fly’.¹¹⁴

3.4.2 *Transfers of unaccompanied minors upon application of the Dublin Regulation*

When an unaccompanied minor is transferred under the Dublin Regulation, special rules apply. Firstly, a flight is booked two weeks in advance – for regular Dublin claimants a flight is booked 5 days in advance – and the receiving country is notified of the planned transfer two weeks in advance, instead of 3 days. This gives the receiving country time to arrange for reception facilities and guardianship. Secondly, the DT&V notifies guardianship organisation Nidos by letter about preparations for transfer and sends a second letter when the transfer flight has been booked. Nidos can also contact guardianship institutions in the responsible country, and arrange for a guardian. In the case of unaccompanied children under the age of 16, the DT&V consults with Nidos to see whether the guardian can accompany the minor to the border.¹¹⁵

For further information on unaccompanied minors, see paragraphs 3.1.3, 3.1.4 and 3.2.1.

seeker can be expelled to their country of origin.

114 The physician is hired by the DT&V, but works for an independent medical institution. Interview DT&V official (26 April 2012).

115 Interview DT&V official (26 April 2012).

3.5 *The Rights of Asylum Applicants in the Asylum Procedure*

3.5.1 *Right to information*

During the rest and preparation period, a representative of the Dutch Council for Refugees informs all asylum seekers about the asylum procedure. This can be either during a one-to-one meeting, or in a group of asylum seekers who often do not know each other but speak a common language, generally with a phone interpreter. During this information meeting, the asylum seeker will also be informed that the Dutch authorities may make a Dublin claim.

If a Dublin transfer request has already been, or will be, issued to another Dublin country, the information meeting with the representative of the Dutch Council for Refugees is dedicated to the Dublin procedure. During this meeting, the asylum seeker receives a leaflet with information about the Dublin procedure (available in various languages).¹¹⁶

The IND notifies the asylum seeker if a Dublin procedure has been initiated (see chapter 2.1.2). During the Dublin interview, the IND explains which country has been asked to take over the asylum application and on which basis.¹¹⁷ When an asylum application is rejected because another country is responsible for examining the asylum application, the asylum seeker obtains a negative decision stating that their asylum request is rejected on the basis of Article 30(1)(a) Aliens Act. This decision – as well as the concept decision (see Dublin procedure under day 5, chapter 2.1.2) – is presented to the asylum seeker and their legal representative in writing (in Dutch). The decision contains the grounds on which the other country is held responsible for the asylum request. The Dublin claimant is also informed orally via an interpreter (by telephone), of the decision and of their right to appeal. The IND decision is generally presented at least 15 days prior to the planned transfer.

116 Arabic, Armenian, Burmese, Chinese, Dari, English, Farsi, French, Russian, Somali, Tamil, Tigrinya.

117 There is always an interpreter present. The legal representative of the Dublin claimant can attend the Dublin interview, but in practice this is exceptional. If the Dublin claimant so wishes, a representative of the Dutch Refugee Council may attend instead.

The lawyer and the asylum seeker also receive documents about the Dublin claim and the acceptance of the transfer by the destination country, e.g. copies of letters between the Dublin offices of both countries. Before the transfer to the responsible country, the Dublin claimant is informed about the date and means of transfer through an information leaflet and in a meeting with a DT&V official (see chapter 2.2.2). Until recently, asylum seekers, including Dublin claimants, were informed about the actual time of transfer 24 hours prior to departure. The Council of State ruled that the Minister should review this policy, as the asylum seeker should be informed in a timely and adequate manner about their transfer.¹¹⁸ As a result of this judgment, the Minister requested DT&V to review its working methods, and to inform the asylum seeker's legal representative as soon as flight information is known.¹¹⁹ As this is a very recent change, it remains to be seen how this will work in practice.

3.5.2 *Access to the asylum procedure*

The application of a Dublin claimant transferred to the Netherlands due to a 'take charge request' will be handled in the general asylum procedure. The asylum seeker can request asylum in the Netherlands at the central reception location in Ter Apel. When arriving at Rotterdam port or Schiphol airport from a non-Schengen country (UK, Ireland, Romania, Bulgaria), the asylum seeker is denied entry into the Netherlands. Their application is dealt with in the Schiphol procedure.¹²⁰

The application of an asylum seeker who has previously lodged an asylum application in the Netherlands is dealt with as a subsequent asylum application ('opvolgend asiolverzoek') irrespective of whether there has already been an interview during the first asylum procedure. The asylum seeker follows the steps of the general asylum procedure, but with a few differences:

118 ABRvS [Council of State], 26 March 2012, case no. 201202050/4/V4.

119 Nationale Ombudsman [State Ombudsman], 14 May 2012, report no. 2012/81.

120 As described previously in chapter 2.1.1, the Schiphol procedure differs from the asylum procedure in Ter Apel, as the rest and preparation period is only two days instead of 6.

- The asylum seeker receives an appointment for submitting the new application, but will not get a formal rest and preparation period or accommodation while they are waiting for this appointment (Article 3.109(6)(c) Aliens Decree). The period during which the asylum seeker must wait for an appointment varies. This may take a couple of weeks. No attention is paid to the fact that an asylum seeker may be destitute during this period.
- If an interview has been conducted during the first asylum procedure, there will only be one interview which concentrates on possible new facts and circumstances that are relevant for the asylum request.

If an asylum seeker whose asylum request has already been rejected in the Netherlands is taken back by the Netherlands as a result of a Dublin claim and lodges a subsequent asylum application, this application will often be rejected as well due to a lack of new facts and circumstances. Asylum seekers who are transferred to the Netherlands under Dublin run a higher risk of being detained than other (failed) asylum seekers (irrespective of whether they re-apply for asylum or not). The authorities often assume in these cases that the asylum seeker is not willing to return to their country of origin and is therefore considered likely to abscond.

The Netherlands may become responsible for an asylum application where initially another Dublin country was considered responsible. This can be because the time limit for transferring the asylum seeker has been exceeded (Article 19(4) and 20(2) Dublin Regulation), or for example because an ECtHR judgment (like *MSS vs Belgium and Greece*) indicates that transfer would constitute a breach of Article 3 ECHR. In such cases the asylum seeker may also make a subsequent asylum request in *Ter Apel*. As the asylum request has not been substantively examined during the Dublin Procedure, the request will be examined on its merits during the subsequent proceeding, pursuant to the terms of a subsequent asylum application in accordance with national law. This means that the former Dublin claimant is not entitled to a rest and preparation period (Article 3.109(6)(c) Aliens Decree), and if their asylum request is rejected, they will not be entitled to four

weeks of accommodation [art. 62(3) Aliens Act in connection with the regulation on provisions for asylum seekers¹²¹). Instead, they must leave the Netherlands immediately, within 24 hours if they receive a refusal after the substantive examination of their asylum claim. However, thanks to the MSS-judgment, a ban on transfers to Greece has been applied. In the subsequent asylum requests that resulted from this, the instruction to leave the Netherlands immediately has not been applied. Instead, if the asylum request was rejected, the Dublin claimant was entitled to four weeks of accommodation.¹²²

The Kastrati judgment of the EU Court of Justice¹²³ is interpreted as follows in Dutch practice: if an asylum request is withdrawn before the claim to take charge of the request is accepted by the member state considered responsible, the transfer is cancelled because the asylum request has lost its relevance. However, if the withdrawal takes place after the Dublin request was accepted by the responsible Member State, then the (former) asylum seeker can still be transferred.

3.5.3 *Effective Remedy*

As described in chapter 2.1.1, Dublin claimants may appeal to the regional court in the Hague if their asylum request is rejected because another Dublin Member State is considered to be responsible.

If an asylum claim is rejected during the general asylum procedure, the Dublin claimant must lodge an appeal within one week. This term is four weeks in the extended asylum procedure.¹²⁴ The appeal can be based on the merits of the case, as well as on procedural

121 There is a special regulation for the provisions offered to asylum seekers ('Regeling Verstrekkingen Asielzoekers', RVA). Accessible via: http://wetten.overheid.nl/BWBR0017959/geldigheidsdatum_13-07-2012.

122 Letter, Minister for Immigration and Asylum, 10 February 2011, Kamerstukken II 2010/2011, 19 637, no. 1397.

123 Court of Justice EU, 3 May 2012, Kastrati vs Sweden, C-620/10

124 Article 69 Aliens Act. As described previously in chapter 2.1.2, some Dublin cases are dealt with in the framework of the extended asylum procedure. This depends on the length of time before a Dublin claim is accepted by the responsible country. If the responsible Member State accepts the claim quickly, the IND prefers to deal with Dublin cases in the framework of the general asylum procedure.

grounds. When the asylum seeker cannot afford a lawyer, the Legal Aid Board provides one (see chapter 2.1.1).

Appeals against negative decisions in Dublin cases do not have automatic suspensive effect.¹²⁵ A provisional measure ('voorlopige voorziening', vovo) needs to be requested in order to receive suspensive effect for the transfer. In general it is possible to lodge a request for a provisional measure within 24 hours of receiving this decision. This means that if it is lodged at a later moment, the IND may hold to the transfer without waiting for the court's decision on the request. A request for a provisional measure is valid once a formal appeal is made. The appeal grounds can be submitted at a later date.

If a provisional measure is granted, the Dublin claimant may stay in the Netherlands until the judge rules on their appeal.

During the appeal, the Dublin claimants still have accommodation and other support as outlined in chapter 3.6.1.

As described previously in chapter 3.3.4 on time-frames, although a Dublin claimant may generally await a decision on a request for a provisional measure, as long as the court has not ruled on this request, the IND can still transfer the Dublin claimant if the transfer term of six months is jeopardized.¹²⁶ Only the timely issuance of a provisional measure can prevent this. It may happen – though in practice this is rare – that the asylum seeker has to approach the court a second time and request that the court decides on the requested provisional measure before the date of the planned transfer ('spoed-vovo'). If the judge grants the provisional measure, the transfer term of six months will start again after the court has ruled on the merits of the appeal procedure.

A further appeal against the regional court's ruling is possible with the Council of State. The minister may also appeal against the regional court's ruling.

The procedure of further appeal with the Council of State does not have automatic suspensive effect either. Again, a provisional

125 Article 82(2)(c) Aliens Act. The regional court has the authority to rule on the appeal at the same time as processing the request for a provisional measure. Art. 8:86 General Administrative Law Act (Awb).

126 Aliens Circular C22/5.3.

measure from the president of the Council of State may be necessary to prevent transfer. If new facts and circumstances ('nova') become known *after* the Council of State's ruling and *before* the date of transfer, and these nova may be relevant for the decision to prevent the transfer of the Dublin claimant to the other country, the lawyer of the Dublin claimant may lodge an objection to the actual transfer.¹²⁷

Competence of the courts

The regional court has the power to examine both facts and law in an appeal procedure. It also takes into consideration facts and circumstances that are raised after the contested IND decision (*ex nunc* assessment¹²⁸), as well as policy changes that entered into force after the IND decision.¹²⁹ The regional court can annul an IND decision and request the IND to review it.

During a further appeal by either the IND or the applicant, the Council of State determines whether the regional court made a correct assessment during the first appeal procedure, while examining both facts and law that existed during that decision (*ex tunc* assessment). If it rules that the regional court made a wrong assessment, it examines the appeal grounds that were raised in the first appeal procedure and rules whether the appeal was founded or unfounded in the same way as a regional court.

The Council of State can rule that government policy is in violation of the law. If the government fails to change its policy, or decides not to (see for example case no. 201000393/1/V3 (15 September 2010) in chapter 3.2.1), the new decisions based on old policy rules will be reversed during the appeal procedure with the regional court, or the further appeal procedure with the Council of State.

127 On the basis of Article 72(3) Aliens Act.

128 *Ex nunc* assessment means that the court will decide on the situation at the moment of its decision.

129 Article 83(1) Aliens Act.

3.6 Reception Conditions and Detention

3.6.1 Reception conditions

During the first two or three days of the rest and preparation period, the asylum seeker stays in a special reception centre, called a central reception location ('centrale ontvangstlocatie' or COL). During the remainder of the rest and preparation period (lasting at least six days), the asylum seeker resides in a central procedure location ('centrale procesopvanglocatie' or POL) in Wageningen, Gilze or Ter Apel. When the regular asylum procedure (AA-procedure) starts, the asylum seeker travels to an 'Application centre' (in Ter Apel, Den Bosch or Zevenaar) during the day and is returned to the POL in the evenings.¹³⁰ If the IND chooses to examine the asylum application in the extended asylum procedure, the asylum seeker will be moved to an asylum seekers' centre (asielzoekerscentrum, azc).

If an asylum seeker receives a negative decision on the basis of Article 30(1)(a) Aliens Act, because another State is responsible for the application under the Dublin Regulation, the asylum seeker has a right to accommodation for the standard period of four weeks after this decision (notwithstanding that they can be transferred before this period expires if there is no appeal procedure with a timely request for a provisional measure running. See chapter 3.5.3).

Although not specifically stated in the regulation concerning the reception of asylum seekers,¹³¹ in practice Dublin claimants awaiting transfer can generally remain in an asylum seekers' centre until they are taken into custody in preparation for transfer (see chapter 2.2.2) or until the Dublin transfer takes place. During this period, Dublin claimants have access to health care, education and the financial and

130 However, asylum seekers staying in the POL in AC Ter Apel, do not travel to another reception centre for their interviews. The procedure for asylum seekers whose application is processed at AC Schiphol is also different. See Chapter 2.1.1.

131 'Regeling Verstrekkingen Asielzoekers', see footnote in chapter 3.5.2.

social benefits stipulated in the Reception Conditions Directive.¹³²

This practice of continuing to provide reception facilities is in line with the new EU Court of Justice judgment in the case of *Cimade vs France*.¹³³

3.6.2 *Notion of absconding*

Asylum seekers, including Dublin claimants, need to report to the Immigration Police once every week.¹³⁴ The Immigration Police are located near or within the centres where asylum seekers are staying. If an asylum seeker does not fulfil this obligation, they could have departed to an unknown destination ('met onbekende bestemming vertrokken', MOB) and evaded government supervision. A risk of absconding is used as grounds for detention.¹³⁵

If the asylum seeker fails to report on two subsequent occasions, the authorities consider the failure to do so, before concluding that the individual has evaded government supervision. The asylum seeker is summoned to explain in person why they failed to report. If the asylum seeker does not respond to this request, and they are still entitled to accommodation, the Immigration Police will check the room in the accommodation centre or the latest known address to ascertain whether the presumption that the asylum seeker has absconded or departed from the Netherlands is reasonable.¹³⁶

3.6.3 *Detention*

There are two forms of detention that can be imposed on asylum seekers (including those subject to a Dublin procedure) during the asylum procedure or after the asylum request has been rejected:

132 Listed in Article 9 'Regeling Verstrekkingen Asielzoekers'.

133 Court of Justice EU, 27 Sep. 2012, C-179/11.

134 Art. 54(1)(f) Aliens Act in conjunction with Article 4.51(1)(b) Aliens Decree.

135 Aliens Circular A6/5.3.3.6.

136 Aliens Circular A3/7.7.1.4; Rechtbank Zwolle [Regional court Zwolle], 9 April 2010, case no. 09/37491; Nationale Ombudsman [State Ombudsman], 7 July 2003, report no. 2003/216.

border detention or *Immigration custody*. The detention regime applicable depends on whether the Dublin claimant travelled to the Netherlands from a non-Schengen country and arrived at the Dutch border via an international port or airport, or whether the Dublin claimant is already on the territory of the Netherlands.

It still remains to be seen if the EU Court of Justice judgment in *Cimade vs France*¹³⁷ will lead to a change in the criteria for detaining Dublin claimants.

Border detention

If a Dublin claimant travels from a non-Schengen country (e.g. the United Kingdom) via an international port or airport and arrives at the Dutch border, they will be refused access to Dutch territory ('toegangsweigering') and placed in border detention.¹³⁸ Border detention is enforced in the Schiphol Application Centre and - after a week or 10 days - in the Border Detention Centre. The asylum seeker will often stay in border detention while a decision is reached on their asylum application and - in case of a negative outcome - while awaiting expulsion, or transfer on the basis of the Dublin Regulation. Even if this takes several weeks or months, they will in principle continue to be held in border detention. Asylum seekers who are awaiting transfer under the Dublin Regulation are often subject to lengthy border detention.¹³⁹

137 Court of Justice EU, 27 Sep. 2012, C-179/11.

138 Preventing unauthorised entry on the basis of Article 6 (1)(2) Aliens Act; Aliens Circular A6/2.2. Article 5(1)(f) ECHR: 'Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.'

139 A report from 19 January 2011 by the Dutch Council for Refugees and UNHCR ('Rapport Gesloten OC Procedure voor asielzoekers 2008 - 2010') illustrates this. Amongst the border detainees who were relocated to the border detention ('Grenshospitium') in 2010, before the IND had reached a decision on their asylum request, the percentage of Dublin claimants was 47% (page 26).

Immigration custody

If the applicant is already on Dutch territory when requesting asylum, they may also be placed in detention, namely in Immigration custody ('vreemdelingenbewaring'). Immigration custody can only take place if there is a reasonable prospect of deportation, and/or if it is required for public order or national security.¹⁴⁰ Detention is considered necessary if there are substantial indications that the asylum seeker intends to avoid transfer under the Dublin regulation, and therefore a demonstrable risk of absconding exists.¹⁴¹

Immigration custody is also possible for a maximum of four weeks if the documents needed for removal are (almost) ready. Asylum seekers waiting for a first decision or the outcome of their procedure can be detained in aliens custody for a maximum of four to six weeks, if the IND expects that the asylum application will be rejected and the asylum seeker will be removed. Immigration custody is only justified for carrying out removal from the Netherlands. If, therefore, there is no prospect of the asylum seeker being removed, the custodial measure has to be lifted. The regional court reviews the custodial measure in an appeal procedure.¹⁴² From the moment the asylum seeker is put in detention, they receive legal aid, and may appeal against the custodial measure.

As described earlier, Dublin claimants who are apprehended by the Immigration Police and handed over to the DT&V to implement transfer to another Member State are moved to the deportation centre in Rotterdam for a maximum of 5 working days. In this case, custody is legitimised by the presence of documents for expulsion, therefore flight tickets and travel documents have to be available.

The Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) investigated the conditions within detention centres in the Netherlands in 2011.¹⁴³ Based on their visit to the deportation centre in Rotterdam, the CPT called upon the Dutch authorities to avoid detaining families with children as far as

140 Art. 59 Aliens Act.

141 Aliens Circular A6/5.3.3.6.

142 Art. 94 Aliens Act.

143 CPT, 'Report to the Government of the Netherlands on the visit to the Netherlands carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment [CPT] from 10 to 21 October 2011' (CPT/Inf (2012) 21).

possible. The CPT also made recommendations for improving the living conditions in this centre. According to findings of the Dutch national Ombudsman immigration custody is not always used as a means of last resort (*ultimum remedium*) and the living conditions of migrants in immigration custody are in some respects worse than the living conditions of detainees in criminal detention. The ombudsman urged improvements on both aspects.¹⁴⁴

3.7 Member State Co-Operation

3.7.1 Exchange of Information with other Member States

The Netherlands exchanges information with other Member States as required by the annexes in the Dublin Implementation Regulation (1560/2003), consisting of *inter alia* personal details of the applicant and their family members, previous asylum procedures and the travel route.¹⁴⁵ All annexes in the Dublin Implementation Regulation are applied for this exchange of information. We are not aware of any major problems regarding of deadlines being met.

3.7.2 Cooperation with other Dublin states and use of conciliation mechanism

According to the IND, disputes between Member States occasionally arise over responsibility for the examination of a particular asylum application. These disputes arise over whether the Dublin Regulation covers a particular case, the credibility of the asylum seeker's story, and other differing views on the factual situation. The Netherlands tries to solve disputed cases through the liaison officers in other Member States (see chapter 2.2.2), through bilateral consultations, and by visiting and inviting

¹⁴⁴ Nationale ombudsman, Vreemdelingenbewaring: strafregime of maatregel om uit te zetten, 7 augustus 2012, nr. 2012/105.

¹⁴⁵ Interview IND official [18 June 2012].

delegates of other Member States to the Netherlands to discuss disputed cases.¹⁴⁶

The Netherlands does not make use of the conciliation mechanism between Member States under the Dublin Regulation. According to an IND official, other countries do not make use of this mechanism either, and it is therefore a dead letter in the Dublin Regulation.¹⁴⁷

3.7.3 *Member State Administrative Arrangements under Article 23*

There are no administrative arrangements under Article 23, as according to IND, the Netherlands already cooperates effectively with neighbouring states, such as Germany.¹⁴⁸ The Netherlands and Germany have made special agreements about the transfer and taking back of irregular migrants. When conducting controls in the border area, the Dutch Royal Marechaussee and the German Bundespolizei often encounter asylum seekers who have crossed the border from the neighbouring country irregularly. In such cases, the Dutch and German authorities contact each other directly on the basis of bilateral agreements, instead of filing claims with each other's Dublin units.¹⁴⁹

However, according to a Council of State decision from 2009, the rules of the Dublin Regulation cannot be circumvented if the regulation is applicable as a basis for transfer.¹⁵⁰

146 Interview IND official (18 June 2012).

147 Interview IND official (18 June 2012).

148 Interview IND official (18 June 2012).

149 'Dublin als scharnierpunt tussen Nederland en Europa', INContext 1/2012.

150 In this case the official Agreement on Acceptance of Persons at the Border between Benelux on one hand and Germany on the other hand (published in *Tractatenblad* 1966, nr. 166) offered an alternative. This agreement is applicable to migrants in general who crossed the border without the proper documents. The Council of State has ruled that this Agreement should not be used if the Dublin Regulation is applicable (23 Feb. 2009, case no. 200806881). This court decision has been criticized by Prof. Battjes (see annotation in *Jurisprudentie Vreemdelingenrecht* 2009/172). Prof. Battjes argues that formal international agreements like this Benelux-Germany Agreement - if concluded before 1 May 1999 - have priority over the provisions of the Dublin Regulation. Prof. Battjes' opinion is based on EU Law more specifically art. 307 EC Treaty and the date 1 May 1999 is related to the Treaty of Amsterdam.

If, for example, an asylum seeker from Germany is, apprehended in the border area of the Netherlands, and does not request asylum in the Netherlands, the Dutch authorities contact the German authorities directly to return the asylum seeker. Many return requests made by the Netherlands consist of such 'take backs' of Dublin claimants who have not applied for asylum in the Netherlands. These claims are based on the fact that the asylum seeker has previously applied for asylum in another Member State (see art. 16(c, d and e) Dublin Regulation). Because the claimant does not request asylum in the Netherlands, the transfer procedure is much less complicated.

3.8 The Impact of European Jurisprudence at national level

3.8.1 MSS and the suspension of transfers to Greece

In June 2010, the president of the ECtHR issued motivated interim measures in a case against the Netherlands for the first time. As a result, the Minister of Justice decided to temporarily suspend all Dublin transfers of asylum seekers from Central and South Somalia to Greece, to pre-empt Dublin claimants using legal means to suspend the transfer.¹⁵¹

On 30 September 2010, the minister received a letter from the ECtHR, stating that until a judgment was made in *M.S.S.*, a Rule 39 would be issued in all cases concerning transfer to Greece. In his letter of 13 October 2010, the Minister of Justice notified the Parliament that this meant that transfers to Greece could not be carried out, if the asylum seeker appealed against the transfer. At that time, Greece was responsible for the applications of approximately 1900 asylum seekers who were staying in the Netherlands.¹⁵² As a result of this change of policy, the Netherlands examined approximately 2050 'Greek' Dublin cases.¹⁵³

151 Letter Minister of Justice, 11 June 2010, Kamerstukken II 2009/10, 19 637, no. 1350.

152 Letter Minister of Justice, 13 October 2010, Kamerstukken II 2010/2011, 19 637, no.1363.

153 Once the Netherlands started examining applications of Dublin claimants who

As a result of the judgment of the ECtHR in MSS, the minister concluded that Dublin transfers to Greece had to be dropped completely. Failed asylum seekers who were waiting for transfer to Greece were invited to reapply for asylum. Although this was considered as a subsequent asylum request, the instruction to leave the country immediately, if the application was rejected, was not applied.¹⁵⁴

The minister also announced that in future in cases in which Greece was responsible under Dublin, the IND would check if yet another Dublin country should accept responsibility for examining the asylum request.¹⁵⁵ However, so far there have been no known attempts in the Netherlands to transfer asylum seekers to a third Dublin country as an alternative for transfer to Greece.

3.8.2 *MSS and 'ME and NS' and transfers to other countries*

The jurisprudence in the MSS-judgment and – to a lesser extent – the ME and NS-judgment is often referred to in cases concerning transfers to several responsible Member States. However, at the present time Dutch policy does not provide for the suspension of transfers to other Member States, and/or for specific categories of asylum seekers. As a result of the M.S.S. judgment by the ECtHR, it has been argued in various cases that poor reception conditions (including the use of unjustified detention) for Dublin transferees to certain Member States – i.e. Italy, Malta, Hungary – should lead to the application of the sovereignty clause in Article 3(2) Dublin Regulation. Until now, the Council of State has never accepted this. The ME and NS judgment of the EU Court of Justice has also not led to a change in this respect. In line with the M.S.S. judgment, the Council of State ruled that the Minister should not automatically

entered through Greece, around 100 additional Dublin claimants reported to the IND, who had previously departed to 'an unknown destination' (see chapter 3.6.2). See: Ministry of Interior and Kingdom Relations 'Rapportage Vreemdelingenketen januari-juni 2011' p. 18. At the end of November 2011, more than 90% of the 'Greek' asylum requests had been processed, of which 60% were granted a permit. See reply to Parliamentary Questions: 'Beantwoording schriftelijke vragen met kenmerk 2011Z24518 (het lid Spekman over Rapport Vreemdelingenketen juli – januari 2011) (31 januari 2012).

154 Letter, Minister for Immigration and Asylum, 10 February 2011, Kamerstukken II 2010/2011, 19 637, no. 1397.

155 Ibid.

rely on the mutual trust principle with regard to other Member States. He should first carefully consider any reports submitted by the applicant.¹⁵⁶ When an asylum seeker relies solely on general documentation – containing information on one of the aspects considered in the M.S.S. judgment – to substantiate the assertion that a transfer is in violation of Article 3 ECHR, the assertion should be carefully assessed and considered.¹⁵⁷

Now we will address some case law regarding three specific countries.

Malta

The Council of State ruled in various further appeals that the applicant has not effectively rebutted the mutual trust principle with regard to Malta.¹⁵⁸

Thomas Hammarberg's report on detention conditions in Malta is often submitted by asylum seekers.¹⁵⁹ The Council of State however has ruled that the detention conditions in Malta are such that the Netherlands does not need to invoke the sovereignty clause. Even though the submitted reports in case no. 201005977/1/V3¹⁶⁰ show that detention conditions are poor, and that asylum seekers are not provided with legal

156 ABRvS [Council of State], 5 October 2011, case no. 201101593/1/V4.
(See Annex III for a summary of this court decision).

157 ABRvS [Council of State], 14 July 2011, case no. 201009278/1/V3

158 ABRvS [Council of State], 7 October 2011, case no. 201001837/1/V3; ABRvS [Council of State], 7 October 2011 [see Annex III for a summary of this court decision]., case no. 201005977/1/V3 [see Annex III for a summary of this court decision].; ABRvS [Council of State], 2 February 2012, case no. 201111099/1/V4; ABRvS [Council of State], 4 July 2012, case no. 201107341/1/V3.

159 The regional court in Maastricht (Rechtbank Maastricht, 18 July 2011, case nos. 11/4966 and 11/4964) ruled that the sole reference to the report of Thomas Hammarberg of June 9 2011 on the situation of asylum seekers and detention in Malta, is not concrete enough to serve as an indication of violation of Article 3 ECHR. The regional court in Haarlem (Rechtbank Haarlem, 8 September 2011, case no. 11/24207 and 11/24204) ruled however, that the reference to this report is concrete enough, because the applicant referred to specific phrases in the report that demonstrate that all persons arriving in an 'irregular manner' will be subjected to 'mandatory detention'. According to the court, the minister has not clarified why this phrase does not provide concrete indications leading to doubts that Malta will adhere to its international obligations. Therefore, without further clarification, it is not clear on which basis the minister concludes that there are no concrete indications that the applicant will be detained when transferred to Malta.

160 ABRvS [Council of State] 7 October 2011, case no. 201005977/1/V3.
See Annex III for a summary of this court decision.

assistance or information in Malta, the Dutch authorities don't accept that Dublin transferees to Malta are detained. According to the Council of State, the reports show that the majority of asylum seekers are offered at least some form of protection in Malta, and that there are no serious deficiencies in the Maltese asylum procedure. While one report shows that the accommodation conditions for asylum seekers could be improved, it also reports that accommodation is available in all cases, as well as food and financial support.

The Council of State applies a similar line of argumentation with regard to the transfer of unaccompanied minors to Malta. In case no. 201001837¹⁶¹ it held that the transfer of an unaccompanied minor to Malta was allowed. The asylum seeker submitted reports that demonstrated that living conditions for unaccompanied minors in Malta are poor.¹⁶² According to the Council of State, these reports also show that there are special reception facilities for unaccompanied minors in Malta. Therefore, the claim that the living conditions upon return to Malta will be in violation of art. 3 and 13 ECHR, is unfounded. Furthermore, the reports demonstrate neither that it is difficult to apply for asylum in Malta, nor that there are serious deficiencies during the examination of the asylum application, a lack of interpreters, or insufficient training of personnel conducting interviews or deciding on the asylum application. Instead, according to the Council of State, the reports show that a great number of asylum seekers are offered at least some form of protection.

Furthermore, the Council of State argues that these reports relate to the circumstances of asylum applicants who arrive in Malta for the first time. First-time applicants are placed in detention under poor conditions, without legal assistance and information. These reports do not demonstrate that these conditions are also applicable to Dublin transferees, nor do they show that Dublin transferees are detained upon return.

Italy

The Council of State ruled in various further appeals that the Minister did not have to conclude that the mutual trust principle

161 ABRvS [Council of State], 7 October 2011, case no. 201001837. See Annex III for a summary of this court decision.

162 See the list of submitted reports in the summary of this case in the annex.

was violated with regard to Italy.¹⁶³ With respect to vulnerable persons, however, the Council of State sometimes rules differently.

The Commissioner for Human Rights, Thomas Hammarberg,¹⁶⁴ states that Italy has problems in identifying and meeting the needs of vulnerable persons, such as 'unaccompanied children, single or pregnant women, persons with disabilities and victims of torture and sexual and gender-based violence'. On the basis of this report and interim measures granted by the ECtHR,¹⁶⁵ regional courts in the Netherlands have granted provisional measures¹⁶⁶ or terminated the transfer to Italy of unaccompanied minors¹⁶⁷, pregnant women,¹⁶⁸ and single mothers with young children.¹⁶⁹

Nevertheless, this line of argumentation is not applied on a general basis, as the following judgment, concerning the transfer of an unaccompanied minor, shows.¹⁷⁰ The Council of State concluded that careful consideration of the submitted reports did not demonstrate that the asylum seeker runs a real risk of ill-treatment in violation of art. 3 and art. 13 ECHR upon transfer to Italy. The fact that the applicant was an unaccompanied minor and under medical supervision did not stand in the way of transfer to Italy. The asylum seeker did not plausibly argue that he could not receive the required medical care in Italy, or that reception facilities and guardianship

163 E.g. ABRvS [Council of State], 14 July 2011, case no. 201009278/1/V3, 201007479/1 and 201002796/1/V3; ABRvS [Council of State], 11 April 2012, case no. 201200077/1/V4.

164 'Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, following his visit to Italy from 26 to 27 May 2011' Strasbourg, 7 September 2011, CommDH(2011)26.

165 Inter alia ECtHR, 7 September 2011, case no. 55887/11; ECtHR 23 January 2012, case no. 4107/10.

166 Provisional measures led to a suspension of transfers until the court decided in the appeal procedure, see chapter 3.5.3.

167 Rechtbank Haarlem [Regional court Haarlem], 21 March 2012, case no. 12/3357; Rechtbank Den Haag [Regional court The Hague], 5 May 2012, case no. 12/4388 (provisional measure).

168 Rechtbank Arnhem [Regional court Arnhem], 20 March 2012, case no. 12/5873 and 12/5875 (provisional measure); Rechtbank Maastricht [Regional court Maastricht], 8 February 2012, case no. 11/36441, 11/36437, 11/36446 and 11/36445.

169 Rechtbank Almelo [Regional court Almelo], 19 March 2012, case no. 12/4493 (provisional measure); Rechtbank Haarlem [Regional court Haarlem], 19 December 2011, case no. 10/44902; ABRvS [Council of State], 4 July 2012, case no. 201204961/2/V4 (provisional measure).

170 ABRvS [Council of State], 5 October 2011, case no. 201101593/1/V4. (See Annex III for a summary of this court decision).

were insufficiently guaranteed. Therefore, the Dutch authorities could rely on the mutual trust principle and on the presumption that Italy would not violate the prohibition on *refoulement*. In some cases, the Dutch authorities make arrangements with the authorities in the other Dublin country before the actual transfer, for example regarding guarantees on assigning guardianship to an unaccompanied minor or the medical treatment of vulnerable persons.

Special attention should be given to cases of vulnerable asylum seekers. As explained in chapter 3.2.2, the Netherlands may use discretion as stipulated in Article 3(2) Dublin Regulation if the asylum seeker demonstrates that due to special and individual circumstances, transfer would be of a 'disproportionate harshness'. With regard to medical care in Italy, Dutch courts have ruled in several cases that transfer to Italy should not be implemented. In judgment no. 201002874/1, 30 August 2010, the Council of State ruled that due to the medical care needed for their physically and psychologically disabled daughter, a family could not be transferred to Italy. Also the Regional Court in Maastricht ruled in favour of an under-age asylum seeker on 2 November 2011, case no. 11/23402 and 11/23401. The asylum seeker submitted a declaration from his medical supervisor, and had also stated during his Dublin interviews that previous experiences in Italy had contributed to his psychological and medical situation. The court of Maastricht ruled that it would be disproportionately harsh to send the unaccompanied minor to Italy.

Hungary

In an appeal against a decision (in a subsequent asylum procedure) on Hungary's responsibility under the Dublin Regulation, the regional court of Zwolle¹⁷¹ ruled in favour of the applicant. According to the court, the IND decision to hold Hungary responsible for the asylum application was a violation of Article 3 ECHR. The Dublin claimant had been transferred to Hungary during his previous asylum procedure, and was detained for six months, partly in an isolation cell. During his detention he was maltreated, psychological and medical care was not available, and he did not have access to a lawyer. Neither did he have access to an effective remedy to

¹⁷¹ Rechtbank Zwolle [Regional court Zwolle], 9 July 2012, case no. 12/11389.

complain about the (prolonging of the) custodial measure, nor about the maltreatment during detention. The court quotes passages from reports of the Hungarian Helsinki Committee¹⁷², the UNHCR¹⁷³ and Pro Asyl¹⁷⁴, and states that the information in these reports, together with the earlier experiences of the asylum seeker in Hungary, show that the applicant runs a real risk of a violation of Article 3 ECHR upon return to Hungary. The court annulled the decision of the IND holding Hungary responsible for the asylum application.

The regional court of Den Bosch recently annulled an IND decision in which Hungary was held responsible for an asylum claim.¹⁷⁵ The asylum seeker held that Dublin claimants are generally detained and maltreated in Hungary, after transfer on the basis of the Dublin Regulation. The court agreed with the asylum seeker, basing its decision on the letter of the Austrian UNHCR of 14 October 2011 and on a (not publicly available) country report by the Austrian Bundesasylamt of 9 December 2011.¹⁷⁶

3.8.3 *Petrosian' and 'Kastrati'*

The Petrosian judgment by the EU Court of Justice concerning the time frames for transfer has not had much impact in the Netherlands, because in this judgment, the court confirmed the Dutch Council of State's interpretation of Article 20!(d) (see chapter 3.3.4).

172 Hungarian Helsinki Committee (HHC), 'Access to protection jeopardised, Information note on the treatment of Dublin returnees in Hungary', December 2011. <http://helsinki.hu/en/access-to-protection-jeopardised-2> (last visited 3 August 2012).

173 UNHCR, 'Der Hohe Flüchtlingskommissar der Vereinten Nationen Büro in Österreich, Situation von Asylsuchenden in Ungarn', 3 February 2012; UNHCR, 'Hungary as a country of asylum, Observations on the situation of asylum seekers and refugees in Hungary, April 2012. <http://www.unhcr.org/refworld/docid/4f9167db2.html> (last visited 3 August 2012).

174 Press release Pro Asyl, 'Systematische Verletzung der Menschenrechte von Flüchtlingen', 15 March 2012. http://www.proasyl.de/de/presse/detail/news/ungarn_systematische_verletzung_der_menschenrechte_von_fuechtlingen/ (last visited 3 August 2012).

175 Rechtbank Den Bosch [Regional court Den Bosch], 6 June 2012, case nos. 12/10839 and 12/10540.

176 The front page of the (not publicly available) Austrian country report states that it concerns 'Anfragebeantwortung der Staatendokumentation' with the theme of "Dublinverfahren, Haftbedingungen, Inhaftierung".

The Kastrati judgment has not led to a major change in the application of the Dublin Regulation in the Netherlands either. As before, if an asylum seeker withdraws their asylum request after the responsible Dublin MS has accepted the claim, this is not a reason for the Dutch authorities to cancel the transfer (see chapter 3.5.2).

3.9 Good Practice in the Netherlands

- The principle of Article 7 Dublin Regulation, concerning the transfer to a Dublin country where a family member resides as a recognized refugee, has been enlarged in Dutch policy rules beyond the unification with family members who are recognized as a refugees. The Netherlands also accepts responsibility for asylum seekers with a family member in the Netherlands who enjoys asylum based on some form of subsidiary protection.
- Unmarried (homosexual and heterosexual) partners in a stable relationship are considered to be family members as stipulated in art. 2(i)(i) Dublin Regulation.
- Transfers of asylum seekers who (for the time being) cannot be transferred for health reasons are cancelled. The postponement decision constitutes a residence permit, as in Article 9(1) Dublin Regulation, and the Netherlands agrees to take over the responsibility for the asylum request by virtue of Article 16(2) Dublin Regulation.
- The asylum seeker is kept informed about developments in the Dublin procedure, both automatically and on request. They receive copies of documents such as letters between the Dublin Offices of both countries. They are informed about the date and means of transfer beforehand. Interpreters and folders are available in several languages.

- The asylum seeker and their representative may comment on the intention to transfer them to another country in a few ways (orally, during an interview which will be recorded in a report, in writing as part of corrections and additions to the interview report, and in writing in response to an intended decision¹⁷⁷). This is done before the final IND decision about transfer is taken so that their comments can still influence this decision. In a transfer decision (which is part of the decision concerning the asylum request) the authorities have to explain why the asylum seekers' arguments to waive the transfer did not convince them.
- The asylum seeker has access to legal aid from a lawyer and to assistance from the Dutch Council of Refugees, during the entire Dublin procedure.
- The asylum seeker is offered accommodation during the Dublin procedure, while awaiting the decision about transfer to another Dublin country and while awaiting the transfer itself (until they are detained).
- Every unaccompanied minor gets the support of a guardian, including those who are subject to a Dublin procedure. Also UAMs are not detained in the Dublin procedure.
- If an asylum seeker and especially a UAM thinks that a specific family member is staying in a Dublin country, the Dutch authorities try to trace them, if this is considered realistic in view of the information the asylum seeker can provide about this family member and their whereabouts.

¹⁷⁷ See chapter 2.1.

4 *Conclusion and Recommendations*

From the asylum seeker's perspective, there are a number of positive aspects in the way the responsibility criteria of the Dublin Regulation are applied in the Netherlands. Also the way asylum seekers who are involved in a Dublin procedure are treated has some positive facets (see chapter 3.9).

Nevertheless, there is good reason to present a number of recommendations concerning the application of the Dublin Regulation in the Netherlands. There are possibilities to improve the way the legitimate interests of the asylum seeker are taken into account within the existing framework of the Dublin Regulation.

1. It is recommended that the Minister for Security and Justice and the IND choose a humane approach and apply Article 3(2) and Article 15 Dublin Regulation to a higher level than the Dutch Courts find legally obligatory.
2. It is recommended that the Minister for Security and Justice includes, in the application of Article 15 Dublin Regulation, the option to join family members in the Netherlands who have not requested asylum, but who are present for other reasons, in accordance with the scope this Article offers (see chapter 3.2.1).
3. It is recommended that the Minister for Security and Justice includes, in the application of Article 15 Dublin Regulation, the option to join family members by handling an asylum request that was lodged in another Dublin Member State, in accordance with the scope this Article offers.

4. It is recommended that the Minister for Security and Justice includes, in the application of Article 15 section 3 Dublin Regulation, the option for an unaccompanied minor asylum seeker to join a family member, in accordance with the scope this Article offers, even if there is a family member and/or relative in the country of origin.
5. It is recommended that the use of detention of asylum seekers subjected to a Dublin procedure, even for a short duration, is stopped. This includes both border detention and Immigration custody (see chapter 3.6.3).
6. It is recommended that the IND checks the responsibility of another Dublin country, if there is doubt that this other country is responsible for the asylum request under Article 6 – 14 Dublin Regulation, even if that country has (tacitly) accepted the Dublin claim (see chapter 3.3.4)
7. It is recommended that the Minister for Security and Justice takes responsibility for handling an asylum request if the ECtHR has issued an Interim Measure, as soon as it is apparent that this Interim Measure will last more than six months (see chapter 3.3).
8. It is recommended that the IND revokes negative IND/Dublin decisions, in cases where a Dublin transfer had to be cancelled after the asylum procedure had already ended, so that the asylum seeker will return to the application stage of the asylum procedure. At the moment, in a situation like this, an asylum seeker has to lodge a subsequent asylum request with
 - a. less safeguards than in the ordinary asylum procedure and
 - b. if a residence permit is granted: the date of commencement of the status which is linked to the date of the subsequent asylum request (see chapter 3.3.4 and 3.5.2).
 - Both shortcomings can be overcome by revocation of the IND decision.

9. It is recommended that the Minister for Security and Justice constructs an appeal system in which two moments of alertness are not required to ensure that a Dublin transfer is examined in time by the court. Once the asylum seeker has lodged an appeal and a request for a provisional measure, there should be no risk that they will be transferred before the court has reached a decision (see chapter 3.5.3).
10. It is recommended that the Minister for Security and Justice changes the procedure for Dublin in cases to ensure that asylum seekers who want to lodge a subsequent asylum application are not left without accommodation while they wait for their appointment. This recommendation can be accomplished partly by ensuring that the file is to hand when the asylum seeker is returned to the Netherlands and by bringing forward the meeting to initiate the new asylum procedure.

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Annex II

Relevant statistics

I. Rejections

a. Number of rejections (= persons) of asylum requests in the Netherlands because another Dublin country is considered to be responsible under the Dublin Regulation¹⁷⁸:

2007, 1st half: 330

2007 2nd half: 390

2008 1st half: 940

2008 2nd half: 720

2009 1st half: 1290

2009 2nd half: 1,440

2010 1st half: 2,120

2010 2nd half: 1,440

2011 1st half; 670

2011 2nd half: 1,000

b. Additional information about Dublin cases processed by the IND can be found in the biannual reports the minister sends to Parliament.

¹⁷⁸ 'Rapportage Vreemdelingenketen' juli-december 2011, 15 May 2012, page 18, TK 19637, nr. 1531.

In November 2011 the minister wrote:

“ In the first half of 2011, 670 applications were refused as a result of an accepted Dublin claim. This is 68% less than in the same period in 2010. From 2009, there was a substantial increase in the number of Dublin cases from Somalia and Georgia. In 2010, extra capacity was made available to process the decisions of accepted Dublin claimants. At present, the percentage of Dublin claimants has normalised. (...)

The ECtHR decision in M.S.S. on January 21 2011 means that the 2000 applications rejected on the grounds of a claim on Greece have been substantively examined by the Netherlands. The last cases were dealt with in September 2011. ”¹⁷⁹

In May 2012 the minister wrote:

“The number of Dublin claims dropped by 55% between December 2010 and December 2011 (from 3,680 to 1,640). The number of Dublin claims on which no decision had been reached increased rapidly after 2008, when Dublin transfers to Greece ceased. The decision by the ECtHR in M.M.S resulted in the Netherlands assuming responsibility for asylum seekers for whom a previous request had been made to Greece. This in turn led to a normalisation of the number of Dublin claims awaiting a decision”

“ In the second half of 2011, under the Program Streamlining Admissions Procedure, a measure was adopted to speed up Dublin procedures. This has resulted in a quicker turnaround for Dublin cases. The number of rejections on the grounds of Dublin increased by 50% in the second half of 2011 (...). This could be a (temporary) effect of the implementation of this measure ”.¹⁸⁰

179 ‘Rapportage Vreemdelingenketen’ januari-juni 2011, 8 Nov. 2011, page 18, TK 19637, nr. 1473.

180 Rapportage Vreemdelingenketen juli-december 2011, 15 May 2012, page 14 and 18, TK 19637, nr. 1531.

II. Eurodac results

Information from the IND about the number of Eurodac checks in 2011¹⁸¹:

Reason:	asylum request	illegal entry	from abroad
No. of queries:	13,490	11,989	25,479
Result:			
- local hits	4,148	2,899	7,047
- foreign hits	4,128	3,412	7,540
- error	1,768	835	2,603

Additional remarks:

- Based on one set of fingerprints, several attempts may have been made e.g. because the first attempt resulted in error.
- 'Local hits' means hits because of earlier registration in the Netherlands; 'foreign hits' means hits because of earlier registration in other Dublin member states
- One attempt may lead to more than one (local and/or foreign) hit.
- 14 checks which were conducted at the EU outer border are not included in this table.

III. Transfers

a. According to a table compiled by the European Migration Network the number of Dublin transfers in 2010 was:

- from other countries to the Netherlands: 1,190
- from the Netherlands to other countries: 4,160.¹⁸²

b. Information from the DT&V about processing Dublin files

¹⁸¹ Based on information by e-mail from the IND unit 'Middel en Control', 7 August and 14 August 2012.

¹⁸² EMN Bulletin January – May 2012, 'EU International Protection, including Asylum, Statistics 2011 at a glance', page 11.

(submitted 1 Sept 2011 – 31 March 2012)¹⁸³

Number of cases (= persons) submitted for transfer: 1750

A. Classified by source:

- a. rejected under the general asylum procedure: 750
- b. rejected under the extended asylum procedure: 600
- c. submitted by the Aliens Police (no asylum request in the Netherlands): 400

B. Classified by outcome:

- 1. effectively transferred to the responsible country under the Dublin Regulation: 690
- 2. departed voluntarily with IOM: 160
- 3. departed to 'an unknown destination' (absconded): 310
- 4. granted a residence permit: 5
- 5. miscellaneous: 70 (e.g. T cases in which a new decision of the IND was needed)
- 6. still pending (on 31 March 2012): 520

IV. Eurostat

Statistical information can also be found at the Eurostat website.¹⁸⁴ The website contains tables on Dublin transfers and Eurodac, with numbers for total requests, accepted requests and rejected requests all specified per Dublin country (as far as available). Also in the tables for Dublin transfers, specific statistical data can be obtained regarding the legal basis of a Dublin transfer within the Dublin Regulation. Figures for Eurostat are delivered by the Dublin countries themselves. Because for some countries (recent) figures are not available or published (yet), the tables are not complete.

Relevant national case law

¹⁸³ Information from DT&V-official, July 2012.

¹⁸⁴ See http://epp.eurostat.ec.europa.eu/portal/page/portal/statistics/search_database. Use 'Dublin' as a key word in the 'Search in tree' search box.

Annex III

- Summaries of Dutch case law concerning the application of the Dublin Regulation in chronological order
- Internet links to the text of the court decision, if available, can be found by clicking on the decision number.

1

KEY WORDS		Time limits/Time Frames
Country of Appeal		Netherlands
Responsible Member State under Dublin Criteria		Germany
Case name		---
Appeal body name i.e. Court/Tribunal/Appeals Board		Council of State (Administrative Law section)
Decision number/Neutral citation		200407407/1 ¹
Date decision delivered or promulgated: Date of determination		10 February 2005
Country of applicant/Claimant		Iraq
Summary of the case		
	<i>Facts (brief overview)</i>	The asylum application is rejected, as Germany is considered responsible under the Dublin Regulation. The asylum seeker concealed that he had previously applied for asylum in Germany. The request to the German authorities to take back the applicant exceeded the three months term under art. 17 Dublin Regulation. According to the Minister, the longer time period for the determination of responsibility of the asylum application is allowed, due to the manifest deceit by the asylum seeker.
KEY WORDS		Time limits/Time Frames

	<i>Decision & Reasoning</i>	<p>The three months term within Article 17 starts when an asylum application is lodged within the meaning of Article 4 (2) Dublin Regulation. When a Member State has not requested the responsible Member State to take charge of or take back the asylum application within the three months term, the Member State where the asylum application was lodged becomes responsible for examining the application. These provisions do not provide grounds for the minister's reliance on previous jurisprudence concerning Article 11 of the Dublin Convention (case no. 200206824/1). The Minister derived from this case that the term in art. 17(1) starts when the Minister has become aware of the fact that the asylum seeker withheld data that are important for determining the responsible Member State.</p>	
	<i>Outcome of proceedings</i>	<p>Appeal by the minister is unfounded, the Netherlands is responsible for the examination of the asylum application.</p>	
Subsequent Proceedings		---	
Dublin regulation's legal provisions applicable		<p>Article 17, paragraph 1 Article 4, paragraph 2</p>	
Legal provisions cited: national (optional) & international references		<i>Legislation</i>	<i>Articles</i>

Case law cited: national (optional) & international references		<i>Court name</i>	<i>Neutral citation</i>
		Council of State	25 March 2003, no. 200206824/1
Other sources cited: NGO reports etc		<i>Organization</i>	<i>Reference</i>

Observations/Comments			

KEY WORDS

Proof/Evidence

2	Country of Appeal	Netherlands
	Responsible Member State under Dublin Criteria	Germany
	Case name	---
	Appeal body name i.e. Court/Tribunal/Appeals Board	Council of State (Administrative Law section)
	Decision number/Neutral citation	200505146/1 ²
	Date decision delivered or promulgated: Date of determination	2 September 2005
	Country of applicant/Claimant	Turkey
	Summary of the case	
	<i>Facts (brief overview)</i>	The asylum applications were rejected because Germany was considered responsible under the Dublin Regulation. Before applying for asylum in the Netherlands, the asylum seekers returned to Turkey. The minister states that they have not demonstrated their return to Turkey. To demonstrate that they left the EU Member States' territory for at least three months, the applicants submitted a declaration of a district head in Turkey, and a doctor's prescription for one of the applicants.
	<i>Decision & Reasoning</i>	<p>The [lower] regional court held that the asylum seekers may not rely on art. 16 to claim that the responsibility of Germany for the examination of the asylum applications has ceased, due to the conditions in Article 16 paragraphs 3 and 4. In higher appeal, the Council of State rules that the fact that art. 16 Dublin Regulation addresses Member States, does not preclude applicants from complaining that the Netherlands did not adhere to its obligations flowing from this provision.</p> <p>In accordance with art. 83 Dutch Aliens Act, the appeal court shall consider facts and circumstances that have occurred after the contested decision. However, the submitted declaration and doctor's prescription, which aim to show that the asylum seekers left the EU Member States' territory, could not be understood as facts and circumstances in the meaning of art. 83, as it is hard to see whether the applicants could not have presented these documents earlier in the procedure, and thus, should have submitted these before.</p>
	KEY WORDS	Proof/Evidence

	<i>Outcome of proceedings</i>	<p>The appeal of the asylum seekers with the Council of State is well founded. Nevertheless, the asylum seekers have not demonstrated they left the territory of the EU Member States through the declaration of the district head and doctor's prescription, as it is not established that the asylum seekers could not have presented these documents earlier in the asylum procedure.</p>	
Subsequent Proceedings			
Dublin regulation's legal provisions applicable		Article 16	
Legal provisions cited: national (optional) & international references		<i>Legislation</i>	<i>Articles</i>
		Aliens Act	Art. 83
Case law cited: national (optional) & international references		<i>Court name</i>	<i>Neutral citation</i>

Other sources cited: NGO reports etc		<i>Organization</i>	<i>Reference</i>

Observations/Comments		---	

KEY WORDS		Time limits/Time Frames
Country of Appeal		Netherlands
Responsible Member State under Dublin Criteria		Greece
Case name		---
Appeal body name i.e. Court/Tribunal/Appeals Board		Council of State (Administrative Law section)
Decision number/Neutral citation		<u>100351953</u>
Date decision delivered or promulgated: Date of determination		25 June 2007
Country of applicant/Claimant		---
Summary of the case		
	<i>Facts (brief overview)</i>	The asylum application of the asylum seeker is rejected, as Greece is responsible under the Dublin Regulation. This case concerns the request of a national interim measure during higher appeal by the Minister.
	<i>Decision & Reasoning</i>	It cannot be excluded a priori that the decision of the (lower) regional court would be maintained in higher appeal with the Council of State. The term within which the transfer to Greece should take place ends before the decision in higher appeal is expected. Therefore, the higher appeal would become illusory without an interim measure with suspensive effect. The term within Article 19(3) Dublin Regulation is suspended from the day of publication of the decision to grant an interim measure.
	<i>Outcome of proceedings</i>	Appeal of the Minister is well founded, a national interim measure suspends the term within Article 19(3) Dublin Regulation.

KEY WORDS	Time limits/Time Frames	
Subsequent Proceedings	---	
Dublin regulation's legal provisions applicable	Article 19	
Legal provisions cited: national (optional) & international references	<i>Legislation</i>	<i>Articles</i>
	General Administrative Law Act	Art. 8:81
Case law cited: national (optional) & international references	<i>Court name</i>	<i>Neutral citation</i>
	Council of State	14 February 2005, 200408891/1
Other sources cited: NGO reports etc	<i>Organization</i>	<i>Reference</i>

Observations/Comments	---	

KEY WORDS		Family unity; Humanitarian clause/reasons; Sovereignty clause
Country of Appeal		Netherlands
Responsible Member State under Dublin Criteria		France
Case name		---
Appeal body name i.e. Court/Tribunal/Appeals Board		Council of State (Administrative Law section)
Decision number/Neutral citation		<u>200706391/1</u>
Date decision delivered or promulgated: Date of determination		19 March 2008
Country of applicant/Claimant		Georgia
Summary of the case		
	<i>Facts (brief overview)</i>	<p>This case concerns the asylum applications of a couple and their child. The asylum requests of the mother and child were rejected in the Netherlands, as France has agreed to take back the asylum applicants under the Dublin Regulation. France did not agree to take back the asylum application of the husband, which made the Netherlands responsible for his asylum application. The family refused to agree with a request to take back the husband's application on the basis of art. 15 Dublin Regulation in order to keep the family together. The asylum seekers believe it is evident that France will not agree with such a request because of their history in France (their history in France remains unclear, except that the father has been detained there).</p>

KEY WORDS		Family unity; Humanitarian clause/reasons; Sovereignty clause	
	<i>Decision & Reasoning</i>	<p>In accordance with paragraphs C3/2.3.6.1 and C3/2.3.6.3 Aliens Circular, the Minister should give careful consideration when using his discretion in art. 3 paragraph 2 and art. 15 Dublin Regulation. It is up to the Minister to review whether there is a special combination of factors that makes the examination of the asylum application by the Netherlands reasonable. The Minister has attempted to meet his duty to keep the family together by requesting France to take back the asylum application of the husband on the basis of art. 15 Dublin Regulation. This possibility could not be tested, as the asylum seekers refused to agree with a request to take back the applicants. Nevertheless, it should not lead to the conclusion that the Minister is required to examine the asylum applications, for which France remains responsible. Contrary to the asylum seeker's argument that the request on the basis of art. 15 Dublin Regulation would be unsuccessful, the Minister could not presume that the husband could not return to France. The asylum seeker has not provided documents to support the allegation that her husband is undesirable in France, nor explained the nature of negative experiences he had with the French authorities.</p>	
	<i>Outcome of proceedings</i>	Appeal of the Minister is well founded.	
Subsequent Proceedings		---	
Dublin regulation's legal provisions applicable		Article 3 (2) Article 15	
Legal provisions cited: national (optional) & international references		<i>Legislation</i>	<i>Articles</i>
		Aliens Circular	paragraphs C3/2.3.6.1 and C3/2.3.6.3
Case law cited: national (optional) & international references		<i>Court name</i>	<i>Neutral citation</i>

Other sources cited: NGO reports etc		<i>Organization</i>	<i>Reference</i>

Observations/Comments		---	

KEY WORDS

Medical issues; Residence Document

Country of Appeal	Netherlands
Responsible Member State under Dublin Criteria	Italy
Case name	----
Appeal body name i.e. Court/Tribunal/Appeals Board	Council of State (Administrative Law section)
Decision number/Neutral citation	<u>Nr. 201000724/1/V3</u>
Date decision delivered or promulgated: Date of determination	12 July 2010
Country of applicant/Claimant	-----
Summary of the case	
<i>Facts (brief overview)</i>	The first asylum request in the Netherlands had been rejected because Italy was considered responsible under the Dublin Regulation. After this procedure, the Minister decided to officially delay the expulsion to Italy because of the asylum seeker's medical condition (pregnancy), until 6 weeks after delivery. The delay lasted from 4 February 2009 until 26 April 2009. Hereafter, the asylum seeker applied for asylum again in the Netherlands, and claimed that the delay of the expulsion to Italy should be considered as a new fact and circumstance. The subsequent application was rejected because Italy remained responsible under the Dublin Regulation, according to the Dutch authorities.
<i>Decision & Reasoning</i>	The Dutch Aliens Act states that an alien has lawful residence when expulsion is not possible due the medical situation of the alien, or one of the family members, which makes it irresponsible to travel (art. 8, j, in conjunction with art. 64).

KEY WORDS		Medical issues; Residence Document	
	<i>Decision & Reasoning</i>	The official decision to delay the expulsion is considered a 'residence document' as in art. 2 j Dublin Reg. Taking into account the English version ('any authorisation') and the French version ('toute autorisation'), 'residence document' in this Article includes a decision that implies a temporary permission to remain in the country. Therefore art. 16 (2) is applicable and the responsibility for examining the asylum request now lies with the Netherlands. This is not contrary to the objectives of the Dublin Regulation. One objective is to quickly determine which state is responsible for examining an asylum request (Preamble, point 4) and as the explanatory memorandum demonstrates, the regulation is based on the principle that the responsibility lies with the member state that played the biggest role in the entry or stay of the asylum seeker on the territory of the member states.	
	<i>Outcome of proceedings</i>	The asylum seeker's appeal is well-founded. The asylum application should be examined by the Netherlands.	
Subsequent Proceedings		----	
Dublin regulation's legal provisions applicable		<ul style="list-style-type: none"> - Art. 2 under j - Art. 16 section 2 - Preamble, point 4. 	
Legal provisions cited: national (optional) & international references		<i>Legislation</i>	<i>Articles</i>
		Aliens Act	Art. 64
Case law cited: national (optional) & international references		<i>Court name</i>	<i>Neutral citation</i>

Other sources cited: NGO reports etc		<i>Organization</i>	<i>Reference</i>

Observations/Comments		This case means that any time a transfer is delayed and the applicant is given a temporary permit, then the Dublin Regulation is no longer applicable.	

KEY WORDS		Unaccompanied minors; Family unity; Humanitarian clause
Country of Appeal		Netherlands
Responsible Member State under Dublin Criteria		Belgium
Case name		---
Appeal body name i.e. Court/Tribunal/Appeals Board		Council of State (Administrative Law section)
Decision number/Neutral citation		<u>Nr. 200904938/1/V3</u>
Date decision delivered or promulgated: Date of determination		19 July 2010
Country of applicant/Claimant		Egypt
Summary of the case		
	<i>Facts (brief overview)</i>	The asylum request of the unaccompanied minor was rejected after examination of his asylum claim, because his story lacked credibility. The asylum story of his brother differed from the asylum seeker's story; he voluntarily returned to Egypt, and went to Belgium where he studies on a student visa. In appeal, the minister argued he did not have to examine whether Belgium is responsible under the Dublin Regulation, and that the court applied an incorrect reasoning based on art. 15(3).
	<i>Decision & Reasoning</i>	The Council of State does not agree with the Minister that art. 15(3) requires that the unaccompanied minor's family member(s) should be asylum seeker(s). Instead, the importance that is attached in the point 6 preamble to the fact that the family should stay together, provides that it not only concerns family members who are asylum seekers. If this were the case, keeping the family together could only be achieved to a limited extent.

KEY WORDS		Unaccompanied minors; Family unity; Humanitarian clause				
	<i>Decision & Reasoning</i>	Furthermore, it does not follow from the point 7 preamble that the Dublin Regulation is not applicable when a family member has not applied for asylum. In accordance with the obligation to perform to the best of one's abilities - inherent in art. 15(3) and (4) - the Minister should only have examined the asylum application if the Belgian authorities did not accept the request to take charge of the asylum application, in order to reunite the unaccompanied minor with his brother. As Belgium should have been requested to take charge of the asylum application, the Council of State agrees with the asylum seeker that the (lower) regional court was wrong to express its opinion on the rejection of the asylum request.				
	<i>Outcome of proceedings</i>	The appeal of the Minister is unfounded and the appeal of the asylum seeker is well-founded. The decision on the asylum request after substantive examination is annulled. The Netherlands must ask Belgium to examine the asylum application.				
Subsequent Proceedings		---				
Dublin regulation's legal provisions applicable		Article 15 (3) and (4) Article 6 Article 8 Preamble, point 6 and 4				
Legal provisions cited: national (optional) & international references		<table border="1"> <thead> <tr> <th>Legislation</th> <th>Articles</th> </tr> </thead> <tbody> <tr> <td>---</td> <td></td> </tr> </tbody> </table>	Legislation	Articles	---	
Legislation	Articles					

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Organization	Reference					

Observations/Comments		---				

KEY WORDS		Unaccompanied minors; Humanitarian clause; Family unity
Country of Appeal		Netherlands
Responsible Member State under Dublin Criteria		Malta
Case name		---
Appeal body name i.e. Court/Tribunal/Appeals Board		Council of State (Administrative Law section)
Decision number/Neutral citation		<u>Nr. 201000393/1/V3</u>
Date decision delivered or promulgated:		15 September 2010
Date of determination		
Country of applicant/Claimant		Somalia
Summary of the case		
	<i>Facts (brief overview)</i>	<p>The unaccompanied minor applied for asylum in the Netherlands. However the request was rejected, as Malta was considered responsible for the asylum application of the unaccompanied minor. The unaccompanied minor has a sister in the Netherlands, and a mother and grandmother in Somalia. In appeal the Minister stated that it is not in the best interest of the asylum seeker to be reunited with his sister in the Netherlands, as his mother and grandmother are still living in Somalia, and he could stay with them upon return to Somalia.</p>
	<i>Decision & Reasoning</i>	<p>Art. 15 (3) Dublin Regulation is elaborated on in more detail in paragraph C3/2.3.6.3 Aliens Circular, which states that Member States should reunite the unaccompanied minor with relatives in another Member State who are able to take care of him/her, unless this is not in the best interest of the unaccompanied minor. It should be noted that if the unaccompanied minor has family member(s) in the country of origin, the minor is in principle not eligible for reunification on the basis of art. 15 Dublin Regulation, because reunification of the child with the core family – as provided in Article 2 i – in the country of origin is preferred, if possible.</p>

KEY WORDS		Unaccompanied minors; Humanitarian clause; Family unity				
	<i>Decision & Reasoning</i>	As the unaccompanied minor has a mother and grandmother in the country of origin, through whom care exists, the Minister considered Malta, and not the Netherlands, to be responsible for examining the asylum application. The Council of State considers that it follows from the text of art. 15 (3) Dublin Regulation that only if reunification with a family member in the Netherlands is not in the best interest of the minor, should reunification not be pursued. The idea that Malta remains responsible for examining the asylum application, because the asylum seeker's mother still resides in Somalia and therefore it would not be in the asylum seeker's best interests if his asylum application is examined by the Netherlands, is not understandable and cannot be upheld. To the contrary, it would be in the best interest of the minor if he could stay with his sister in the Netherlands during the examination of his asylum application, instead of being accompanied with someone he does not know in Malta. In so far as the policy pursued by the minister stands in the way, the policy should be considered inapplicable because it is in breach of Article 15 (3).				
	<i>Outcome of proceedings</i>	Appeal by the Minister is dismissed and the asylum application has to be examined by the Netherlands authorities.				
Subsequent Proceedings						
Dublin regulation's legal provisions applicable		Article 15, paragraph 3				
Legal provisions cited: national (optional) & international references		<table border="1"> <thead> <tr> <th><i>Legislation</i></th> <th><i>Articles</i></th> </tr> </thead> <tbody> <tr> <td>Aliens Circular</td> <td>C3/2.3.6.3, B14/2.2.4</td> </tr> </tbody> </table>	<i>Legislation</i>	<i>Articles</i>	Aliens Circular	C3/2.3.6.3, B14/2.2.4
<i>Legislation</i>	<i>Articles</i>					
Aliens Circular	C3/2.3.6.3, B14/2.2.4					
Case law cited: national (optional) & international references		<table border="1"> <thead> <tr> <th><i>Court name</i></th> <th><i>Neutral citation</i></th> </tr> </thead> <tbody> <tr> <td>---</td> <td></td> </tr> </tbody> </table>	<i>Court name</i>	<i>Neutral citation</i>	---	
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<i>Organization</i>	<i>Reference</i>					

Observations/Comments		Until now the text of C3/2.3.6.3 Aliens Circular is still the same as during this procedure.				

KEY WORDS		Proof/Evidence
Country of Appeal		Netherlands
Responsible Member State under Dublin Criteria		Norway
Case name		---
Appeal body name i.e. Court/Tribunal/Appeals Board		Council of State (Administrative Law section)
Decision number/Neutral citation		<u>Nr. 201002493/1/V2</u>
Date decision delivered or promulgated: Date of determination		28 April 2011
Country of applicant/Claimant		Afghanistan
Summary of the case		
	<i>Facts (brief overview)</i>	<p>The asylum application was rejected, as Norway was considered responsible under the Dublin Regulation. The asylum application had been rejected three times in Norway. After the third rejection, the applicant travelled to Afghanistan, where he stayed for at least three months. Thereafter, the applicant travelled to the Netherlands and applied for asylum. The minister claims that the documents that the asylum seeker has submitted to demonstrate his stay in Afghanistan, do not show that he left the territory of the EU Member States for three months, and are not from an objective source.</p>
	<i>Decision & Reasoning</i>	<p>The submitted documents of the Medical Centre in Peshawar are insufficient evidence that the asylum seeker stayed in Afghanistan for a period of at least three months. They only show that he stayed for two weeks in Pakistan for medical treatment. However, the submitted employer's statement and pay slips are concrete enough to be considered as "other circumstantial evidence of the same kind" in the sense of annex II list B, under 1.9 and II.3 of Regulation 1560/2003/EC.</p>

KEY WORDS		Proof/Evidence
	<i>Decision & Reasoning</i>	As the Council of State ruled in a previous case [200808783/1/V3], it does not follow from this Regulation and annex II that “other circumstantial evidence of the same kind” should be derived from an objective source. However, even though the employer’s statement and pay slips should thus be considered as evidence in the sense of annex II of Regulation 1560/2003, the asylum seeker has still not demonstrated that he left the territory of the Member States for a period of at least three months.
	<i>Outcome of proceedings</i>	The appeal of the asylum seeker is well-founded. Nevertheless, the legal consequences of the annulled decision should be upheld, because the asylum seeker has not demonstrated that he left the territory of the Member States for a period of at least three months. Therefore, Norway remains responsible for examining the asylum application.
Subsequent Proceedings		
Dublin regulation’s legal provisions applicable		Article 4 (5) Article 16 (2) (3) and (4)
Legal provisions cited: national (optional) & international references	<i>Legislation</i>	<i>Articles</i>
	Commission Regulation (1560/2003/EC) of 2 September 2003 laying down the rules for the application of the Dublin Regulation	Annex II, list A under I.9 Annex II, list B under I.9 en II.3
Case law cited: national (optional) & international references	<i>Court name</i>	<i>Neutral citation</i>
	Council of State (the Netherlands)	19 June 2009, 200808783/1/V3
Other sources cited: NGO reports etc	<i>Organization</i>	<i>Reference</i>

Observations/Comments	---	

9 KEY WORDS		Family unity
Country of Appeal		Netherlands
Responsible Member State under Dublin Criteria		Germany
Case name		---
Appeal body name i.e. Court/Tribunal/Appeals Board		Council of State (Administrative Law section)
Decision number/Neutral citation		<u>Nr. 201012024/1/V2</u>
Date decision delivered or promulgated: Date of determination		2 May 2011
Country of applicant/Claimant		Turkey
Summary of the case		
	<i>Facts (brief overview)</i>	The asylum request was rejected after substantive examination of the asylum claim, because the asylum seeker could not submit documents to demonstrate the travel route and the asylum story lacked credibility. The fiancée of the asylum seeker, whom she knows via internet, lives in Germany. The asylum seeker argues that the minister should have requested Germany to take charge of her asylum application under the Dublin Regulation.
	<i>Decision & Reasoning</i>	In accordance with Article 7 Dublin Regulation, the country where a family member of the asylum seeker lives, and who is allowed to reside as a refugee, is responsible for examining the asylum application - regardless of whether the family was already formed in the country of origin. Therefore, the minister should have requested Germany to take charge of the asylum application, before examining the asylum application. In that case, Germany should have established whether the fiancée is considered a family member of the asylum seeker. The minister has not made a request to take charge of the application to Germany. The reason for decision to reject the asylum application in the Netherlands is not established with the required accuracy.

KEY WORDS		Family unity	
	<i>Outcome of proceedings</i>	The asylum seeker's appeal is well-founded. The decision to reject the asylum request is annulled, and Germany must be requested to take charge of the asylum request.	
Subsequent Proceedings		---	
Dublin regulation's legal provisions applicable		Article 7	
Legal provisions cited: national (optional) & international references	<i>Legislation</i>	<i>Articles</i>	
	---	---	
Case law cited: national (optional) & international references	<i>Court name</i>	<i>Neutral citation</i>	
	---	---	
Other sources cited: NGO reports etc	<i>Organization</i>	<i>Reference</i>	
	---	---	
Observations/Comments		---	

KEY WORDS

Unaccompanied minors; Sovereignty clause; Reception conditions in the responsible state

Country of Appeal	Netherlands
Responsible Member State under Dublin Criteria	Italy
Case name	---
Appeal body name i.e. Court/Tribunal/Appeals Board	Council of State (Administrative Law section)
Decision number/Neutral citation	<u>201101593/1/V4</u> ³
Date decision delivered or promulgated: Date of determination	5 October 2011
Country of applicant/Claimant	Afghanistan
Summary of the case	
<i>Facts (brief overview)</i>	<p>The asylum application was rejected, as Italy was considered responsible under the Dublin Regulation, because he applied there for asylum. The asylum seeker is an unaccompanied minor, who is under medical supervision (his medical conditions are not mentioned in the case). The asylum seeker claims that the Netherlands should invoke the sovereignty clause to prevent his transfer to Italy.</p>
<i>Decision & Reasoning</i>	<p>The Council of State reiterates its case law that, in accordance with the M.S.S. judgment, the authorities are obliged to carefully assess all documentation that the asylum seeker supplies in support of his claim that he runs a risk of ill-treatment, in violation of art. 3 ECHR. In this case, the minister did not carefully assess the information provided on the situation of asylum seekers in Italy, and therefore, he should not have automatically relied on the inter-governmental trust principle with regard to Italy. Nevertheless, the Council of State rules that if the minister had assessed the information supplied in accordance with the M.S.S. judgment, there would not have been any basis for the statement that the asylum seeker should not be transferred to Italy. Also his personal asylum story does not provide indications that he should not be transferred to Italy.</p>

KEY WORDS		Unaccompanied minors; Sovereignty clause; Reception conditions in the responsible state	
	<i>Decision & Reasoning</i>	The fact that he is an unaccompanied minor and under medical control does not stand in the way of transfer to Italy, as the asylum seeker did not prove that he could not receive the required medical care in Italy, and that the reception facilities and guardianship are insufficiently guaranteed. It is not demonstrated that the asylum seeker runs a real risk of ill-treatment in violation with art. 3 and art. 13 ECHR upon transfer to Italy. Therefore, the minister could rely on the inter-governmental trust principle and on the presumption that Italy will not violate the prohibition against refoulement.	
	<i>Outcome of proceedings</i>	The appeal of the asylum seeker is well-founded because the submitted documents have not been carefully assessed. Nevertheless, the legal consequences of the annulled decision should be upheld, because the documents do not provide grounds for the claim that the applicant runs a risk of ill-treatment in violation of Article 3 or 13 ECHR in Italy. Therefore, Italy remains responsible for the examination of the asylum application.	
Subsequent Proceedings		---	
Dublin regulation's legal provisions applicable		Article 3, paragraph 2	
Legal provisions cited: national (optional) & international references		<i>Legislation</i>	<i>Articles</i>
		ECHR	Articles 3 and 13
Case law cited: national (optional) & international references		<i>Court name</i>	<i>Neutral citation</i>
		European Court of Human Rights	<i>M.S.S. v Belgium and Greece</i> , 21 January 2011, application no. 30696/09
		Court of Justice of the European Union	Prejudicial questions, 18 August 2010, C-411/10 and C-274/21
		Council of State, the Netherlands	14 July 2011, case no. 201009278/1/V3
Other sources cited: NGO reports etc		<i>Organization</i>	<i>Reference</i>

Observations/Comments		---	

KEY WORDS

Unaccompanied minors; Access to the asylum procedure; Reception conditions in the responsible state; Sovereignty clause; Detention

Country of Appeal		Netherlands
Responsible Member State under Dublin Criteria		Malta
Case name		---
Appeal body name i.e. Court/Tribunal/Appeals Board		Council of State (Administrative Law section)
Decision number/Neutral citation		<u>201001837/1/V3</u>
Date decision delivered or promulgated: Date of determination		7 October 2011
Country of applicant/Claimant		---
Summary of the case		
	<i>Facts (brief overview)</i>	The asylum seeker is an unaccompanied minor. His asylum request was rejected, as Malta was considered responsible under the Dublin Regulation, because his application was under examination there. In the Netherlands, the organization 'Nidos' provided guardianship to the asylum seeker. The asylum seeker claims that the Netherlands should invoke the sovereignty clause to prevent his transfer to Malta.
	<i>Decision & Reasoning</i>	Article 6 of the Dublin Regulation is not applicable, as 'Nidos' cannot be understood as 'a family member' in terms of art. 2 under i Dublin Regulation. The reports that the asylum seeker has submitted to substantiate his claim relate to the circumstances of asylum seekers who arrive in Malta for the first time, who are placed in detention under poor conditions, and are confronted with a lack of legal assistance and information. However, it is not proven that these conditions are also applicable to Dublin transferees, nor does it show that Dublin transferees are put in detention again.

KEY WORDS

Unaccompanied minors; Access to the asylum procedure; Reception conditions in the responsible state; Sovereignty clause; Detention

	<i>Decision & Reasoning</i>	<p>The reports of Amnesty International of December 2010 and of the European Migration Network show that there are special reception facilities for unaccompanied minors in Malta. Therefore, the claim that the living conditions upon return to Malta will be in violation of art. 3 and 13 ECHR, is unfounded. Furthermore, the reports show neither that it is difficult to apply for asylum in Malta, nor that there are serious deficiencies during the examination of the asylum application, due to a lack of interpreters or insufficient training of personnel conducting interviews or deciding on the asylum application. Instead, the reports show that a great amount of asylum seekers are offered at least some form of protection. Though the report of Amnesty International mentions certain deficiencies in the Maltese asylum procedure, these do not lead to a violation of art. 3 and/or art. 13 ECHR upon transfer to Malta. Therefore, the minister could rely on the inter-governmental trust principle and on the presumption that Malta will not violate the prohibition on refoulement.</p>	
	<i>Outcome of proceedings</i>	Appeal of the asylum seeker is unfounded.	
Subsequent Proceedings		---	
Dublin regulation's legal provisions applicable		<p>Article 3 paragraph 2 Article 6 Article 2 under i</p>	
Legal provisions cited: national (optional) & international references		<i>Legislation</i>	<i>Articles</i>
		ECHR	Articles 3 and 13
Case law cited: national (optional) & international references		<i>Court name</i>	<i>Neutral citation</i>
		European Court of Human Rights	<i>M.S.S. v Belgium and Greece</i> , 21 January 2011, application no. 30696/09
		Council of State, the Netherlands	14 July 2011, case no. 201009278/1/V3

KEY WORDS

Unaccompanied minors; Access to the asylum procedure; Reception conditions in the responsible state; Sovereignty clause; Detention

	<i>Organization</i>	<i>Reference</i>
Other sources cited: NGO reports etc	European Parliament	'European Parliament resolution on the situation with refugee camps in Malta', 6 April 2006
	United Nations Human Rights Council	'Compilation Prepared by the Office of the High Commissioner for Human Rights, in accordance with paragraph 15(b) of the Annex to Human Rights Council Resolution 5/1 – Malta', 12 March 2009
	UNHCR	'UN experts express concern at length for illegal migrants in Malta', 26 January 2009
	Human Rights Watch	'World Report 2009', 14 January 2009
	Committee on Migration, Refugees and Population of the Parliamentary Assembly of the Council of Europe	'Europe's "boat-people": mixed migration flows by sea into southern Europe', 11 July 2008
	Global Detention Project	'Malta Detention Profile', December 2009

KEY WORDS	Unaccompanied minors; Access to the asylum procedure; Reception conditions in the responsible state; Sovereignty clause; Detention	
Other sources cited: NGO reports etc	Amnesty International	'Human Rights in Republic of Malta', 2009
	Amnesty International	'Annual Report 2010'
	Amnesty International	'Seeking safety, finding fear', December 2010
	News Article www.maltatoday.com	'Council of Europe - 'Dublin' undermining refugee rights and burdening Malta'
	Doctors without borders	'Not criminals', April 2009
	European Migration Network (EMN)	'Unaccompanied minors in Malta', 2009
	MaltaMedia	'Somalis «regularly beaten» in Malta, claims Somali website', 29 October 2007
Observations/Comments	---	

KEY WORDS

Detention; Sovereignty clause; Reception conditions in the responsible state; Access to the asylum procedure

Country of Appeal	Netherlands
Responsible Member State under Dublin Criteria	Malta
Case name	---
Appeal body name i.e. Court/Tribunal/Appeals Board	Council of State (Administrative Law section)
Decision number/Neutral citation	<u>Nr. 201005977/1/V3</u>
Date decision delivered or promulgated: Date of determination	7 October 2011
Country of applicant/Claimant	Somalia
Summary of the case	
	<i>Facts (brief overview)</i>
	The asylum request was rejected, as Malta is considered responsible under the Dublin Regulation due to his application for asylum there. The asylum seeker claims that the Netherlands should invoke the sovereignty clause to prevent his transfer, due to the detention conditions and deficiencies in the asylum procedure in Malta.
	<i>Decision & Reasoning</i>
	The reports that the asylum seeker has submitted to substantiate his claim relate to the poor detention conditions of asylum seekers who arrive in Malta for the first time and are confronted with a lack of legal assistance and information. However, it does not appear from the reports that Dublin transferees are detained as well. The report of D. Lutterbeck of the University of Malta shows, with regard to the Maltese asylum procedure, that a great amount of asylum seekers are offered at least some form of protection in Malta. Furthermore, the reports do not show that there are serious deficiencies in the Maltese asylum procedure. While the ECRI report demonstrates that the accommodation conditions for asylum seekers could be improved, it also proves that accommodation is available in all cases, as well as food and financial support.

KEY WORDS		Detention; Sovereignty clause; Reception conditions in the responsible state; Access to the asylum procedure	
	<i>Decision & Reasoning</i>	The regional (lower) court was wrong to rule that the applicant should demonstrate through concrete and individual facts and circumstances, that the inter-governmental trust principle is not applicable with regard to Malta. Nevertheless, the submitted reports do not show that there would be a situation in violation of art. 3 and/or art. 13 ECHR upon transfer to Malta. Therefore, the Minister could rely on the inter-governmental trust principle and on the presumption that Malta will not violate the prohibition on refoulement.	
	<i>Outcome of proceedings</i>	The asylum seeker's appeal is unfounded.	
Subsequent Proceedings		---	
Dublin regulation's legal provisions applicable		Article 3 (2)	
Legal provisions cited: national (optional) & international references		<i>Legislation</i>	<i>Articles</i>
		ECHR	Articles 3, 13
Case law cited: national (optional) & international references		<i>Court name</i>	<i>Neutral citation</i>
		European Court of Human Rights	<i>M.S.S. v Belgium and Greece</i> , 21 January 2011, application no. 30696/09
		Council of State, the Netherlands	14 July 2011, case no. 201009278/1/V3

KEY WORDS

Detention; Sovereignty clause; Reception conditions in the responsible state; Access to the asylum procedure

Other sources cited:
NGO reports etc

<i>Organization</i>	<i>Reference</i>
European Parliament	'European Parliament resolution on the situation with refugee camps in Malta', 6 April 2006
UNHCR	'UN experts express concern at length for illegal migrants in Malta', 26 January 2009
Human Rights Watch	'World Report 2009', 14 January 2009
United Nations Human Rights Council	'Compilation Prepared by the Office of the High Commissioner for Human Rights, in accordance with paragraph 15(b) of the Annex to Human Rights Council Resolution 5/1 – Malta', 12 March 2009
MaltaMedia	'Somalis "regularly beaten" in Malta, claims Somali website', 29 October 2007
Amnesty International	'Human Rights in Republic of Malta', 2009
Global Detention Project	'Malta Detention Profile', December 2009
D. Lutterbeck	'Small frontier Island: Malta and the challenge of irregular immigration' Mediterranean Quarterly Winter 2009 20(1): 119-144.

KEY WORDS

Detention; Sovereignty clause; Reception conditions in the responsible state; Access to the asylum procedure

Other sources cited: NGO reports etc	Freedom House	'Freedom in the World – Malta', 2 July 2008
	European Commission against Racism and Intolerance (ECRI)	'Third report on Malta, Adopted on 14 December 2007'
	Refugee Documentation Centre (Ireland)	'Treatment of asylum seekers returned from Malta to Libya. Treatment of Somali asylum seekers in Libya' 27 August 2009
	Dutch Refugee Council	Letter concerning Malta, 19 July 2009
	Council of Europe Commissioner for Human Rights, Thomas Hammarberg	Third party intervention, 10 March 2010, CommDH(2010)9
	Council of Europe Commissioner for Human Rights, Thomas Hammarberg	Press release, 16 March 2010.
	Council of Europe Commissioner for Human Rights, Thomas Hammarberg	'Letter to Mr. Carmelo Mifsud Bonnici, Minister for Justice and Home Affairs of the Republic of Malta, concerning migrants' rights' CommDH(2009)41, 26 August 2009
	UNHCR	'Persons of UNHCR concern in Malta: possibility of incidents of refoulement', June 2007.
Observations/Comments	---	

KEY WORDS		Reception conditions in the responsible state; Sovereignty clause; Inhuman and degrading treatment
Country of Appeal		Reception conditions in the responsible state; Sovereignty clause; Inhuman and degrading treatment
Responsible Member State under Dublin Criteria		Netherlands
Case name		Italy
Appeal body name i.e. Court/Tribunal/Appeals Board		---
Decision number/Neutral citation		<u>Council of State (Administrative Law section)</u>
Date decision delivered or promulgated: Date of determination		Nr. 201007173/1/V4
Country of applicant/Claimant		11 November 2011
Summary of the case		---
	<i>Facts (brief overview)</i>	<p>The asylum request of the asylum seeker and her child were rejected, as Italy was considered responsible under the Dublin Regulation. The asylum seeker applied for asylum in Italy before, where she received a permit to stay ('soggiorno') with a validity of three years.</p> <p>In appeal, the asylum seeker claimed that the Minister could not rely on the inter-governmental trust principle due to the deficiencies in the Italian asylum procedure and the appalling situation of asylum seekers. To support her claim, the asylum seeker referred to interim measures of the European Court of Human Rights (ECtHR) and supplied various reports from Amnesty International and the Commissioner for Human Rights, Thomas Hammarberg. The ECtHR issued an interim measure in this case on 27 July 2010 (no. 41993/10). The case before the ECtHR is still pending.</p>
	<i>Decision & Reasoning</i>	<p>The Council of State has considered in a previous case (no. 201009278/1/V3) that as a consequence of the M.S.S. judgment, the court should carefully assess the general documentation that is supplied to demonstrate that a transfer under the Dublin Regulation is in violation of Article 3 ECHR. In this case, the (lower) regional court did not assess the documents in the manner prescribed in the M.S.S. case.</p>

	<i>Decision & Reasoning</i>	<p>Therefore, the Minister could not uphold his position that the inter-governmental trust principle should in general be presumed with regard to Italy. Nevertheless, the reports upon which the asylum seeker relies do not provide grounds for the judgment that the asylum seeker should not be transferred to Italy. Also, the asylum story does not provide indications that the Italian asylum procedure does not satisfy the requirements, as the asylum seeker has not been threatened with expulsion to her country of origin when she lived in Italy, nor has she been subject to other violations of art. 3 ECHR. The Council of State cannot deduce from the issued interim measure that the President of the ECtHR is of the opinion that the asylum seeker runs a real risk of ill-treatment in violation with Article 3 ECHR. The interim measure should be seen as an actual barrier in the transfer to Italy, but is independent from the examination of the asylum request in the Netherlands.</p>	
	<i>Outcome of proceedings</i>	<p>The appeal of the asylum seeker is well-founded because the submitted documents have not been carefully assessed. Nevertheless, the legal consequences of the annulled decision should be upheld, because the documents do not provide grounds for the claim that the applicant runs a risk of ill-treatment in violation of Article 3 or 13 ECHR in Italy. Therefore, Italy remains responsible for the examination of the asylum application.</p>	
Subsequent Proceedings		---	
Dublin regulation's legal provisions applicable		Article 3, paragraph 2 Dublin Regulation	
Legal provisions cited: national (optional) & international references		<i>Legislation</i>	<i>Articles</i>
		ECHR	Articles 3, 13
Case law cited: national (optional) & international references		<i>Court name</i>	<i>Neutral citation</i>
		European Court of Human Rights	21 January 2011, application no. 30696/09, M.S.S. v Belgium and Greece
		European Court of Justice of the European Union	14 July 2011, no. C411/10 and C 274/21 (prejudicial questions)
		Council of State, the Netherlands	14 July 2011, case no. 201009278/1/V3

KEY WORDS

Reception conditions in the responsible state;
Sovereignty clause; Inhuman and degrading
treatment

	<i>Organization</i>	<i>Reference</i>
Other sources cited: NGO reports etc	Amnesty International	Italy, a briefing to the UN Committee against Torture, April 2007
	Amnesty International	Italy – Amnesty International Report 2007
	Amnesty International	Italy – Amnesty International Report 2008
	Commissioner for Human Rights of the Council of Europe	Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, following his visit to Italy on 13-15 January 2009, April 16 2009
Observations/Comments	---	

KEY WORDS		Time limits; Suspensive effect
Country of Appeal		Netherlands
Responsible Member State under Dublin Criteria		Italy
Case name		---
Appeal body name i.e. Court/Tribunal/Appeals Board		Council of State (Administrative Law section)
Decision number/Neutral citation		<u>Nr. 201105103/1/V4</u>
Date decision delivered or promulgated: Date of determination		22 February 2012
Country of applicant/Claimant		---
Summary of the case		
	<i>Facts (brief overview)</i>	The asylum application was rejected, as Italy was responsible under the Dublin Regulation. The President of the European Court of Human Rights issued a Rule 39 interim measure to the asylum seeker. The asylum seeker applied for asylum again in the Netherlands, claiming that the term of six months to carry out the transfer to Italy has expired. According to the Dutch minister, the interim measure of the ECtHR suspends the term to carry out the transfer, and does not lead to an expiry of the deadline for transfer.
	<i>Decision & Reasoning</i>	In accordance with art. 20 (1)(d) Dublin Regulation, the transfer should be carried out in accordance with national law of the requesting Member State, and at the latest within six months of acceptance of the request by the other Member State. Art. 20 (1)(e) provides that national legislation should allow courts or competent bodies to decide that a decision may suspend the implementation of the transfer. However, national legislation does not provide that an interim measure from the ECtHR suspends the transfer period. In a previous case (25 May 2004, no. 200400863/1), the Council of State ruled that an asylum seeker for whom an interim measure has been issued, enjoys lawful residence in the Netherlands. It follows from another case (11 November 2011, no. 201007173/1/V4), that an interim measure should be regarded as a factual barrier relating to the postponement of the moment of transfer – in this case to Italy.

	<i>Decision & Reasoning</i>	This means that the interim measure from the ECtHR affects the national legal system. Now that the asylum seeker enjoys lawful residence in the Netherlands and may therefore not be expelled, national legislation must be considered to deal with the possibility that an interim measure suspends the time limit of transfer to the responsible Member State.	
	<i>Outcome of proceedings</i>	Appeal of the minister well-founded.	
Subsequent Proceedings		The case before the ECtHR is still pending and the Interim Measure is still effective.	
Dublin regulation's legal provisions applicable		Article 20 (1) (d) and (e) Article 20 (2)	
Legal provisions cited: national (optional) & international references		<i>Legislation</i>	<i>Articles</i>

Case law cited: national (optional) & international references		<i>Court name</i>	<i>Neutral citation</i>
		Council of State	25 May 2004, no. 200400863/1
		Council of State	11 November 2011, no. 201007173/1/V4
Other sources cited: NGO reports etc		<i>Legislation</i>	<i>Articles</i>

Observations/Comments			

KEY WORDS

Reception conditions in the responsible state; Sovereignty clause; Inhuman and degrading treatment; vulnerable groups

Country of Appeal	Netherlands
Responsible Member State under Dublin Criteria	Italy
Case name	---
Appeal body name i.e. Court/Tribunal/Appeals Board	Council of State (Administrative Law section)
Decision number/Neutral citation	<u>Nr.201201024/1/V4</u>
Date decision delivered or promulgated: Date of determination	5 September 2012
Country of applicant/Claimant	---
Summary of the case	
<i>Facts (brief overview)</i>	<p>The asylum application of a single mother with a young child was rejected, as Italy was held responsible under the Dublin Regulation. The asylum seeker claims that after their transfer to Italy, the situation of her and her child would breach art. 3 ECHR. The asylum seeker states she is in a vulnerable position and refers to reports of Hammarberg of 7 September 2011 and Schweizerische Flüchtlingshilfe (SFH) of May 2011. The minister refers to the Council of State decision of 14 July 2011, nr. 2010009278/1/V3.</p>
<i>Decision & Reasoning</i>	<p>The Council of State notes that the Hammarberg and SFH reports were not included in the Council of State's decision of 14 July 2011. Unlike the documents that were already addressed in that decision, these reports pay attention to the position of vulnerable migrants in Italy. The minister should have taken these reports into account as indicated in the M.S.S. judgment. However these reports do not give a significantly different view of the detention and living conditions of vulnerable asylum seekers with special needs in Italy, in the sense that it cannot be derived from them that these asylum seekers are not accommodated in Italy or are that their special needs cannot be met.</p>

KEY WORDS

Reception conditions in the responsible state; Sovereignty clause; Inhuman and degrading treatment; vulnerable groups

	<i>Decision & Reasoning</i>	The Council of State concludes decisively that before every transfer to Italy the personal circumstances of the asylum seeker are brought to the attention of the Italian authorities. There is no reason to believe that the transfer to Italy will result in a real risk of treatment in violation with art. 3 ECHR.	
	<i>Outcome of proceedings</i>	The appeal of the asylum seeker is well-founded because the submitted documents have not been carefully assessed. Nevertheless, the legal consequences of the annulled decision should be upheld, because the documents do not provide grounds for the claim that the applicant runs a risk of ill-treatment in violation of Article 3 or 13 ECHR in Italy. Therefore, Italy remains responsible for the examination of the asylum application.	
Subsequent Proceedings		The case before the ECtHR is still pending and the Interim Measure is still effective.	
Dublin regulation's legal provisions applicable		Article 3	
Legal provisions cited: national (optional) & international references		<i>Legislation</i>	<i>Articles</i>
		ECHR	Article 3
Case law cited: national (optional) & international references		<i>Court name</i>	<i>Neutral citation</i>
		Council of State	14 July 2011, nr. 201009278/1/V3
		ECHR, M.S.S v. Belgium & Greece	ECHR 21 January 2011, nr. 30696.09
Other sources cited: NGO reports etc		<i>Legislation</i>	<i>Articles</i>
		Hammarberg	7 September 2011
		Schweizerische Flüchtlingshilfe	May 2011
Observations/Comments			

European network for technical cooperation on the application of the Dublin II Regulation

By creating a European-wide network of NGOs assisting and counselling asylum seekers subject to a Dublin procedure, the aim of the network is to promote knowledge and the exchange of experience between stakeholders at national and European level. This strengthens the ability of these organisations to provide accurate and appropriate information to asylum seekers subject to a Dublin procedure.

This goal is achieved through research activities intended to improve knowledge of national legislation, practice and jurisprudence related to the technical application of the Dublin II Regulation. The project also aims to identify and promote best practice and the most effective case law on difficult issues related to the application of the Dublin II Regulation including family unity, vulnerable persons, detention.

During the course of the project, national reports were produced as well as a European comparative report. This European comparative report provides a comparative overview of the application of the Dublin II Regulation based on the findings of the national reports. In addition, in order to further enhance the knowledge, we created information brochures on different Member States, an asylum seekers' monitoring tool and a training module, aimed at legal practitioners and civil society organisations. They are available on the project website.

The Dublin II Regulation aims to promptly identify the Member State responsible for the examination of an asylum application. The core of the Regulation is the stipulation that *the Member State responsible for examining the asylum claim of an asylum seeker is the one where the asylum seeker first entered.*

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European Partner Organisations:



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