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The Dublin system: the ECJ Squares the Circle Between Mutual Trust and Human Rights Protection



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Introduction

On Thursday February 16th, the ECJ handed down a seminal **judgment** in the case of *C.K. and others*, C-578/16 PPU. This ruling was rendered on a reference for a preliminary ruling from the Supreme Court of Slovenia asking, in substance, whether the risk faced by an asylum seeker of being a victim of inhuman and degrading treatment because of his/her individual situation, shall prevent his/her transfer to another Member State to consider his/her asylum claim on the basis of the Dublin system.

The Dublin System: Cooperation between Member States based on Mutual Trust

The Dublin system, initiated by a **Convention** signed in 1990 in the city whose name it bears, allocates responsibility for examining asylum applications lodged by third country nationals (TCNs) in the EU, in such a manner that, in principle, only one State has the task of examining each asylum request lodged on the European Union's territory.

Pursuing harmonisation of Member states' asylum policies, the Treaty of Amsterdam introduced the competence of the European Community (Article 63 EC; now Article 78 TFEU) to adopt additional measures in order to achieve a Common European Asylum System (CEAS). On that basis, the Dublin Convention was replaced by the "Dublin II" **Regulation** (Regulation n°343/2003) and then the "Dublin III" **Regulation** (Regulation 604/2013). Also, a number of directives were adopted in order to set up minimum standards on the qualification and status of refugees and persons with subsidiary protection (**Directive 2011/95/UE**), on asylum procedures (currently **Directive 2013/32/UE**) and on reception conditions for asylum-seekers (currently **Directive 2013/33/UE**).

The Dublin system, which constitutes a fundamental part of the CEAS, has as its main goals to (i) ensure the access of TCNs to the asylum application procedure and to (ii) rationalise the treatment of asylum applications by avoiding forum shopping and the

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existence of multiple applications. It therefore establishes a set of criteria which determine which Member State is, in a particular situation, responsible for examining the application of an asylum-seeker. The general rule is that (in effect) the State of first entry into the European Union is the responsible Member State, but there are several exceptions. If another Member State is approached, that state can either, on the basis of the Dublin system, automatically transfer the asylum seeker lodging the application to the responsible state, but it can also – and it has a sovereign right to – decide to examine the application itself as it so wish (Article 17, Dublin III Regulation: the “sovereignty-clause”).

It is important to note that the Dublin system is underpinned by the fundamental idea of equivalence of Member States’ asylum systems, presuming, therefore, that asylum-seekers would not benefit from any advantage by having their application examined in a specific country.

Summary of Previous Case Law of the ECJ: Preserving Effectiveness of EU Cooperation, even at the Expense of Fundamental Rights

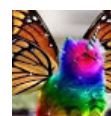
The automaticity of the transfer of asylum-seekers between Member States, founded on the premise of equivalence, quickly appeared problematic in terms of protection of asylum-seekers’ fundamental rights. Notably due to their geographic situation, some Member States were faced with a high number of arrivals that put their asylum-seekers’ reception infrastructures under pressure, and resulted in degradation of their national asylum systems.

It did not take long before challenges against transfer decisions were being introduced, because of the risks faced by asylum-seekers regarding their fundamental rights in the State which the Dublin system made responsible for examining their applications. One of the first landmark rulings on this issue was handed down by the European Court of Human Rights (ECtHR), in which Belgium was held liable for breaching the European Convention on Human Rights (ECHR) by having transferred an asylum seeker back to Greece on the basis of the Dublin system, while this country, in its examination of asylum applications, was not fulfilling the obligations under the ECHR. The ECtHR noted, in the case of *M.S.S c. Belgium and Greece* (application n° 30696/09), that Belgium, being aware of, or having a duty to be aware of the poor detention and reception conditions of asylum-seekers in Greece, should have relied upon the “sovereignty-clause” of the Dublin II Regulation, to refrain from transferring this individual to a country where he faced a real risk of becoming a victim of inhuman and degrading treatment in accordance with Article 3 ECHR.

Less than a year later, the ECJ addressed the same issue with the additional difficulty of having the duty to safeguard the Dublin system’s effet utile. In the famous *N.S. case* (C-411/10), the Court was indeed asked whether “a State which should transfer the asylum seeker [to the responsible Member State according to the Dublin regulation] is obliged to assess the compliance, by that Member State, with the fundamental rights of the European Union”. In addressing this challenge, the ECJ relied - for the first time in the field of asylum - upon the principle of mutual trust between Member States, founded on the presumption that “all participating States [to the Dublin system] observe fundamental rights”, to conclude that it was inconceivable that “any infringement of a fundamental right by the Member State responsible” would affect the obligations of other Member States to comply with the Dublin Regulation (§82).

To maintain the effectiveness of the Dublin Regulation despite the existence of flaws in national asylum systems, the ECJ innovated by introducing the “systemic deficiencies test”, entailing that a transfer should be prohibited “if there are substantial grounds for believing that there are systemic flaws in the asylum procedure and reception conditions for asylum applicants in the Member State responsible, resulting in inhuman and degrading treatment, within the meaning of Article 4 of the EU Charter of Fundamental Rights (corresponding to Article 3 ECHR), of asylum-seekers transferred to the territory of that Member State, the transfer would be incompatible with that provision” (§86).

To secure a clear, effective and fast method for determining the Member State responsible for dealing with an asylum application, the ECJ thus opted for a presumption of compliance by Dublin States with fundamental rights which could be rebutted in the presence of a “systemic deficiency in the asylum procedure and in the reception conditions of asylum-seekers” where Member States would be compelled to prevent the transfer (§89). This presumption of fundamental rights’ respect by Member States was subsequently applied by the ECJ in other judgements (C-4/11, *Puid* and C-



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394/12, *Abdullahi*). In fact, the latter judgment expressly limited both the substantive and procedural grounds on which a Dublin transfer could be challenged.

Heavily criticized, this approach was condemned in Strasbourg with the *Tarakhel* case (application n°29217/12), in 2014 in which the ECtHR reaffirmed and specified its *MSS* judgement by ruling that the Dublin system “does not exempt [national authorities] from carrying out a thorough and individualized examination of the situation of the person concerned and from suspending enforcement of the removal order should the risk of inhuman and degrading treatment be established”.

Stonewalling, one of the ECJ’s arguments against the draft agreement on the accession of the EU to the ECHR (*Opinion 2/13*) was the ECHR requirement that Member States “check that another Member State has observed fundamental rights, even though EU law imposes an obligation of mutual trust between those Member States” (*Opinion 2/13*, §194). The Court’s “systemic deficiencies” test was consolidated in the recast of the Dublin Regulation (Regulation 604/2013, Dublin III) whose Article 3(2) states that “where it is impossible to transfer an applicant to the Member State primarily designated as responsible because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman and degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union, the determining Member State shall continue to examine the criteria set out in Chapter III in order to establish whether another Member State can be designated as responsible”.

A first move from this case law has recently been observed in another field of EU cooperation, namely in EU criminal law. The question asked to the ECJ was whether detention conditions incompatible with art. 4 of the Charter in a Member State issuing a EAW could allow or oblige the executing judicial authority of a requested Member State to refuse the execution of a European Arrest Warrant (EAW). Once again, the ECJ was faced with the dilemma between securing a EU mechanism based on mutual trust or taking human rights considerations seriously. In its landmark ruling in the case *Aranyosi and Căldăraru* (C-404/15), the ECJ considered that in the event of “systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention” deficiencies, and only if “there are substantial grounds to believe that, following the surrender of that person to the issuing Member State, he or she will run a real risk of being subject in that Member State to inhuman and degrading treatment, within the meaning of Article 4” (§94), the executing authority will have to postpone the execution of the EAW.

Hence, a two-step analysis has to be carried out by the national judge who must first assess the existence of general or particular deficiencies in the detention system of the requesting state, before examining, in concreto, whether the requested person faces a real risk of being subject to inhuman and degrading treatment. It remained, however, unclear whether the exception to mutual trust provided in *Aranyosi and Căldăraru* was more or less protective of fundamental rights. Even though a second condition was added, the deficiency requirement seemed softened.

The ruling of the ECJ in *C.K. and others*: A Welcome Step Towards Reconciliation Between the Dublin system and Human Rights ?

Facts and Question referred to the ECJ

A couple with a newborn child lodged an asylum application in Slovenia whereas Croatia was, according to the Dublin criteria, responsible for examining their application. Noting the absence of systemic flaws in the Croatian asylum system but observing that the mother of the child was in a very bad state of health, the Slovene court asked the ECJ whether the reliance upon the sovereignty clause (Article 17 of Dublin III) could be mandatory for the purpose of ensuring the family an effective protection against risks of inhuman and degrading treatment. In other words, the national judge inquired whether Dublin transfers were only prohibited in case of the existence of systematic deficiencies in the responsible state, subjecting asylum-seekers to risks of violations of Article 4 of the Charter, or whether a transfer also had to be precluded when such a risk was faced due to the specific and individual situation of a particular asylum seeker.

The opinion of the Advocate General

Following the *NS* and *Abdullahi* approach, the opinion of Advocate General Tanchev argued that only systemic flaws in the responsible State could require the prevention of a Dublin transfer. Unsurprisingly, he justified his opinion on the principle of mutual trust

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between Member States and on the need to ensure the effectiveness of the CEAS (§51). He further acknowledged that his position did not meet ECtHR standards but stressed that the EU was not bound by it (§52). He moreover underlined that Article 17 of the Regulation constituted a “discretionary” clause which, by definition, could not be construed as imposing obligations on Member States (§ 67).

The judgment of the Court

The fifth Chamber of the ECJ - quite uncommonly - did not follow the Advocate General's opinion. To the contrary, the ECJ stated that, besides situations where “systemic deficiencies” exist in the responsible state, any transfer of asylum-seekers shall be excluded where it gives rise to a real risk for the individual concerned to suffer inhuman or degrading treatment, within the meaning of Article 4 of the Charter. Relying upon Article 52§3 of the Charter, the ECJ recalled that corresponding rights guaranteed both by the Charter and the ECHR should receive the same scope as those laid down by the Convention.

It then quoted Strasbourg's recent ruling in *Paposhvili v. Belgium* (application n° 41738/10, § 175) according to which “illness may be covered by Article 3 [of the ECHR], where it is, or risks being, exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measures, for which the authorities can be held responsible”. Consequently, despite the absence of systemic deficiencies in the Croatian reception conditions of asylum-seekers (§7), Slovenia was required to suspend the transfer due to the fact that it could result, because of the particular medical condition of the immigrant, in a real risk of serious and irremediable deterioration of her health condition (§84). The suspension should, according to the judgement, be maintained as long as that risk exists. On the basis of its ruling in *Aranyosi*, the Court also stressed that national authorities were required to assess the risk before transferring an individual (§76).

The Court added that if the state of health of the migrant was not expected to improve, the relevant Member State had the possibility to itself examine the asylum application on the basis of the sovereignty clause contained in Article 17§1 of the Regulation (§96). However, this provision does not, according to the ECJ, oblige a Member State to examine any application lodged with it, even when read in the light of Article 4 of the Charter.

The ECJ finally concluded that this holding “fully respected the principle of mutual trust since, far from affecting the presumption of respect of fundamental rights by Member States, it ensures that exceptional situations are duly taken into consideration by Member States” and furthermore, that “if a Member State proceeded to the transfer of an asylum-seeker in such circumstances, the resulting inhuman and degrading treatment would not be attributable, neither directly or indirectly, to the authorities of the responsible Member State, but solely to the first Member State”.

Comments

The ruling of the fifth Chamber seems to introduce a crucial change in the case law of the ECJ regarding the relationship between the principle of mutual trust and the protection of individuals against inhuman and degrading treatment. Instead of putting these two imperatives in competition, the Court seems, for the first time, to obviously acknowledge their necessary interdependence. By considering that the principle of mutual trust would be enhanced by an effective application of Article 4 of the Charter, the ECJ finally appears to take seriously the fact that this principle is precisely founded on the respect by Member States of EU values including, above all, the principle of human dignity to which the prohibition of inhuman and degrading treatment is closely linked (Article 2 TEU).

It is therefore not only in case of systemic or generalised flaws in the asylum system of a responsible Member State that a transfer may be prevented. Specific and individual considerations of asylum-seekers must be taken into account in order to assess whether he or she could suffer treatment incompatible with Article 4 of the Charter because of his/her transfer. The Court moreover endorses this requirement by holding that in case of failure in addressing this risk, the first Member State will shoulder responsibility for breach of the Charter.

It should however be stressed that, while the first judgements prioritising the principle of mutual trust were delivered by the ECJ Grand Chamber, the ruling in the case at hand was handed down by a Chamber of five judges whose authority could be considered as

being weaker. Nevertheless, the ruling follows the general evolution of the case law of the ECJ which already underlined several times, following the last recast of the Dublin regulation, the fact that the changes of the system were “intended to make the necessary improvements, in the light of experience, not only to the effectiveness of the Dublin system but also to the protection afforded applicants under that system” (C-63/15, *Ghezelbash*, §52) The latter judgment (from June 2016) had already overturned the procedural aspects of the *Abdullahi* judgment; the *CK* ruling now overturns the substantive aspects.

This valuable step in favour of asylum-seekers’ fundamental rights protection nevertheless raises a number of practical questions. One could ask first – and this question was already put forward by other commentators – whether the risk of the violation of other fundamental rights than the prohibition of inhuman and degrading treatment must justify an exception to the Dublin distribution of responsibilities and, thereby, to the principle of mutual trust. We think that, given the emphasis put by the Court on the exceptional character of the situation, not any breach of any fundamental rights would prevent Member States to rely upon the principle of mutual trust in order to transfer an asylum-seeker. To the contrary, only very serious risks of violation of absolute fundamental rights (Chapter I of the Charter) would in our view justify a mandatory suspension of the transfer of asylum-seekers.

Additionally, the ruling raises questions as regards the consequences of a suspension. As pointed out by the Court, a Member State would never be obliged to itself assess, on the basis of the sovereignty clause (Article 17.1 Dublin III), an asylum application which falls within the responsibility of another State. What if, because of the individual situation of the asylum seeker, the transfer should be suspended in the long term? The finding of the ECJ could then result in the existence of “refugees in orbit”, asylum-seekers who lose the certainty of having their application examined by any Member State of the Union – something which the Dublin system especially seeks to prevent and that could, in itself, constitute an inhuman and degrading treatment.

Finally, the question of the applicability of this approach to EU criminal cooperation should also be raised. The Court seemed, until its holding in the *Aranyosi* case, very reluctant to acknowledge any exception to the principle of mutual trust in the framework of the European Arrest Warrant (see, among others, the cases C-396/11 *Radu* and C-399/11, *Melloni*). The ruling in *C.K.* should however, in our opinion, be seen as applicable also in the field of criminal cooperation if such exceptional circumstances are met since the ruling especially relies upon the judgment in *Aranyosi* and also due to the absolute character of the prohibition laid down in art. 4 of the Charter. Now the two lines of case law have been brought together, but they raise parallel questions about the long-term consequences. Indeed, the Court of Justice has already been asked to elaborate on the *Aranyosi* ruling, in the pending *Aranyosi II* case. So its ruling in that case may be equally relevant to Dublin cases.

In any case, the change of position of the ECJ seems much more in compliance both with the ECHR and, also, with the constitutional requirements of certain national legal orders. Indeed, the German Constitutional Court did not hesitate, in its *judgment* of 15 December 2015, to make an exception to the principle of mutual trust, as implemented by the EAW system, in order to protect the right of human dignity, which, according to this ruling, forms part of German constitutional identity.

One can henceforth wonder whether the *C.K.* and *Aranyosi* rulings generally overturn the *Opinion 2/13* argument based on the principle of mutual trust opposed, among others, by the ECJ against the EU’s draft accession agreement to the ECHR... Either way, this new setting should, without a doubt, have an important impact on today’s and future’s relationships between the EU legal order, on the one hand, with the ECHR and national legal orders, on the other.

Barnard & Peers: chapter 9, chapter 26
JHA4: chapter I:5

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Posted by [Steve Peers](#) at 00:40



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2 comments:



Josha Curlie 10 March 2017 at 06:05

Thank you so much for this blogpost! Very clear explanation, much appreciated since I don't speak French, Slovenian or Swedish very well ;) I'm writing my thesis about this exact topic - do you think parallels can be made between this judgment and the Tarakhel judgment? Thanks in advance!

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Steve Peers 10 March 2017 at 07:12

At first sight, it seems to be a transposition of that judgment into EU law.

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