

The allocation system of the Asylum Policy and EC General Principles: measuring the Member States' discretion under the Dublin Regulation

Miguel Carrasco Carapeto  
0835684

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## Introduction

In October 1999, following the policies to build an area of Freedom, Security and Justice, the Heads of States or Government of the European Union conveyed the concerted political will to progressively establish a Common European Asylum System (CEAS) in the Conclusions of the European Council in Tampere<sup>1</sup>. Ten years later, extensive Community legislation has been enacted, setting minimum standards in the areas of principal common action, based on Article 63 EC<sup>2</sup>: allocation of responsibility for claims among Member States, standards of reception and return, temporary protection, qualification for international protection and asylum procedures.

The underlying *rationale* of the legislation is that, in a space without borders, the penetration and free movement of third-country nationals (TCNs) would foster an excessive multiplication of consecutive asylum applications in several Member States made by the same asylum-seekers; therefore, it is necessary to adopt common grounds of assessment of applications and also determine, through precise criteria and mechanisms, that only one Member State should be responsible for substantially assessing a certain claim for asylum. The Council Regulation 383/2003<sup>3</sup> (Dublin Regulation) has set these criteria, according to which Member States are allowed to transfer asylum-seekers among themselves for the purpose of having substantial assessment of the asylum claims by the one responsible Member State.

Of great importance in the context of this regulation is the observance of “fundamental rights and principles which are acknowledged in particular in the Charter of Fundamental Rights of the European Union”<sup>4</sup>. Therefore, human rights concerns and obligations derived by international instruments such as the Geneva Convention<sup>5</sup> (which is ratified by all Member States and mentioned in Article 63 EC) played a fundamental role in the definition of the Asylum policy.

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<sup>1</sup> European Council, Tampere, Presidency Conclusions, 15-16 October 1999, S/N 200/99.

<sup>2</sup> Article 63 (1), Treaty establishing the European Community (as amended in Amsterdam, 2 October 1997) OJ C 340/1 (entered in force 1 May 1999).

<sup>3</sup> 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, *OJ L 50, 25.2.2003, p. 1–10*.

<sup>4</sup> Para. 15 of the Preamble.

<sup>5</sup> 1951 United Nations Convention on the Status of Refugees, available at <http://www.unhcr.org/pages/49da0e466.html> is stated in Article 63 of the EC Treaty.

As a result, the preparation of the Community legislation, namely the Dublin Regulation, had due account specifically to the principle of *non-refoulement*, according to which “no one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment”<sup>6</sup>. To ensure the effectiveness of *non-refoulement*, the European Court of Human Rights (ECtHR), throughout its case-law on Article 3 in combination with Article 13 ECHR, has imposed a high standard of procedural and substantial obligations on the Member States. The Community instruments, while allowing large discretionary powers to the national administrations in most provisions, have attempted to set a clear minimum level of protection complying with those obligations. Moreover, asylum policy is an area which has been integrated in the Community pillar by the Treaty of Amsterdam<sup>7</sup>, hence general principles of Community law (EC) are applicable to the legislation approved in that sphere.<sup>8</sup> As it is continuously stated by the European Court of Justice (ECJ), general principles derive their inspiration from international human rights instruments, namely the European Convention of Human Rights (ECHR)<sup>9</sup>, and the constitutional traditions of the Member States.<sup>10</sup>

Verwijderd:

Despite the binding nature of both the ECtHR’s jurisprudence and the Community instruments, there are several reports indicating the failure to comply with several obligations by some Member States.<sup>11</sup> Concerning Greece for instance, there is already a

<sup>6</sup> Article 19 (2) of the Charter of Fundamental Rights of the European Union, *OJ C 364*, 18.12.2000, p. 1–22.

<sup>7</sup> Article 63 of the EC Treaty.

<sup>8</sup> C. Costello, *The European Asylum Procedures Directive in Legal Context*, 2006, 20, available at <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=4552f1cc2&query=cathryn%20costello>.

<sup>9</sup> Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, available at <http://www.echr.coe.int/ECHR/EN/Header/Basic+Texts/The+Convention+and+additional+protocols/The+European+Convention+on+Human+Rights/>.

<sup>10</sup> See Article 6 (2) of the Treaty of the European Union (Consolidated versions of the Treaty on European Union and of the Treaty establishing the European Community, *Official Journal C 321E of 29 December 2006*). See also, for instance, Case C-540/03 *European Parliament v Council of the European Union*, ECR 2006 I-05769, para. 35.

<sup>11</sup> Greece: Amnesty International, *Amnesty International Report 2009 - Greece*, 28 May 2009, available at: <http://www.unhcr.org/refworld/docid/4a1fade846.html>; UNHCR, *UNHCR Position on The Return of Asylum-Seekers to Greece Under The ‘Dublin Regulation’*, [http://www.europarl.europa.eu/document/activities/cont/200805/20080529ATT30342/20080529ATT30342\\_EN.pdf](http://www.europarl.europa.eu/document/activities/cont/200805/20080529ATT30342/20080529ATT30342_EN.pdf). Italy: Human Rights Watch, *Treating refugees as refuse*, 14 June 2009, available at: <http://www.unhcr.org/refworld/docid/4a39e90fc.html>; Amnesty International, *Amnesty International Report 2009 - Italy*, 28 May 2009, available at: <http://www.unhcr.org/refworld/docid/4a1fade141.html>.

judgment of the ECtHR, *S.D. v Greece*<sup>12</sup>, which declares a violation of the Convention by that State due to the conditions of detention of asylum-seekers, which amount to ill treatment in the meaning of Article 3 ECHR.

The aim of this study is to ascertain whether a Member State would be in breach of Community law, by transferring an asylum seeker to another Member State (Greece, for example) in application of the Dublin Regulation, having accurate knowledge of the human rights situation for asylum-seekers in those countries, namely the likeliness of them being subject to treatment contrary to Article 3 ECHR, the Qualification Directive<sup>13</sup> and the Procedures Directive<sup>14</sup>. In these circumstances, can one argue that the sending Member State is breaching general principles of Community law? The question has particular interest when considering that Article 3 (2) of the Dublin Regulation allows the sending Member State to take the case itself in any circumstance, providing a substantial analysis of the application. Taking into account that the ECJ has already stated that Member States remain bound by general principles of EC law when acting through discretionary powers<sup>15</sup>, can we defend that such discretionary decision becomes, in certain circumstances, an obligation?

In order to provide a proper discussion of the issue, I will, first, provide a general assessment of EC general principles and address the alleged violations by Greece and Italy. Then, I will analyse the legal framework in question, namely the relevant aspects of the directives adopted in the context of the CEAS. Subsequently, I will address in greater detail Article 3(2) of the Dublin Regulation and analyse whether general principles limit the discretion of the Member States when applying that provision. After this assessment, I will focus on three principles which, in my view, may directly interfere with a decision to transfer an asylum-seeker to another Member State and thereby limit the discretion of national authorities: the principle of *non-refoulement*, the right to asylum and the right to access the asylum procedure. The analysis of these principles will focus, first, on their

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<sup>12</sup> ECtHR, *S.D. v Greece*, 11 June 2009, App. 53541/07.

<sup>13</sup> Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, *OJ L 304, 30.9.2004, p. 12–23*.

<sup>14</sup> Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals *OJ L 348, 24.12.2008, p. 98–107*.

<sup>15</sup> Case C-540/03, *European Parliament v Council*, ECR 2006 I-05769.

ability to take part of general principles of Community law and then on their specific scope of protection and concrete interference with the use of Article 3 (2). Following this discussion, I will turn to the burden and standard of proof required and, before reaching the conclusion, I will address issues regarding the judicial review from the ECJ. In this chapter, I will refer the standard procedure necessary to obtain a ruling from the ECJ on these questions and also anticipate the procedure and likely preliminary questions which may be addressed to the Luxembourg Court.

### **1. Reports on violations**

International Organisations like the United Nations High Commissioner for Refugees (UNHCR), Amnesty International (AI) and Human Rights Watch (HRW) have shown concern over the respect of the rights of asylum-seekers in several Member States. I will provide here examples of situations which likely constitute breaches of asylum-seekers' rights under Community law or ECHR, based on reports from those organisations mainly on Greece, but also on Italy. The choice is purely related to the specific issues I wish to legally analyse later.

Concerning the situation in Greece, the UNHCR has reported<sup>16</sup> in April 2008 that asylum-seekers sent to Greece according to the Dublin Regulation “continue to face serious challenges in accessing and enjoying effective protection in line with international and European standards”<sup>17</sup>.

The UNHCR has denounced that, upon arrival in Athens, the “Dublin returnees” are automatically detained, and due to the lack of interpretation personnel and legal services, are often interviewed in a language they do not understand and without being advised on their rights.<sup>18</sup> AI also claims that asylum-seekers without documentation were

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<sup>16</sup> UNHCR, *UNHCR Position on The Return of Asylum-Seekers to Greece Under The 'Dublin Regulation'*, [http://www.europarl.europa.eu/document/activities/cont/200805/20080529ATT30342/20080529ATT30342\\_EN.pdf](http://www.europarl.europa.eu/document/activities/cont/200805/20080529ATT30342/20080529ATT30342_EN.pdf).

<sup>17</sup> Ibid, 1.

<sup>18</sup> Ibid, 2.

automatically detained in specific centres, without being able to challenge the detention orders and conditions in court.<sup>19</sup>

Moreover, UNHCR claims that access to asylum procedure is barred in practice by extensively long waiting periods for an asylum officer to take care of their application and by the fact that the new legislation fails to guarantee that the authorities do not persist on interrupting applications of “Dublin returnees” as a result of them having previously left Greece<sup>20</sup>. Furthermore, UNHCR claims that, compared to other EU Member States, the refugee status recognition rates remain “disturbingly low”, while the refusal decisions lack factual and legal justification.

As to reception conditions, UNHCR shows great concern, due to the lack of infrastructure in the reception centres, which are constantly overcrowded, and difficult access to employment, health, education and welfare.<sup>21</sup> These conditions are liable to threaten the efficacy of the Dublin Regulation<sup>22</sup>, as asylum-seekers will probably avoid by all means to be transferred to Greece<sup>23</sup>. For these reasons, UNHCR advises Member States not to send asylum-seekers to Greece.<sup>24</sup>

AI has also denounced that, in Greece, legal representation seems to be deficient, the review process of rejected applications lacks independence and there have been several claims of ill-treatment and torture against asylum-seekers.<sup>25</sup>

The situation in Italy has also raised awareness by HRW, who reported that asylum seekers are constantly being deported to Libya, where they will be at risk of being subject

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<sup>19</sup> Amnesty International, *Amnesty International Report 2009 - Italy*, 28 May 2009, available at: <http://www.unhcr.org/refworld/docid/4a1fade141.html>.

<sup>20</sup> This practice is largely discussed in UNHCR, *The Return to Greece of Asylum-Seekers With "Interrupted" Claims*, 9 July 2007, available at: <http://www.unhcr.org/refworld/docid/46b889b32.html> and in P. Papadimitrou, *The New 'Dubliners': Implementation of European Council Regulation 343/2003 (Dublin-II) by The Greek Authorities*, 18 J. Refugee Stud. 299, 2005.

<sup>21</sup> *Ibid*, 7.

<sup>22</sup> Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, *Official Journal L 031*, 06/02/2003 P. 0018 – 002.

<sup>23</sup> See C. Filzwieser, *The Dublin Regulation vs The European Convention of Human Rights – a Non-Issue or a Precarious Legal Balancing Act?* (2006), 5, available at <http://refugeelaw.qeh.ox.ac.uk/pdfs/christian-filzwieser-dublin-convention-dec-06.pdf>.

<sup>24</sup> UNHCR, *UNHCR Position on The Return of Asylum-Seekers to Greece Under The 'Dublin Regulation'*, [http://www.europarl.europa.eu/document/activities/cont/200805/20080529ATT30342/20080529ATT30342\\_EN.pdf](http://www.europarl.europa.eu/document/activities/cont/200805/20080529ATT30342/20080529ATT30342_EN.pdf), 8.

<sup>25</sup> Amnesty International, *Amnesty International Report 2009 - Greece*, 28 May 2009, available at: <http://www.unhcr.org/refworld/docid/4a1fade846.html>.

to torture and ill treatment, without having the opportunity to file for an application or contest the deportation in court.<sup>26</sup>

## 2. Legal framework

### *The Dublin Regulation*

The Dublin Regulation is a result of the integration of the previous Dublin Convention<sup>27</sup> into Community law. It sets the aim of creating a “clear and workable method for determining the Member State responsible for the examination of an asylum application”<sup>28</sup>. Article 5 and following present these criteria, which apply hierarchically: Articles 6, 7 and 8 give priority to family reunification and protection of unaccompanied minors; then Article 9 determines allocation in the State that allowed the entry/permanence of the asylum-seeker; Article 10 sets responsibility to the State through which the asylum-seeker entered/stayed illegally and, finally, as a subsidiary provision, Article 10 establishes that the responsible Member State is the one where the first asylum application was initiated.

Aside from these binding criteria<sup>29</sup>, Article 3 (2) (“sovereignty clause”) allows Member States full discretion to make a substantial assessment of the claim, despite not being responsible according to the previous criteria. Moreover, Article 15 (“humanitarian clause”) enables Member States to take charge of the case for “humanitarian grounds”.

Basically, when receiving an application for asylum, the Member State should determine if it is responsible to take charge of the case, and, when not, it should request the responsible Member State to do so (Article 17). The responsible Member State should,

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<sup>26</sup> Human Rights Watch, *Treating refugees as refuse*, 14 June 2009, available at:

<http://www.unhcr.org/refworld/docid/4a39e90fc.html>

<sup>27</sup> Dublin Convention: State Responsible For Examining Applications For Asylum Lodged In One Of The Member States Of The European Communities, *Official Journal C 254*, 19.08.1997.

<sup>28</sup> Para. 3 of the Preamble of 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, *OJ L 50*, 25.2.2003, p. 1–10.

<sup>29</sup> See C. Filzwieser, *The Dublin Regulation vs The European Convention of Human Rights – a Non-Issue or a Precarious Legal Balancing Act?* (2006), 10, available at

<http://refugeelaw.qeh.ox.ac.uk/pdfs/christian-filzwieser-dublin-convention-dec-06.pdf>.

after receiving the asylum-seeker, make a substantial assessment of the asylum application (Article 16 a) and b)). The subsequent decision must be susceptible of appeal/judicial review (Article 19).

When arriving in the responsible Member State, the asylum-seeker is not exclusively dependant on the national laws, as several Community acts, such as those addressed here below, apply to him/her, from which he/she can derive specific rights.

### *Procedures and Qualification Directives*

Both the Procedures Directive<sup>30</sup> and Qualification Directive<sup>31</sup> apply to the substantial assessment of the asylum claim, performed by the national authorities<sup>32</sup>. The Procedures Directive aims to provide minimum harmonisation to the procedures for granting and withdrawing refugee status<sup>33</sup>, leaving to the Member States the possibility to maintain more favourable provisions in their legislation.<sup>34</sup> In Chapter II, the Directive contains a list of guarantees for the asylum seekers, which the Member States should respect: effective access to the procedure (Article 6), right to remain in the Member State during the examination (Article 7), requirements for the examinations and decisions (Articles 8 and 9), the right to a personal interview (Article 12 – 14), right to legal assistance and representation (Article 15). Although theoretically ambitious, this list of guarantees has been heavily criticized, for allowing Member States to derogate the asylum-seekers' prerogatives in many circumstances and apply concepts of "safe third country"<sup>35</sup> to send asylum-seekers to other states without assessment of the claims, which may seriously harm effective protection.<sup>36</sup> Moreover, even though Article 39 aims

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<sup>30</sup> Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, *OJL 326, 13.12.2005, p. 13–34*.

<sup>31</sup> Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, *OJL 304, 30.9.2004, p. 12–23*.

<sup>32</sup> K. Zwan, *The Procedures Directive: Central Themes, Problem Issues, and Implementation in Selected Member States*, Wolf Legal Publishers, 10.

<sup>33</sup> See footnote 30, para. 5 of the Preamble.

<sup>34</sup> *Ibid.*, para 8 of the Preamble.

<sup>35</sup> *Ibid.*, Articles 26-27, and 30-31.

<sup>36</sup> See, for instance, S. Peers & N. Rogers, *EU Immigration and Asylum Law: Text and Commentary*, Hotei Publishing, 2006, 379; H. Battjes, *European Asylum Law and its Relation to International Law*, Vrije

to grant “an effective remedy before a court or a tribunal” against unfavourable decisions, it leaves to the Member States the choice to provide appeals with suspensive effect.<sup>37</sup>

Aside from the Procedures Directive, the Qualification Directive plays a significant role when the responsible Member State proceeds with the examination of the application. It includes the criteria on which international protection, in the form of refugee status or subsidiary protection, should be granted by the Member States. It is arguable, then, that when the applicant fulfils the requirements of Chapter II and III of the Directive, he/she acquires a right to asylum granted by Community law, which cannot be made ineffective by the national procedural rules.<sup>38</sup> It also includes an express duty to avoid the risk of *refoulement*, in Article 21.

### *Reception Conditions Directive*

Equally relevant for the purpose of this study is a brief overview of the Reception Conditions Directive.<sup>39</sup> The Directive aims to grant a “dignified standard of living”<sup>40</sup> to TCNs waiting for the examination of their application, as long as authorised to remain in the country<sup>41</sup>, which in principle applies to “Dublin returnees”. It addresses the need to provide information<sup>42</sup>, documentation<sup>43</sup>, schooling and education of minors<sup>44</sup>, health care<sup>45</sup> and access to employment<sup>46</sup> to asylum seekers. When it comes to residence and

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Universiteit Amsterdam, 2006, 317; M. Garlick, *Asylum Legislation in the European Community and the 1951 Convention: Key Concerns regarding Asylum Instruments adopted in the ‘First Phase’ of Harmonization*, Ed by T. Balzacq & S. Carrera, *Security vs Freedom?, A Challenge for Europe’s Future*, Ashgate Publishing, 2006, 56.

<sup>37</sup> See further discussion in R. Byrne, *Remedies of Limited Effect: Appeals under The Forthcoming Directive on EU Minimum Standards on Procedures*, *European Journal of Migration and Law* 7: 71-86, 2005; M. Reneman, *Access to an Effective Remedy in European Asylum Procedures*, *Amsterdam Law Forum*, vol. 1, nr. 1, 2008, [www.amsterdamlawforum.org](http://www.amsterdamlawforum.org).

<sup>38</sup> See footnote 31, Article 13. The same applies to subsidiary protection, under Chapter IV and Article 18. See also M. Reneman, *Access to an Effective Remedy in European Asylum Procedures*, *Amsterdam Law Forum*, vol. 1, nr. 1, 2008, 70, [www.amsterdamlawforum.org](http://www.amsterdamlawforum.org).

<sup>39</sup> Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, *Official Journal L 031*, 06/02/2003 P. 0018 – 002.

<sup>40</sup> *Ibid.*, para. 7 of the Preamble.

<sup>41</sup> *Ibid.*, Article 3 (1).

<sup>42</sup> *Ibid.*, Article 5.

<sup>43</sup> *Ibid.*, Article 6.

<sup>44</sup> *Ibid.*, Article 10.

<sup>45</sup> *Ibid.*, Article 15.

<sup>46</sup> *Ibid.*, Article 11.

housing, the Directive allows great discretion to the Member States<sup>47</sup>, who are able to impose detention for “legal reasons or public order reasons”<sup>48</sup>. When housing is provided though, it must comply with the reception conditions of Article 14.

### *Return Directive*

One must finally look at the Return Directive<sup>49</sup>, which “sets out common standards and procedures to be applied in Member States for returning illegally staying third country nationals (...)”.<sup>50</sup> The Directive imposes limitations on the return of illegal immigrants by Member States, when there is a risk of *refoulement*<sup>51</sup>, as a fair and efficient asylum system must be in place.<sup>52</sup> The period for implementation of this directive has not yet expired.

Putting this framework in perspective with the situation in Greece and Italy described in Chapter 1, we can conclude that, in many ways, those States have failed to comply with minimum requirements set by the Directives, thereby violating Community law. Despite the discretionary powers granted to the Member States, the Directives can, in many circumstances, grant minimum safeguards to asylum-seekers.

For instance, it is arguable, in my opinion, that the automatic detention of “Dublin returnees” upon arrival in Greece, without means to contest that detention, constitutes a violation of Article 18 (2) of the Procedures Directive, which grants a right to “speedy judicial review” in these circumstances. In Article 9 (2) of the same act, there is also a clear obligation to include a legal/factual justification in a rejection decision, which apparently is a practice not complied by the Greek authorities, as it was mentioned in Chapter 1.

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<sup>47</sup> Ibid., Article 7 (2).

<sup>48</sup> Ibid., Article 7 (3).

<sup>49</sup> Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals *OJ L 348, 24.12.2008, p. 98–107*.

<sup>50</sup> Ibid., Article 1.

<sup>51</sup> Ibid., See Article 4 (4)(b), Article 5 (c), Article 9 (1) (a).

<sup>52</sup> Ibid., para. 8 of the Preamble.

These are merely two examples of rights granted to asylum-seekers by the Procedures Directive which, on the other hand, constitute clear obligations to the Member States. It is also expected that the ECJ might have the opportunity to interpret the abovementioned legislation in a preliminary ruling, according to mechanism for judicial review set in Article 68 EC. It might do so in the light of general principles, and, therefore, construe the derogations to the rights contained in those instruments in a strict way.<sup>53</sup>

### 3. EC General Principles

Since the 1970s<sup>54</sup>, the ECJ has claimed that, despite the lack of formal instrument binding the Community institutions, fundamental rights must be observed by all the acts adopted in the context of EC powers. The ECJ would, itself, carry out the review of Community acts in order to ascertain their compliance with general principles, taking inspiration from the constitutional traditions of the Member States and from the guidelines provided by international treaties for the protection of human rights of which the Member States are signatories.<sup>55</sup> As previously mentioned, the ECHR has played a significant guidance in that respect and that is confirmed by it being mentioned in Article 6 (2) of the EU Treaty. However, the ECJ has emphasised that it merely draws inspiration from international sources to define the content of EC general principles, as they can gain a specific meaning and standard of protection in the Community legal order.<sup>56</sup>

The specific scope of application of EC general principles, and the powers of review by the ECJ have been progressively defined in the case-law.<sup>57</sup> It has been thus established that the ECJ should be empowered to review not only acts adopted by the Community institutions against general principles, but also acts adopted by the Member States, whenever they fall within the scope of Community law, for instance, when they

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<sup>53</sup> K. Zwaan, *The Procedures Directive: Central Themes, Problem Issues, and Implementation in Selected Member States*, Wolf Legal Publishers, 19.

<sup>54</sup> Case 11/70 *Internationale Handelsgesellschaft*, ECR 1970 P-01125.

<sup>55</sup> P. Craig & G. de Burca, *EU Law: Text, Cases and Materials*, Oxford University Press, 2008, 383.

<sup>56</sup> Case 465/07 *Elgafaji*, ECR 2009 P-0000, para 28, in H. Battjes, *European Asylum Law and its Relation to International Law*, Vrije Universiteit Amsterdam, 2006, 95.

<sup>57</sup> H. Battjes, *European Asylum Law and its Relation to International Law*, Vrije Universiteit Amsterdam, 2006, 86.

aim to implement directives or when they fall within the scope of directives or regulations.<sup>58</sup> Moreover, the discretion given to the Member States to implement Community acts does not absolve them from application of general principles.<sup>59</sup>

Therefore, if EC general principles are applicable, that essentially means that the acts/legislation must comply with it and this constitutes an enforceable obligation, as the ECJ, in the framework of Articles 230, 234 and 68 EC, is able to verify that compliance and declare a certain Community act invalid when it violates general principles.<sup>60</sup>

Hence, one can affirm that EC general principles represent grounds of review of Community acts and national acts in the scope of Community law, but they are also commonly used by the Court to interpret and supplement provisions of Community legislation.<sup>61</sup>

In the specific context of CEAS, EC general principles can be used to contest the referred instruments in Chapter 2, and their implementation in the Member States, as well as any national measure which falls within the scope of the provisions of those instruments.<sup>62</sup>

#### **4. Article 3 (2) of the Dublin Regulation: full discretion?**

The wording of Article 3 (2) suggests that Member States can use unlimited discretionary powers to decide in which situations they will make use of this provision. However, Member States, according to Article 3 (1) of the Dublin Regulation, have the duty to analyse the allocation criteria of the Regulation in order to assess whether they are fully responsible to take charge of a submitted application. If they are not, they may initiate the

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<sup>58</sup> Ibid., 90.

<sup>59</sup> Case C-540/03 *European Parliament v Council of the European Union*, ECR 2006 I-05769, para 70.

<sup>60</sup> M. Reneman, *Access to an Effective Remedy in European Asylum Procedures*, Amsterdam Law Forum, vol. 1, nr. 1, 2008, 68, [www.amsterdamlawforum.org](http://www.amsterdamlawforum.org).

<sup>61</sup> See, for instance, Case 222/84, *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary*, ECR 1986 P-01651, paras 19 and 28.

<sup>62</sup> C. Costello, *The European Asylum Procedures Directive in Legal Context*, 2006, 20, available at <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=4552f1cc2&query=cathryn%20costello>.

procedure to transfer the asylum-seeker to the responsible Member State<sup>63</sup>. This process is indispensable to the logic of the allocation system proposed by the regulation. It is necessary to grant its purpose and effectiveness. Therefore, as C. Filzweiser suggests<sup>64</sup>, the *effet utile* of Community law instruments constitutes an inherent limit to the use of Article 3 (2), which should be exceptional.

Moreover, the discretion given to the Member States under Article 3 (2) is limited by general principles of Community law, such as those derived from the jurisprudence of the ECtHR. The Regulation itself acknowledges that its creation observes the principles of the Geneva Convention<sup>65</sup> and *non-refoulement*.<sup>66</sup> In paragraphs 12 and 15 of the Preamble, it is asserted that Member States are bound by international obligations and also to fundamental rights, as designed in the Charter<sup>67</sup>, when applying the Regulation.

Such conclusion can also be derived from the jurisprudence of the ECJ. In the *Family Reunification* case<sup>68</sup>, the ECJ emphasized that fundamental rights form an integral part of the general principles of law, the observance of which the Court ensures, drawing inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories, namely the ECHR.<sup>69</sup> More strikingly, the Court also ruled that when exercising discretionary powers allowed by certain provisions of a Directive, Member States are still bound to ensure that general principles are complied with, namely fundamental rights.<sup>70</sup> From this assertion, the Court held that the Directive in question was not in breach of Community law and general principles.<sup>71</sup> The reason inherent to this conclusion is that the Directive did not

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<sup>63</sup> Article 17 (1) of the 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, *OJ L 50, 25.2.2003, p. 1–10*.

<sup>64</sup> C. Filzweiser, *The Dublin Regulation vs The European Convention of Human Rights – a Non-Issue or a Precarious Legal Balancing Act?* (2006), 10, available at <http://refugeelaw.qeh.ox.ac.uk/pdfs/christian-filzweiser-dublin-convention-dec-06.pdf>.

<sup>65</sup> 1951 United Nations Convention relating to the Status of Refugees, available at <http://www.unhcr.org/pages/49da0e466.html>.

<sup>66</sup> See footnote 63, para. 2 of the Preamble.

<sup>67</sup> Charter of fundamental rights of the European Union *OJ C 364, 18.12.2000, p. 1–2*.

<sup>68</sup> Case C-540/03 European Parliament v Council of the European Union, ECR 2006 I-05769.

<sup>69</sup> *Ibid.*, para 35.

<sup>70</sup> *Ibid.*, para 70.

<sup>71</sup> *Ibid.*, paras 60-62, 66, 70-73.

allow Member States greater discretionary powers than those already enjoyed under international obligations. Also, it did not impose obligations which would necessarily constitute a violation of general principles<sup>72</sup>. Therefore, Member States are equally bound by general principles of Community law, as derived from those international obligations, when using discretionary powers.

From this judgment, we can thus deduce that, when assessing whether they should make use of their of Article 3 (2) to retain an asylum-seeker in their territory, Member States do not hold an unlimited margin of appreciation, as they are bound by their international obligations and those derived from Community law, in the form of general principles, such as the ones derived from the ECHR.<sup>73</sup>

The question has particular interest as the ECJ might be able to provide its own judgment on the issue in the future. Given the fact that the Dublin Regulation, in Article 19 (2), imposes the possibility of judicial appeal against a decision to transfer asylum-seeker to another Member State, it is likely that the national courts are forced to interpret Article 3 (1) and (2) against human rights and general principles. As a consequence, one can foresee that a preliminary ruling may be submitted to the ECJ by a court of last instance, in accordance with Article 68 of the EC Treaty. This issue is discussed in greater detail in Chapter 9.

In the coming chapters I will, thus, analyse which principles might interfere with the Member States' discretion under Article 3 (2).

## 5. Principle of *Non-refoulement*

As previously stated, “*refoulement*” means “removal of an alien to a state where he runs a certain risk of being submitted to certain human rights violations”.<sup>74</sup> The prohibition of

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<sup>72</sup> Ibid.

<sup>73</sup> Also sharing this view: C. Filzwieser, *The Dublin Regulation vs The European Convention of Human Rights – a Non-Issue or a Precarious Legal Balancing Act?* (2006), 10, available at <http://refugeelaw.qeh.ox.ac.uk/pdfs/christian-filzwieser-dublin-convention-dec-06.pdf>

<sup>74</sup> H. Battjes, *European Asylum Law and its Relation to International Law*, Vrije Universiteit Amsterdam, 10,2006.

*refoulement* is present in several international instruments. The Geneva Convention<sup>75</sup>, for instance, refers to it in Article 33 (1):

“No Contracting State shall expel, return, or extradite a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular group or political opinion.”

The Convention against Torture (CAT)<sup>76</sup> also includes an explicit prohibition of *refoulement* in Article 3. The ECHR does not contain an express prohibition of *refoulement*, but an implicit one. Article 3 ECHR states: “no one shall be subjected to torture or to inhuman or degrading treatment or punishment”. Because of the absolute nature of the provision and its link with Article 1 ECHR, the Strasbourg Court established that the Contracting States are held liable under the Convention in the event of extradition or expulsion of aliens from their territory, whenever there are substantial grounds for believing that the person will face a real risk of being subjected to treatment contrary to Article 3 ECHR in another State.<sup>77</sup> Through this formulation, the ECtHR enshrined an absolute prohibition of *refoulement*.<sup>78</sup>

Once the ECHR is mentioned in Article 6 (2) EU and it remains the main source of inspiration of the ECJ to develop the scope of EC general principles, I will pay particular attention to the prohibition of *refoulement* as stated in the ECHR. First, however, it is opportune to address the question of whether the prohibition of *refoulement* is eligible to constitute a general principle of Community law and, in connection with that, binds the Member States directly *under* Community law.

### 5.1 Is *non-refoulement* a general principle of Community law?

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<sup>75</sup> 1951 Convention relating to the Status of Refugees, available at <http://www.unhcr.org/pages/49da0e466.html>.

<sup>76</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, available at [http://www.unhcr.ch/html/menu3/b/h\\_cat39.htm](http://www.unhcr.ch/html/menu3/b/h_cat39.htm).

<sup>77</sup> See ECtHR, *Soering v UK*, 07 July 1989, App. 14038/88, para 88.

<sup>78</sup> See ECtHR, *Chahal v UK*, 15 November 1996, App. 22414/93, para 80; ECtHR, *Saadi v Italy*, 28 February 2008, App. 37201/06, para 138.

Attending to the fact that the European Community (EC) has developed extensive legislation on asylum and that the relevant instruments mention the observance of *non-refoulement*<sup>79</sup>, it is possible to argue that the Community institutions themselves recognised, in first hand, the submission of their own acts to that principle and, for that reason alone, it is rather unquestionable that it constitutes an EC general principle. The fact that the principle of *non-refoulement* is recognised in several international human rights treaties also points to the fact that it is a general principle of Community law. Moreover, the EU Charter of Fundamental Rights<sup>80</sup> expressly recognizes the principle in Article 19 (2), incorporating the relevant case-law of the ECtHR.<sup>81</sup> This means that, Community institutions as well as Member States must take this prohibition into account, whenever implementing or acting in the context of Community law.<sup>82</sup> Even though the Charter does not have binding effect yet, the ECJ has already mentioned it as a source of inspiration to reaffirm and define the scope of fundamental rights and EC general principles in the abovementioned *Family Reunification* case.<sup>83</sup>

Hence, it is clearly arguable that the prohibition of *refoulement* constitutes a general principle of Community law. The relevance of this conclusion is obviously linked to the fact that the ECJ, as the ultimate guardian of fundamental rights in the European Union, will be able to review Community acts and Member States' implementation of those acts against the principle of *non-refoulement* and make sure that those acts comply with that principle.

## 5.2 Scope of protection

### *ECHR*

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<sup>79</sup> See, for instance, paragraph 8 of the Preamble of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals *OJ L 348, 24.12.2008, p. 98–107*; and also paragraph 2 of the Preamble of the 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, *OJ L 50, 25.2.2003, p. 1–10*.

<sup>80</sup> Charter of fundamental rights of the European Union *OJ C 364, 18.12.2000, p. 1–2*.

<sup>81</sup> H. Battjes, *European Asylum Law and its Relation to International Law*, Vrije Universiteit Amsterdam, 2006, 115.

<sup>82</sup> See footnote 80, Article 5 (1).

<sup>83</sup> Case C-540/03 European Parliament v Council of the European Union, ECR 2006 I-05769, para 38.

To understand the specific scope of protection offered by the principle of *non-refoulement*, as a general principle of EC law, one must take account to the way the ECtHR has perceived this principle and ensured its effectiveness in the Contracting States. This overview is necessary due to the abovementioned inspiration that the ECJ draws from the ECtHR's case-law to shape general principles of Community law and also because the Community instruments constituting the CEAS mention its compliance with the fundamental rights.

From the basic principle outlined at the beginning of the Chapter, the ECtHR developed certain requirements that the Contracting States should follow, so as to grant the effectiveness of the principle. Therefore, in order to determine the risk of violation of the ECHR, the national authorities must carry a highly individualised test, attending not only to the circumstances of the host state, but also to the specific situation of the person in question.<sup>84</sup> In *NA. v. UK*<sup>85</sup> the ECtHR recognised that the general situation in a country of origin may cause a real risk of *refoulement*: individualisation of the risk is not always necessary.

Moreover, the ECtHR has also established a prohibition of indirect *refoulement*, which typically relates to the situation of a State sending an asylum-seeker to another State (a “safe third country”), without assessing his/her claim. According to the judgment in *T.I. v UK*<sup>86</sup>, a State may send an asylum seeker to a third country in these conditions, if that country provides “effective procedural safeguards”<sup>87</sup> protecting the asylum-seeker from being deported to his country of origin. The danger of indirect *refoulement* also played a significant role in decision of *K.R.S. v UK*, where the ECtHR held that the UK would not breach the Convention by transferring an Iranian asylum-seeker to Greece, according to the Dublin Regulation. One of the underlying arguments for such decision was that there was evidence showing that Greece did not remove people Iran.

As a consequence, the sending State must carry out a detailed analysis to ensure that the third country is, indeed, safe in that sense. The sending State would only breach

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<sup>84</sup> See ECtHR, *Vilvarajah and Others v UK*, 30 October 1991, Apps 13163/87; 13164/87; 13165/87; 13447/87; 13448/87, para 108.

<sup>85</sup> ECtHR, *NA. v UK*, 17 July 2008, App. 25984/07, para 130.

<sup>86</sup> ECtHR, *T.I. v UK*, 07 March 2000, App. 43844/98.

<sup>87</sup> *Ibid.*, 16.

the Convention if, at the time of the transfer, it would be possible to find a real risk that the third country would expel the asylum-seeker to his country of origin, in breach of *non-refoulement*.<sup>88</sup>

### *ECtHR and the system of the Dublin Regulation*

Taking these developments into account, it is pertinent to question the position of the ECHR towards the system of the Dublin Regulation, namely the presumption of safety of all the Member States in Paragraph 2 of the Preamble.

The issue was indirectly approached in *T.I. v UK*, which concerned a transfer of an asylum seeker from the UK to Germany, according to the Dublin Convention. The ECtHR reiterated that the UK could not automatically rely on the arrangements of the Dublin Convention to escape responsibility to ensure that the removal of the asylum-seeker to another State would not breach its obligations under the ECHR<sup>89</sup>. This affirmation is followed by the traditional approach of the ECtHR towards actions of the Contracting Parties taken in the context of their participation in other international organisations:

“Where States establish international organisations, or mutatis mutandis international agreements, to pursue co-operation in certain fields or activities, there may be implications for the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention if Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution.”<sup>90</sup>

In line with this principle, the ECtHR stated recently, in *K.R.S. v UK*<sup>91</sup>, that “the asylum regime so created [by the Dublin Regulation] protects fundamental rights, as regards both the substantive guarantees offered and mechanisms controlling their observance”.<sup>92</sup> *K.R.S. v UK* referred to a transfer of an asylum-seeker from the UK to

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<sup>88</sup> Ibid., 17.

<sup>89</sup> Ibid., 15.

<sup>90</sup> Ibid., 15.

<sup>91</sup> ECtHR, *K.R.S. v UK*, 2 December 2008, App. 32733/08.

<sup>92</sup> Ibid., 10.

Greece under the Dublin Regulation. The applicant contested the transfer decision, relying on the abovementioned UNHCR report<sup>93</sup>, which included an express request to the Member States not to transfer asylum-seekers to Greece. While taking due account of the UNHCR position, the Strasbourg Court followed the reasoning initiated in *T.I. v UK*: the UK would not breach the ECHR by sending an asylum applicant to Greece because, until then, Greece did not expel and there is a presumption that Greece would abide to the Directives related to the CEAS and not remove asylum-seekers to a third country where they would face ill-treatment contrary to Article 3 ECHR.<sup>94</sup> On the other hand, it seemed clear to the ECtHR that asylum-seekers would find, in Greece, an effective remedy, to contest a deportation order to an unsafe country, namely an interim measure by ECtHR.<sup>95</sup> Moreover, the ECtHR attended to the fact that it would be possible for the asylum-seekers to complain under Articles 3 and 13 ECHR against Greece, if faced with a violation of those provisions by the Greek authorities.<sup>96</sup> The same arguments were used to reject the complaints about the conditions of detention in Greece, which could raise an issue of direct *refoulement*. The Strasbourg Court held, though, that the UK would not be held responsible under the ECHR in that regard, as “were any claim under the Convention to arise from those conditions, it should be pursued first with the Greek domestic authorities and thereafter in an application to this Court.”

In short, we could conclude that, when complying with the Dublin Regulation, the Member States should take due account to Articles 3 and 13 ECHR, despite the fact that there is a presumption that they do so, which the applicant must have the opportunity to rebut. Even though the Dublin Regulation does not contain a specific provision on this possibility, it is implied that each asylum-seeker will have an opportunity to rebut the presumption of safety when contesting the decision to transfer him/her to another Member State through Article 19 (2) and 20 (1) (e).

### 5.3 *Non-refoulement* and Article 3 (2) of the Dublin Regulation

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<sup>93</sup> UNHCR, *UNHCR Position on The Return of Asylum-Seekers to Greece Under The ‘Dublin Regulation’*, <http://www.europarl.europa.eu/document/activities/cont/200805/20080529ATT30342/20080529ATT30342EN.pdf>.

<sup>94</sup> ECtHR, *K.R.S. v UK*, 2 December 2008, App. 32733/0, 11.

<sup>95</sup> *Ibid.*

<sup>96</sup> *Ibid.*

It is opportune at this point to question whether compliance with the principle of *non-refoulement* can force Member States to make use of Article 3 (2) of the Dublin Regulation and avoid the transfer of an asylum-seeker according to that instrument.

Both previous cases analysed focused mainly on the issue of indirect *refoulement* – whether the sending State would breach the ECHR by removing the asylum-seeker to another Member State, where that person could be expelled to his/her country of origin. It is important, however, to address the question from the direct *refoulement* perspective, especially given the new judgment in *S.D. v Greece*<sup>97</sup>, where the ECtHR held a violation of Article 3 ECHR, due to the degrading conditions in the two detention centres for asylum-seekers where the applicant was detained.

In line with this new judgment, could we argue that it constitutes a decisive argument to rebut the presumption of safety among Member States stated in the Dublin Regulation? Arguably yes. Therefore, it is likely that, when faced with a decision of deportation to Greece from any Member State, the asylum-seeker should contest it on the ground that there is a risk he/she will be subject to treatment contrary to Article 3 ECHR. Quite likely, the question might arise to the ECtHR itself. Faced with its own judgment which declares a violation of the ECHR by Greece, it is possible that the Strasbourg Court re-thinks its own ruling in *K.R.S. v UK* and does not authorize a transfer decision to Greece under the Dublin Regulation, unless, of course, there are credible reports and guarantees from the Government, ensuring that the situation has changed in the meantime, and the risk of ill-treatment no longer exists. In this context, it is relevant to underline that, under the ECHR there are two distinct obligations: the obligation to provide adequate conditions in detention centres and effective remedies against violations of the relevant provisions to the host (responsible) Member State, but also the obligation of the transferring Member State to ensure that the removal of the asylum-seeker does not constitute *refoulement*. In the latter situation, while there is sufficient evidence that the host State consecutively breaches the ECHR, then the sending Member State would also breach the ECHR by deporting the asylum-seeker to that State.

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<sup>97</sup> ECtHR, *S.D. v Greece*, 11 June 2009, App. 53541/07

In addition, if we construe the principle of *non-refoulement* as a general principle of EC law in similar terms as the ECtHR has done, encompassing both prohibition of direct and indirect *refoulement*, one can defend that the sending Member State would breach Community law when sending the asylum-seeker to Greece. It would be desirable that the ECJ is asked to clarify its position on this issue. It might happen in the future, as it is possible for the person targeted with a transfer to Greece to contest that decision in the national courts, claiming the possible violation on *non-refoulement*. As the issue concerns Community instruments, the court of last instance might be compelled to make a Preliminary question to the ECJ according to Article 68 EC and ask what exactly is the scope of protection on *non-refoulement* in the Community legal order and its compatibility with the system created by the Dublin Regulation, in particular, with the use of Article 3 (2).

As a result, it is possible to affirm that, when faced with human rights obligations derived from the ECHR and Community law, Member States might be forced to make use of Article 3 (2) of the Dublin Regulation. Before taking the decision to transfer, the national authorities should, thus, make a detailed assessment on the conditions of detention in the responsible Member State, as well as the real opportunities to seek an effective remedy against those conditions. Those authorities should also make sure that the receiving State provides sufficient procedural safeguards to avoid an expulsion which would amount to *refoulement*.

## **6. Right to Asylum**

The right to asylum could be described as the right of someone who fulfils the criteria available in international treaties or European law to be granted international protection, either in the form of refugee status or in the form of subsidiary protection.

### 6.1 Is the right to asylum a general principle of Community law?

The Geneva Convention and the ECHR do not grant the right to asylum.<sup>98</sup> However, when it comes to Community law, one can defend that the right to asylum constitutes the entitlement to an asylum status to someone in need of protection, which is offered by a Member State, when that individual fulfils the criteria laid down in the Qualification Directive.<sup>99</sup> That status entails also secondary rights, in accordance with the Directive.<sup>100</sup> That same feature establishes the difference between the right to asylum and the principle of *non-refoulement*: while the first entails a certain standard of protection, the other imposes a mere prohibition of expulsion.<sup>101</sup>

For the purpose of interpreting the right to asylum and understand its content in Community law, one should take account to the Charter of Fundamental Rights, which establishes, in Article 18:

“The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community.”<sup>102</sup>

As the Advocate General Poiares Maduro declared in his Opinion in the *Elgafaji* case<sup>103</sup>, the Charter, which cannot at this point be relied upon by individuals to claim fundamental rights, could be used as an instrument of interpretation of Community legislation, especially when that legislation regulates the access to certain a right – in that sense, “the Charter provides a particularly useful instrument for determining the content, scope and meaning to be given to that right”.<sup>104</sup> Moreover, the Commission has acknowledged that “it can reasonably be expected that the Charter will become mandatory through the

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<sup>98</sup> ECtHR, *Vilvarajah and Others v UK*, 30 October 1991, Apps 13163/87; 13164/87; 13165/87; 13447/87; 13448/87, para 102, in H. Battjes, *European Asylum Law and its Relation to International Law*, Vrije Universiteit Amsterdam, 2006, 112.

<sup>99</sup> Article 13 and 18 of the Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, *OJ L 304*, 30.9.2004, p. 12–23.

<sup>100</sup> Chapter VII of the Qualification Directive, as referred in the previous footnote.

<sup>101</sup> *Ibid.*

<sup>102</sup> Article 18 of the Charter of fundamental rights of the European Union *OJ C 364*, 18.12.2000, p. 1–2.

<sup>103</sup> Opinion of Mr Advocate General Poiares Maduro delivered on 9 September 2008, on Case 465/07 *Elgafaji*, ECR 2009 P-0000, para 21.

<sup>104</sup> *Ibid.*

Court's interpretation of it as belonging to the general principles of Community law.”<sup>105</sup> However, despite this relevance, the Charter does not provide a strong indication that the right to asylum should take part of EC general principles, given the fact that the provision does not clarify the content of the right in the Community and mentions the Refugee Convention, which, as previously stated, does not grant a right to asylum status.

As a consequence, the Qualification Directive must be considered in this context, as it “pursues the objective of developing a fundamental right to asylum which follows the general principles of Community law which, themselves, are the result of constitutional traditions common to the Member States and the ECHR”.<sup>106</sup> The Preamble of the Directive itself refers the compliance with the Charter in Recital 10, where it is determined that the Qualification Directive “seeks to ensure full respect for human dignity and the right to asylum”.<sup>107</sup> According to the ECJ’s case-law, general principles may also be derived from Community legislation.<sup>108</sup> If we consider this principle and criteria adopted in the Qualification Directive to provide clear access to that right, one can defend that the right to asylum takes part of general principles of Community law that Member States must abide to.

Furthermore, the fact that the ECHR does not grant a right to asylum should not be an impediment for such conclusion. As stated in Chapter 3, the ECJ stated in the *Elgafaji* case<sup>109</sup>, that even though the Community legal order is bound to respect fundamental rights and general principles which the ECJ ensures by taking special consideration to the standard of protection of the ECtHR, the Community legal order is

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<sup>105</sup> Communication on the legal nature of the Charter of Fundamental Rights of the European Union (COM(2000)644final of 11 October 2000), available at [http://eur-lex.europa.eu/smartapi/cgi/sga\\_doc?smartapi!celexplus!prod!CELEXnumdoc&numdoc=52000DC0644&lg=en](http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&numdoc=52000DC0644&lg=en), in H. Battjes, *European Asylum Law and its Relation to International Law*, Vrije Universiteit Amsterdam, 2006, 116.

<sup>106</sup> *Ibid.*

<sup>107</sup> Paragraph 10 of the Preamble of the Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, *OJ L 304*, 30.9.2004, p. 12–23.

<sup>108</sup> See T-228/02, *Organization des Modhahedines du peuple d’Iran v. Council* *OJ C 331*, 30.12.2006, p. 28–28, para 149; see also T-47/03, *Sison* *OJ C 269*, 10.11.2007, para 204.

<sup>109</sup> Case 465/07 *Elgafaji*, ECR 2009 P-0000, para 28.

an autonomous one. In that sense, the scope of protection of fundamental rights can be different and, particularly, more favourable than the one provided by the ECHR.<sup>110</sup>

Hence we can conclude that the right to asylum is likely to form part of the EC general principles, as a fundamental right which the ECJ is able to enforce.

Verwijderd: .

## 6.2 Scope of protection

More complicated to determine is certainly the specific scope of the referred principle and its implications. An extreme reading of the right to asylum as the prerogative of someone who applies for asylum in one Member State and fulfils the criteria set in the Qualification Directive would imply that the Member State should make a substantial assessment of the case and grant asylum, not being able to expel the person to a third country or transfer him/her to another Member State according to the Dublin Regulation. However, that is not the reading desired to the right to asylum. First, as H. Battjes notices, Article 18 of the Charter does not impose on the Member States an obligation to “grant” asylum, but to “guarantee” asylum in accordance with the Geneva Convention and the EC Treaty. Secondly, the application of the Qualification Directive must be harmonised with the application of the Procedures Directive, as both of them are applicable to the asylum applications in the responsible Member State. As previously stated, the Procedures Directive allows Member States to make use of “safe third country” derogations. That implies that the use of “safe third country” presumptions is allowed as a general practice of international law and it also implies that Member States are not obliged to make a substantial assessment of the case to ascertain whether the person has the right to asylum. Hence the right to asylum does not have an absolute nature, as it is possible, under international and European law, for a State to derogate that right to an asylum-seeker. This derogation, however, is not itself unlimited.

The transfer of an asylum-seeker according to the Dublin Regulation should not affect the right to asylum. The sending Member State must make sure that the right to asylum is effective, if the person transferred fulfils the criteria set in the Qualification Directive to be entitled to refugee status or international protection in the responsible

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<sup>110</sup> Ibid.

Member State, in order to “guarantee” it. This does not imply that the sending Member State must make a preliminary assessment or check whether the person in question is liable to fulfil those criteria. It means that the sending must make sure that the responsible Member State will afford opportunities to the asylum-seeker to make his/her claim taken into consideration. That presupposes, first, that the responsible Member State must provide an asylum procedure conducive to the granting of a durable solution, which means that the asylum-seeker must be able to show evidence that his/her situation claims for international protection. The access to an asylum procedure is, thus, instrumental to the effectiveness of the right to asylum. Secondly, the responsible Member State must be able to provide adequate protection, with appropriate secondary rights.<sup>111</sup> The State must also grant asylum status when the conditions for qualification are fulfilled.

### 6.3 The right to asylum and Article 3 (2) of the Dublin Regulation

The remaining question seems to be, then, whether the right to asylum, as previously indicated, is liable to limit the Member States’ discretion when making use of Article 3 (2) of the Dublin Regulation. The pertinence of the question relates to the rates of recognition of asylum status to applicants in Greece. As the UNHCR has reported, out of the 25,113 new registered asylum-seekers in the country, only eight were granted asylum, which corresponds to a recognition rate of 0,04. This rate is “disturbingly low” when compared to the one of other Member States with similar number of applications, which have granted asylum in rates between 20% and 56%.<sup>112</sup> Certainly, one can assume that, among all the asylum-seekers sent to Greece, there should be a much higher rate of recognition. This leads to the conclusion that, as the situation stands now, Greece likely fails to grant the right to a durable solution to thousands of asylum-seekers, including the “Dublin returnees”.

Should the acknowledgement of the low rates of recognition in Greece have an impact when another Member State initiates the procedure to transfer an asylum-seeker to

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<sup>111</sup> H. Battjes, *European Asylum Law and its Relation to International Law*, Vrije Universiteit Amsterdam, 2006, 114.

<sup>112</sup> UNHCR, *UNHCR Position on The Return of Asylum-Seekers to Greece Under The ‘Dublin Regulation’*, [http://www.europarl.europa.eu/document/activities/cont/200805/20080529ATT30342/20080529ATT30342\\_EN.pdf](http://www.europarl.europa.eu/document/activities/cont/200805/20080529ATT30342/20080529ATT30342_EN.pdf).

that country? Could the acknowledgement of the situation of asylum-seekers arriving in Italy from Libya have interference in the decision to transfer an asylum-seeker to that State? Arguably yes, due to a possible violation of the right to asylum, as it was previously defined. By sending the applicant to Greece, the Member State could breach the obligation to ensure the right to asylum, as it is demanded by Community law.

One could say that it is exclusive responsibility of the host Member State to ensure that the right to asylum is complied with and the sending that the Member State should not be held liable in that regard. While I think that the host State has a clear obligation, under Community law, to ensure the right to asylum, I also believe that the system created by the Dublin Regulation cannot be insensitive towards the effectiveness of fundamental rights. A situation where Member States are allowed to transfer asylum-seekers to States where their fundamental rights are consistently not safeguarded would be unacceptable in a system which is bound to ensure full observance of fundamental rights and general principles of Community law.

Besides, the insertion of the Article 3 (2) in the Regulation might have resulted from prior concerns relating to these situations. Member States were, therefore, through Article 3 (2), given a possibility to avoid eventual violations of fundamental rights. The only way to harmonise the system of the Dublin Regulation with a serious guarantee of fundamental rights is by giving sending Member States the obligation to refrain from sending applicants to other States, where there is a risk that they will not be granted with international protection.

This matter could also come to be subject of interpretation by the ECJ, through the same means as the principle of *non-refoulement*: an asylum-seeker, when faced with a transfer decision to Greece, can claim that such transfer violates the Member States' obligation to guarantee the right to asylum; therefore, the Member State in question should make use of Article 3 (2) to take charge of the case. The question could, then, arise to the ECJ through Article 68 EC. The ECJ could be asked by the national court whether, indeed, there's such a fundamental right to asylum in the Community legal order, as taking part of the general principles of law which the ECJ ensures. If so, the national court may also question the ECJ as to whether the compliance with such fundamental right implies that the Member State is prevented from transferring an

asylum-seeker to Greece and hence obliged to make use of Article 3 (2) of the Dublin Regulation.

## 7. Access to Asylum Procedure

The access to the asylum procedure holds an extreme relevance, given that it is instrumental to the effectiveness of the prohibition of *refoulement* and the right to asylum. In order to show evidence that an asylum-seeker fulfils the requirements to be granted with international protection or that the expulsion to his/her country of origin would amount to *refoulement*, the asylum seeker must have an opportunity to initiate the procedure with the competent authorities and this obligation must be complied with both in legislation and in practice. This means that, even if the Member States provide legislation which grant procedural rules for asylum applications, the authorities should not act in a way that makes those rules void in practice.

### 7.1 Is the access to asylum procedure a general principle of Community law?

Article 6 (2) of the Procedures Directive clearly defines an obligation for the responsible Member States to “make sure” that adult asylum-seekers have the opportunity to make an application. This obligation applies to both aliens arriving from third countries and “Dublin-returnees”. In connection to paragraph 2, paragraph 5 of Article 6 also clarifies that:

“Member States shall ensure that authorities likely to be addressed by someone who wishes to make an application for asylum are able to advise that person how and where he/she may make such an application and/or may require these authorities to forward the application to the competent authority.”<sup>113</sup>

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<sup>113</sup> Article 6 (5) of the Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals *OJL 348, 24.12.2008, p. 98–107*.

This paragraph shows how the Procedures Directive imposes on Member States the duty to grant that access to asylum procedure is effective, which is confirmed by that fact that both paragraphs 2 and 5 do not allow possibilities of derogation.

Moreover, the Dublin Regulation makes reference to the access to an asylum procedure as well. In Recital 4, it is mentioned that the Regulation should create a method, which

“should, in particular, make it possible to determine rapidly the Member State responsible, so as to guarantee effective access to the procedures for determining refugee status and not to compromise the objective of the rapid processing asylum applications.”<sup>114</sup>

Article 16 (1) (b) of the same instrument imposes the obligation for the responsible Member State to complete the examination of the applicant for asylum, which, again, denotes the need to grant access to the procedure.

In addition, one could also name the Community right to asylum, explicit in Article 18 of the Charter of Fundamental Rights, as requiring implicitly the effectiveness of the access to asylum procedure, once it constitutes a necessary step to grant the right to asylum.

Because it is present in the CEAS legislation and in the Charter, and also because it represents an instrumental step to the formulation of *non-refoulement* and the right to asylum, the access to asylum procedure is liable to constitute a general principle of EC law.

## 7.2 Scope of Protection

The access to an asylum procedure does not require, though, a necessary substantial assessment of the applicant’s claim. It merely requires that the alien is able to make an application for asylum. As seen before, it is possible for Member States to apply the “safe third country” concepts to send the aliens to other States, as long as such

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<sup>114</sup> Paragraph 4 of the Preamble of the 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, *OJ L 50, 25.2.2003, p. 1–10*.

expulsion is in accordance with international instruments and with the obligation to “guarantee” the right to asylum. This conclusion also applies for “Dublin-returnees”, as the Procedures Directive applies whenever they are received by the responsible Member State and that instrument allows a subsequent transfer to another country.<sup>115</sup>

After this preliminary remark, in order to figure the concrete scope of the principle in Community law, attention must be paid to Article 6 (2) and (5) of the Procedures Directive, which is an instrument that binds Member States and more directly approaches the principle. As the deadline for transposition of the Directive has already expired, the underlying question related to those provisions is whether they entail direct effect.

If those provisions produce direct effect, it means that, according to the principle of supremacy of Community law, individuals can rely on them before national courts, in order to set apart national measures contrary to them. The fact that the EC asylum legislation provides mostly for minimum harmonisation does not impede the creation of direct effect by some of its provisions.

The traditional test to ascertain whether a determined provision entails direct effect consists of three requirements: the provision must be sufficiently precise (must set a clear obligation to the Member State), it must not require the adoption of further measures on the part of the Community or national authorities and leaves them, in relation to its implementation, no discretionary powers.<sup>116</sup> We must, then, apply this criteria to Article 6 (2) and (5) of the Procedures Directive.

In my view, it is clear that these provisions set a clear goal: to afford asylum seekers with effective access to asylum. This is confirmed by the verb used – “shall” – which implies a clear obligation, instead of the verb “may” used in other provisions of the directive, which allow powers of choice to the Member States. Therefore, the obligation is, in my opinion, sufficiently precise. As to the other requirements, one can argue that the provisions in analysis do require implementation on the part of the Member States and some discretionary powers in that task. Member States must create means to afford

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<sup>115</sup> Articles 23, 24 and 25 of the Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals *OJ L 348, 24.12.2008, p. 98–107*.

<sup>116</sup> Case 41/74 Van Duyn ECR 1974 P-01337, paras 6 and 12.

asylum-seekers with opportunities to apply for asylum and have, moreover, several possibilities to grant the effectiveness of such obligation.

Do these features prevent direct effect? Arguably, they do not. Provisions that allow some discretion in their implementation do not necessarily block direct effect<sup>117</sup>, especially when they set a clear obligation of result.<sup>118</sup> This is, I believe, the case of paragraphs (2) and (5) of Article 6 of the Procedures Directive. Therefore, I would argue that asylum-seekers may rely on the Procedures Directive to claim that either Greece or Italy failed to fulfil their obligations under Community law. Having regard to what has been said, one can assume that Member States have the legal duty to ensure access to asylum procedure for all asylum-seekers, including the “Dublin-returnees”.

### 7.3 Access to Asylum Procedure and Article 3 (2) of the Dublin Regulation

In Chapter 2, I referred to several problems occurring in Greece and Italy related to access to asylum procedure for “Dublin returnees”. It can be recalled that in Greece, access to asylum procedure is barred in practice due to very extensive periods of wait for an asylum officer as well as due to the alleged practice of interrupting procedures when applicants leave the country without notice, which clearly leaves “Dublin Returnees” without access to an examination. Furthermore, one can presume that access to a procedure is barred in Italy, at least for applicants arriving from Libya, because of the Agreement established between that country and Libya.

Does the acknowledgement of these facts influence the decision of Member States to send asylum-seekers? It should so. The lack of access to a proper asylum procedure might trigger serious violations of Community law and international law, as it might give rise to *refoulement* and ineffectiveness of the right to asylum. Therefore, Member States should, once more, make use of Article 3 (2) whenever there is evidence that the host Member State does not grant, whether in law or practice, an effective access to a

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<sup>117</sup> H. Battjes, *European Asylum Law and its Relation to International Law*, Vrije Universiteit Amsterdam, 2006, 540.

<sup>118</sup> Case C-476/01 Criminal proceedings against Felix Kapper, ECR I-5205, in P. Craig & G. de Burca, *EU Law: Text, Cases and Materials*, Oxford University Press, 2008, 281.

procedure, carried out by a competent and authority, which meets the requirements of Article 6 (2) and (5) of the Procedures Directive.

The question might arise to the ECJ in the same manner as the right to asylum: through a preliminary reference based on Article 68 EC, both in the judicial procedure against a transfer decision and in a judicial procedure against the responsible Member State. The national court might ask the ECJ whether the access to asylum procedure is a right which asylum-seekers can rely upon in the current state of Community law. This question is related the possible direct effect of Articles 6 (2) and (5) of the Procedures Directive. If the ECJ agrees that those provisions entail direct effect, then the Member States must refrain from acting in a way that jeopardizes their purpose. Individuals can rely on them to either prevent a transfer to a country where the access to a procedure is not granted.

The clear delimitation of the principle, in terms of its binding nature for both sending and host State, is difficult to define. The problem is similar to the one previously discussed in Chapter 6.3 regarding the right to asylum. Is it really possible to defend that the sending Member State should be responsible to ensure that other Member States comply with this principle? In my view, an eventual responsibility should only arise when it is possible for the sending Member State to avoid that the asylum-seeker is exposed to a violation of the right to access the asylum procedure in the host State. Only in these circumstances, when it is possible to ascertain, at the time of the transfer decision, that the responsible State consistently disregards its obligations under Community law, should the sending Member State be obliged to make use of Article 3 (2).

Could the sending Member State ask the receiving Member State for assurances that the asylum application of the person concerned will be examined? Such cooperation between the sending and receiving authorities could exist, but on the overall, it does not grant a viable solution to the applicants, as it is merely an occasional assurance by the host administration which does not have legal nature. It would also be easy, for the receiving Member State to initiate a procedure which, in practice, is not adequate, leaving the applicant waiting for a substantial assessment for years, as it happens in Greece

according to the UNHCR report.<sup>119</sup> The non-compliance with the procedural requirements would then be difficult to contest by the asylum-seeker. Furthermore, in the case that such assurances become a practice, it would be difficult for the host Member State to comply with them, if the availability of personnel and administrative conditions are not *de facto* improved.

This high level of responsibility is justified by the fundamental nature of the access to asylum procedure. Without a procedure, it would not be possible to ascertain whether a certain person is truly entitled to international protection. Moreover, the procedure is conducive to knowing whether the expulsion of a person to his/her country of origin constitutes *refoulement*. If there's no procedure at all, it is likely that arbitrary expulsion of certain persons result in breach of the principle of *non-refoulement*.

In addition, Article 3 (1) of the Dublin Regulation imposes that at least one Member State should be responsible to examine an application. If the responsible Member State according to the provided criteria does not grant this prerogative, then Article 3 (2) should provide a safeguard in that regard, by obliging the Member State to initiate the procedure itself.

As a consequence, in a preliminary reference submitted by the national court which has before itself an action against a transfer decision of an asylum-seeker to Greece/Italy, it is possible that the ECJ obliges the national court to quash the transfer decision and recommend the national authorities to refrain from sending the asylum-seeker to Member States where, according to the evidence shown, compliance with minimum requirements set by the Procedures Directive is not granted. In that situation, the sending Member State must be compelled to make use of Article 3 (2) of the Dublin Regulation.

## **8. Burden and Standard of Proof**

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<sup>119</sup> UNHCR, *UNHCR Position on The Return of Asylum-Seekers to Greece Under The 'Dublin Regulation'*, 3, available at [http://www.europarl.europa.eu/document/activities/cont/200805/20080529ATT30342/20080529ATT30342\\_EN.pdf](http://www.europarl.europa.eu/document/activities/cont/200805/20080529ATT30342/20080529ATT30342_EN.pdf).

It is interesting, at this point, to discuss the issue of proof, which pragmatically arises whenever an asylum-seeker wishes to challenge an order of transfer from one Member State to another in the national courts, regardless of the substantial claims against that decision (such as the violation of *non-refoulement*, right to asylum, access to asylum procedure, etc).

First and foremost, given that there is a presumption of safety in the Dublin Regulation<sup>120</sup> (which, in a broad interpretation, means safety from *refoulement* and violation of other fundamental rights), it is for the asylum-seeker faced with a transfer decision to carry the burden of proof. He/she must accordingly show evidence that the removal to a certain Member State is capable of violating his/her fundamental rights and thereby try to rebut the presumption of safety. On what kind of evidence should the applicant then rely on?

The reports elaborated by accredited organisations seem to be one of the main sources of information to ascertain the specific situation in a certain State. They remain the main sources of evidence used by the Strasbourg Court whenever it analyzes whether a country of origin is safe for a certain asylum-seeker. In rulings like *NA. v UK*<sup>121</sup>, *Salah Sheekh*<sup>122</sup> and *Vilvarajah*<sup>123</sup>, the ECtHR relies on reports provided by international organisations such as the UNHCR, Amnesty International, Human Rights Watch, Médecins sans Frontières, etc. These judgments also rely on State reports and submissions from Governments, but it is likely that these will not be available regarding human rights' situations in other Member States, given the presumption of safety. National courts can, therefore, follow the steps of the Strasbourg Court and take particular regard to reports published by international organisations in order to assess the situation in the responsible Member State.

In the particular context of Community law, reports from the Commission and the European Parliament regarding the implementation of instruments adopted in the context

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<sup>120</sup> Paragraph 2 of the Preamble of the 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, *OJ L 50, 25.2.2003, p. 1-10*.

<sup>121</sup> ECtHR, *NA. v UK*, 17 July 2008, App. 25984/07.

<sup>122</sup> ECtHR, *Salah Sheekh v NL*, 11 January 2007, App. 1948/04.

<sup>123</sup> ECtHR, *Vilvarajah and Others v UK*, 30 October 1991, Apps 13163/87; 13164/87; 13165/87; 13447/87; 13448/87.

of CEAS could be useful to detect failures of implementation in determined Member States, but in this regard they are not very helpful, since normally the reports do not mention which Member States show difficulties of implementation.<sup>124</sup>

A relevant source of evidence concerning a breach of fundamental rights' standards imposed by EC instruments of CEAS and general principles could be a judgment of the ECJ in the context of an enforcement action (Article 226 EC) brought by the Commission, where the ECJ declares a failure of the Member State to implement Community obligations. In these rulings, the ECJ normally decides based on the reasoned opinion provided by the Commission, which normally describes on what grounds the Member State failed to comply with Community obligations, and the submissions of the Member State. Such appraisal by the ECJ could undoubtedly be a decisive weapon, when an asylum-seeker is trying to show the national court that the Member State where he/she is being sent to does not grant his/her rights.

Another question related to the relevance of enforcement actions in the context of asylum is whether the national authorities have a duty not to send an asylum-seeker to a Member State against which the Commission initiated an enforcement procedure in the ECJ. In my view, such initiative should not, itself alone, determine the obligation not to transfer or the obligation to the national courts to quash a transfer decision. While it certainly might cause a more detailed and careful approach of the situation in the responsible Member State, the national authority/court should be granted with specific information regarding the claims of the Commission and on the specific risk that the asylum-seeker might be deprived of his/her fundamental rights in that State. Moreover, the fact that the Commission initiates a procedure in the ECJ against a Member State does not prevent it from retracting it in the course of proceedings, given a possible change of circumstances in the Member State.

If, on the other hand, there is a decision from the ECJ which declares a violation of Community standards of protection by a Member State, then the national authorities should refrain from sending the applicant to that State, unless there's credible evidence

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<sup>124</sup> See, for instance, Report from the Commission to the European Parliament and the Council on the evaluation of the Dublin system {SEC(2007) 742} /\* COM/2007/0299 final \*/ ; Report on the implementation in the European Union of Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers and refugees: visits by the Committee on Civil Liberties 2005-2008 (2008/2235(INI)).

that, since the judgment, the Member State in question conformed to its obligations under Community law.

## **9. Judicial review from the ECJ**

Throughout this text, I have mentioned occasionally how certain legal questions can ever be brought to the appraisal of the ECJ. It is relevant, in that sense, to analyse in greater detail the procedural steps necessary to obtain a ruling on these issues, taking into account the judicial review system proposed by the EC Treaty, as well as the eventual standard of review by the ECJ.

### **9.1 General Remarks**

The European Union, through Article 6 (2) and deriving inspiration from Articles 6 and 13 ECHR, is bound by the principle of effective judicial protection, which determines that a person should be always allowed to seek judicial protection of the rights they derive from the Community legal order.<sup>125</sup>

Taking into account the system of legal remedies available in the EC Treaty, asylum-seekers are barred from accessing directly the Luxembourg Courts (Court of First Instance and ECJ) to seek protection of their rights, essentially because they lack standing under Articles 230 and 232 EC.<sup>126</sup> As a result, asylum-seekers should contest decisions from national authorities regarding their application in the national courts, where they are able to claim Community rights and general principles. Regarding domestic procedures, the ECJ has developed three important principles: procedural autonomy, effectiveness and equivalence.

The principle of procedural autonomy determines that Member States are allowed discretion to shape their own procedural rules governing access to courts and protection of Community rights. However, such autonomy is limited by the principle of

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<sup>125</sup> Case C-55/00 P *Unión de Pequeños Agricultores*, ECR 2002 I-06677, paras 38 and 39.

<sup>126</sup> H. Battjes, *European Asylum Law and its Relation to International Law*, Vrije Universiteit Amsterdam, 2006, 557.

effectiveness, which means that procedural rules must provide means to enforce Community rights.<sup>127</sup> Procedural autonomy is also limited by the principle of equivalence, which establishes that national procedural rules cannot make the plea and enforcement of Community rights more difficult than the enforcement of rights derived from domestic laws.<sup>128</sup>

When it comes to national pleading of Community law, Article 234 EC enables the intervention of the ECJ, which is made through a Preliminary Ruling – the national courts can submit questions of interpretation of the Treaty and secondary legislation to the Luxembourg Court. The ECJ, through its ruling, offers guidance to the interpretation of Community law, granting thereby its uniform application and binding nature.

## 9.2 Article 68 EC

Article 68 (1) EC presents a more restricted possibility of approach to the ECJ, when compared to Article 234 EC: instead of “any” court, only national courts whose decisions cannot be subject to appeal can submit questions of interpretation and validity of Community law to the ECJ .

Therefore, in national proceedings against a decision of transfer of an asylum-seeker to another Member State pursuant to the Dublin Regulation, only when the case reaches a court whose ruling, in that specific case, cannot be subject to further judicial review, it is possible to refer a question to the ECJ.<sup>129</sup> As a consequence, national courts of lower instances are free to interpret Community instruments

Another issue regarding Article 68 EC concerns the margin of discretion of the national court to refer a question to the ECJ. Attending to the wording of the Article, and given that the ruling in question would not be subject to review, one can presume that, whenever there is a certain doubt regarding the application of Community law, the national court must refer a question to the ECJ. If the Court fails to do so, one could argue in this respect that the case-law of the ECJ regarding Article 234 EC could apply to Article 68 EC as well - both Articles form the same mechanism to ensure the uniform

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<sup>127</sup> Ibid., 555

<sup>128</sup> Ibid.

<sup>129</sup> Ibid., 577

application and interpretation of EC law. When the question is submitted by a court of last instance, the ruling from the ECJ is, moreover, the ultimate chance for applicants to obtain adequate protection of their rights derived from the Community legal order. Attending to the fact that this function is present in both Articles 234 EC and 68 EC, the principles underlined in the Köbler case<sup>130</sup> regarding 234 EC might apply to Article 68 EC as well. In this case, the ECJ insisted that courts of last instance do have a special duty to refer questions to the ECJ whenever the interpretation or application of Community rules raises doubts in certain proceedings. The failure to comply with such obligation may give rise to state liability.<sup>131</sup>

### 9.3 Review by the ECJ

Following these principles, and as it has been previously stated, it is possible that a question regarding the interpretation of the Dublin Regulation might arise to the ECJ. As previously stated, once a transfer decision would be made in accordance with the Dublin Regulation, the issue falls within the scope of Community law and is therefore amenable to review by the ECJ.

H. Battjes states<sup>132</sup>, in a particular note, that the ECJ is not competent to review acts related to domestic application of Article 3 (2). According to the referred author, such provision does not confer the right to examine an application, it merely confirms such sovereign right; therefore, the use of Article 3 (2) falls outside the scope of Community law. As initially explained in Chapter 4, I tend to disagree with such construction, as I understand that the Dublin Regulation does oblige Member States to transfer asylum-seekers to the responsible Member State according to the provided criteria. If Member States would constantly ignore such obligations, the whole purpose of the regulation would be undermined, as well as the objectives of the CEAS. In this perspective, Article 3 (2) is derogation from those obligations, it gives Member States the

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<sup>130</sup> Case C-224/01 Köbler ECR 2003 I-10239.

<sup>131</sup> Ibid., paras 34 – 36.

<sup>132</sup> H. Battjes, *European Asylum Law and its Relation to International Law*, Vrije Universiteit Amsterdam, 2006, 569.

ability to examine the application in spite of not being responsible. Such derogation falls, as a consequence, in the scope of Community law.

In any way, even if such construction is not accepted, I do not think that the matter cannot be brought to the ECJ for that reason. The same issue can be subject to review by the ECJ, when seen through another perspective: on what extent the referred general principles can limit the ability of the sending Member State to proceed with a transfer. If such transfer, which undeniably falls within the scope of EC law, is liable to threaten the applicant's fundamental rights, is it legal? When approached through this perspective, the ECJ would not necessarily interpret Article 3 (2).

#### 9.4 The procedure and possible preliminary questions to the ECJ

The likely scenario would consist of judicial proceedings against a transfer decision to Greece or Italy for instance, through which the asylum-seeker could claim Community rights and general principles, such as those previously invoked. While proceedings remain in lower instance courts, the judicial authorities are free to make their own interpretation of Community law, given the lack of access to the ECJ. If the case reaches the last instance court, or a lower court whose decision in that specific case cannot be subject to appeal, then the court should refer questions of interpretation of the Dublin Regulation.

I would like to stress that, in my opinion, the questions which might arise from a case like this would not concern the validity of the Dublin Regulation itself. Even if the national court is convinced that the transfer of an asylum-seeker in the circumstances described above, while being an obligation under the Regulation also violates EC general principles, the Regulation never forces that State to breach EC general principles, given Article 3 (2), which represents a safeguard clause.

As a result, the questions which might arise in a case like this would concern, first, the specific scope of protection granted by *non-refoulement*, right to asylum and access to asylum procedure in the Community legal order. Secondly, the national court could ask on what terms exactly those principles bind the Member States when deciding to transfer an asylum-seeker to another Member State. Thirdly, the national court could ask the ECJ

on what grounds the alleged violations of those principles in another Member State might prevent the national authorities' decision to transfer. More directly, the national court could ask for an interpretation of Article 3 (2) of the Dublin Regulation, taking into account the binding nature of EC general principles. Does the violation of EC general principles and Community rights in the host Member State prevent the transfer of the asylum-seeker?

The answer to these questions would likely provide the national court with the necessary guidance to decide whether it should quash the contested transfer decision or not.

### **Conclusion**

Throughout this study, I have discussed a set of issues related to the main concern of this text: to ascertain whether and to what extent the legal obligations deriving from Community law, namely from general principles, would limit the Member States' discretion in the decision of transferring an asylum-seeker to another Member State.

I started by defending that EC general principles are applicable to national measures which fall within the scope of application of the CEAS' instruments, including, for instance, transfer decisions according to the Dublin Regulation and also decisions to examine the application under Article 3 (2). The most important consequences of this finding are the fact that national authorities should take these principles into account when proceeding with a transfer and that the national courts and the ECJ will have jurisdiction to analyse the conformity of these decisions with general principles of Community law.

Moving to the specific principles which could interfere with a decision under Article 3 (2) and which could serve as grounds of review of a transfer decision, I concluded, first, that the principle of *non-refoulement*, the right to asylum and access to an asylum procedure can be considered general principles of Community law, for different reasons.

While assessing whether a transfer decision constitutes direct or indirect *refoulement*, national authorities must, therefore, pay attention to the development of the principle in the ECtHR's case-law, which, at this point, is the main source of guidance in the Community legal order, given the lack of case-law of the ECJ on this issue.

Concerning the right to asylum, while being a general principle, it can be derogated in a restrictive manner by the Member States: they must check whether the granting of such right is effective in the host State.

When analysing the access to asylum procedure, I also concluded that it is a fundamental right in the Community, on which asylum-seekers can rely on to contest a transfer decision to a State that does not grant such access.

On a more practical note, I also concluded that asylum-seekers carry the burden of proving that a certain transfer would constitute a violation of EC general principles and also that the ECJ might provide its own assessment through a Preliminary Ruling under Article 68 EC.

Reaching this stage, it is possible to defend that, in the circumstance where the asylum-seeker would be deprived of such prerogatives in the responsible Member State, national authorities are forced to make use of Article 3 (2) and take charge of the application, by proceeding with a substantial assessment of the application. In my view, this is the only way to conform the system of the Dublin Regulation to an effective and credible protection of fundamental rights, although it would be exciting to have a judgment of the ECJ in the future clarifying this discussion.

On a general comment, I share the concerns expressed by authors and institutions<sup>133</sup> regarding the unfair administrative burden carried by the Mediterranean States (as Greece and Italy) as a consequence of the Dublin system, resulting from the bigger geographic exposure to the illegal entrance of immigrants. It might partially justify the lack of personnel and infrastructure to meet the required standards, but it cannot be held to deny applicants their basic rights. While it is true that these States should comply with the minimum requirements set in the Asylum Directives, it is unfair to attribute a

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<sup>133</sup> See, for instance, P. Papadimitrou, *The New 'Dubliners': Implementation of European Council Regulation 343/2003 (Dublin-II) by The Greek Authorities*, 18 J. Refugee Stud. 299, 2005, 4; Human Rights Watch, *Treating refugees as refuse*, 14 June 2009, available at: <http://www.unhcr.org/refworld/docid/4a39e90fc.html>.

much larger administrative burden on these States alone, for geographical reasons only. A system that benefits the Community in the whole should be equally supported in a whole by all the Member States. Therefore, it is urgent that the Community legislators intervene to find a solution that allows a more equal share of costs among Member States. The Commission has acknowledged the need for a legislative reform in this and other subjects on the 2007 Green Paper on the Future Common European Asylum System.<sup>134</sup>

The fact that the levels of protection diverge among Member States threatens the purpose and the effectiveness of the CEAS as whole. The Commission itself reported that Member States justify the low number of effected transfers (when compared to the accepted ones) with the sudden disappearance of the asylum-seekers when they receive the transfer order.<sup>135</sup> While it is certainly not the single reason, one of the factors that might trigger such behaviour is the knowledge, by the asylum-seekers themselves, that they might have lesser chance to get international protection in the State they will be sent to.<sup>136</sup> This shows the importance of ensuring the same standard of access to international protection in all Member States (both in law and in practice) as not only a benefit for the asylum-seekers but also as an inherent feature of effectiveness of the European asylum system.

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<sup>134</sup> European Union: European Commission, *Commission Green Paper on the Future Common European Asylum System (COM(2007) 301 final)*, 6 June 2007, COM(2007) 301 final, page 10, available at: <http://www.unhcr.org/refworld/docid/466e5a972.html> [accessed 20 August 2009].

<sup>135</sup> Report from the Commission to the European Parliament and the Council on the evaluation of the Dublin system {SEC(2007) 742} /\* COM/2007/0299 final \*/.

<sup>136</sup> C. Filzwieser, *The Dublin Regulation vs The European Convention of Human Rights – a Non-Issue or a Precarious Legal Balancing Act?* (2006), 5, available at <http://refugeelaw.qeh.ox.ac.uk/pdfs/christian-filzwieser-dublin-convention-dec-06.pdf>.

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