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3.2.5.2. Access to the asylum procedure and non-refoulement

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In five joined cases in Italy, the CJEU underlined that national courts in the requesting Member State can assess whether there are systemic flaws in the asylum and reception systems in the requested Member State, but in the absence of such flaws, they cannot determine the risks of indirect *refoulement.* It is for the courts of the requested Member State to assess and determine this risk.

The situation at the Croatian border remained the topic of appeals in many EU+ countries in the context of the Dublin procedure. For example, the Danish Refugee Appeals Board confirmed transfers to Croatia, on the condition that Croatian authorities provide guarantees that the applicants would have access to the asylum procedure.

The Slovenian Supreme Court rejected several appeals against decisions to transfer an applicant to Croatia, noting that general claims about shortcomings in the asylum procedure and the reception system would not substantiate that there was an individual risk for an applicant who is transferred to Croatia under the Dublin III Regulation.336The German Higher Administrative Court of Lower Saxony came to a similar conclusion, noting that there was not sufficient evidence of systemic deficiencies specifically for applicants transferred to Croatia under the Dublin III Regulation.

The Swiss Federal Administrative Court cited jurisprudence from Germany and followed comparable argumentation when delivering its reference judgment on transfers to Croatia. Other cases related to transfers to Croatia followed in line throughout 2023.337

The Dutch Regional Court in Amsterdam annulled a transfer since the national authorities did not investigate sufficiently the situation of applicants transferred to Croatia under the Dublin procedure. The court also reasoned that, the fact that reports did not mention that migrants who are pushed back may also be Dublin returnees, did not mean that they were not. The Dutch Regional Court in Roermond ordered an interim measure not to implement a Dublin transfer to Croatia, while awaiting the CJEU ruling on the indivisibility of mutual trust in the Dublin procedure. In September 2023, the Council of State noted the letter sent by the Croatian authorities to the Dutch State Secretary and underlined that recent reports from various organisations did not show that the testimonials and issues concerned Dublin returnees. Thus, it ruled that the possible shortcomings in the asylum system in Croatia do not mean that all Dublin

returnees in general or the applicant in this case specifically would face a real risk of treatment in violation of the EU Charter, Article 4 and the ECHR, Article 3 in transferred.

The issue of Dublin transfers from Slovenia to Croatia featured at the centre of Slovenian civil society organisations' interests, with Amnesty International Slovenia taking the lead in demanding to stop the transfers several times throughout 2023.338In its reply, the Slovenian Ministry of the Interior provided information which suggested that applicants were not systematically denied access to international protection and it referred to the court's evolving jurisprudence.339

While it did not make an assessment of the situation in Slovenia, the Higher Administrative Court of Lower Saxony underlined that a difference should be made between applicants transferred back under the Dublin III Regulation and applicants taken over informally between Austria or Italy and Slovenia. It found that the lower court incorrectly assessed that applicants transferred to Slovenia would automatically be at risk of a chain return from Slovenia to Croatia, and finally to Bosnia and Herzegovina, without the possibility to apply for international protection. The Slovenian authorities agreed to take back the applicant.

In March 2023, the Dutch Regional Court in Arnhem and the Austrian Constitutional Court both ruled that national authorities failed to sufficiently investigate the risk of chain *refoulement* for applicants transferred to Bulgaria, as well as their reception circumstances.340But in August 2023, the Dutch Council of State confirmed a transfer decision, finding enough information to substantiate that instances of indirect pushbacks happened only at sea, and thus, the situation of those asylum seekers could not be compared to that of applicants transferred back under the Dublin procedure. The Belgian Council for Alien Law Litigation (CALL) confirmed the transfer decision to Bulgaria in September 2023, underlining that the CGRS duly reasoned and analysed the case before concluding that there would not be a risk of violation of the ECHR, Article 3 for the applicant.

The Dutch Regional Court in Middelburg did not find sufficient evidence that Dublin returnees were at risk of pushbacks in Romania. The Regional Court in Rotterdam confirmed a transfer to Spain as the applicant did not demonstrate that he would not have access to the asylum procedure or reception conditions. The Regional Court in Den Bosch suspended the implementation of a transfer to Lithuania, noting that it was questionable whether pushbacks were still conducted and whether they were also directed at Dublin returnees. The Belgian CALL concluded that the CGRS did not diligently examine the allegations related to a risk of violating the ECHR, Article 3 for an applicant who contested his transfer to Lithuania due to his experience when trying to submit an asylum application there and the poor conditions in reception.

The Dutch Council of State held that sufficient grounds did not exist to conclude that Romania systematically applied the readmission agreement with Serbia to applicants who were transferred back from another EU+ country, without the possibility of applying for international protection.341

In Germany, the Regional Administrative Court of Aachen annulled a Dublin transfer to Hungary of a family of four. It considered that there were substantial grounds to believe that there were systemic weaknesses in the Hungarian asylum procedure due to the 'embassy procedure' that

may pose a risk of inhuman or degrading treatment through arbitrary returns. The court also believed that the family would have difficulties in securing a minimum livelihood if transferred back.

- 336See for example:

  Slovenia, Supreme Court [Vrhovno sodišče], *Applicant* v *Ministry of the Interior*, VS00063929, ECLI:SI:VSRS:2023:I. UP.245.2022, 11 January 2023.
- 337Switzerland, Federal Administrative Court [Bundesverwaltungsgericht - Tribunal administratif fédéral - FAC], *Applicant* v *State Secretariat for Migration (Staatssekretariat für Migration – SEM)*, F-3303/2023, 16 June 2023.

- 338Amnesty International. (2023, March 7). *Poziv k spremembi zakonodaje in ustavitvi vračanj na Hrvaško [Call for changes to legislation and halting returns to Croatia]* . https://www.amnesty.si/poziv-pv-prosilci-za-azil
- 339Government of the Republic of Slovenia | Vlada Republike Slovenije. (2023, May 4). *Zavračamo navedbe o sistematičnem vračanju na Hrvaško [We reject allegations of systematic return to Croatia]*.

- 340Netherlands, Court of The Hague [Rechtbank Den Haag], *Applicant* v *State Secretary for Justice and Security (Staatssecretaris van Justitie en Veiligheid)*, NL22.20076, ECLI:NL:RBDHA:2023:2454, 2 March 2023.

- 341Council of State | Raad van State. (2023, December 27). *Staatssecretaris J&V mag vreemdelingen overdragen aan Roemenië [State Secretary J&V may transfer foreign nationals to Romania]*.

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