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Serious and systematic infringements of EU law

Following two similar cases, the Regional Court of Den Bosch referred a case to the CJEU for a preliminary ruling on the divisibility of mutual trust between Member States in the Dublin procedure. The previous two referrals were submitted in October 2021 and March 2022,338 but they were later withdrawn as the appeals of the decisions were revoked.

National courts inquired if serious and systematic infringements of EU law by the potentially responsible Member State would preclude a Dublin transfer to that state or would the infringements imply that the requesting Member State cannot rely on the principle of mutual trust, necessitating it to examine and demonstrate that the applicant would not be in a situation contrary to the Charter of Fundamental Rights of the EU, Article 4. The courts also inquired about the types of evidence that can be used and the standard of proof.

Differences in protection policies

The Icelandic Immigration Appeals Board examined the possibility of transferring an applicant to Sweden, where an application for international protection was rejected, the applicant was issued a return order to Palestine, lost the right to material reception conditions and was homeless for 5 months. The board noted that the procedure for assessing the principle of *non-refoulement* in return procedures in Sweden provided sufficient guarantees to ensure that the applicant's life would not be at risk. The rejected applicant also retained the right to essential health care until departure, and the board concluded that this is adequate in the particular case. In addition, the applicant did not have a condition that would require treatment that is only available in Iceland and not in Sweden. Finally, the board acknowledged that applicants with a negative decision lose their right to accommodation in Sweden, but as an exception, vulnerable persons could still be accommodated. Thus, the board confirmed the transfer decision.

Similarly, the Dutch Council of State confirmed that a more restrictive policy in Sweden related to applicants from Syria in itself does not indicate that there would be a shortcoming in the asylum procedure or that the applicant would run a real risk of indirect *refoulement* if he were transferred back. Based on the principle of mutual trust, the court highlighted that the authorities can assume that a Member State's asylum system is effective and in compliance with

fundamental rights enshrined in the Charter of Fundamental Rights of the EU, the ECHR and the Geneva Convention. The burden of proof is on the applicant to demonstrate that he would not be offered international protection in the Member State responsible on the basis of its protection policy, while in principle he would receive this in the Netherlands. This means that the applicant should substantiate that there is an obvious and fundamental difference in protection policies and that both the administrative authority and the courts in the Member State responsible would not protect him against *refoulement*. If this burden of proof is met, then the Dutch authorities are responsible to further investigate and remove all doubts of a possible risk, if the transfer is implemented.

The Regional Court of The Hague declared a Pakistani applicant's appeal as inadmissible, noting that the fact that the legal representative's secretariat confused the case with another appeal was not an excusable justification for lodging the appeal with a delay. The court still analysed whether the specific circumstances of the case would render it admissible. It concluded that the fact that the Netherlands, unlike Germany, considers Ahmadis from Pakistan a risk group cannot be considered as evidence of a fundamental difference in protection between the two countries. The court added that it could not ascertain in advance whether the Netherlands would grant the applicant international protection. Also, the applicant did not substantiate that the German authorities would not protect against *refoulement*.

When assessing transfers to Denmark (202106573/1/V3 and 202105784/1/V3), the Dutch Council of State found "obvious and fundamental differences" in asylum policies between Denmark and the Netherlands related to Syrian applicants. The Council of State held that the applicants met the burden of proof, by providing evidence that the policy of the determining authority in Denmark was to return Syrian applicants, and this was endorsed by the Danish Refugees Appeals Board. The Council of State noted that the State Secretary did not conduct a further investigation to eliminate any doubts about a possible real risk of *refoulement*.

Access to the asylum procedure and *non-refoulement*

The situation at the Croatian border *(see Section 4.1)* was at the focus of several appeals in many EU+ countries in the context of the Dublin procedure. For example, the Belgian CALL ordered the suspension of transfers to Croatia in several cases due to inadequate material reception conditions and a possible risk of *refoulement*.339 The Croatian Ministry of the Interior signalled that the Dublin Procedure Department did not receive an official revocation of transfers from Belgium to Croatia. The ministry added that as of December 2022, an individual guarantee is submitted to Belgium for applicants who accepted through the Dublin procedure, with each response accepting responsibility to examine the request for international protection. Dublin returns to Croatia did continue throughout 2022.

The Federal Administrative Court (FAC) in Switzerland annulled SEM's transfer decision of two applicants to Croatia, noting that the authority had not sufficiently clarified the facts of the case which are relevant for the determination of the state responsible for the asylum applications. In addition, the applicants substantiated in a credible manner their detention and acts of torture by police officers at the border, while SEM had based its decision on old reports to conclude that there were no systemic flaws in Croatia's asylum system. At the beginning of 2023, FAC noted that it is highly probable that unlawful removals constitute a regular practice in Croatia, but for

Dublin transfers, it was not a primary concern whether it was extremely difficult for an applicant to reach the Croatian territory. The court underlined that there was no indication that Dublin returnees to Croatia were being unlawfully removed despite expressing their wish to apply for international protection. The Croatian Ministry of the Interior added that Dublin returnees are issued a certificate of registration after they express their intention to apply for international protection, and they are instructed to report to the reception facility in Zagreb (families with children are transported to the facility in an official vehicle without a police label).

The Dutch Council of State cancelled several transfers to Croatia (for example, of an applicant from Egypt and an applicant from Algeria), noting that various sources and reports indicated that the risk of pushbacks existed for third-country nationals transferred to Croatia from other Member States. The court also noted that there was clear evidence of pushbacks at the border and the Dutch authorities could no longer assume that Croatia complies with its international obligations toward third-country nationals. Thus, Dutch authorities could no longer transfer applicants to Croatia based on the Dublin III Regulation without further investigation on whether the country complies with the requirements of the ECHR, Article 3. The Croatian Ministry of the Interior shared that a non-paper was sent to the Dutch authorities about the situation of nationals of Egypt and Algeria and it expressed the possibility of providing individual guarantees for transferred applicants for international protection, if requested. The authorities underlined in the non-paper their conviction that the Dublin III Regulation is implemented fully and consistently, and that applicants' rights are protected in accordance with EU and national legislation and international obligations.

Similarly, in Germany, the Regional Administrative Courts of Freiburg, Hanover and Stuttgart annulled transfers to Croatia. All courts mentioned the recent incidents of pushbacks as an indication of a risk of treatment contrary to the ECHR, Article 3 and the Charter of Fundamental Rights of the EU, Article 4, and noted systemic deficiencies in the asylum and reception systems. The Stuttgart court highlighted that applications from persons who were transferred back under the Dublin III Regulation were treated as subsequent ones, and there was a risk that the applicants were denied a substantive examination of the merits of their asylum claim and, thus, were not offered adequate protection against *refoulement*. Nevertheless, other courts – like the Regional Administrative Courts of Ansbach, Leipzig[340] and Hannover[341] – decided that there are no systemic flaws in the Croatian asylum system.

For Dublin transfers to Hungary, a new legal position was published in Sweden. The Swedish Migration Agency (SMA) continued to send requests and take transfer decisions when Hungary was identified as the Member State responsible, but it also continued to suspend the implementation of transfers to Hungary as long as the situation persists. The legal position was issued to assess the impact of the 'embassy procedure' *(see Section 4.1)* and underlined that there was no legal clarity on whether applicants transferred back to Hungary may lodge an application on the territory of Hungary. In addition, the legal position found that a claim by a transferred applicant would be treated as a subsequent application and noted that this was contrary to Dublin III Regulation, Article 18. The document added that there were also doubts about the possibility to access an effective remedy. The position underlined that suspending the implementation of transfers to Hungary does not mean that the transfer time limit is suspended according to Dublin III Regulation, Article 29(1).[342]

The Regional Administrative Court of Arnsberg in Germany ordered the suspension of the transfer of an Uzbek applicant to Hungary. He entered the country through Ukraine in March 2022 and continued his journey to Germany without asking for international protection. The court highlighted serious reasons to assume systemic flaws in the Hungarian asylum procedure and violations of the *non-refoulement* principle. The court underlined that, despite a request from the German authorities, the Hungarian authorities did not provide written guarantees that the applicant's case would be managed in line with the recast APD.

The AIDA report for the Netherlands observed that transfers to Hungary from the Netherlands were not undertaken in 2022 by applying the sovereignty clause in cases where it was established that Hungary is the Member State responsible (a practice which was started in 2015).

When assessing transfers to Lithuania, courts in Germany and Estonia took a different approach. The Regional Administrative Court of Hanover found that the German authorities should not have determined Lithuania as the state responsible for the asylum application merely on the basis of the Dublin III Regulation, Article 13 (irregular entry), but they should have continued the examination whether another Member State could have been designated as responsible, referring to potential systemic flaws in asylum and reception conditions. The court noted that, due to increased border crossings in the summer of 2021 and concerns around the possibility to access the asylum procedure and adequate material reception conditions, the asylum and reception systems in Lithuania showed signs of systemic weaknesses, which could result in inhuman or degrading treatment. At the same time, other courts in Germany (see for example here and here343) have concluded that there are no systemic flaws in the Lithuanian asylum system.

In contrast, the Estonian Circuit Court assessed that the shortcomings in accommodation in Lithuania due to mass arrivals could not lead to a conclusion that the transfer could not be implemented. It found that since the applicant could contest the negative decision before a court, it suggested that there were no deficiencies in the system. The court also considered that the situation of the applicant, who arrived from Belarus in 2020, was not comparable to those who arrived on a mass scale in the summer of 2021.

For transfers to Spain, the Icelandic Immigration Appeals Board analysed the possibility of the applicant to access the asylum procedure, receive material reception conditions, including appropriate health care, and be protected against *refoulement*. The board upheld the transfer decision by the Directorate of Immigration.

Access to and quality of reception conditions in the country responsible for the application

The court cases cited above involving transfers to Croatia, Lithuania and Spain also looked into the applicant's possibility of accessing reception conditions and the quality of these conditions. Concerns around inadequate reception conditions for individual applicants has led to cancelling transfers to Croatia and Lithuania. The Croatian Ministry of the Interior added that the authorities made efforts to improve the reception system and accommodation through projects co-financed with AMIF. For example, improvements were made to the reception centre in Kutina

and the reception centre in Zagreb was in the process of being reconstructed. Projects implemented in previous years, such as the cooperation with Médecins du Monde Belgique on health care services and psychosocial support from the Croatian Red Cross, have continued in 2022 as well *(see Section 4.7)*.

In January 2022, the Belgian Immigration Office confirmed to the Flemish Refugee Action that it no longer took Dublin transfer decisions for Bulgaria.[344]

For transfers to Italy, selected jurisprudence pointed more and more towards a trend of courts concluding that there was no evidence of systemic flaws in the asylum and reception systems following legislative changes in 2020. However, the approach may change in the beginning of 2023, after Italy notified other Member States in December 2022 that it would not accept incoming transfers due to a lack of reception places.

In January 2023, the Court of The Hague concluded that the Italian government's circular must be regarded as a temporary obstacle to implementing transfers and should not be considered as an indication of structural and fundamental shortcomings. The court underlined that the presumption of mutual trust remains.

The German Federal Administrative Court confirmed on 27 January 2022 the decision of the Higher Administrative Court of North Rhine Westphalia in July 2021, halting the transfer of a single man to Italy. The transfer was ruled to be unlawful due to the lack of accommodation in Italy, based on an alleged lack of sufficient consideration of the facts on the ground.

The Swiss Federal Administrative Court established a different approach to take charge and take back requests to Italy. In 2022, the obligation previously introduced by the court in December 2019 to obtain individual guarantees from Italian authorities for applicants with serious health problems (with regard to adequate accommodation and immediate access to medical care) was lifted for take charge procedures. For take back procedures, guarantees were still required. The court reasoned this with the risk of being excluded from accommodation in take back cases.

The Swiss Refugee Council continued its work on monitoring reception conditions in Italy for Dublin returnees. In February 2022, the organisation published a report which assesses the situation specifically for applicants with mental health problems. The organisation continued to advocate against Dublin transfers to Italy.[345]

The Regional Court of the Hague underlined that Dutch authorities may rely on the principle of mutual trust, although it considered that there were still certain shortcomings in the Italian asylum and reception systems. It found that the applicant in the specific case, who had diabetes, had access to medical treatment upon a return and would not be faced with a situation that would be in violation of the ECHR, Article 3.

However, the Portuguese Central Administrative Court concluded in another case that the applicant's medical conditions needed to be assessed as a vulnerability factor and upheld the lower court's decision to oblige the authorities to reconsider the applicant's transfer to Italy.

The Icelandic Immigration Appeals Board concluded that better living conditions in Iceland than in Italy did not justify cancelling a Dublin transfer decision. In the case, the court noted that the

applicant was living in an overcrowded reception centre and faced discrimination against applicants and beneficiaries of international protection, but the applicant had a valid residence permit on grounds not related to international protection, was in good health, found work and studied in Italy, and did not appear to have any special ties with Iceland.

The regional court in Brno, Czechia, ruled in February 2022 on an applicant's transfer to France. It reiterated that Czechia was obliged to consider this risk properly, individually and thoroughly if there existed a risk of breaching the ECHR, Article 3.

In another case, the Portuguese Supreme Court found that the fact that the applicant was not granted accommodation in kind could not be considered as a systemic failure of the French reception system. The court considered that the EUR 400 cash benefit and access to free health care should be sufficient for the applicant to cover his needs.

In October 2022, the Swiss FAC examined the Dublin transfer to Bulgaria of an Afghan applicant, who suffered from health problems and drug addiction. SEM used text modules to substantiate the decision and the request sent to Bulgaria did not contain information on the applicant's medical state. Thus, the court considered that not all legally-relevant medical facts were examined. In addition, the court was not convinced that the Bulgarian authorities took sufficient account of the principle of *non-refoulement*. Lastly, the court added that SEM had also failed to take into account the impact of the war in Ukraine on the Bulgarian asylum and reception system.346

The Court of the Hague annulled a Dublin transfer to Belgium after the ECtHR issued interim measures against the country *(see Section 4.7)*. The burden of proof on reception conditions thus shifted from the applicant to the national authorities to demonstrate that the applicant would be provided with adequate material reception conditions following a transfer to Belgium.

Use of detention

Approaches to Dublin transfers to Malta seemed to have converged, and several transfers were halted due to the country's detention policy *(see Section 4.8)*. For example, the Tribunal of Rome annulled the transfer decision of an applicant who had been detained in Malta for 16 months, fell ill due to the conditions and had to be hospitalised for 2 months.

Likewise, the Dutch Council of State upheld a case concerning two applicants, including a child who suffered trauma in Malta and experienced PTSD. The court stated that the child would be at risk of a significant and irreversible impact on her health if transferred back to Malta. The council added that, even though the medical advice concluded that the child was physically fit to travel, the Dutch authorities should have been more active to fulfil their duty to clarify any serious doubts about the impact of the transfer on the child's health. According to its own manual, SEM does not transfer vulnerable asylum seekers to Malta if they are facing detention.347

The Constitutional Court in Austria disagreed with a decision by the Federal Administrative Court (BVwG) when the court found a planned transfer of a Syrian national to Malta to be admissible. The Syrian national claimed that he would be detained upon a return to Malta and that the conditions in detention in Malta would violate his rights guaranteed by the ECHR, Articles 2 and 3. The BVwG did not assess the situation in detention in Malta.

The practice of detaining children and conditions in detention in Poland led to a case being referred back by a Regional Administrative Court to BAMF. The court found several reports from various, reliable sources on concerns about the detention of children and concluded that BAMF must undertake further investigation to assess whether the applicants would be at risk of a situation contrary to the Charter of Fundamental Rights of the EU, Article 4.

Impact of the war in Ukraine on neighbouring EU+ countries

Courts had different approach towards Dublin transfers to EU+ countries which were the most impacted by the arrival of Ukrainians, such as Poland and Romania. In Germany, the Regional Administrative Court in Aachen noted in March 2022 that Poland sent a circular on 25 February 2022 temporarily suspending all incoming transfers as of 28 February 2022 until further notice. Hence, the court annulled a transfer.

In June 2022, the Czech Supreme Administrative Court did not make reference to this circular, but it sent back a case to the regional court, noting that the lower court did not provide sufficiently relevant and up-to-date reports to determine whether the number of people arriving from Ukraine led to systemic flaws in the Polish asylum and reception systems.

For transfers to Romania, in July 2022, the Regional Administrative Court of Arnsberg in Germany noted that the Romanian authorities announced on 28 February 2022 that Dublin transfers would be accepted only in urgent cases and, thus, the court annulled a Dublin transfer.

In October 2022, the Civil Court of Rome annulled an applicant's transfer to Romania according to Article 3(2) of the Dublin III Regulation and Article 4 of the EU Charter of Fundamental Rights, considering systemic deficiencies existing in the country. The court observed that the country was already unprepared to accommodate asylum seekers before the Ukrainian crisis and that with the arrival of thousands of people from Ukraine the situation had reached a critical level. In January 2023, the Civil Court of Rome confirmed its previous orientation, annulling a transfer to Romania.

However, the Dutch Council of State concluded that the fact that Romania intended to suspend incoming transfers would not mean that Romania refused the requests. The council found that it was an indication of a temporary measure and noted that the letter from the Romanian authorities allowed urgent transfers, such as the transfer of applicants in detention or transfers with a close deadline.

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