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The Right to an Effective Remedy in EU Asylum Law

Exploring Potential Gaps in Judicial Protection under the Dublin System and the New Proposed Migration Management System

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Contents

Summary

Through an in-depth study of the remedies available to applicants for international protection under the Dublin System and the new Proposed Migration Management System, this thesis explores the scope of the remedy in the situation where a Member State refuses to take responsibility for the examination of an application for international protection. It is evident that an applicant may challenge a decision to transfer him or her, but it is uncertain whether a decision by a Member State not to take charge of an applicant may be appealed. This uncertainty has been demonstrated through diverging case-law in national courts, and the lack of a preliminary ruling by the Court of Justice of the European Union in this matter.

Through the application of the legal dogmatic method, it is submitted that there are compelling reasons in favor of an effective remedy to be made available in the situation where a take charge request has been rejected, especially in light of the fundamental right to an effective remedy and other fundamental rights at stake. While the Dublin system to a large extent allows for such an interpretation, the provisions of the new Migration Management System are designed in such a way that it is more difficult to assert such a right. Should the issue arise before a national court again, a reference for a preliminary ruling should be made in order for the Court of Justice of the European Union to provide for more legal certainty in this regard.

Sammanfattning

Genom en djupgående studie av de rättsmedel som gjorts tillgängliga för sökande av internationellt skydd inom ramen för Dublinsystemet och det nya migrationshanteringssystemet, utforskas i denna studie omfattningen av rättsmedlet i en situation där en medlemsstat vägrar ta ansvar för prövningen av en ansökan om internationellt skydd. Det är uppenbart att en sökande kan överklaga ett beslut om att överföra honom eller henne, men det är osäkert om ett beslut av en medlemsstat att inte ta över ansvaret för en sökande kan överklagas. Denna ovisshet har visat sig genom stora skillnader i nationell rättspraxis, tillsammans med bristen på ett förhandsavgörande från Europeiska unionens domstol.

Genom tillämpningen av en rättsdogmatisk metod, framförs att det finns övervägande skäl varför ett effektivt rättsmedel måste göras tillgängligt för sökanden i situationer där en framställan om ett övertagande har blivit avvisad, särskild mot bakgrund av att den grundläggande rätten till ett effektivt rättsmedel och även andra grundläggande rättigheter står på spel. Medan Dublinsystemet till stor del ger utrymme för en sådan tolkning, är bestämmelserna i det nya migrationshanteringssystemet utformade på ett sådant sätt att det är svårare att hävda en sådan rätt. Om frågan skulle uppstå vid en nationell domstol igen, bör domstolen begära ett förhandsavgörande för att Europeiska unionens domstol ska kunna skapa ett mer rättssäkert system i detta avseende.

Abbreviations

AFSJ	Area of Freedom, Security, and Justice
BVerwG, BvWG	Bundesverwaltungsgericht
CEAS	Common European Asylum System
CJEU	Court of Justice of the European Union
CFR	Charter of Fundamental Rights of the European Union
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU, Union	European Union
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
VG	Verwaltungsgericht

1 Introduction

1.1 Background

In a case before the Swedish Migration Court of Appeal, a third-country national challenged the decision of the Swedish Migration Agency not to take charge of his application for international protection made in Greece. The Migration Agency had refused to take charge of his application in spite of the fact that he claimed that his wife was a beneficiary of international protection in Sweden.[1] According to Article 9 of the Dublin III Regulation, responsibility for the examination of an application for international protection is allocated to a Member State where family members of the applicants reside, if they are beneficiaries of international protection.[2] However, the Court did not grant his appeal as it considered that the Dublin III Regulation did not provide for such a remedy.[3]

To make his case, the applicant referred to similar cases in Germany and the United Kingdom where appeal had been granted. Despite this, the Swedish Migration Court of Appeal stated that the question of how the Dublin III Regulation should be interpreted in this regard was so obvious that there was no need to ask the Court of Justice of the European Union (CJEU) for a preliminary ruling on the matter.[4] Similar to the Swedish judgment, courts in Austria and the Netherlands had also denied applicants the right appeal decisions by Member States not to agree to take charge of the examination of the application for international protection.[5]

The right to an effective remedy is a fundamental right, as protected by both the Charter of Fundamental Rights of the European Union[6] (CFR) as well as the European Convention of Human Rights[7] (ECHR). The question is whether the applicants for international protection must be granted an effective remedy against such decisions, in order for the Member States to comply with the fundamental right to an effective remedy, as well as other provisions of EU law governing the rights of people in need of international protection.

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[1] MIG 2020:4, 26 February 2020, UM14005-19.
[2] Consolidated Version of Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) [2013] OJ L 180/31.
[3] MIG 2020:4.
[4] ibid.
[5] BvWG Österreich W175 2206076-1 [2018] ECLI:AT:BVWG:2018:W175.2206076.1.00; Council of State, 21 December 2018, ECLI:NL:RVS:2018:4298.
[6] Charter of Fundamental Rights of the European Union [2012] 2012/C 326/02, Art 47.
[7] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nr. 11 and 14, 4 November 1950, ETS 5, Art 13.

The Dublin System has been widely criticized, especially in the light of the high number of irregular migrants who applied for international protection in the EU during 2015.[8] However, the critique does not mainly concern insufficient protection for the rights of individuals, but rather the unfair share of burden between the Member States. According to the Commission, the 'migrant crisis' in 2015 exposed structural weaknesses of the functioning of the Dublin System. In practice, the most commonly used criterion for allocating responsibility to a Member State is that of irregular entry. The reasoning behind the criterion is that the Member States are under obligation to protect the external borders of the Union, and failure to do so should have consequences primarily for themselves. However, as admitted by the Commission, this system places disproportionally high demands on the Member States with external borders of the Union.[9]

In 2016, the Commission submitted a package of proposals with the aim to reform the Common European Asylum System (CEAS), of which the Dublin System forms part.[10] These proposals included a recast of the Dublin III Regulation ('the Dublin IV Regulation').[11] However, these plans failed as they did not pass through the legislative procedure before the Commission announced its new plans for a revision of the CEAS. On 23 September 2020, the New Pact on Migration and Asylum was presented.[12] According to these plans, the Dublin III Regulation will be repealed and replaced by the Asylum and Migration Management Regulation.[13]

The proposal for the Asylum and Migration Management Regulation is primarily based on the premise that the burden of responsibility is unfairly distributed amongst the Member States of the EU. Hence, a solidarity mechanism is introduced in the new Regulation which is intended to ensure that the Member States share an equal burden of responsibility.[14]

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[8] See, eg, Maarten Den Heijer, Jorrit Rijpma & Thomas Spijkerboer, 'Coercion, prohibition, and great expectations: The continuing failure of the Common European Asylum System' [2016] Common Market Law Review, p. 607; Vincent Chetail, 'Looking beyond the Rhetoric of the Refugee Crisis: The Failed Reform of the Common European Asylum System' [2016] European Journal of Human Rights, p. 584.
[9] Commission, 'Communication from the Commission to the European Parliament and the Council towards a reform of the Common European Asylum System and Enhancing Legal Avenues to Europe' COM(2016) 197 final, 6 April 2016, p. 3–4.
[10] ibid, p. 1–20.
[11] Commission, 'Proposal for a regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)' COM(2016) 270 final/2, 4 May 2016.
[12] Commission, 'Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum' COM(2020) 609 final, 23 September 2020.
[13] Commission, 'Proposal for a regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund]' COM(2020) 610 final, 2020/0279 (COD), 23 September 2020.
[14] ibid, Arts 45–56.

The right to appeal a transfer decision is expressly provided for in both the Dublin III Regulation and the Asylum and Migration Management Regulation. However, regarding the situation where a Member State refuses to take charge of an applicant, and therefore no transfer decision is taken, both Regulations are silent on the matter. As already mentioned, there is diverging national case-law in this regard, and so far, the CJEU has not ruled on the matter.

In order for the CEAS to function properly, there is a need for a uniform application of EU law. One could imagine that a situation where there is diverging case law from different national courts, would be a standard situation where a preliminary ruling from the CJEU is obtained. However, the issue of how far-reaching the obligation to ask for preliminary rulings is will not be discussed in this paper. Instead, the focus will be on the issue of the right to appeal decisions not to take responsibility for the examination of an application for international protection.

An important remark to be made is that the Dublin system does not confer upon the individual a right to choose which Member State should be responsible for the examination of the application for international protection. Nor does the new proposed Regulation confer such a right.[15] However, the question of freedom of choice is distinguished from the question of the right to appeal a decision to not take charge of an application for international protection, as the latter concerns the correct application of the Regulation. Further, in the situation where the allocation of responsibility is based on the application of the criteria relating to family unity, it raises questions about the right to family life and potentially also the rights of the child.

1.2 Aim of the Study

As indicated above, the political debate regarding the allocation of responsibility for examining applications for international protection is centered around a state perspective. It may be true that one of the main shortcomings of the current system is that it promotes an unfair share of the burden of responsibility, which can be traced to how the criteria are constructed. However, when it comes to shortcomings of the Dublin III Regulation regarding the protection of individuals' rights, the new Commission Proposal is rather silent on the matter. Further, in the case of the remedy provided for in the Asylum and Migration Management Regulation, explicit limitations are introduced.

The purpose of the present study is to highlight the perspective of individuals' rights and expose potential gaps in judicial protection afforded to applicants in the Dublin System and the new Migration Management System. This will be done through an in-depth examination of the scope of

[15] ibid, Art 11(1)(a).

the remedy provided for in the Dublin III Regulation and the Asylum and Migration Management Regulation, which is the main tool made available to individuals to ensure the correct application of the Regulations.

1.3 Research Question

In order to meet the aim of the study, the following research question will be answered in this paper:

How are the remedies provided for in the Dublin System and the new Migration Management System to be understood, in light of the fundamental right to an effective remedy, in a situation where a Member State has refused to take responsibility for the examination of an application for international protection?

1.4 Delimitations

Gaps in judicial protection provided under the Dublin System and the new Migration Management System may very well extend beyond the potential lack of an effective remedy against the refusal of a take charge request. However, in order to provide for a comprehensive analysis in this regard, the scope of the research is limited to focusing on the remedies concerning the situation of a non-transfer.

As already mentioned, the New Pact on Asylum and Migration provides for extensive changes to the current legislation in order to reform the CEAS. It is not possible, in the context of this essay, to capture all the elements of the changes introduced. Here, the rights of the individuals are examined in depth while the share of burden between the Member States and the new solidarity mechanism in the Asylum and Migration Management Regulation are omitted from the discussion. However, a brief description of the CEAS is necessary to provide for an understanding of the context in which the relevant rules are formed.

Further, the Commission Proposal for the Dublin IV Regulation will also be discussed, since it entailed substantive changes to remedies provided for in the Dublin System, including an express right to appeal when no transfer decision had been taken.[16] Thus, the 2016 proposal is relevant both in relation to the understanding of the Dublin III Regulation and order to understand the changes made to the 2020 proposal.

[16] COM(2016) 270, Art 28.

1.5 Previous Research

Legal remedies in the Dublin System have already been subject to research by legal scholars, especially in light of the many preliminary rulings made by the CJEU regarding transfer decisions, as displayed in Chapter 6. Thus, the scope of the remedy has been explored in-depth concerning transfer decisions. However, as far as can be established, not much research has been done regarding the right to an effective remedy against the refusal to take charge of an applicant. An exception to this statement is a publication titled 'An Individual Legal Remedy against the Refusal of a Take Charge Request under the Dublin III Regulation', provided by The Migration Law Clinic of the VU University of Amsterdam.[17] This 'expert opinion' as it is called by its authors, provides for an examination of the area of law at large and serves as a good reference to explore the issues at hand. However, it does not include an analysis of the proposals for the Dublin IV Regulation or the Asylum and Migration Management Regulation. Thus, there are still issues to be addressed in this regard, with relevance to the further legal development in the area of asylum law in the EU.

1.6 Research Method and Material

The research in this paper largely builds upon the use of the legal dogmatic method, in which the different sources of law are examined in order to systematize and interpret the valid law. Essentially, the method aims at finding out how to apply the law to a particular issue and fill in potential gaps.[18] In this regard, the hierarchy of norms within the EU legal order and other specific features of EU law needs to be taken into consideration, as it differs from other legal systems.

The sources of law within the EU can be divided into two categories: primary law and secondary law.[19] The primary law of the EU consists of the Treaty on European Union[20] (TEU), the Treaty on the Functioning of the European Union[21] (TFEU), and the Charter of Fundamental Rights of the European Union (CFR).[22] The secondary law consists of regulations, directives, and decisions.[23] In the context of this paper, it is worth noting

[17] Migration Law Clinic, 'An Individual Legal Remedy Against the Refusal of a Take Charge Request under the Dublin III Regulation' (2020) VU University Amsterdam, Faculty of Law < https://migrationlawclinic.files.wordpress.com/2020/09/expert-opinion-mlc-effective-remedy-dublin-sept-2020.pdf> accessed 23 December 2020.
[18] Jan Kleineman, 'Rättsdogmatisk metod' in Maria Nääv & Mauro Zamboni (eds) *Juridisk metodlära* (2nd edn) (Studentlitteratur 2018) p. 21–26.
[19] Paul Craig & Gráinne De Búrca, EU Law: text, cases, and materials, UK Version (7th edn) (Oxford University Press 2020) p. 147–159.
[20] Consolidated Version of the Treaty on European Union [2012] 2012/C 326/01.
[21] Consolidated Version of the Treaty on the Functioning of the European Union [2012] 2012/C 326/01.
[22] TEU, Arts 1 & 6(1).
[23] TFEU, Art 288.

that regulations such as the Dublin III Regulation are binding in their entirety and directly applicable in all Member States.[24] Chapter 2.2 provides for a description of both the primary law and secondary law governing the CEAS.

Concerning the study of EU law, another methodological issue needs to be addressed as well. While it may be interesting to look at how national courts apply EU law, it is important to keep in mind that the method used by national courts may differ a lot from the method used by the CJEU. The CJEU is known for its extensive use of the teleological approach, where provisions are interpreted in a way that ensures that the legal act achieves its purpose.[25] For instance, as stated by the CJEU in the case *CILFIT*, 'every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied'.[26]

In order to provide for a clear analysis of EU law and a reasonable prediction of how the CJEU would rule on the matter, the method used by the Court needs to be taken into consideration. This is done by applying the same approach used by the Court in *Ghezelbash,* the landmark decision regarding remedies in the Dublin III Regulation. The Court considered that the earlier case-law concerning the Dublin II Regulation was no longer applicable, and that '[t]he scope of the appeal provided for in Article 27(1) of [the Dublin III Regulation] must therefore be determined in the light of the wording of the provisions of that regulation, its general scheme, its objectives and its context, in particular its evolution in connection with the system of which it forms part'. [27]

Concerning the new proposed legislation, the use of the legal dogmatic method differs to some extent. First of all, the legislation is not implemented yet, and it is therefore not a study of the valid law. Rather, the discussion in this section is focused on how the legislation in the future may be applied and interpreted in specific situations. Second, the use of the method in relation to legislation that is not yet in force is also affected by the difference in the material available. At the present moment, it is difficult to tell whether the case-law of the CJEU regarding the Dublin system will continue to apply to the Asylum and Migration Management Regulation. This is particularly because it does not amend the Dublin III Regulation but rather repeals and replaces it. In the absence of clarity regarding the applicability of previous case law, and therefore lack of authoritative

[24] ibid.
[25] Jane Reichel, 'EU-rättslig metod' in Maria Nääv & Mauro Zamboni (eds) *Juridisk metodlära* (2nd edn) (Studentlitteratur 2018) p. 122.
[26] Case C-283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministero della santà* [1982] EU:C:1982:335, para. 20.
[27] Case C-63/15 *Mehrdad Ghezelbash v Staatssecretaris van Veiligheid en Justitie* [2016] ECLI:EU:C:2016:409, para 35. This case is described in-depth in Chapters 5 & 6.

interpretation concerning the Asylum and Migration Management Regulation, the analysis will be limited to the few sources available.

In addition to interpreting the valid law and the proposed changes to it, the law will also be evaluated against the background of its purpose and its compatibility with fundamental rights. In this regard, it is worth mentioning that it is difficult to make a complete distinction between the interpretation of valid law and the evaluation of to which extent the purpose is achieved, since the interpretation of the valid law may to a greater or lesser extent build upon teleological reasoning.

Concerning the Dublin System, it is clear that the current legal situation is unsatisfactory from a harmonization perspective since national courts in different Member States have interpreted the same provision of EU law and reached opposite conclusions. Furthermore, since the right to an effective remedy is a fundamental right, different interpretations regarding the extent of the right to appeal risk leading to a systematic violation of this right. Regarding the Asylum and Migration Management Regulation, the use of a critical perspective is primarily intended to highlight possible shortcomings and provide for solutions that are more appropriate in respect of the purpose of the Regulation and sufficient protection of fundamental rights.

The main source of material used to conduct this study is primary sources such as legislation, case-law, and official documents from EU institutions. To some extent, secondary sources have been used as well. Concerning the case-law referred to in this study, this includes judgments made by the CJEU, and the European Court of Human Rights (ECtHR), as well as national courts in Austria, Germany, Sweden, the Netherlands, and the United Kingdom. In Chapters 6 and 7, where the scope of the remedy provided for in the Dublin III Regulation is examined, no selection had to be made as there were not many cases dealing with this topic. As far as can be established, the display of the case-law at hand is exhaustive in order to provide for an in-depht analysis in this regard. In other chapters, the selection of relevant case-law is to some extent influenced by the 'expert opinion' provided by the Migration Law Clinic of the VU University of Amsterdam.[28] Further, in Chapter 4.1, where the right to an effective remedy is discussed, commentaries to the CFR and the ECHR have been consulted in order to gain an in-depth understanding of the issues at hand and to find the relevant case-law.[29]

[28] Migration Law Clinic (2020).
[29] Steve Peers et al (eds), *The EU Charter of fundamental rights: a commentary* (Hard Pub Ltd. 2014); William A. Schabas, *The European Convention on Human Rights – a commentary* (Oxford University Press 2015); Manuel Kellerbauer, Marcus Klamert & Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights – a commentary* (Oxford University Press 2019).

1.7 Outline

In order to carry out a comprehensible study of the scope of the remedies provided for in the Dublin System as well as the new Migration Management System, the outline of this paper is as follows. Chapter 1 has provided for a background to and a framework for the research conducted in this paper. Next, Chapter 2 allows the readers to familiarize themselves with the CEAS. The purpose of this brief introduction to the subject is to provide for a context in which the Dublin System and the new Migration Management System are to be understood.

The main research is presented throughout Chapters 3 to 10. In Chapter 3, the key aspects of the Dublin III Regulation are presented. In this section, the focus lies on the procedure for determining responsibility and on the procedural safeguards. Chapter 4 provides for an overview of the fundamental rights at stake upon application of the procedure for determining responsibility, including the right to an effective remedy. Chapter 5 lays out the history of the Dublin System, particularly from a perspective of the protection of fundamental rights. Both legislative changes as well as the developments in the case-law of the CJEU and the ECtHR are discussed. Chapters 6 and 7 display the case-law concerning the application of the effective remedy provided for in the Dublin III Regulation. While Chapter 6 focuses on CJEU case-law concerning transfer decisions, Chapter 7 provides for the national case-law concerning non-transfer situations. In Chapter 8, the proposal for the Dublin IV Regulation is presented. Similarly, Chapter 9 contains the main aspects of the proposal for the Asylum and Migration Management Regulation. Chapter 10 is the last, concluding chapter.

2 The Common European Asylum System

2.1 General Remarks

In order to understand the context in which the Dublin III Regulation operates, it is essential to provide for an overview of the CEAS and its origin. EU cooperation within the area of asylum and migration started long before the events of 2015, when the exceptionally high influx of irregular migrants put a strain on the system.[30]

The CEAS is a part of the EU cooperation called the area of freedom, security, and justice (AFSJ). In 1999, the European Council met in Tampere, Finland, to set the framework for the AFSJ.[31] However, the origin of the CEAS can be traced back to the Schengen Agreement in 1985. Internal border controls within the internal market were abolished through the agreement, resulting in the need to better control the external borders.[32] Since then, the EU has worked towards creating the CEAS. The cornerstone of this system is the Dublin III Regulation, which governs the allocation of responsibility to the Member States for examining applications for international protection.[33]

2.2 Primary Law

The legal basis for the CEAS is set out in Article 78 TFEU. In the first paragraph, it is stated that the common policy in this area shall include any third-country national in need of international protection. International protection includes asylum, subsidiary protection, and temporary protection. The differences in these categories will not be explained in the context of this essay, as it is not relevant in relation to the issues discussed.

Article 78(2)(a–g) TFEU clarifies what measures the CEAS shall consist of. Besides adopting common policies on uniform statuses of asylum and international protection, these measures include a common system for temporary protection, common procedures for status declaration, common standards of reception conditions, and establishing partnerships with third countries to manage a high influx of people applying for international protection. It also includes, as set out in Article 78(2)(e) TFEU, measures

[30] COM(2016) 197, p. 3–4.
[31] Presidency Conclusions, Tampere European Council, 15-16 October 1999.
[32] The Schengen acquis - Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders [2000] OJ L 239/13.
[33] Dublin III Regulation, Recital 7.

establishing criteria and mechanisms for determining which Member State is responsible for examining an application for international protection, which is the legal basis for the Dublin System, as well as the new Migration Management System. Further, Article 78(3) TFEU provides that the Council may, after having consulted the European Parliament, adopt provisional measures in the case of emergency situations leading to a high influx of third-country nationals to the EU.

Through the entry into force of the Lisbon Treaty in 2009, the ordinary legislative procedure was introduced in the AFSJ.[34] Further, Article 4(2)(j) TFEU states that in the AFSJ, the competence of the Union is shared with the Member States. Shared competence is defined in Article 2(2) TFEU, where it is stated that both the Union and the Member States can legislate and adopt legally binding acts, but the competence of the Member States is limited to areas or issues where the Union has not yet exercised or has ceased to exercise its competence.

2.3 Secondary Law

The CEAS consists of seven different legislative acts. The Dublin III Regulation will be described in more detail in the following chapter, while the six other Regulations will be mentioned in the next paragraph. An important remark to be made in this context is that the proposal put forward by the Commission in 2020 aims at reforming the CEAS in its entirety. Mention of this was made in the background, Chapter 1.1. However, the basic features of the system will to some extent remain even if the proposals for the New Pact on Migration and Asylum are adopted.

The Qualification Directive lays out rules to ensure a uniform status declaration of people eligible for international protection and the content of the protection resulting from the status declaration.[35] The Asylum Procedures Directive sets out rules on common procedures for the examination of applications of international protection.[36] The Reception Conditions Directive imposes requirements on the Member States to offer a certain standard for the reception of applicants for international protection.[37] The Eurodac Regulation provides for the framework for a database,

[34] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 [2007] 2007/C 306/01.
[35] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted [2011] OJ L 337/9.
[36] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection [2013] OJ L 180/60.
[37] Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection [2013] OJ L 180/96.

Eurodac, to store fingerprints to ensure the effective application of the Dublin III Regulation.[38] The Union Resettlement Framework Regulation established the Asylum, Migration and Integration Fund for the period from 1 January 2014 to 31 December 2020. The Regulation also lays down rules regarding the utilization of the funds.[39] Lastly, there is a Regulation establishing the European Asylum Support Office, with the purpose to assist the Member States and improve the implementation of CEAS.[40]

[38] Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice [2013] OJ L 180/1.

[39] Regulation (EU) No 516/2014 of the European Parliament and of the Council of 16 April 2014 establishing the Asylum, Migration and Integration Fund, amending Council Decision 2008/381/EC and repealing Decisions No 573/2007/EC and No 575/2007/EC of the European Parliament and of the Council and Council Decision 2007/435/EC [2014] OJ L 150/168.

[40] Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office [2010] OJ L 132/11.

3 The Dublin III Regulation

3.1 General Remarks

This chapter will provide for a basic understanding of the key elements in the Dublin III Regulation, along with a more comprehensive analysis of the provisions with relevance to the question of whether an applicant may challenge a decision to refuse a take charge request. As mentioned in the introduction, the Dublin III Regulation lays down the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.[41]

In addition to the EU Member States, the four European Free Trade Association (EFTA) countries; Iceland, Norway, Switzerland, and Liechtenstein, are also participating in the cooperation.[42] On a terminological note, when referring to 'Member States', this term includes all of the participating states in the Dublin System.

3.2 Start of the Procedure for Determining the Member State Responsible

The procedure for determining the Member State responsible begins as soon as an application for international protection has been lodged in one of the Member States, as set out in Article 20(1). The Member State in which the application was first submitted ('the determining Member State') must determine which Member State is responsible for examining the application.

Once the procedure has begun, the applicant has the right to be informed of the application of the Regulation according to Article 4. Further, as set out

[41] Consolidated Version of Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) [2013] OJ L 180/31, Art 1.

[42] Agreement between the European Community and the Republic of Iceland and the Kingdom of Norway concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Iceland or Norway – Declarations [2001] OJ L 93/40; Agreement between the European Community and the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland [2008] OJ L 53/5; Protocol between the European Community, the Swiss Confederation and the Principality of Liechtenstein on the accession of the Principality of Liechtenstein to the Agreement between the European Community and the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland [2011] OJ L 160/39.

in Article 5, a personal interview shall be held with the applicant in order to facilitate the process of determining the Member State responsible. If the applicant is a minor, the best interest of the child must be taken into consideration in all parts of the process, as set out in Article 6.

If the determining Member State considers that another Member State is responsible for examining the application, the determining Member State shall request the other Member State to take charge of, or take back, the applicant. This follows from Articles 21 and 23, which will be described in more detail down below. However, first, the criteria will be presented.

3.3 Criteria for Allocating Responsibility

The criteria for determining the Member State responsible is provided for in Articles 8 to 16. As stated in Article 7(1), the criteria must be applied in the order in which they are set out. Furthermore, the decision regarding which Member State is responsible must be made in the light of what the situation looked like when the application was first submitted, according to Article 7(2).

Articles 8 to 11 and 16 are criteria relating to family unity. As a main rule, if a family member to the applicant is legally present in any of the Member States, that Member State is responsible for examining the application for international protection. The term ‘family member’ is defined in Article 2(g). Primarily, it refers to married couples or unmarried couples in stable relationships and their minor children, insofar as the family existed in the country of origin.

If the applicant is an unaccompanied minor, Article 8 applies. Provided that it is in the best interest of the minor, the Member State responsible is primarily where he or she has family members or siblings who are legally present. The criteria in Articles 9 and 10 apply to other applicants than unaccompanied minors, in situations where the applicant has family members that are beneficiaries of or applicants for international protection. Article 11 provides for a family procedure, in a situation where several family members submit applications for international protection at nearby dates. Article 16 regards dependent persons and applies when a person is dependent on his or her child, sibling, or parent, on account of serious illness, severe disability, etc.

Articles 12 to 15 are criteria that relate to other situations than the existence of legally residing family members. Rather, the criteria are based on practical issues in connection to the applicant’s entry into the Union. The first situation in this regard is when the applicant is in possession of a valid visa or a residence document issued by any of the Member States. According to Article 12, that Member State is the Member State responsible. Second, as set out in Article 13, a Member State becomes responsible when an applicant has irregularly crossed the border into that

Member State, coming directly from a third country. However, in this situation, the responsibility ceases after 12 months. As mentioned in the background to this paper, this criterion is of great significance in practice. The third situation is when an applicant has entered the territory of a Member State and the need for a visa is waived by the Member State, which makes that Member State responsible according to Article 14. The last situation is when an application for international protection has been made in an international transit area of an airport in a Member State. As set out in Article 15, that Member State is responsible.

The responsibility of a Member State to examine an application is not optional. The obligations of the Member State responsible is set out in Article 18. However, as provided by Article 17, the criteria do not prevent a Member State to take charge of an applicant voluntarily or, based on humanitarian grounds, request another Member State than the Member state responsible to take charge of an applicant.

If none of the criteria applies, the Member State in which the application was first lodged is the Member State responsible, as stated in Article 3(2). According to the second paragraph of Article 3(2), the same applies in the situation where a transfer of an applicant to the Member State responsible cannot take place due to the risk of violation of the prohibition of torture as set out in Article 4 CFR, and no other Member State can be designated as responsible based on the criteria.

An important remark to be made is that the application of the criteria presupposes, as a general rule, that the applicant has lodged one single application for international protection in one of the Member States and then stayed in that Member State. If, on the other hand, the applicant has lodged an application in one Member State and then traveled to another Member State and lodged a new application or resides illegally in that Member State, the ‘take back procedure’, as set out in Articles 23 to 25, may be applicable. If that is the case, the applicant may be sent back to the Member State where he or she made the first application, without regard to the criteria in Articles 8 to 16. Next, this procedure together with the ‘take charge procedure’ will be described in more detail.

3.4 Procedures for Taking Charge and Taking Back

The take charge procedure, as well as the take back procedure, are governed by Chapter VI, Articles 21 to 22 and 23 to 25 respectively. In this section, the focus will be on the take charge procedure since it is relevant to the question of whether there is a remedy against the decision of a Member State not to take charge of an applicant. These rules will not be explained in detail, but rather the main elements of the procedure.

When the determining Member State considers that another Member State is responsible for examining an application, it may request the other Member State to take charge of the applicant ('take charge request'), as provided by Article 21(1). The determining Member State will henceforth be referred to as 'the requesting Member State', while the other Member State will be referred to as 'the requested Member State'. As a main rule, the request shall be made as quickly as possible and no later than three months upon receiving the application. According to Article 21(3), a take charge request shall be made using a standard form and include circumstantial evidence and/or relevant statements from the applicant's statement.

The procedure for replying to a take charge request is set out in Article 22. The main elements of this procedure are the following. As stated in the first paragraph, the requested Member State shall make the necessary checks and give a decision within two months upon receiving the request. There is no definition of 'necessary checks' in the Regulation. However, as provided by the second paragraph, elements of proof and circumstantial evidence shall be used. These terms are defined in paragraph three. According to paragraph four, the requirement of proof should not exceed what is necessary for the proper application of the Regulation. Further, in the absence of formal proof, circumstantial evidence must be coherent, verifiable, and sufficiently detailed, as stated in the fifth paragraph. It is apparent from this article that the decision to take or not to take charge of an applicant shall be made through a proper examination of the elements of proof and circumstantial evidence provided for, and not based on a discretionary assessment.

The take back procedure differs from the take charge procedure to some degree, with the main difference being that it is not dependent on the application of the criteria. Article 23 applies in the situation when a new application for international protection has been lodged in the requesting Member State and Article 24 applies in the situation when no new application has been made but the applicant is residing illegally in the requesting Member State. Article 25 governs the reply to a 'take back request'. These rules will not be elaborated on further. Instead, procedural safeguards will be explained next.

3.5 Procedural Safeguards

The procedural safeguards provided for in the Dublin III Regulation are the notification of a transfer decision in Article 26 and remedies in Article 27. Before discussing the legal remedies available to the applicant, a short comment concerning Article 26 will be made. If a take charge request or a take back request is accepted by the requested Member State, the requesting Member State shall notify the person concerned of the decision to transfer him or her. There is no corresponding provision regarding the situation where a request is rejected and therefore, no transfer decision is taken. As provided by paragraph 2 of Article 26, the decision referred to in paragraph 1 shall include, inter alia, information on the legal remedies available and

the time limits for seeking such remedies. The lack of equivalent provisions in the case of a rejected request may be interpreted as meaning that there is no remedy made available to the applicant in this situation. However, in order to determine the scope of the remedy provided for in Article 27, it is first of all necessary to look into the wording of that provision.

Article 27(1) provides that '[t]he applicant or another person as referred to in Article 18(1)(c) or (d) shall have the right to an effective remedy, in the form of an appeal or a review, in fact and in law, against a transfer decision, before a court or tribunal'. The term 'transfer decision' is not defined in the Regulation. As mentioned above, the term can also be found in Article 26 where it refers only to transfer decisions after a take charge request or take back request has been accepted. However, Article 27(1) read in conjunction with recital 19 can be interpreted in a broader sense. Recital 19 reads as follows:

> 'In order to guarantee effective protection of the rights of the persons concerned, legal safeguards and the right to an effective remedy in respect of *decisions regarding transfers* to the Member State responsible should be established, in accordance, in particular, with Article 47 of the [CFR]. In order to ensure that international law is respected, an effective remedy against such decisions should cover both the examination of the application of this Regulation and of the legal and factual situation in the Member State to which the applicant is transferred'.[43]

While the scope of Article 27(1) is explicitly limited to a 'transfer decision', recital 19 instead refers to 'decisions regarding transfer'. Decisions regarding transfer are not necessarily limited to meaning decisions to transfer the applicant but could also be interpreted as meaning decisions not to transfer the applicant. It is difficult to imagine what decisions, that are not transfer decisions, the recital would otherwise refer to. Thus, a literal interpretation of Article 27(1), read in the light of recital 19, does not provide for a definite answer to the question of which type of decisions are subject to legal remedies. However, as will be shown in Chapter 7, national courts have reached different conclusions in this regard.

3.6 Interstate Procedures

In a situation where a Member State has requested another Member State to take charge of an applicant and the request is refused, the Member States have reached different conclusions regarding which Member State is responsible for examining the application for international protection. In the matter of disputes regarding the application of the Dublin III Regulation, Article 37 provides for a conciliation procedure. Further, Article 5 of the Implementing Regulation provides for a re-examination procedure in the

[43] Emphasis added.

situation where a take charge request has been rejected.[44] These procedures will be looked into next, in order to determine whether they can be considered to replace the need for an individual legal remedy against the refusal of a take charge request.

The blueprint of the conciliation procedure is set out in Article 37(2). In order for the procedure to commence, it has to be initiated by one of the Member States involved in the dispute. This request is made to the Chairman of the Committee, as provided by Article 44. The Chairman is responsible for appointing three members of the Committee which represent three Member States that are not involved in the dispute. These shall propose a solution to the matter. As stated in the second sentence of paragraph 2, '[b]y agreeing to use the conciliation procedure, the Member States concerned undertake to take the utmost account of the solution proposed'. However, the solution proposed is not a binding decision, as the final sentence of paragraph 2 sets out that '[w]hether it is adopted or rejected by the parties, the solution proposed shall be final and irrevocable'. Thus, it is up to the Member States themselves to decide whether they adhere to the proposed solution or not.

The re-examination procedure in Article 5 of the Implementing Regulation is set out as follows. The requesting Member State may ask for a re-examination of a take charge request in certain situations, as provided by paragraph 2. Either, the requesting Member State considers that the refusal of the request is based on misappraisal, or it has additional evidence to put forward. The request for a re-examination of the take charge request must be made within three weeks upon receiving the decision from the requested Member State. In addition to time limits, there are no other procedural rules governing the re-examination procedure. Unlike the conciliation procedure, the re-examination procedure does not involve any third parties and thus leaves it up to the parties themselves to resolve the dispute.

The presence of these procedures in the Dublin III Regulation and the Implementing Regulation respectively, means that there is an alternative to the legal remedies under Article 27 of the Dublin III Regulation, in order to overturn decisions to refuse a take charge request. In this regard, the general scheme of the Dublin III Regulation and the Implementing Regulation could therefore implicate that Article 27 of the Dublin III Regulation, read in conjunction with recital 19, should be interpreted in a narrow sense, where decisions to refuse a take charge request are excluded.

However, both the conciliation procedure and the re-examination procedure are interstate procedures. They can only be initiated by the Member States, and not by the applicants themselves. As will be discussed in the following

[44] Commission Implementing Regulation (EU) No 118/2014 of 30 January 2014 amending Regulation (EC) No 1560/2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 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 [2014] OJ L 39/1.

chapters, to ensure the correct application of the criteria and Member States' compliance with fundamental rights, the applicants must have access to effective remedies. Having to rely on the Member States to initiate these procedures cannot replace an individual legal remedy. Further, since the outcome of the procedures are not binding decisions, these dispute resolving mechanisms cannot be considered to be effective either. This argument is reinforced by the fact that the conciliation procedure has never been formally used since it first was established in the Dublin Convention in 1990.[45]

[45] Commission, 'Proposal for a regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund]' COM(2020) 610 final, 2020/0279 (COD), 23 September 2020, p. 27.

4 Fundamental Rights at stake

4.1 The Right to an Effective Remedy

4.1.1 General Remarks

In order to determine the scope of the remedies provided for in the Dublin System, the scope of the fundamental right to an effective remedy must be determined. The right to an effective remedy is provided for in Article 47 CFR, which is based on Articles 6 and 13 ECHR.[46] Further, Article 19(1) TEU also stipulates that the Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.

In addition to being a fundamental right in itself, the right to an effective remedy is also essential when it comes to the enforcement of other fundamental rights. As regards asylum seekers, effective enforcement of the right to asylum, Article 18 CFR, and non-refoulement, Article 4 CFR and Article 3 ECHR, is crucial. At the same time, the right to family life, as protected by Article 7 CFR and Article 8 ECHR, is essential for asylum seekers as well as for everybody else. These rights risk becoming relatively fruitless if individuals lack access to legal remedies.

4.1.2 Applicability and Scope

Article 47 CFR is the 'reference standard' of the CJEU when considering issues of effective judicial protection, as pointed out by Sasha Prechal, judge at the CJEU and honorary professor of European Law at Utrecht University.[47] However, the right to effective judicial protection was a general principle of EU law even before the CFR entered into force. This is evident from the case-law of the CJEU, for instance in the judgments *Johnston*[48], delivered in 1986, and *Heylens*[49], delivered in 1987. In *Johnston*, the Court stated that '[t]he requirement of judicial control […] reflects a general principle of law which underlies the constitutional traditions common to the Member States'.[50]

As argued by Prechal, while the CFR may be the first point of reference when considering the protection of fundamental rights, it does not exclude

[46] Explanations relating to the Charter of Fundamental Rights [2017] OJ C 303/17.
[47] Sasha Prechal, 'The Court of Justice and Effective Judicial Protecion: What has the Charter changed?' in Christophe Paulussen et al (eds) *Fundamental Rights in International and European Law: Public and Private Law Perspectives* (Asser Press 2015) p. 143.
[48] Case C-222/84 *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary* [1987] ECLI:EU:C:1987:442.
[49] Case C-222/86 *Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v Georges Heylens and others* [1987] ECLI:EU:C:1987:442.
[50] Case C-222/84 *Johnston,* para 18.

the applicability of general principles of EU law. It is important to have in mind that the general principle of effective judicial protection is not as sharply defined as the right to an effective remedy in Article 47 CFR, why it may have an even wider scope of application.[51]

Another important remark to be made is that the CFR was adopted in 2000 but did not become a binding source of EU law until the adoption of the Lisbon Agreement, which entered into force in 2009.[52] Article 6 TEU states that the Charter has the same legal value as the Treaties. This has had implications for the protection of fundamental rights in the Dublin System, as well as in any other area of EU law.

Member States of the EU are bound by the obligations of the CFR when implementing Union law, as stated in Article 51. When considering the scope of Article 47 CFR, this is the first condition to have in mind. In the case of remedies within the Dublin System, this condition is fulfilled since it concerns the application of an EU legal instrument.

In the case of the ECHR, there is no corresponding provision that limits the field of application to a certain context. Instead, Article 1 provides that the rights and freedoms as defined in Section I of the Convention applies to everyone within the jurisdiction of the High Contracting Parties. It is evident from this provision, that not only nationals but also migrants are covered by the rights provided for in the ECHR.

Article 52 CFR is a general provision governing the scope and interpretation of rights and principles provided for in the CFR. The first paragraph of Article 52 sets out that limitations of CFR rights and freedoms must be provided for by law and respect the essence of the rights and freedoms. Further, limitations must also be subject to the principle of proportionality. Since the right to an effective remedy is applicable in situations concerning the Dublin System, limitations to this right must fulfill the criteria just mentioned. However, there are no explicit limitations to the remedies provided for in the Dublin III Regulation.

The relationship between ECHR and the CFR is governed by Article 52(3) CFR. Rights provided for by the CFR that correspond to rights in the ECHR shall be interpreted in the light of the meaning and scope of the rights provided for in the ECHR. However, the protection afforded by the rights of the CFR may be more extensive than the ECHR.

As mentioned above, Article 47 CFR is based on Articles 13 and 6 ECHR. However, there are two major differences concerning the scope of these rights. This follows from the text of the provisions in question. First of all, Article 6 ECHR, providing for the right to a fair trial, is limited to civil and criminal matters. Therefore, it does not apply to the Dublin System. The

[51] Prechal (2015) p. 156–157.
[52] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 [2007] 2007/C 306/01.

scope of Article 47 CFR is wider in this regard, covering also administrative law.[53] Second, Article 13 ECHR, providing for a right to an effective remedy, is only applicable when there is a violation of rights provided for in the Convention.

The first paragraph of Article 47 CFR provides that the right to an effective remedy is afforded to everyone whose rights and freedoms guaranteed by EU law are violated. The second paragraph of Article 47 outlines the content of the right to an effective remedy and a fair trial, which include the possibility to be advised, defended, represented, and to have access to a fair and public hearing before a tribunal within a reasonable time. Further, the tribunal must be impartial, independent, and previously established by law. Lastly, the third paragraph provides that legal aid must be made available in situations where it is necessary to ensure effective access to justice for those who lack sufficient resources.

A literal interpretation of the first paragraph of Article 47 gives the impression that the scope of the right to an effective remedy is extensive since there is no limitation in terms of which rights and freedoms are protected, unlike Article 13 ECHR. As submitted in a comment to Article 47 by Peers et al, the 'rights and freedoms' covered by Article 47 do not appear to have an independent meaning.[54] Instead, it must be understood as any rights and freedoms provided by EU law are covered by Article 47.

An important remark in this regard is that the question of whether there is even a right or freedom covered by EU law at stake may rise issues. However, as submitted by Prechal, the existence of a dispute over alleged rights and freedoms should be sufficient for Article 47 to apply. Otherwise, the protection provided by Article 47 would be very limited, primarily because it would complicate the access to court.[55]

As further noted in a comment to Article 47 CFR, remedies need to be ensured to the extent that 'where there is a right under Union law, there is a remedy to ensure its enforcement'.[56] In the case *Schrems*, the CJEU stated that effective judicial review as a means to guarantee compliance with EU law is inherent in the rule of law.[57] The rule of law is one of the EU's founding values, as stated in Article 2 TEU.

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[53] Dinah Shelton, 'Article 47, D. Analysis, II. Scope of Application' in Steve Peers et al (eds), *The EU Charter of fundamental rights: a commentary* (Hard Pub Ltd. 2014) para. 47.44. However, as noted in the commentary, it appears that the ECtHR sometimes interprets 6 (1) broadly, so that it also includes administrative procedures.
[54] Angela Ward, 'Article 47' in Steve Peers et al (eds), *The EU Charter of fundamental rights: a commentary* (Hard Pub Ltd. 2014) para 47.01.
[55] Prechal (2015) p. 148.
[56] Herwig C. H. Hofmann, 'Article 47, D. Analysis, III. Specific Provisions (Meaning), (b) Scope of Protection' in Steve Peers et al (eds), *The EU Charter of fundamental rights: a commentary* (Hard Pub Ltd. 2014) para 47.53.
[57] Case C-362/14 *Maximillian Schrems v Data Protection Commissioner* [2015] ECLI:EU:C:2015:650, para 95.

A decision by an administrative authority does not itself satisfy the requirements of Article 47. This is evident from the case *El Hassani*, which regarded the question of whether there was a right to appeal in visa procedures. The Court underlined that the administrative decision to refuse a visa must be subject to review by an independent and impartial judicial body.[58]

It follows from the foregoing observations that the question of whether the right to an effective remedy means that the Member States must provide for a remedy against decisions to reject take charge requests depends on the existence of individual rights at stake. In the situation where such a decision allegedly keeps family members apart, it is evident that the right to family life and possibly even the rights of the child are at stake. In this situation, both Article 47 CFR and Article 13 ECHR are applicable. Further, the subjective right to the correct application of the criteria in the Dublin III Regulation, which will be discussed in Chapter 6, also constitutes a basis for why there should be a right to appeal in these cases, to satisfy the requirements of Article 47 CFR.

4.2 The Right to Family Life and the Rights of the Child

The right to an effective remedy is not the only fundamental right at stake when looking into whether an applicant may challenge a decision of a Member State to refuse a take charge request. In this section, the focus will be on the situation where an applicant has family members located in a different Member State, that are also applicants or beneficiaries of international protection. Provided that these family members fall into the categories of family members provided for in the criteria, Articles 8 to 10 and 16, the Member State where they reside is also responsible for the other applicant. However, if for some reason this Member State refuses to take charge of the applicant, it does not only raise the issue of whether the criteria have been applied correctly but also whether fundamental rights have been breached. The fundamental rights that are relevant to look into in this section are first and foremost the right to family life and the best interest of the child.

The right to family life is protected by Article 7 CFR and Article 8 ECHR. Further, the importance of respect for family life is mentioned in several parts of the Dublin III Regulation. Recital 14 even sets out that upon application of the Regulation, respect for family life should be a primary consideration. The order in which the criteria are set out proves this point, as criteria ensuring family unity comes first. Recitals 15 to 18 of the Regulation further reiterates the importance of family unity. The best

[58] Case C-403/16 *Soufiane El Hassani v Minister Spraw Zagranicznych* [2017] ECLI:EU:C:2017:960, paras 38-42.

interest of the child is closely related to the respect for family life but is mentioned separately several times throughout the Dublin III Regulation. Most importantly, Article 6 provides for guarantees for minors, and Article 8, which is the first criteria, concerns unaccompanied minors only. In recital 13, reference is also made to the Convention on the Rights of the Child[59] and the CFR.

To what extent does the right to family life apply to third-country nationals in the EU? This issue is partly governed by the Family Reunification Directive.[60] According to Article 1, the purpose of the Family Reunification Directive is to determine the conditions for the exercise of the right to family reunification by third-country nationals residing lawfully in the territory of the Member States. The applicability of the Directive is set out in Article 3. As provided in the first paragraph, the Directive is applicable when the applicant for family reunification is holding a residence permit issued by a Member State for a period of validity of at least one year and has reasonable prospects of obtaining the right of permanent residence, if the members of his or her family are third-country nationals of whatever status. From this follows, as explicitly provided for in the second paragraph, that the Directive does not apply when the applicant is a refugee whose application for international protection has not yet given rise to a final decision. Nor does it apply in situations of temporary or subsidiary protection. According to the third paragraph, family members of a Union citizen are also excluded from the target group of the Directive.

Thus, applicants for international protection cannot, while awaiting their final decision, avail themselves the right to family reunification by relying on the Family Reunification Directive. The protection of family unity provided by the criteria of the Dublin III Regulation goes further than the Family Reunification Directive since it applies to applicants of international protection.

For the purpose of this paper, it is not necessary to further elaborate on the contents of these rights. It is sufficient to mention that the right to family life first and foremost means that there is a right to live together as a family, as is evident from the case *Kutzner v Germany* in the European Court of Human Rights (ECtHR).[61] The refusal of a Member State to take charge of an applicant, in the situation where the applicant has family members in that Member State that are applicants or beneficiaries of international protection, clearly risks violating the fundamental right to family life. In addition, if the situation involves a minor, the best interest of the child is also at stake. Therefore, it is of fundamental importance to the applicant to be able to challenge the decision of a Member State not to take charge of him or her.

[59] UN Commission on Human Rights, Convention on the Rights of the Child, 7 March 1990, E/CN.4/RES/1990/74.
[60] Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L 251/12.
[61] App no 46544/99, *Kutzner v Germany*, judgment of 26 February 2002.

5 History of the Dublin System from a Fundamental Rights Perspective

5.1 General Remarks

This section explores the developments in the Dublin System from the Dublin Convention in 1990 to the current Dublin III Regulation which entered into force in 2013. As will be displayed below, the protection of fundamental rights within the Dublin System has increased over time. In its initial stage, the Dublin System was an intergovernmental mechanism for dividing the responsibility of examining applications for asylum. Nowadays, the Dublin System is incorporated into the CEAS, a, to some extent, harmonized area of EU law.

The following part also shows how the principle of mutual trust within the Dublin System is perceived by both the CJEU and the ECtHR.[62] The increased protection of fundamental rights can to a large extent be attributed to the practice of these two Courts. The purpose of this chapter is primarily to provide for a context in which the issue of remedies within the Dublin System is to be understood.

5.2 The Dublin Convention

The Dublin System was originally formed through the Dublin Convention in 1990, which entered into force in 1997. The Convention was adopted to efficiently allocate responsibility for examining applications for asylum lodged in one of the Member States of the European Communities. The allocation mechanism was based on the application of a number of criteria that were to be applied in the order set out in the Convention.[63]

Cooperation in this area of migration policy emerged as a necessary consequence of the removal of internal borders by the Schengen agreement.[64] There are mainly two reasons for this. The mechanism for determining responsibility for the examination of an application for asylum

[62] Mutual trust within the Dublin System is the assumption that all Member States treat applicants for international protection in accordance with the obligations arising from EU law and international law.
[63] Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities - Dublin Convention [1997] 97/C 254/01.
[64] The Schengen acquis - Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders [2000] OJ L 239/13.

prevents ‘forum shopping’. When one Member State is responsible for the examination of the asylum application, the asylum seeker is prevented from moving from state to state in order to find the state with the most generous asylum policies. Furthermore, the allocation of responsibility based on set criteria ensures that the asylum seeker has his or her application examined in one of the states. Otherwise, a situation could arise where no state considered itself competent to examine the application.[65]

In order to ensure the effective implementation of the Dublin Convention, in 2000 it was complemented by the Eurodac Regulation, establishing the database ‘Eurodac’ for the comparison of fingerprints of applicants for international protection.[66]

In its initial stage, the Dublin System contained little to no reference to fundamental rights. Nevertheless, as the first criterion, provided by Article 4, relates to family members, the importance of family unity can be viewed as an integral part of the allocation mechanism. However, the definition of a family member, as set out in the second paragraph of Article 4, only included spouses, unmarried children under the age of 18, and their parents. Further, there was also the possibility according to Article 9 to voluntarily accept responsibility based on humanitarian grounds. This aimed primarily at family and cultural grounds, as set out in the article.

As far as can be established, there is no case-law from the CJEU concerning the application of the Dublin Convention. In one case before the ECtHR, an applicant challenged a Dublin transfer on the basis that it would violate Article 3 ECHR. The applicant, a Sri-Lankan national, had left Germany and applied for asylum in the United Kingdom. The applicant feared that his transfer back to Germany would lead to him being returned to Sri-Lanka, in violation of the prohibition of torture. However, the Court considered the application to be inadmissible since it had not been established that there was a real risk that Germany would return the applicant to Sri-Lanka in violation of Article 3.[67]

5.3 The Dublin II Regulation

On 17 March 2003, the Dublin Convention was replaced by Regulation 343/2003 (‘the Dublin II Regulation’). The Dublin System now formed a part of the CEAS. It is evident from recital 4 of the Dublin II Regulation that the main goal was to ensure a rapid process for determining the Member State responsible for examining an application for asylum. Family

[65] ibid, p. 1; Joined cases C-411/10 and C-493/10 *N. S. v Secretary of State for the Home Department and M. E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* [2011] ECLI:EU:C:2011:865, para 79.
[66] Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention [2000] OJ L 316/1.
[67] App no. 43844/98 *T.I. v. the United Kingdom*, decision of 7 March 2000.

unity was to be ensured as long as it was compatible with the other objectives of the Regulation, as set out in recital 6. Reference to fundamental rights is scarce in comparison with the current Regulation in force. Recital 2 mentions the principle of *non-refoulement*, i.e., that nobody shall be sent back to persecution. At the same time, it is also stated that all Member States are considered as safe countries in this regard. Further, in recital 16, reference is made to the CFR and in particular, the right to asylum as protected by Article 18 CFR. [68]

The Dublin II Regulation has been widely criticized for not ensuring adequate protection for fundamental rights.[69] Further, in the ECtHR case *M.S.S. v Belgium and Greece*, mutual trust within the Dublin System was questioned. The case concerned an Afghan applicant who had traveled to Greece and later applied for asylum in Belgium. Subsequently, he was transferred back to Greece under the Dublin System. The living and detention conditions that the applicant was subject to in Greece was considered to violate Article 3 ECHR and the principle of *non-refoulement*. The Court reasoned that no matter the existence of mutual trust, the obligations arising from Article 3 must be observed. In this case, Belgium should have refrained from transferring the applicant back to Greece by relying on the 'sovereignty clause' in Article 3(2) of the Dublin II Regulation. By doing so, the criteria could be deviated from and responsibility could be accorded on a voluntary basis. The Court also considered that the right to an effective remedy under Article 13 ECHR was violated. Both the Greek and Belgian asylum procedures were considered deficient.[70]

Later in the same year as the ruling by the ECtHR was delivered, the CJEU delivered its judgment in the joined cases *N.S & Others*. These cases raised similar issues as those in *M.S.S. v Belgium and Greece*, and the latter was referred to by the CJEU several times throughout the judgment. The Court held that a transfer may not take place in the situation where a Member State cannot be unaware of systemic deficiencies regarding the asylum procedure and reception conditions in the responsible Member State, which amount to substantial grounds for believing that the asylum seeker would face a real

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[68] 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 [2003] OJ L 50/1.

[69] Samantha Velluti, *Reforming the common European asylum system: legislative developments and judicial activism of the European Courts* (Springer Berlin Heidelberg 2014) p. 39; Human Rights Watch, *Stuck in a Revolving Door. Iraqis and Other Asylum-seekers and Migrants at the Greece/Turkey entrance to the European Union*, November 2018. <https://www.hrw.org/sites/default/files/reports/greeceturkey1108web_0.pdf> accessed 16 November 2020; Francesco Maiani and Vigdis Vevstad 'Chapter 1: Distribution of Applicants for International Protection and Protected Persons' in European Parliament, Directorate-General for Internal Policies, Policy Department C, Citizens' Rights and Constitutional Affairs, 'Setting up for a Common European Asylum system. Report on the application of existing instruments and proposals for the new system,' PE 425.622 (Brussels 2010).

[70] App no. 30696/09 *M.S.S. v Belgium and Greece*, judgment of 21 January 2011.

risk of being subjected to inhumane or degrading treatment within the meaning of Article 4 CFR.[71]

In light of the above reasoning, the scope of the remedy provided for in the Dublin II Regulation was limited accordingly in the case *Abdullahi*. The CJEU held that a transfer decision can only be called into question by the applicant by pleading that there are systemic deficiencies. In its reasoning, the Court pointed out that the allocation of responsibility to the Member States for examining applications for international protection is based on organizational rules which govern the relations between the Member States. Further, it was held that one of the main objectives of the Dublin II Regulation was to establish an efficient and rapid method for determining the Member State responsible which would not compromise the aim of rapid processing of asylum applications.[72]

5.4 The Dublin III Regulation

On 26 June 2013, the Dublin II Regulation was recast into Regulation 604/2013 ('the Dublin III Regulation'). The objective of rapid allocation of responsibility is still evident in the new and updated version of the Dublin System, as set out in recital 5. However, unlike the Dublin II Regulation, the Dublin III Regulation contains several references to fundamental rights in the recitals, as shown in Chapter 4. For instance, recital 13 mentions the best interest of the child as a primary consideration upon application of the Regulation, in accordance with the Convention on the Rights of the Child[73] and the CFR. Respect for family life in accordance with the CFR is also noted as one of the primary considerations, as set out in recital 14. In addition, recitals 15 to 17 further describes how respect for family life is to be ensured upon the application of the Regulation.

Further, the definition of family members is broader in comparison to both the Dublin Convention and the Dublin II Regulation. For instance, concerning minors, responsibility can be accorded on the basis of the presence of siblings, adult aunts and uncles, and grandparents in any of the Member States. Thus, it is evident that respect for family unity and the rights of the child is better ensured in this version of the Dublin System.

For the first time in the history of the Dublin System, reference is also made to the right to an effective remedy in accordance with Article 47 CFR. As evident from recital 19, the right to an effective remedy and additional legal safeguards are necessary to ensure that the rights of the persons concerned are protected. In light of this, the remedies provided for in the Dublin III Regulation are much more detailed than the ones in the Dublin II

[71] Joined cases C-411/10 and C-493/10 *N. S. & Others*, para 94.
[72] ibid, paras 56, 59 & 62.
[73] UN Commission on Human Rights, Convention on the Rights of the Child, 7 March 1990, E/CN.4/RES/1990/74.

Regulation. This change had implications for how the CJEU interpreted the scope of this remedy concerning transfer decisions, as will be highlighted next.

The landmark decision of the CJEU regarding the right to an effective remedy under the Dublin III Regulation is the case *Ghezelbash*. The Court departed from its previous case law regarding the right to an effective remedy, especially its interpretation in the case *Abdullahi* which concerned the application of the remedies in the Dublin II Regulation. The scope of the remedies is no longer limited to pleading systemic deficiencies in the asylum procedure or reception conditions, which would amount to grounds for believing that the applicant would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 CFR. Instead, applicants are permitted to challenge transfer decisions based on the incorrect application of the criteria.[74]

5.5 Concluding Remarks

The case *Ghezelbash* and the subsequent case-law of the CJEU regarding remedies in the Dublin III Regulation will be analyzed more thoroughly in the following chapter. To summarize the developments in the Dublin System, it is evident that it has evolved from an inter-state mechanism for allocating responsibility of examining international protection, to a more rights-based mechanism that involves the applicant in the process of determining the Member State responsible. Both the criteria and the scope of the remedy provided for in the current Dublin III Regulation suggests that the protection for fundamental rights has become stronger. It is against this background that the issue of the scope of appeal concerning decisions to refuse to take charge of an applicant will be analyzed.

[74] Case C-63/15 *Ghezelbash*.

6 Case-law from the Court of Justice of the EU

6.1 General Remarks

This chapter will provide for an overview of the case-law of the CJEU concerning the remedies provided for in the Dublin III Regulation. As far as can be established, the scope of Article 27(1) has been subject to interpretation by the Court in a total number of eleven cases. These cases will be presented below. While these cases do not concern decisions not to take charge of an applicant but rather transfer decisions, they are still relevant to look into in order to understand how the Court views the applicants' right to an effective remedy in the Dublin System.

6.2 The Landmark Decision: Ghezelbash

As mentioned in the previous chapter, *Ghezelbash* is the landmark decision by the CJEU regarding the right to an effective remedy against transfer decisions.[75] Here, the Court deviated from the earlier case-law relating to the Dublin II Regulation and submitted that the remedies provided for in the Dublin III Regulation are not limited to pleading systemic deficiencies in the asylum procedure or reception conditions, which would amount to grounds for believing that the applicant would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 CFR.[76] Thus, earlier case-law relating to the Dublin II Regulation is no longer applicable.

The case *Ghezelbash* concerned an Iranian national who applied for international protection in the Netherlands. Based on a visa previously granted to him in France, the Netherlands considered that France was responsible for the applicant in accordance with the criterion provided for in Article 12 of the Dublin III Regulation. The Dutch authorities sent a take charge request to France, which was accepted by the French authorities. However, following this decision, the applicant stated that he had returned to Iran after his visit to France and that France was therefore not the Member State responsible. The questions asked by the referring court concerned the scope of the remedies under Article 27(1), read in conjunction with recital 19. The main question was whether it is possible to plead, in an appeal against a transfer decision, the incorrect application of one of the criteria.[77]

[75] Case C-63/15 *Ghezelbash*.
[76] ibid, paras 36–37.
[77] ibid, paras 19–24 & 28.

In response to the main question asked by the referring court, the CJEU, first of all, pointed out that the rights enjoyed by an applicant according to the Dublin III Regulation differ essentially from the Dublin II Regulation. Therefore, the scope of the remedy provided for in Article 27(1) must be interpreted in the light of the wording of the provisions, the general scheme, the objectives, and the context of the Dublin III Regulation. Regarding the context of the Regulation, it is especially important to take into consideration the evolution of the Dublin System and the surrounding system of which it forms part.[78]

Regarding the wording of Article 27(1), the Court noted that it does not contain or make reference to any limitations regarding what type of arguments may be raised by the applicant in order for it to be applicable. Nor is there a link between the remedies in Article 27 and the rule in Article 3(2) which sets out that a transfer cannot take place when there are systemic flaws in the asylum procedure and the reception conditions for asylum seekers in the Member State responsible, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 CFR.[79]

In addition, the Court brought to attention the wording of recital 19. As set out in the last sentence, compliance with international law requires the effective remedy to cover both the examination of the application of that Regulation and the examination of the legal and factual situation in the Member State to which the asylum seeker is to be transferred. The examination of the legal and factual situation in a Member State relates to the requirement set out in Article 3(2). However, the first one of these two types of examinations is rather meant to ensure the proper application of the Regulation.[80]

Next, the Court considered the general scheme of the Dublin III Regulation. The process of determining the Member State responsible through the application of the criteria listed in Chapter III is essential for the application of the Regulation. Reference is made to recitals 4, 5, and 40, which provides that the objective of the Regulation is to establish a clear and workable method to allocate responsibility for examining an application for international protection. The method shall be based on objective and fair criteria, in relation to both the Member States and the applicants. This is reflected in, inter alia, Articles 3(1), 7(1), and Chapter IV.[81]

Further, the Court held that the take charge procedure is important in the process of determining the Member State responsible. In particular, the fact that both the requesting and the requested Member State must check whether the criteria are met through an examination of the elements of proof and circumstantial evidence, suggests that the correct application of the criteria is crucial in this process. Thus, the examination referred to in recital

[78] ibid, paras 34–35.
[79] ibid, paras 36–37.
[80] ibid, paras 39–40.
[81] ibid, paras 41–42.

19 regarding the proper application of the Regulation must be understood as meaning that the legal remedy provided by Article 27 is intended to ensure that the criteria are correctly applied.[82]

As submitted by the Court, that interpretation is also supported by the general development in the Dublin system in regard to the rights enjoyed by the applicant. For instance, mention is made of Article 4, which confers a right upon the applicant to be informed of, among other things, the criteria for allocating responsibility. Further, the Court also referred to several other provisions, introduced by the Dublin III Regulation, which serve to ensure the involvement of the applicants in the process of determining the Member State responsible.[83]

In light of these changes, the Court considered that the Dublin III Regulation cannot be viewed as only governing the relations between the Member States in order to ensure effective allocation of responsibility. Rather, the objective of the Regulation is also to make improvements in terms of the protection afforded to applicants under the Dublin system. A narrow interpretation of Article 27(1) would not be compatible with the purpose of the Regulation. Further, the objective of swift procedures for allocating responsibility should not be achieved at the expense of the correct application of the criteria.[84]

The Court also noted, with reference to point 74 of the Advocate General's Opinion, that to have an applicant object to the application of the criteria cannot be equated with forum shopping. Ensuring the correct application of the criteria does not mean taking into account the will of the applicant, but rather to give the applicant opportunity to inform the court of relevant circumstances to determine responsibility based on the criteria. Further, the Court held that an inquiry exposing potential errors in the process of allocating responsibility has no bearing on the principle of mutual trust.[85]

Based on these considerations, the Court concluded that applicants are entitled to plead, in an appeal against a transfer decision, the incorrect application of one of the criteria for determining responsibility.[86] The interesting thing is that the Court made no reference to the right to an effective remedy in Article 47 CFR. Nor did it refer to the fundamental right to family life or any other fundamental right. Thus, the Court reached its conclusion without relying in any way on fundamental rights in its reasoning. Rather, the Court concluded that there is a subjective right to the correct application of the criteria without having to show that a fundamental right is at stake.

[82] ibid, paras 43–44.
[83] ibid, paras 45–50.
[84] ibid, paras 51–53, 56–57.
[85] ibid, paras 54–55.
[86] ibid, para 61.

6.3 Subsequent Case-Law

In subsequent cases, the Court refers to a large extent to its reasoning in *Ghezelbash*. For instance, this was the case in the judgment *A.S.*[87] Unlike the situation in *Ghezelbash*, the case did not concern the criteria in Article 12. Rather, the applicant had irregularly crossed the border into a Member State why responsibility was conferred on the basis of Article 13. However, in *Ghezelbash*, the Court does not make a distinction between the different criteria in its reasoning. Thus, the same reasoning was applied in the present case.[88]

The situation differed to some extent in the judgment *Karim*[89], but even then, the same reasoning as in *Ghezelbash* applied. The case concerned an applicant who applied for international protection in Sweden. However, a search in the Eurodac database showed that the applicant previously had applied for international protection in Slovenia. Swedish authorities requested Slovenia to take back the applicant, which the Slovenian authorities accepted. The applicant objected to the transfer decision, mainly on the basis that he had traveled outside EU territory for more than three months after his initial application for international protection, which meant that the responsibility for Slovenia had expired according to Article 19(2). Thus, the case did not concern the wrongful application of the criteria in Chapter III of the Dublin III Regulation but rather the wrongful application of Article 19(2) and if it was possible to challenge a transfer decision on that basis.[90]

As mentioned by the Court, Article 19(2) sets out that an application for international protection lodged after the three-month period shall be regarded as a new application and the process of determining the Member State responsible must be redone. In light of this, the Court considered that appeal must be allowed in this situation in order to ensure that the procedure for determining the Member State responsible is correctly applied.[91]

In the case *Mengesteab*, the applicant challenged a transfer decision on the ground that the three-month period for sending a take charge request according to Article 21(1) had expired.[92] The Court considered that application of the Dublin III Regulation primarily entails a process for determining the Member State responsible through the application of the criteria in Chapter III of the Regulation. However, the take charge and take back procedures provided in Chapter IV must be seen as an integral part of this process. Reference is made to point 72 of the Advocate General's Opinion, where it is stated that the take charge and take back procedures are

[87] Case C-490/16 *A.S. v Republika Slovenija* [2017] ECLI:EU:C:2017:58.
[88] ibid, paras 24–35.
[89] Case C-155/15 *George Karim v Migrationsverket* [2016] ECLI:EU:C:2016:410.
[90] ibid, paras 7–9, 12.
[91] ibid, paras 23–27.
[92] Case C-670/16 *Tsegezab Mengesteab v Bundesrepublik Deutschland* [2017] ECLI:EU:C:2017:587, paras 35–36.

governed by a series of specified time limits. The Court noted that the expiry of the time limit in 21(1) for sending a take charge request, according to the same provision, means that the responsibility is transferred to the requesting Member State.[93]

Thus, the time limits governing the take charge procedure contribute to determining the Member State responsible along with the criteria in Chapter III. Further, the time limits serve to achieve the objective of rapidly processing applications for international protection as referred to in recital 5. To be able to challenge the wrongful application of the take charge procedure is consistent with the objective of strengthening the protection of the rights of the applicants, as set out in recital 9. The Court also emphasized that Article 27, read in conjunction with recital 19, provides for a remedy to review the application of the Regulation. There is no distinction regarding which rules can be relied on in this regard. According to the Court, Article 27 must therefore be interpreted as providing a remedy in the present situation.[94]

The case *Shiri*[95] concerned a similar issue as in the case *Mengesteab*. The difference was that in *Shiri*, a transfer decision had already been made. However, the implementation of the transfer decision had taken longer than expected and exceeded the 6-month time limit for transfer as set out in Article 29(1). In this case, the responsibility for examining the application for international protection is transferred to the requesting state, as provided by the second paragraph of Article 29. With reference to the reasoning in the case *Mengesteab*, the Court considered that the applicant could rely on Article 29 to challenge the transfer decision.[96]

The reasoning by the Court in *Shiri* concerning Article 27(1) was repeated in the case *Jawo*[97], which also concerned the application of Article 29. The enforcement of the transfer decision was delayed due to the absence of the applicant. Thus, it had to be established whether the applicant had 'absconded' within the meaning of Article 29(2). If this is the case, the six-month time limit does not apply. According to the Court, the applicant can rely on Article 29(2) in order to challenge the transfer decision by claiming that he had not absconded.[98]

In *Hasan*, the Court considered the scope of Article 27(1) of the Dublin III Regulation in terms of which circumstances could be considered relevant in order to challenge a transfer decision.[99] The applicant had already been transferred from Germany to Italy but returned to Germany illegally. The

[93] ibid, paras 49–50, 52.
[94] ibid, paras 53–54, 57–58 & 62.
[95] Case C-201/16 *Majid Shiri, also known as Madzhdi Shiri, joined party: Bundesamt für Fremdenwesen und Asyl* [2017] ECLI:EU:C:2017:805.
[96] ibid, paras 35–46.
[97] Case C-163/17 *Abubacarr Jawo v Bundesrepublik Deutschland* [2019] ECLI:EU:C:2019:218.
[98] ibid, paras 25–31, 66–70.
[99] Case C-360/16 *Bundesrepublik Deutschland v Aziz Hasan* [2018] ECLI:EU:C:2018:35.

Court held that the enforcement of a transfer decision does not definitely establish the responsibility of the Member State to which the applicant has been transferred. Thus, the Court ruled that Article 27(1), read in the light of recital 19 and Article 47 CFR, does not preclude a legislative provision that may lead the court or tribunal hearing an action brought against a transfer decision to take into account circumstances that are subsequent not only to the adoption of that decision but also to the transfer of the person concerned.[100]

In *Hassan*, a transfer decision was challenged on the basis that it violated Article 26 of the Dublin III Regulation since the decision was taken before the requested state had responded to the take back request. The Court held that Article 26 must be interpreted as providing for a specific procedural order where an acceptance of a take charge or take back request must take place before the applicant is notified of the decision to transfer him or her.[101]

The joined cases *H & R* concerned the application of the criterion in Article 9 in situations where responsibility had already been established and take back procedures had been initiated since the applicants previously had applied for international protection in another Member State.[102] The criterion in Article 9 covers family members who are beneficiaries of international protection. Thus, this ruling showcases how the Court views family unity in relation to Dublin transfers.

In short, the situations in the two joined cases were as follows. The applicants applied for international protection in the Netherlands. The Dutch authorities held that both of the applicants had previously applied for international protection in Germany. Thus, take back requests were sent to Germany. However, in the case of the first applicant, H, she claimed that the United Kingdom was responsible for examining her application for international protection since her husband resided there. On the other hand, the second applicant, R, claimed that his/her spouse resided in the Netherlands. On the basis of the criterion in Article 9, the applicants argued that Germany was not the Member State responsible but rather the United Kingdom and the Netherlands respectively. The referring court was unsure of whether the applicants could rely on Article 9 in this situation to challenge the transfer decisions.[103]

The CJEU held that the take back procedure differs essentially from the take charge procedure. This is because the take back procedure does not entail an examination of the criteria listed in Chapter III of the Dublin III Regulation. Rather, according to Article 23, a take back request may be sent in a situation where a new application has been lodged in the requesting Member State if the requesting Member State considers that another Member State is

[100] ibid, paras 15–20, 27–40.
[101] Case C-647/16 *Adil Hassan v Préfet du Pas-de-Calais* [2018] ECLI:EU:C:2018:368.
[102] Joined Cases C-582/17 and C-583/17 *Staatssecretaris van Veiligheid en Justitie v H. and R* [2019] ECLI:EU:C:2019:280.
[103] ibid, paras 17–35.

responsible in accordance with Article 20(5) and 18(1)(b), (c) or (d). Thus, the Court held that a transfer decision made by the second Member State in which the applicant has applied for international protection cannot, in principle, be challenged on the ground that it does not comply with the criteria in Article 9.[104]

However, in the light of the right to family life, the best interest of the child, and the principle of sincere cooperation, a Member State must accept responsibility when the applicant has provided the competent authorities with information that clearly establishes that that Member State is responsible according to the criteria. In such a situation, the Member State shall not send a take back request. Therefore, the Court concluded that the applicant may, by way of exception, challenge the transfer decision by relying on Article 9 where the applicant has informed the competent authorities with information that clearly establishes responsibility for the requesting Member State.[105]

The case *M.A. & Others* also concerned transfer decisions taken subsequent to the issuing of take back requests. One of the issues was whether the discretionary clause in Article 17 could be relied on to challenge the transfer decisions. The case concerned three applicants, two parents, and a child, who applied for asylum in Ireland. They had previously resided in the United Kingdom for six years. The Irish authorities sent a take back request to the United Kingdom, which was accepted. The applicants challenged the transfer decisions mainly on the ground that the discretionary clause was applicable due to the health problems that the child and one of the parents suffered from.[106]

One of the questions asked by the referring court concerned the applicability of the concept of an effective remedy in relation to Article 17. The CJEU considered that the refusal of a Member State to use the discretionary clause in Article 17 cannot be challenged. However, a refusal to accept responsibility based on the application of the discretionary clause would in this case inevitably lead to a transfer decision. If the applicant decides to challenge the transfer decision, he or she may rely on Article 17 in this regard.[107]

6.4 Concluding Remarks

It is evident from the case-law presented above that CJEU considers that there is a right to challenge transfer decisions on the basis that the procedure for determining the Member State responsible has been applied incorrectly.

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[104] ibid, paras 57–59, 84.
[105] ibid, paras 83–84.
[106] Case C-661/17 *M.A. and Others v The International Protection Appeals Tribunal and Others* [2019] ECLI:EU:C:2019:53, paras 32–38.
[107] ibid, paras 43, 73–79.

Ghezelbash and *A.S.* concerned the incorrect application of the criteria, while the rest of the cases concerned the incorrect application of the procedure in other aspects.

As mentioned in the introduction to this chapter, all cases concern transfer decisions, but the reasoning by the Court can to a large extent be applied in situations concerning rejected take charge requests. This is because the responsibility to take charge of an applicant is not optional for the Member States. A wrongful application of the procedure for determining the Member State responsible can have taken place irrespective of whether the outcome is that the applicant shall be transferred or not.

The reasoning by the Court in *Ghezelbash* is not dependent on the existence of fundamental rights at stake, not even the right to an effective remedy. However, emphasis was put on the objective of the Dublin III Regulation to provide for strong protection of the applicants' fundamental rights. In light of this, in the cases *H&R* and *MA & Others*, the Court concluded that Article 27 must be interpreted broadly and provide for a remedy even in situations where the take back procedure applied, which meant that the criteria relied on by the applicants were, in principle, not applicable.

In the absence of case-law from the CJEU concerning remedies against decisions not to take charge of an applicant, the next chapter will provide for an overview of national case-law in this regard.

7 Case-law from EU Member States

7.1 General Remarks

As highlighted in the introduction of this paper, the issue of whether negative replies to take charge requests may be appealed have been dealt with in a number of cases before national courts. In the absence of case law from the CJEU, national case law may provide guidance on possible ways of interpreting the scope of Article 27 of the Dublin III Regulation, read in the light of recital 19. The Member States where this issue has been dealt with are Austria, Germany, Sweden, the Netherlands, and the United Kingdom. As will be displayed below, national case law shows a fragmented picture regarding the question of whether it is possible to appeal a decision to refuse a take charge request. In some Member States, there is a tendency to allow appeals more often, while in other Member States it is less common. Further, in some cases, appeal has been allowed without giving any specific reasons why.

An important remark to be made is that, due to language barriers, the understanding of the cases from Austria, Germany, and the Netherlands is based on the summary of these provided for in the expert opinion by the Migration Law Clinic of the VU University Amsterdam.[108] However, the description of the case law from Sweden and the United Kingdom is based on the author's own understanding of these cases, which largely corresponds to how these cases are described in the expert opinion.

7.2 Austria

In Austria, the Austrian Federal Administrative Court (Bundesverwaltungs-gericht, BVwG) has concluded in one case that the individual applicant does not have access to a legal remedy against a decision to reject a take charge request. The case concerned a child residing in a Greek camp, whose parents had applied for asylum in Austria. The Greek authorities sent a take charge request to the Austrian authorities, which rejected the request.[109]

The reasoning by the Court was as follows. First of all, the Court considered that the procedure for taking charge was purely intergovernmental. Further, no subjectively enforceable right to the correct application of the Dublin criteria can be derived from the Dublin System in the case of rejected take charge requests, as it is a self-contained system of legal protection according to the Court. The fact that fundamental rights were at stake, as submitted by

[108] Migration Law Clinic (2020).
[109] BvWG Österreich W175 2206076-1[2018] ECLI:AT:BVWG:2018:W175.2206076.1.00.

the applicant with reference to Article 8 ECHR and Articles 7 and 47 CFR, did not matter in this regard.[110]

The Court also held that in order to challenge a decision to refuse to take charge of an applicant, the requesting Member State must submit a request for re-examination, as provided for in the Implementing Regulation. Further, the requesting Member State can initiate an infringement procedure against the requested Member State, in accordance with Article 259 TFEU. The review thus depends on the Member States, as individual applicants are not able to initiate these procedures themselves.[111]

7.3 Germany

In Germany, appeal has been granted in several rulings by first instance Administrative Courts (*Verwaltungsgericht or VG*). As far as can be established, the issue has not yet been subject to a ruling by a higher court. However, a ruling by the Federal Administrative Court (*Bundesverwaltungsgericht or BVerwG*) concerning a take back situation is worth mentioning in this regard. The case concerned the criteria related to unaccompanied minors in the Dublin II Regulation. The Court held that the criteria not only govern the interstate relationships but also serve to protect the fundamental rights of the applicants. Because of this, the applicant has a subjective right to have his or her asylum application examined by the Member State responsible. Thus, decisions not consistent with the rules governing responsibility may be challenged by the applicant.[112]

This ruling by Germany's highest court of appeal in administrative law has had an impact on the assessment by the lower instance courts in the case of take-charge situations as well. For instance, this was the case in a ruling by the Administrative Court in Bremen. The case concerned a take charge request based on the application of the criteria in Article 8(2) of the Dublin III Regulation. The Court considered that there was a right to appeal the decision by the German authorities not to take charge of the applicant.[113] In several other cases concerning the application of the criteria concerning family unity, provided for in Articles 8-10 of the Dublin III Regulation, the Courts also ruled in favor of the applicant. References were made to Article 47 CFR and the right to effective legal protection as protected in the German Constitution or Basic Law.[114] Two of these cases will be highlighted next.

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[110] ibid.
[111] ibid.
[112] BVerwG, Decision of 16 November 2015, 1 C 4.15, ECLI:DE:BVerwG:2015:161115U1C4.15.0.
[113] VG Bremen, Decision of 27 March 2020, 5 V 2557/19.
[114] VG Wiesbaden, Decision of 23 September 2019, 6 L 1158/19.WI.A; VG Münster, Decision of 18 September 2019, 2 L 820/19.A; VG Weimar, Decision of 3 September 2019, 2 E 1204/19 We; VG Stuttgart, Decision of 14 August 2019, A 3 K 2257/19; VG

On 20 December 2018, the Administrative Court of Münster ruled in a case concerning an unaccompanied minor in Greece. The Court found that there is a subjective right to have one's application for asylum examined in the Member State responsible according to the criteria that best serve the interest of the child and family unity. In light of this, the remedies provided for in the Dublin III Regulation cannot be considered to cover only appeals against transfer decisions but also decisions to refuse to take charge of an applicant. The Court also held that if Article 27 were to be interpreted narrowly, in accordance with the wording of the provision, this would limit the protection of the fundamental rights of the applicant. Further, it would also go against the purpose of the Dublin III Regulation.[115]

The Administrative Court of Berlin had a similar approach in a ruling on 15 March 2019. The Court held that Article 27 of the Dublin III Regulation covered only appeals concerning transfer decisions, but that Article 47 CFR required that appeal must be afforded also in the situation where a decision to transfer is not made due to the rejection of the take charge request. The Court also argued that the remedy must be sought in the requested Member State since the authorities in the requesting state cannot oblige the requested Member State to take charge of the applicant.[116] The same reasoning was also applied by the Administrative Court of Trier in two cases.[117]

On a final note, regarding German case-law, in a number of rulings by administrative courts concerning rejected take charge requests, a remedy has been granted based on the application of Article 27 of the Dublin III Regulation, without providing for an explicit explanation as to why.[118]

7.4 Sweden

As far as can be established, so far only one case concerning the right to an effective remedy against the refusal to take charge of an applicant has been decided by the Swedish Migration Court of Appeal.[119] As mentioned in the

Hannover, Decision of 9 August 2019, 2 B 3013/19; VG Karlsruhe, Decision of 30 July 2019, A 1 K 4345/19; VG Ansbach, Decision of 2 July 2019, AN 18 E 19.50459; VG Münster, Decision of 6 May 2019, 2 L 392/19.A; VG Wiesbaden, Decision of 25 April 2019, 4 L 478/19.WI.A; VG Arnsberg, Decision of 9 April 2019, 1 L 1977/18.A; VG Trier, Decision of 27 March 2019, 7 L 1027/19.TR; VG Berlin, Decision of 15 March 2019, 23 L 706.18; VG Münster, Decision of 20 December 2018, 2 L 989/18.A, ECLI:DE:VGMS:2018:1220.2L989.18A.00. For English summaries of these cases, see Equal Rights Beyond Borders strategic litigation on Family Reunion, available at: <https://www.equal-rights.org/litigation> accessed 13 November 2020.

[115] VG Münster, 2 L 989/18.A.

[116] VG Berlin, 23 L 706.18.

[117] VG Trier, 7 L 1027/19.TR, para 3; VG Trier, Decision 18 February 2020, 7 L 398/20.TR.

[118] VG Berlin, Decision of 4 July 2019, 37 L 277.19.A; VG Münster, 2 L 392/19.A; VG Potsdam, Decision of 25 September 2018, 11 L 751/18.A; VG Trier, Decision of 27 March 2019, 7 L 1027/19.TR.

[119] The Migration Court of Appeal is the highest court of appeal in migration cases in Sweden, see The Administrative Court in Stockholm, 'The Migration Court of Appeal'

background of this paper, the case concerned an applicant who originally applied for asylum in Greece, where he informed the authorities that he had a wife that had been granted international protection in Sweden. Greek authorities considered that Sweden was responsible for examining the application, based on the application of the criteria in Article 9. Accordingly, the Greek authorities sent a take charge request to Sweden, which was refused by the Swedish authorities. This decision was appealed by the applicant, first to the Migration Court and second to the Migration Court of Appeal. The applicant argued, inter alia, that allowing the appeal was the only possible interpretation of Article 27 of the Dublin III Regulation that was in line with the right to an effective remedy under Article 47 CFR. Further, the applicant held that the right to appeal in these situations had been granted by courts in Germany and the United Kingdom.[120]

Despite this, the Migration Court ruled that there was no right to appeal in these situations. The Court argued that the wording of Article 27 covered only decisions to transfer an applicant, and not a decision not to accept a take charge request. Further, the Court stated that it is evident from the case law from the CJEU, for example, *Ghezelbash* and *Karim*, that the Court may only review an appeal where it is clear that the infringements are relevant to the procedure for determining the State responsible. Review of a Member State's decision to refuse a take charge request goes against the purpose of the Dublin III Regulation, which is to rapidly determine responsibility for examining an application. At last, the Court also stated that the decision not to allow an appeal in this situation does not deprive the applicant of the opportunity to apply for family reunification in another way.[121]

As already mentioned, this decision was appealed by the applicant to the Migration Court of Appeal. The applicant claimed that there were grounds for obtaining a preliminary ruling from the CJEU. Interestingly enough, the Court considered that the interpretation of the provisions in question was so obvious that there was no reason to ask for a preliminary ruling by the CJEU. The Court considered that the wording of Article 27, read in conjunction with recital 19, excludes the possibility to appeal a decision to refuse a take charge request. In this regard, the Court put forward that indeed, recital 19 contains the phrasing 'decisions regarding transfer'. However, since a refusal of a take charge request means that no transfer decision is taken it is not a decision regarding transfer.[122]

The Court also referred to Advocate General Sharpston's opinion in *Ghezelbash*[123], where it is stated that an appeal may not be lodged until a decision to transfer has been taken. Further, as set out in the opinion, the

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<https://www.domstol.se/globalassets/filer/domstol/migrationsoverdomstolen/ovrigt/engelska_migrationsoverdomstolen.pdf> accessed 16 November 2020.

[120] MIG 2020:4.

[121] ibid.

[122] ibid.

[123] Case C-63/15 *Ghezelbash*, Opinion of AG Sharpston, ECLI:EU:C:2016:186, para. 56.

appeal must be directed against the decision to transfer and not against the consent of the requested State to assume responsibility, since, according to the Advocate General, it is the decision on transfer that directly affects the individual asylum seeker.[124]

Lastly, the Court argued that a decision to refuse to take charge of an applicant primarily affects the states involved and not the individual directly in such a way that it could be a violation of his or her fundamental rights. Therefore, there is no right for the applicant to appeal based on the application of Article 47 CFR.[125]

7.5 The Netherlands

In the Netherlands, the question of whether it is possible to appeal a decision to refuse to take charge has been dealt with in two separate cases. The first one was delivered on 21 December 2018 by the Dutch Council of State.[126] The Council of State considered that Article 27 of the Dublin Regulation must be interpreted narrowly, as only including remedies against transfer decisions. Further, it was held that a remedy against a decision to refuse a take charge request would be contrary to the interstate mechanisms provided for in the Dublin System. These are the conciliation procedure, as set out in Article 37 of the Dublin III Regulation and the re-examination procedure, as provided by Article 5 of the Implementing Regulation.[127]

The second case was delivered on 9 July 2019 by the District Court of the Hague. The Greek authorities had sent a take charge request to the Netherlands to bring together the applicant with his wife and child, whose applications for asylum were examined by the Dutch authorities. However, the take charge request was rejected by the Netherlands. The time limits for the interstate mechanisms had expired, why the reasoning by the Council of State in the first case could not be applied in the present case according to the Court. Further, the Court considered that the decision to reject a take charge request constitutes an administrative act as set out in Article 72(3) of the Dutch Aliens Act (Vreemdelingenwet 2000). As such, it can be objected to under administrative law. However, the appeal must be made to the administrative body before it can be appealed to the Court. Consequently, the Court considered that it had no jurisdiction and transferred the decision to the administrative body.[128]

The judgment by the District Court of the Hague was appealed by the State Secretary of Justice and Security. It was argued that a decision to refuse a

[124] MIG 2020:4.
[125] ibid.
[126] The Council of State (or Raad Van State) is the highest court of appeal in the Netherlands concerning general administrative law, see Raad Van State, 'The Council of State' < https://www.raadvanstate.nl/talen/artikel/> accessed 16 November 2020.
[127] Council of State, 21 December 2018, ECLI:NL:RVS:2018:4298.
[128] District Court of the Hague, 9 July 2019, ECLI:NL:RBDHA:2019:6868.

take charge request did not constitute an administrative act. However, before the Council of State had ruled on this issue, the applicant was granted asylum by the Dutch authorities. Following this, the Council of State considered that the appeal was inadmissible due to the lack of procedural interest. Thus, the question of whether a decision to refuse to take charge constitutes an administrative act under Dutch law remains unanswered.[129]

7.6 The United Kingdom

In the United Kingdom, appeal has been granted in several cases before the Upper Immigrational Tribunal.[130] The first case, delivered on 29 April 2016, was *MK, HK, and IK*. French authorities sent a take charge request to the United Kingdom, in order to bring together two children, HK and IK, with their (alleged) mother MK. The authorities in the United Kingdom replied negatively to the request, on the basis that there were doubts regarding the family ties.[131]

The Upper Tribunal considered that it is possible to challenge decisions to refuse to take charge of an applicant. It was submitted that a decision on a take charge request is not in any way final and that the duty of investigation of the authorities in the requested state continues even after an initial refusal decision has been taken. Therefore, it can be legally challenged. According to the Tribunal, another interpretation would be 'entirely inconsistent with the concept of practical and effective protection and the broader context of the real world of asylum claims'.[132]

In the case *HA & Others*, delivered on 19 April 2018, the appeal of a decision to refuse to take charge was also allowed. The case concerned a married couple and their child who wanted to be reunited in the United Kingdom, where one of the spouses lived. The reasoning by the Upper Tribunal was brief. The argument was that the case involved human rights, why Article 27, read in the light of recital 19, was applicable.[133]

The third case that is relevant in this regard is *MS & MAS*, delivered on 19 July 2018. The case concerned two applicants, MS and MAS, who claimed to be brothers. MAS was lawfully present in the United Kingdom while MS, an unaccompanied minor, had applied for asylum in France. Again, the

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[129] ibid.
[130] Judgments by the Upper Immigrational Tribunal may be appealed before the Court of Appeal, see Courts and Tribunals Judiciary, 'Tribunals Structure Chart' <https://www.judiciary.uk/wp-content/uploads/2020/08/tribunals-chart-updated-May-2020.pdf> accessed 16 November 2020.
[131] R (on the application of MK, IK & HK) v Secretary of State for the Home Department [2016] JR 2471, para 3–11.
[132] R (on the application of MK, IK & HK) v Secretary of State for the Home Department [2016] JR 2471, para 41.
[133] R (on the application of HA & Others) v Secretary of State for the Home Department [2018] UKUT 00297 (IAC), para 49.

Upper Tribunal considered that it is possible to appeal a decision not to agree to take charge of an applicant.[134]

Here, the reasoning by the Upper Tribunal was lengthy. It held that a narrow reading of Article 27, as only applicable to transfer decisions, is incorrect. This is because recital 19 recognizes that there is a right to an effective remedy in respect of decisions *regarding* transfers. According to the Upper Tribunal, a decision to reject a take charge request is a decision regarding a transfer. It does not matter that such a decision means that no transfer decision is taken.[135]

Further, with reference to cases C-63/15 *Ghezelbash* and C-670/16 *Mengesteab*, the Upper Tribunal considered that there is a right to an effective remedy to challenge the wrongful application of the criteria for determining responsibility. If this right was limited to situations where the wrongful application of the criteria will lead to transfer and not in situations where the applicant remains in the Member State where he or she is located, it would be arbitrary and such an interpretation is unwarranted. Reference was also made to Article 47 CFR and the importance of family reunion in situations involving a child.[136]

The fourth and last case in this section is *FwF, FrF & NF*, delivered on 15 August 2019. The case concerned the three alleged siblings, FwF, FrF, and NF. FwF and FrF, who were minors, applied for asylum in France and wanted to be reunited with their older brother NF in the United Kingdom. The take charge requests sent by the French Authorities, based on the application of the criteria in Article 8(1) of the Dublin III Regulation, was rejected by the British Authorities. The Upper Tribunal considered that the application for judicial review was allowed. However, there was no discussion about it, it was just stated that the applicants have a right to an effective remedy under the Dublin III Regulation and the CFR.[137]

7.7 Concluding Remarks

As shown in the present chapter, the national courts' interpretation of remedies within the Dublin System differs a lot. While courts in Sweden, Austria, and the Netherlands have reached the conclusion that there is no right for the applicant to appeal a decision to reject a take charge request, courts in Germany and the United Kingdom has arrived at the opposite conclusion.

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[134] R (on the application of MS & MAS) v Secretary of State for the Home Department [2018] JR 9682, paras 3 & 185–189.
[135] ibid, paras 185–187.
[136] R (on the application of MS & MAS) v Secretary of State for the Home Department [2018] JR 9682, paras 188–189.
[137] R (on the application of FwF & FrF) v Secretary of State for the Home Department [2019] JR 1626, paras 2–10 & 101.

The reasons provided by the national courts for not allowing a remedy in these situations can be summarized as follows. First of all, the wording of Article 27 contradicts any other interpretation, since it refers only to transfer decisions. Further, the take charge procedure is purely intergovernmental, meaning that it only governs the relationships between the Member State. As such, it does not affect the applicant in such a way that it affects his or her fundamental rights. This was submitted by both the Swedish and Austrian highest court of appeal. Further, as held by courts in Austria and the Netherlands, the existence of intergovernmental dispute resolution mechanisms in the Dublin III Regulation and the Implementing Regulation replaces an individual legal remedy in these situations.

In contrast to this line of reasoning, both German and UK courts focused on the fundamental rights implications for the applicants subject to the take charge procedure rather than the intergovernmental aspect of it. As submitted by courts in both Member States, the right to family life, the rights of the child, and the fundamental right to an effective remedy are at stake in this procedure. Article 27 must be read in the light of recital 19, which provides support for a broad interpretation of remedies within the Dublin System. Further, German courts also submitted that there is a subjective right to the correct application of the Dublin criteria.

8 The Dublin IV Regulation Proposal

8.1 General Remarks

The Dublin IV Regulation is, as mentioned earlier, a Commission proposal in 2016 for a recast of the Dublin III Regulation.[138] The proposal was negotiated in the European Parliament as well as the Council in accordance with the ordinary legislative procedure. However, the slow progress in this procedure led to the plans for Dublin IV being abandoned in favor of the 2020 Commission proposal for the New Pact on Migration and Asylum, including the Asylum and Migration Management Regulation. Despite the fact that the Dublin IV Regulation was never adopted, the provisions might be of relevance for the interpretation of both the Dublin III Regulation and the Asylum and Migration Management Regulation. In this regard, the remedies of the Dublin IV Regulation will be discussed as it differs in essential aspects from the remedies in the other two Regulations.

8.2 Remedies

The remedies in the Dublin IV Regulation are provided for in Article 28. The first paragraph is very similar to the corresponding provision in both the Dublin III Regulation and the Asylum and Migration Management Regulation. According to Article 28, there is a right to an effective remedy against a transfer decision. However, as laid out in paragraph 4, the scope of this right is limited to an assessment of whether Articles 3(2), in relation to the existence of a risk of inhuman or degrading treatment, or Articles 10 to 13 and 18 are infringed upon. The latter articles set out criteria relating to family unity and the rights of the child.

The fourth paragraph of Article 28 means that the scope of the remedy provided for in the Dublin IV Regulation is very limited in comparison to the remedies in the Dublin III Regulation. Although, it is quite similar to the remedies in the Asylum and Migration Management Regulation, as will be shown in the next chapter. However, paragraph 5 of Article 28 stands out in relation to both the Dublin III Regulation and the Asylum and Migration Management Regulation, since it explicitly provides for a remedy in situations where no transfer decision is taken and the applicant claims that another Member State is responsible for examining his or her application

[138] Commission, 'Proposal for a regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)' COM(2016) 270 final/2, 4 May 2016.

based on the criteria relating to family members. Thus, according to the Dublin IV Regulation, there is a right to appeal a decision by a Member State to refuse to take responsibility for an applicant.

There appears to be two possible ways of interpreting the addition of the fifth paragraph in Article 28, when considering what implications it has for the interpretation of the remedies provided for in the Dublin III Regulation as well as the Asylum and Migration Management Regulation. One of the arguments that can be deduced from the added fifth paragraph is that it suggests that the legislator did not consider that this situation was covered by the wording of the first paragraph of Article 28. This argument would mean that neither the Dublin III Regulation nor the Asylum and Migration Management Regulation provides for a remedy against a decision to refuse to take charge of an applicant since it is not explicitly provided for in these Regulations. On the other hand, one could argue that that the legislator considered that the right to appeal a decision to reject a take charge request did in fact already exist, but that it needed to be clarified through an express provision stating this right.

While it was made clear that there was a right to an effective remedy even in certain situations where no transfer decision had been taken, the administration of the take charge procedure in these situations remained rather unclear. The take charge procedure is an administrative procedure involving at least two different Member States. How the outcome of this procedure is communicated to the applicant in the absence of a transfer decision is highly relevant, especially in order for the applicant to know how and when to appeal the decision not to transfer him or her. What is remarkable though, is that unlike Article 27 of the Dublin IV Regulation, titled ‘Notification of a transfer decision’, there is no corresponding provision relating to the situation where no transfer decision is taken following a take charge request. Nor is there a provision stating that a decision not to transfer an applicant shall be made. Therefore, it is rather unclear how the remedy would be applied in practice.

In light of this ambiguity, the general scheme of the Dublin IV Regulation provides no further guidance on how to view the intentions of the legislator regarding the question of whether the right to appeal a decision to refuse a take charge request was already implicit in the first paragraph. Next, the relevant provisions of the Asylum and Migration Management Regulation will be discussed in order to bring more clarity to the question of how the remedies within the Dublin System and the new Migration Management System should be understood.

9 The Asylum and Migration Management Regulation Proposal

9.1 General Remarks

The proposal for the Asylum and Migration Management Regulation was presented by the Commission on 23 September 2020, along with the other parts of the New Pact on Migration and Asylum.[139] The main change compared to the Dublin III Regulation was the introduction of the so-called 'Solidary Mechanism'. In situations of migratory pressure, it obliges the other Member States to provide for solidarity contributions, in order to help the Member State(s) concerned. However, this mechanism will not be explained further since it is not relevant in light of the research question. Nor will the criteria be explained in this section, since no major changes were introduced in this area. Instead, the focus will be on the provisions with relevance to the question of whether there is a right to an effective remedy against the decision to refuse a take charge request.

9.2 Procedures for Taking Charge and Taking Back

Chapter V of the Asylum and Migration Management Regulation, titled 'Procedures', contains, inter alia, procedures for take charge requests and take back notifications. Article 29 and 30 governs the take charge procedure. Apart from changes in time limits for sending and answering to take charge requests, there are no substantial differences to the procedure in the Dublin III Regulation. In contrast, the procedure for sending back an applicant to another Member State has changed considerably in the Asylum and Migration Management Regulation. Instead of sending a take back request, the Member State where the applicant is present shall send a take back notification to the Member State where the applicant shall be returned to. Thus, a decision to send back applicants to another Member State shall, as a main rule, be recognized by that Member State. The exception to this rule is where the Member State can demonstrate that its responsibility has ceased to exist pursuant to Article 27. In the case of a take charge request, there is no automatic recognition of the requesting Member State's decision of the Member State responsible. Just as set out in the Dublin III Regulation,

[139] Commission, 'Proposal for a regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund]' COM(2020) 610 final, 2020/0279 (COD), 23 September 2020.

the requested Member State shall examine the take charge request and make the 'necessary checks' according to Article 30(1).

9.3 Procedural safeguards

Procedural safeguards are set out in Articles 32 and 33. Article 32, titled 'Notification of a transfer decision', is similar to the corresponding provision in the Dublin III Regulation. However, the remedies provided for in Article 33 has changed significantly compared to the Dublin III Regulation. First, the contents of Article 33 will be described. Second, there will be a discussion regarding what implications these changes have for the interpretation of the right to challenge decisions not to take charge of an applicant.

The first sentence of Article 33(1) of the Asylum and Migration Management Regulation corresponds with Article 27(1) of the Dublin III Regulation. It provides that there is a right to an effective remedy, in the form of an appeal or a review, in fact and in law, against a transfer decision, before a court or tribunal. However, unlike the remedies in the Dublin III Regulation, the scope of this right is limited to an assessment of a) 'whether the transfer would result in a real risk of inhuman or degrading treatment for the person concerned within the meaning of Article 4 of the [CFR]' and b) 'whether Articles 15 to 18 and Article 24 have been infringed, in the case of the persons taken charge of pursuant to Article 26(1), point (a)'.

It is obvious that the limitation relating to *non-refoulement* excludes any right to appeal a decision to refuse to take charge of an applicant since it is not relevant if no transfer takes place. However, the limitation in point (b) is relevant in any case. Articles 15 to 18 and 24 are criteria relating to family unity. Unlike the other criteria, these criteria have a close connection to the right to family life and the rights of the child. The incorrect application of these criteria risks violating fundamental rights, while incorrect application of the other criteria does not. However, as set out in point (b) of Article 33(1), the right to an effective remedy relating to infringement of Articles 15 to 18 and 24 is limited to persons taken charge of pursuant to Article 26(1), point (a). Article 26 governs the obligations of the Member State responsible. Paragraph 1, point (a) sets out that the Member State responsible is obligated to take charge of an applicant whose application was registered in a different Member State, provided that the conditions in Articles 29, 30, and 35 are met. Thus, persons taken charge of can only be interpreted as meaning those persons subject to take charge requests that have been accepted by the requested Member State.

From a textual approach based solely on the provisions of the Asylum and Migration Management Regulation, there is no room for interpreting that there would be a right to appeal a rejected take charge request. However, just like in the Dublin III Regulation, the right to an effective remedy is referred to in the recitals. Recital 56 of the Asylum and Migration

Management Regulation is very similar to recital 19 of the Dublin III Regulation. The term ‘decisions regarding transfer’ is included in the new Regulation as well, why the discussion regarding the implications of this term applies here as well.

The only thing different from recital 19 of the Dublin III Regulation is that one sentence is added to recital 56 of the Asylum and Migration Management Regulation, stating that ‘[t]he scope of the effective remedy should be limited to an assessment of whether applicants' fundamental rights to respect of family life, the rights of the child, or the prohibition of inhuman and degrading treatment risk to be infringed upon’. This could be interpreted as meaning that the right to an effective remedy applies in all situations where these rights are at risk to be infringed upon. The right to family life and the rights of the child are at stake in all stages of decision-making regarding the application of the criteria relating to family unity. This includes the decision to reject a take charge request.

To summarize the findings so far, Article 33(1) of the Asylum and Migration Management Regulation, read in conjunction with recital 56, could be interpreted as including the right to appeal a decision not to take charge of an applicant. The wording of the article itself speaks against this interpretation, while the recital allows for this interpretation, based on the referral to the protection of fundamental rights.

9.4 Interstate Procedures

Even though it is pointed out in the introduction to the proposal of the new Asylum and Migration Management Regulation that the conciliation procedure has never been used, it is included in there as well, albeit in a changed format.[140] The conciliation procedure is governed by Article 44. The procedure is initiated by one or more Member States upon encountering difficulties regarding the cooperation under the Regulation. The first measure provided for in the procedure is to hold consultations between the Member States themselves, in accordance with the principle of sincere cooperation. Information regarding these consultations may be shared with the Commission and the Committee referred to in Article 67. If the first step is insufficient, it is possible to request the Commission to hold consultations in order to find appropriate solutions. The Commission may, inter alia, adopt recommendations addressed to the Member States.

However, the solutions proposed are not binding decisions. It appears that the same reasoning regarding it being an interstate procedure and the lack of effective enforcement mechanisms is applicable even in this updated form of the interstate procedure. As in the Dublin III Regulation, the conciliation procedure therefore cannot be regarded as an alternative to an individual legal remedy.

[140] COM(2020) 610 final, p. 27.

10 Conclusions

10.1 General Remarks

In accordance with the purpose of the present study, the perspective of individuals' rights within the Dublin System and the new Migration Management System has been highlighted. Further, potential gaps in judicial protection have been identified. In this concluding chapter, the findings of the study will be presented in a structured way, in order to provide for a final answer to the research question as laid out in the first chapter:

> How are the remedies provided for in the Dublin System and the new Migration Management System to be understood, in light of the fundamental right to an effective remedy, in a situation where a Member State has refused to take responsibility for the examination of an application for international protection?

10.2 An Effective Remedy Against the Refusal of a Take Charge Request?

10.2.1 The Dublin System

In order to determine whether the Dublin III Regulation provides for an individual legal remedy against the refusal of a Take Charge Request, a number of arguments in both directions have been laid out in this paper, which will be summarized and structured in this section in order to provide for a definite answer to the question.

In line with the reasoning by the CJEU in the case *Ghezelbash* and subsequent case-law, the scope of the remedies provided for in the Dublin III Regulation must be interpreted in light of the wording of the provisions of the Regulation, along with its general scheme and objectives and the context and evolution of the system.

Regarding the wording of Article 27 of the Dublin III Regulation, read in the light of recital 19, it has been submitted that it does in fact allow for a broad interpretation where even non-transfers can be challenged by the applicants. This is because a decision not to take charge of an applicant can be viewed as a decision regarding a transfer. This view was taken by the Upper Tribunals in the UK, while the Swedish Migration Court of Appeal held the opposite.

The general scheme of the Dublin III Regulation essentially speaks against the existence of an individual legal remedy against a negative reply to a take charge request. For instance, Article 26 provides that an applicant shall be

informed of the decision to transfer him or her, including the legal remedies available to the applicant to challenge the decision. There is no corresponding provision applicable to the situation where a take charge request has been rejected. Further, both the Austrian Federal Administrative Court and the Dutch Council of State considered that the interstate procedures provided for in both the Dublin III Regulation and the Implementing Regulation replaced the need for an individual legal remedy. However, as these procedures can only be initiated by the Member States themselves and lack effective enforcement mechanisms, they cannot be compared to an effective remedy in the sense of Article 47 CFR.

The evolution of the Dublin System shows that the objective of strong protection of fundamental rights has been given a more prominent role. Further, it is evident that it has evolved from an inter-state mechanism for allocating responsibility of examining international protection, to a more rights-based mechanism that involves the applicant in the process of determining the Member State responsible. Thus, it is no longer merely an intergovernmental system that only affects the relationships between the Member States.

Especially in light of the objectives and the context of the Dublin III Regulation, the CJEU has established that there is a subjective right to the correct application of both the criteria and the other provisions governing the procedure of allocating responsibility for the examination of an application for international protection. Thus, applicants may challenge transfer decisions on the basis that the procedure has been applied incorrectly. The same reasoning is applicable even in situations where a take charge request has been refused and therefore, no transfer decision is taken.

Further, in the situation where an applicant has family members in any of the Member States, a refusal of that Member State to accept responsibility for the applicant risks violating the fundamental right to family life and potentially even the rights of the child. At least in these situations, where fundamental rights are at stake, the right to an effective remedy in accordance with the CFR and ECHR is applicable. However, Article 47 CFR appears to apply even in situations when other rights stemming from EU law are at stake.

The proposal for the recast of the Dublin III Regulation into the so-called Dublin IV Regulation shows, however, that the legislator did not consider it to be obvious that the remedy in Article 27(1) included the possibility to challenge a decision by a Member State not to take charge. This is evident from the added fifth paragraph, which explicitly provides for such a remedy. However, it is not clear whether this means that the situation was not considered to be covered by the first paragraph, or if it simply had to be clarified.

In conclusion, it is uncertain whether an applicant may challenge a decision by a Member State not to take charge of him or her. However, there are

compelling reasons why it should be considered to be allowed. From a teleological approach, the objectives of the Regulation are better ensured if no distinction is made between a transfer decision and a non-transfer in this regard. However, in the absence of a preliminary ruling by the CJEU, the issue will remain and the current unsatisfactory situation with diverging case-law in the Member States will continue to apply.

10.2.2 The New Migration Management System

The proposal for an Asylum and Migration Management Regulation is intended to heal the shortcomings of the Dublin III Regulation and provide for a more sustainable system. However, apart from the new solidarity mechanism which will demand the Member States to share the burden in situations of migratory pressure, not much has changed. The procedure for determining the Member State responsible remains to a large extent in the same format as set out in the Dublin III Regulation. However, the remedies available to the applicants have been made more rigid the new Regulation compared to the corresponding provision in the older version. This makes it even more difficult to determine whether the Asylum and Migration Management Regulation provides for an individual legal remedy against the refusal of a Take Charge Request.

The scope of the remedy provided for in the Asylum and Migration Management Regulation is explicitly limited to an assessment of whether the transfer would violate non-refoulement, and, in the case of the persons taken charge of pursuant to a take charge request, whether Articles 15 to 18 and 24 have been infringed. Even if the term decisions regarding transfer still can be found in the recitals, it is difficult to argue that persons not taken charge of are covered by the remedies.

Further, it appears that the reasoning by the CJEU in *Ghezelbash* is to a large extent no longer applicable to the remedies in the Asylum and Migration Management Regulation. Since the scope of the remedy is limited to apply only in relation to a few of the criteria, it is evident that the applicants no longer have a subjective right to the correct application to the criteria not covered by the exception, nor to the correct application of the procedure at large.

However, the criteria that are covered by the exemptions are applicable even in situations where a take charge request has been rejected, why it is possible to argue that the applicant may challenge such a decision even in this new proposed Regulation. It is evident that the focus lies on the protection of fundamental rights rather than the correct application of the procedure in all senses. Thus, compliance with the right to family life, rights of the child, and ultimately the right to an effective remedy, might imply that a remedy must be provided even in the situation where a take charge request has been rejected and consequently, no transfer decision is taken. In relation to the Dublin III Regulation, courts in both Germany and the United Kingdom focused on the fundamental right aspect when providing for a remedy under the Dublin III Regulation in these situations.

10.3 Concluding Remarks

In light of what has been concluded above, it remains uncertain whether the remedy provided for in the Dublin System and the new Migration Management System applies in situations where a take charge request is refused and thus, no transfer decision is taken. In relation to the Dublin III Regulation, there are more compelling arguments in favor of such an interpretation, while the opposite applies to the Asylum and Migration Management Regulation. However, just as in the case of transfer decisions, fundamental rights are at stake. In the interest of legal certainty and compliance with fundamental rights, it is of the utmost importance that the issue is examined by the CJEU. Therefore, next time this issue arises before a national court, a reference for a preliminary ruling by the CJEU would be highly anticipated.

On a final note, a proposal for further research is to examine the possibilities of implementing the principle of mutual recognition to a greater extent in the procedure for allocating responsibility for the examination of applications of international protection. In view of the fact that the proposal for the new Migration Management System provides for take back notifications instead of take back requests, a similar approach could be carried out in regards to the take charge procedure. Such a development would certainly eliminate the need for an individual legal remedy to be made available against a Member State's refusal of a take charge request.

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