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#### 1. Introduction

In the 1980s, with the coming into force of the Schengen agreement, the Member States lost a fair chunk of control over the movement of third country nationals within the territory. Therefore, the Member States agreed to establish a Common European Asylum System (CEAS) with the Treaty of Amsterdam.

One of the most important legal documents for the CEAS today is Regulation 343/2003 which is also called Dublin Regulation or Dublin II. The aim of this Regulation on the one hand is to avoid asylum shopping<sup>1</sup> and on the other hand to lay out hierarchical criteria of which Member State is responsible for an asylum application. Besides the Dublin Regulation, Article 78(1) of the Treaty on European Union (TEU) lays down that a central part of the CEAS is the principle of non-refoulement <sup>2</sup> which has been developed with the Geneva Convention in 1946. <sup>3</sup> Another aspect of the Dublin System is mutual trust which refers to the assumption that every Member State of the Dublin System is respecting its Fundamental Rights obligations and therefore is regarded to be a safe-country. The conclusion from this assumption was that Member States automated their asylum procedures because it did not constitute a breach of the principle of non-refoulement when removing an asylum seeker to another Member State.

This automaticity led to removals of asylum seekers within the Dublin System without an evaluation of the effects which caused several asylum seekers to claim the disrespect of their Fundamental Rights before the European Court of Human Rights (ECtHR). In two cases (T.I. and K.R.S.) the ECtHR was asked to analyse whether the removal of an asylum seeker to Germany (T.I.) and the removal of an asylum seeker to Greece (K.R.S.) would constitute a violation of the principle of non-refoulement. The ECtHR concluded in both cases that it was no breach of this principle which constitutes an affirmation of the idea of mutual trust.

Differently in the case of M.S.S. the ECtHR ruled that both Belgium (the sending state) and Greece (the receiving state) breached their Fundamental Right obligations. This case marked a turning point in the development of mutual trust in the scope of the Dublin System due to the fact that it required Member States of the Dublin System to make sure that they are not breaching their Human Rights obligations and the principle of non-refoulement even when

<sup>&</sup>lt;sup>1</sup> Asylum shopping refers to the practice of applying for asylum in several Member States in order to get the best outcome possible

<sup>&</sup>lt;sup>2</sup> For an explanation of this principle please see part 2.1

<sup>&</sup>lt;sup>3</sup> Geneva Convention State of Refugees Art. 33(1)

transferring an asylum seeker to the Member States which is responsible according to the Dublin Regulation.

After this judgement several questions have been referred to the Court of Justice of the European Union (CJEU) in order to clarify how the judgement of the ECtHR influences the practice and obligations of Member States of the Dublin Regulation in combination with their Human Right obligations.

Dealing with this topic is especially relevant at the moment due to the fact that EU is looking forward to access the European Convention on Human Rights<sup>4</sup> which will change the legal status of Fundamental Right protection in the EU. By accessing the ECHR the legal status of Fundamental Rights in the EU will increase as the EU's actions and measures will be directly scrutinised by the ECtHR.

This paper outlines how the judgements by the ECtHR and the CJEU influenced the idea of mutual trust that has been underlying the Dublin System. Therefore it will be outlined in part two what the legal framework for the judgements is. Afterwards it will be showed how the ECtHR with its judgements in T.I. and K.R.S. on the one hand introduced the principle of indirect-refoulement and on the other hand strengthened the assumption of safety. Part three will then in detail outline why the ECtHR overcame the idea of blind mutual trust and the assumption of safety and what this implies for the burden of proof. Moreover, part three will deal with the questions referred to the CJEU in the joined cases of N.S. and M.E. and why the answers to these question followed the ECtHR in its conclusion that a blind assumption of safety is not compatible with the obligations to respect Fundamental Rights. It will be concluded which scrutiny Member States need to conduct and which obligations arise for them in order to make sure to safeguard Fundamental Rights. Part 3.3 will then outline, while taking into account recent policy developments and recent judgements, how these judgements changed mutual trust and what this implies for mutual trust in the future of the Dublin System.

<sup>&</sup>lt;sup>4</sup> Council of the European Union, June 2013, Fifth Negotiation meeting between the CDDH ad hoc negotiation group the European Commission on the Accession of the European Union to the European Convention on Human Rights

#### 2. Mutual trust in the Dublin System

#### 2.1 The legal framework

Part of the legal framework in the scope of asylum law is of international character. One basic principle underlying asylum law, and playing a crucial role for this paper, is the principle of non-refoulement. Article 33(1) of the Refugee Geneva Convention, which all Member States of the European Union (EU) ratified, states that "[n]o Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." Therefore it is prohibited for Nation States, that ratified the Geneva Convention, to remove a person that might be entitled to asylum. The United Nations High Commissioner (UNHCR) even stated that the principle of non-refoulement is progressively achieving the status of a peremptory law.<sup>5</sup>

Besides the international law principles that need to be respected, the Treaty of Lisbon influenced Human Rights obligations among the EU Member States significantly. The first mention of establishing an area of Freedom, Security and Justice in the EU came along in 1999 with the Treaty of Amsterdam. An underlying principle that has been introduced in this scope, which is playing a crucial role for the topic at hand, is the idea of mutual trust. This principle implies that all Member States of the EU have mutual confidence in each other in the sense that it is expected that "all EU Member States respect and protect fully Fundamental Rights". <sup>6</sup>

Along with the Lisbon Treaty the Member States additionally agreed on the Charter of Fundamental Rights of the European Union. This system of Human Rights obligations was established in the Charter of Fundamental Rights, European Convention of Human Rights and the general principles of EU law<sup>7</sup>. But it is important to point out that these obligations are only binding when Member States act in the scope of EU law<sup>8</sup>, therefore giving the Court of Justice of the European Union (CJEU) only jurisdictional power, when EU law is concerned. Moreover, with the execution of the Treaty of the European Union (TEU), the Member States

<sup>&</sup>lt;sup>5</sup> Mallia, "Notes and Comments- Case of M.S.S. v. Belgium and Greece: A Catalyst in the Re-thinking of the Dublin II Regulation" (2011), Refugee Survey Quarterly, p.112

<sup>&</sup>lt;sup>6</sup> Mitsilegas, "The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual", (2012) Yearbook of Europeal Law, 31, , p.319 <sup>7</sup> Art. 6 TEU

Art. 6 IEU

<sup>&</sup>lt;sup>8</sup> Lavrysen, 2012. "European Asylum Law and the ECHR: An uneasy Co-existence", Goettingen Journal of International Law. 4(1), p.202

of the EU agreed on the establishment of a Common European Asylum System (CEAS) based on the spirit of fair sharing of responsibilities and burdens.<sup>9</sup>

An important aspect of the coming into force of the ECHR is the role of the European Court of Human Rights (ECtHR). Although the ECtHR is not yet directly part of the legal order of the European Union, it has been implemented in order to give individuals and groups of individuals the chance to file complaints against breaches of the European Convention of Human Rights<sup>10</sup> (herein referred to as "Convention"). This legal system, and the inclusion of the ECtHR, is in a phase of reform at the moment as the EU is looking forward on the accession of the EU to the ECHR. <sup>11</sup> Such an accession of the EU to the Convention would result in the fact that all EU acts and measures realised through an agent, institution or persons on behalf of the EU will become an integral part of the Fundamental Right protection system. <sup>12</sup> Therefore, as a result of the accession, the ECtHR becomes part of the EU's legal order, because "any person, non-governmental organisation or group of individual will have the right to submit acts, measures and omissions of the EU, [...], to the external control exercised by the [European] Court [of Human Rights] in the lights guaranteed under the Convention"<sup>13</sup>.

Although this agreement is not been implemented yet it has to be taken into account as it will drastically change the position of the ECtHR and their influence on the European asylum policy. Nevertheless, due to the fact that the European Institutions are bound by the ECHR, as a matter of EU law, international obligations are arising not only for the European Institutions but for the Member States as well. Therefore, these obligations might be subject to external scrutiny, for example through the ECtHR. <sup>14</sup>Therefore, the ECtHR already has the power to influence how interstate relations and interstate trust work when Human Rights are concerned. Hence, the ECtHR has the jurisdictional power to influence the asylum system that is prevailing in the EU in the sense that certain behaviour may be prohibited on the basis of Human Right violations.

<sup>&</sup>lt;sup>9</sup> Art. 80 TEU

<sup>&</sup>lt;sup>10</sup> Slaughter, Anne-Marie: "Judicial Globalization", p.1109

<sup>&</sup>lt;sup>11</sup> Council of the European Union, June 2013, Fifth Negotiation meeting between the CDDH ad hoc negotiation group the European Commission on the Accession of the European Union to the European Convention on Human Rights

<sup>&</sup>lt;sup>12</sup> Council of the European Union, June 2013, Fifth Negotiation meeting between the CDDH ad hoc negotiation group the European Commission on the Accession of the European Union to the European Convention on Human Rights, Art. 1(1-3)

<sup>&</sup>lt;sup>13</sup> Council of the European Union, June 2013, Fifth Negotiation meeting between the CDDH ad hoc negotiation group the European Commission on the Accession of the European Union to the European Convention on Human Rights, Appendix V, I, 5.

<sup>&</sup>lt;sup>14</sup> Lavrysen, 2012. "European Asylum Law and the ECHR: An uneasy Co-existence", Goettingen Journal of International Law. 4(1), p.206

## 2.2 Mutual trust in the Dublin System

Besides these more general Human Right obligations and laws, the EU has developed particular rules for asylum applications within the Area of Freedom, Security and Justice. The most essential tool in this regard is Regulation 343/2003, the so-called Dublin II or Dublin Regulation. The aim of this system is the avoidance of asylum shopping on the one hand and on the other hand to make sure that asylum seekers are not sent from one Member State to another (within the Schengen area) without having his or her asylum application examined. Chapter III of this regulation lays down hierarchical criteria to determine which Member State is responsible. Nevertheless Member States are in the position, according to Article 3(2) of the Regulation, to examine an asylum application although they are not the first Member State responsible according to the criteria laid down in Chapter III. This, at the moment discretionary, clause is referred to as sovereignty clause.

Moreover, the Dublin Regulation is based on the idea of mutual trust which includes the full and inclusive application of the Geneva Convention (respecting the principle of nonrefoulement) resulting in the assumption that all Member States respect their obligations arising from the Geneva Convention and therefore are considered safe countries. <sup>15</sup> Due to this assumption, Member States of the Dublin System were not breaching the principle of nonrefoulement when transferring an asylum seeker from one Member State to another, which led to automatic transfers from one Member State to the Member State responsible according to Chapter III of the Dublin Regulation. Whether this principle is still applicable when safeguarding Human Rights obligations, is crucial for the thesis at hand and questioned by the ECtHR as well as the CJEU as it will be outlined in the following.

The Dublin Regulation is criticised for safeguarding the Northern Member States from immigration while shifting the entire burden on the Southern Member States. <sup>16</sup> This critique derives from the fact that asylum seekers are required to lodge an asylum application in the country of arrival. If they did not do so but lodge an asylum application in another Member State, the country of first entry is, according to Chapter III Regulation 343/2003, responsible for examining the claim. Taken together with the fact that almost 90% of illegal immigrants

<sup>&</sup>lt;sup>15</sup> Regulation 343/2003; preamble (2)

<sup>&</sup>lt;sup>16</sup> Mallia, "Notes and Comments- Case of M.S.S. v. Belgium and Greece: A Catalyst in the Re-thinking of the Dublin II Regulation" (2011), Refugee Survey Quarterly, p. 116

enter the EU through Greece <sup>17</sup> it becomes obvious that the outlined solidarity and sharing of the burden <sup>18</sup> is not applied in practice.

At the moment the EU institutions are working on the establishment of a CEAS which has a common asylum procedure and common rules as its basis. Nevertheless, there have been judgements of the CJEU and the ECtHR that required Member States of the Dublin System to change their behaviour due to their Human Right obligations. <sup>19</sup> Therefore the next chapter will deal with two cases of the ECtHR that influenced the idea of mutual trust in the Dublin System in its early phase, which will be followed by a chapter that entirely deals with two important and recent judgements (one by the ECtHR <sup>20</sup> and one by CJEU <sup>21</sup>) which changed the application of the Dublin Regulation.

<sup>&</sup>lt;sup>17</sup> CJEU, N.S. vs SSHD (C-411/10) and M.E. (C-493/10), 21. December 2011, §87

<sup>&</sup>lt;sup>18</sup> Art. 80 TEU

<sup>&</sup>lt;sup>19</sup> ECtHR, M.S.S. v Belgium and Greece, 21 January 2011

<sup>&</sup>lt;sup>20</sup> ECtHR, M.S.S. v Belgium and Greece, 21 January 2011

<sup>&</sup>lt;sup>21</sup> CJEU, N.S. v SSHD (C-411/10) and M.E. (C-493/10), 21 December 2011

#### 3. The cases of T.I. and K.R.S. of the ECtHR and their implications for mutual trust

#### 3.1 T.I. and the possibility of the refutability of the presumption of safety

The asylum seeker T.I. is a Sri Lankan national who was born in 1969 in Jaffe where he lived until May 1995. Starting in 1993, the applicant was taken by the violent organisation LTTE in order to conduct certain tasks for them.<sup>22</sup> In 1995 he was wrongly accused by the army of being an LTTE member which resulted in army detention and torture.<sup>23</sup> After being released by the army, the applicant was questioned and beaten by another pro-Government organisation, which was followed by an accusation in October 1993 to be involved in the explosion of an oil tanker.<sup>24</sup> The questioning and humiliating treatment he received during his detention was conducted by officers of the Criminal Investigation Department.<sup>25</sup> After his uncle bribed a police officer, T.I. was able to leave not only the arrest but also Sri Lanka and arrive in Germany in February 1996 where he lodged an asylum application.

On April 26 in 1997 the Bavarian Administrative Court rejected the asylum application after an oral hearing due to the argument that the ill-treatment the asylum seeker received did not arise from government officials.<sup>26</sup> Hence, the Court concluded that T.I. was safe from prosecution if returning to the South of Sri Lanka.<sup>27</sup> This judgement made him leave Germany and go to the United Kingdom (UK) where he lodged an asylum application on the 20<sup>th</sup> of September 1997.<sup>28</sup> The UK Government requested afterwards that Germany accepted their responsibility to deal with the asylum application in the scope of the Dublin Convention which led the UK to remove the asylum applicant to Germany.

But T.I. refused to get removed to Germany because of challenging the assumption of Germany being a safe country.<sup>29</sup> He based this claim on the fact that Germany did not recognise persons as refugees whose ill-treatment did not originate from government officials but from non-state agents.<sup>30</sup> His argument was based on the evidence given in two medical reports by the Medical Foundation for the Care of the Victims of Torture proving that T.I. had

- 25 Ibid.
- <sup>26</sup> Ibid.

- <sup>29</sup> Ibid.
- <sup>30</sup> Ibid.

 <sup>&</sup>lt;sup>22</sup> (ECtHR), T.I. v UK, Appl. No. 43844/98
<sup>23</sup> Ibid.

<sup>24</sup> Ibid.

<sup>&</sup>lt;sup>27</sup> Ibid. <sup>28</sup> Ibid.

been the target of torture in Sri Lanka.<sup>31</sup> In addition to these medical reports, the asylum seeker put forward documents verifying his account of events which had been written by family members. In general one can already state that there is a high burden of proof for the asylum seeker to show which kind of ill-treatment he received. Besides the two medical reports (both stating, that T.I. has been the victim of torture) he was required to find other people who witnessed his story in order to be heard again by the Courts.

In its judgement, the ECtHR firstly stated that both Germany and the UK are members of the Geneva Convention which requires its members to follow the principle of non-refoulement and not to "expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion". <sup>32</sup> But, due to the fact that Germany is regarded to be a safe country (due to the safe country assumption that is underlying the Dublin System), the UK argued that this principle is not breached. Dissenting, in its judgement, the ECtHR argued that the Geneva Convention imposes an obligation on its Member States that no person shall be expelled to a country where substantial grounds have been shown to assume that the person in question will face a risk of being subject to treatment which is contrary to Art. 3 of the Convention (inhuman or degrading), no matter if another agreement is in place.<sup>33</sup>

The ECtHR concludes from this statement that the agreement (the Dublin Regulation) between Germany and the UK (among others) does not affect the responsibility of the UK deriving from the Geneva Convention. Therefore, the UK, regardless of the Dublin Convention, still needs to make sure that an asylum seeker is not exposed to treatment contrary to Art. 3 of the Convention.<sup>34</sup> With this statement, the ECtHR, did not intend to rule on the legality of the Germany Asylum system but on the idea of the presumption of safety <sup>35</sup> which is underlying the mutual trust among Member States in the scope of the Dublin System. mutual trust in the scope of the Dublin System implies mutual confidence and that, besides others, Fundamental Right obligations are respected by the Member States and therefore assuming that the other Member States of the Dublin System are "safe countries". Hence, when the

<sup>31</sup> Ibid.

<sup>34</sup> Ibid.

<sup>&</sup>lt;sup>32</sup> Geneva Convention, State of Refugees, Art. 33 (1)

<sup>&</sup>lt;sup>33</sup> (ECtHR), T.I. v UK, Appl. No. 43844/98

<sup>&</sup>lt;sup>35</sup> Moreno-Lax," Dismantling the Dublin System: M.S.S. v Belgium and Greece" (2012), European Journal of Migration and Law 14

ECtHR states that the UK needs to make sure that they do not expose an asylum seeker to treatment contrary to Article 3 of the Convention, the ECtHR questions the compatibility of the presumption with the legal Fundamental Right obligations. Hence, in the scope of this judgement, for the first time in history, the idea of indirect-refoulement has been introduced by the ECtHR. <sup>36</sup> Indirect Refoulement in this case would mean that if the UK is transferring T.I. to Germany where he would be removed to Sri Lanka, the UK would have indirectly breached the principle of non-refoulement by knowingly exposing him to a removal to Sri Lank via Germany. Hence, this judgement questions the assumption that all other Member States of the Dublin Convention are safe states and introduces the idea of indirect-refoulement. <sup>37</sup>

Though the Court's judgement is based on the primary concern that there are enough procedural safeguards that guarantee that the asylum seeker is not removed from Germany to Sri Lanka<sup>38</sup>, the ECtHR points out that if there is substantial ground to believe that Germany is going to remove the applicant back to his home country, the UK would breach Art. 33(1) of the Convention when removing him to Germany. However, in the given case, the Court concluded that there is not enough ground to believe that Germany will expel the asylum seeker to Sri Lanka but rather open up the possibility to lodge a new asylum application. Therefore, the UK action is not regarded as a breach of the Convention when removing T.I. to Germany.<sup>39</sup>

But the importance of this judgement is essential for the development of mutual trust. For the first time the ECtHR outlined that the presumption of safety might be rebuttable (with regard to the risk of indirect-refoulement in this case). Therefore, Member States of the Dublin System might be legally responsible when automatically transferring an asylum seeker to another Member State if this exposes the asylum seeker to treatment contrary to Article 3 of the Convention. If the assumption of safety therefore no longer holds under certain circumstances, it is necessary to understand when these circumstances are present in order to prevent Member States from breaching their obligations arising from the Convention.

In this case the ECtHR concluded that there is no certain risk that Germany will remove the asylum seeker to Sri Lanka but does not clarify when exactly this is the case. There are no clear guidelines given in which cases a Member State of the Dublin Convention needs to put down the assumption of safety in order to fulfil obligations arising from other agreements.

<sup>&</sup>lt;sup>36</sup> Brouwer, "Mutual Trust and the Dublin Regulation: Protection of Fundamental Rights in the EU and the Burden of Proof", (2013), Utrecht Law Review, 9, p.139

<sup>&</sup>lt;sup>37</sup> ibid. p.139

<sup>&</sup>lt;sup>38</sup> (ECtHR), T.I. v UK, Appl. No. 43844/98

<sup>&</sup>lt;sup>39</sup> İbid.

Therefore, it is not obvious for Member States when the idea of automatic mutual trust (which is displayed by the automatic removal of an asylum seeker from one Member State to another) needs to be overcome. Moreover, one cannot derive from the judgement how much scrutiny Member States of the Dublin Convention need to conduct in order to be able to tell if the risk of indirect refoulement exists when removing an asylum seeker to another Member State. Hence, one can say that the T.I. judgement did change the way Member States cooperate in the scope of the Dublin System but does not give clear guidance when such changes need to be respected in everyday procedures.

## 3.2 A small step back by the ECtHR with the judgement in the K.R.S. case

Another important case in this scope is the case of K.R.S. who lodged an asylum application in the UK in 2006. But instead of dealing with the application themselves, the UK requested Greece to accept responsibility for the application due to the fact that it was discovered that he entered the Dublin area through Greece which made Greece the country being in charge. <sup>40</sup> Therefore, the UK planned to remove K.R.S. to Greece in May 2008 which was stopped by the asylum seeker's representatives and was attempted again in July 2008.

K.R.S. lodged an application at the ECtHR in order not to be transferred to Greece in July 2008 which was answered by the Court with the application of Rule 39<sup>41</sup>. <sup>42</sup> In general the question arising was if Greece was breaching Art. 3 and Art. 13 of the Convention. Art. 3 of the Convention is potentially violated when the expulsion of an asylum seeker to another Member State is taking place although there is a risk that the asylum seeker is facing treatment contrary to Art. 3 of the Convention in the nation state he or she is sent to. <sup>43</sup> With regard to this aspect the Court ruled that "[t]he assessment of the existence of a real risk must be a rigorous one [...] which implies that there must be a meaningful assessment of the applicant's claim". <sup>44</sup> Hence, one can say that the asylum seeker is in a position where he needs to proof that he might be facing treatment contrary to Art. 3. Therefore again showing the high burden of proof asylum seekers face when dealing with deportations in the scope of the Dublin System.

<sup>&</sup>lt;sup>40</sup> Art. 10, Reg 343/2003

<sup>&</sup>lt;sup>41</sup> (ECtHR), K.R.S. v United Kingdom, Appl. No. 32733/08.

<sup>&</sup>lt;sup>42</sup> Rule 39 is referring to interim measures by the ECtHR which are binding upon the nation state in question. In this case this implied that the asylum seeker is not to be expelled to Greece before the final judgement of the Court.

<sup>&</sup>lt;sup>43</sup> (ECtHR), K.R.S. v United Kingdom, Appl. No. 32733/08.

<sup>&</sup>lt;sup>44</sup> Ibid.

But in its judgement, the ECtHR ruled that the UK is not breaching Art. 3 of the Convention when expelling K.R.S. to Greece due to several reasons: Firstly, the Court argued that Greece did not expel people to Iran during that time. <sup>45</sup> Therefore there is no risk of indirect refoulement, similar to the judgement in the T.I. case. Secondly, there is no reason to believe that an Asylum Seeker who is returned to Greece, does not have a true chance of applying Rule 39 and hence may stay in Greece. <sup>46</sup> And thirdly, Greece is required to give the opportunity to lodge an asylum application under Art. 34 of the Convention which in the point of view of the Court must be assumed to take place when there is no proof of the contrary. <sup>47</sup> Based on these arguments and the fact that it was certain that K.R.S. to Greece because there was no risk of breaching the principle of refoulement. In order to target the asylum procedure in Greece, the applicant would have needed to go to Greece where he would have been able to lodge an application for Rule 39 if needed.<sup>48</sup>

When looking at mutual trust and the influence of this judgement, one could argue that the ECtHR is not paying enough attention to deficiencies in the European asylum system which has been brought forward by the UNHCR and other Non-Governmental Organisations. <sup>49</sup> In general one can state that the Dublin System is not about harmonising asylum application rules among the Member States but about determining which country is in charge of an asylum application, resulting in complicated relationships between the different systems.

In addition, the judgement dealt again with the obligations that are arising for the Member States from the Convention. Here, the ECtHR stresses the importance of "non-refoulement" in disregard of the fact whether the Dublin agreement is in place. <sup>50</sup> Moreno-Lax interpreted this more concretely via stating that there is no obligation to transfer an asylum seeker to another country but an obligation to respect Fundamental Rights. <sup>51</sup> Therefore, Member States would possibly be in the position, by making use of the sovereignty clause, to make sure that Fundamental Rights of asylum seekers are respected.

<sup>&</sup>lt;sup>45</sup> ibid. paragraph 17

<sup>&</sup>lt;sup>46</sup> ibid. paragraph 17

<sup>&</sup>lt;sup>47</sup> ibid. paragraph 18

<sup>&</sup>lt;sup>48</sup> Clayton, "Asylum Seekers in Europe: M.S.S. v Belgium and Greece"(2011), Human Rights Law Review 11: 4, pp.761

<sup>&</sup>lt;sup>49</sup> Brouwer, "Mutual Trust and the Dublin Regulation: Protection of Fundamental Rights in the EU and the burden of proof",

<sup>(2013)</sup> Utrecht Law Review, 9

<sup>&</sup>lt;sup>50</sup> (ECtHR), K.R.S. v United Kingdom, Appl. No. 32733/08.

<sup>&</sup>lt;sup>51</sup> Moreno-Lax," Dismantling the Dublin System: M.S.S. v Belgium and Greece" (2012), European Journal of Migration and Law 14

Moreover, the ECtHR concluded that, if there is no proof of breaches of certain Articles of the Convention, automatic expulsion and thus automatic mutual trust is appropriate. Hence, making the possibility of the refutability of the presumption of safety (as introduced in the T.I.) less likely while reinforcing the method of automatic mutual trust. Although certain reports have been used in the M.S.S. judgement (as it will be outlined in the following part), had already been published at the time of the judgement in the K.R.S. case, the Court decided not to put the respect of Fundamental Rights over the idea of automatic mutual trust. Hence, this judgement is regarded as putting the interest of the contracting state (fast and efficient processing of asylum applications) over the interest of the asylum seeker (respect of Fundamental Rights).

Concluding, one can say that the judgement in the T.I. case was a first step towards the refutability of the presumption of safety and therefore the strengthening of the rights of the individual (the asylum seeker). The K.R.S. judgement differently limited this step by increasing the burden of proof for asylum seekers while reinforcing the conduct of automatic deportation and automatic mutual trust.

# 4. Mutual trust 2.0: How the most recent judgements of the ECtHR and the CJEU influence mutual trust in the scope of the Dublin System

### 4.1. M.S.S. – The ECtHR's change of direction

#### 4.1.1 The story behind the judgement in the M.S.S. case

The case of M.S.S. v. Belgium and Greece shows a different development compared to the formerly discussed cases of T.I. and K.R.S. . M.S.S. is an Afghan national who left Kabul to travel via Iran and Turkey to Greece where his fingerprints were taken for the first time in December 2008.<sup>52</sup> After a week in detention, the asylum seeker did not apply for asylum which led to an order to leave the Greece.

M.S.S. left Greece to present himself to the Aliens Office in Belgium in February 2009 where he lodged an asylum application although he did not have any documents of identification. <sup>53</sup> The Belgian authorities requested Greece to accept responsibility for the asylum application in the scope of Article 10 (1) of Regulation 343/2003 due to the fact that his fingerprints were recorded for the first time in Greece in 2008. <sup>54</sup> The Greek authorities failed to respond within the two-month period which is provided for in Article 18 (1) Regulation 343/2003. <sup>55</sup> Hence, Belgium regarded this behaviour as accepting the responsibility.

On May 19, 2009 the Aliens office in Belgium, based on section 51/5 of the Aliens Act, decided to remove M.S.S. to Greece although the United Nations High Commissioner for Refugees sent a letter to the Belgian authorities recommending not to transfer asylum seekers to Greece at that moment in time. <sup>56</sup> The reason, according to the Belgian authorities, why M.S.S. was nevertheless removed to Greece was that there was no reason to believe that Greece would fail its obligations arising from the 1951 Geneva Convention as soon as M.S.S. lodged an asylum application there.<sup>57</sup>

On May 29, 2009 M.S.S. was to be removed to Greece which the applicant's initial counsel tried to stop. Based on the risk of arbitrary detention, the fear of ill-treatment in the scope of Article 3 of the Convention, the fear of M.S.S. to be removed to Afghanistan and the general

<sup>&</sup>lt;sup>52</sup> ECtHR, M.S.S. v Belgium and Greece, 21. January 2011, § 9

<sup>&</sup>lt;sup>53</sup> ibid. § 11

<sup>&</sup>lt;sup>54</sup> ibid. § 13

<sup>&</sup>lt;sup>55</sup> ibid. § 15

<sup>&</sup>lt;sup>56</sup> ibid. § 17

<sup>&</sup>lt;sup>57</sup> ibid. § 18

deficiencies in the Greek asylum system, a request to set aside the removal to Greece was lodged. <sup>58</sup> Though, after a hearing in Brussels this request failed which did not stop M.S.S. from refusing to take a plane back to Afghanistan.

On June 11, 2009 M.S.S. applied, through his counsel, to have his removal suspended through the use of Rule 39 of the Rules of Court. He forwarded several reasons for this whereas the most important ones were his fear of being maltreated in Greece and removed to Afghanistan where he had to fear for his life due to murder attempts by the Taliban.<sup>59</sup> Via showing a certificate which proved that he had worked for the international forces as a translator in Afghanistan, he tried to prove why his life was threatened by the Taliban. Nevertheless, on June 12, 2009 the Belgian authorities decided not to apply Rule 39 but to inform the Greek authorities of the need to thoroughly follow their obligations arising from the Convention.<sup>60</sup> Hence, June 22, 2009 was set as a new date for the removal of M.S.S. to Greece which M.S.S.' lawyers tried to suspend. Based on the risk M.S.S. would have to face in Afghanistan combined with the small chances that the asylum application would be properly examined and the bad detention conditions in Greece, they lodged an application to suspend the removal on June 15, 2009.

The Aliens Appeal Board rejected this application due to two reasons: Firstly, M.S.S. failed to fill a request for the proceedings to be continued within the fifteen days' timeframe and secondly, M.S.S. did not fill a memorial in reply and thereby showing a disrespect of the forms of procedure.<sup>61</sup>

Therefore, on the June 15 M.S.S. was removed to Greece where he was detained immediately. The conditions of this detention did not comply with Human Rights standards. There were more than 20 other detainees in a small space with limited access to toilets only at the discretion of guards. <sup>62</sup> Moreover, the detainees had little to eat and were required to either sleep on the bare floor or dirty mattresses. <sup>63</sup>

After three days of detention under these conditions, M.S.S. was released and received an asylum seeker's card (so called pink card) on June 18. Along with this card came the obligation

<sup>&</sup>lt;sup>58</sup> ibid. § 21 <sup>59</sup> ibid. § 31

<sup>&</sup>lt;sup>60</sup> ibid. § 34

<sup>&</sup>lt;sup>61</sup> ibid. § 34

<sup>&</sup>lt;sup>62</sup> ibid. § 34

<sup>63</sup> ibid. § 34

to report to the police station in Attica in order to inform the authorities of the address of M.S.S. and the progress of his asylum application. <sup>64</sup> M.S.S. did not comply with this obligation and did not report to the police station in the set timeframe. <sup>65</sup> Due to the fact that M.S.S. had no means and no possibility to find a home, he went to live in a park with other Afghan asylum seekers.

Being aware of the situation, the registrar of the Second Section of the Court sent a letter to the Greek authorities indicating that M.S.S. needed to be informed of being able to lodge an effective asylum application as well as of the measures the Greek authorities intended to conduct with the requirement of responding until June 29.<sup>66</sup> Due to the fact that the Greek authorities did not reply until July 23 and the growing risk of the situation in Afghanistan (especially for M.S.S. because of his translator job), the Court applied Rule 39 implying that M.S.S. may not be removed pending the outcome of the proceedings before the Court.<sup>67</sup>

On July 23 the Greek authorities replied to the letter of the Court by stating that the applicant had applied for asylum when arriving at the airport in Athens but failed to report himself and his address to the Attica Police. According to M.S.S.' lawyer the applicant did not report to the police station because he had no address to forward to them.

On August 1 2009 M.S.S. tried to leave Greece with a false Bulgarian identity card. As a result he was put in detention in the same place he had already been detained in earlier. <sup>68</sup> In a message to his lawyer M.S.S. reported to be detained under the same circumstances as he has been detained earlier (overcrowded space, limited access to sanitary facilities, limited places to sleep) with the addition of being beaten by the guards. <sup>69</sup> On August 3 the Greek authorities sentenced the applicant to two months of imprisonment due to the fact that he tried to leave the country with false papers.

In December 2009, M.S.S. went to the Attica Police Station where his pink card was renewed for another six months. Additionally, M.S.S. informed the authorities that he had no place to live which caused him to ask the Ministry of Health and Social Solidarity to help him find a home.<sup>70</sup> Because of a strong demand for housing a possible home was not found earlier then

<sup>&</sup>lt;sup>64</sup> ibid. § 35

<sup>&</sup>lt;sup>65</sup> ibid. § 36

<sup>&</sup>lt;sup>66</sup> ibid. § 38, 39

<sup>&</sup>lt;sup>67</sup> ibid. § 40

<sup>&</sup>lt;sup>68</sup> ibid. § 44

<sup>&</sup>lt;sup>69</sup> ibid. § 45

<sup>&</sup>lt;sup>70</sup> ibid. § 47

January 26, 2010. <sup>71</sup> But due to the fact that the Greek authorities had no possibility to contact M.S.S., it had been impossible to inform him of this.

On June 18, 2010 M.S.S. reported to the Attica Police station again where his pink card was renewed for another six months. Additionally he received a note, written in Greek, as well as an explanation which stated that he was obliged to attend an interview on July 2, 2010. He signed a paper confirming that he received the note although he did not attend the interview.

On September 11, 2010 M.S.S. tried to leave Greece to Italy in order to apply for asylum there. But the Greek police found him and went to the Turkish border with him. They did not remove him to Turkey though, due to the presence of Turkish police officers.<sup>73</sup>

Due to the fact that M.S.S. had lived through these incidents the ECtHR ruled that both Belgium and Greece did not comply with their obligations arising from the 1951 Geneva Convention and were therefore prosecuted of breaching the Convention. In the following, it will be outlined in detail why Belgium and Greece have been prosecuted in order to show how this affects the idea of mutual trust in the scope of the Dublin System.

## 4.1.2 Positive Obligations arising for Member States of the Dublin System

Article 3 of the Convention states that "No one shall be subjected to torture or to inhuman or degrading treatment or punishment" which Greece is regarded to have breached according to the ECtHR. <sup>74</sup> The Greek authorities argued that they face an unusually high burden of immigrants, like all the other Member States that are located at the borders of the Dublin area which has even increased through transfers of asylum seekers within the scope of the Dublin System.<sup>75</sup> The ECtHR acknowledged this fact but concluded that this is not sufficient to absolve a Member State of the Convention from its obligations under Article 3 of the Convention.<sup>76</sup> This is especially true in the case of M.S.S. due to the fact that the Greek authorities were

<sup>&</sup>lt;sup>71</sup> ibid. § 49

<sup>&</sup>lt;sup>72</sup> ibid. § 52

<sup>&</sup>lt;sup>73</sup> ibid. § 54

<sup>&</sup>lt;sup>74</sup> ECtHR, M.S.S. v Belgium and Greece, 21. January 2011, § 205

<sup>&</sup>lt;sup>75</sup> Lavrysen, 2012. "European Asylum Law and the ECHR: An uneasy Co-existence" Goettingen Journal of International Law. 4(1), p. 118

<sup>&</sup>lt;sup>76</sup> ECtHR, M.S.S. v Belgium and Greece, 21. January 2011, § 223

informed that he might be entitled to asylum which the Greek authorities accepted to be responsible for in June 2009.<sup>77</sup>

But these facts did not amount to a violation of Article 3 on its own. The detention and the living conditions played a crucial role in this context. The Greek authorities argued that the detention conditions had not been as described by M.S.S.. <sup>78</sup> However, according to reports by the UNHCR or Amnesty International, the Court gave more weight to the position of M.S.S. and concluded that the detention conditions had not been in line with Article 3. <sup>79</sup> Another aspect that amounted to the violation of Article 3, was the finding that the asylum seeker was living in extreme poverty since his arrival in Greece. <sup>80</sup>

What is crucial in a legal sense with regard to this violation, are the positive obligations that arise from this judgement. According to Brouwer, these obligations have already been developed with the cases of A.A. v. Greece of July 22, 2010 and Kudla v. Poland of October 26, 2000, and rest on Article 3 of the Convention <sup>81</sup> which, based on Lavrysen, is outstanding as not many positive obligations have been derived from the Convention.<sup>82</sup> Costello argues similarly in saying that positive obligations arise for Nation States due to Article 3 of the Convention but highlights the importance of Directive 2003/9/EC and the fact that asylum seekers are regarded to be a particularly vulnerable group.<sup>83</sup> The crucial point with regard to Greece's violation of Article 3 is the importance of the Reception Conditions Directive. Mallia interprets the judgements in a way that Article 3 on its own does not produce positive obligations (in this case provide a home or financial assistance for asylum seekers) but, when taken in relation with the Reception Conditions Directive, which is part of the Greek law, may produce such.<sup>84</sup> Hence, she assigns critical importance to the inactivity of the state which needs to cause the unacceptable conditions of the asylum seekers in order for the positive obligations to arise.<sup>85</sup> Resulting, one can argue that, according to Mallia, the positive

 <sup>83</sup> Costello, "Dublin-case NS/ME: Finally, an end to blind trust across the EU?", retrieved from: <u>http://www.migratieweb.nl/f</u>/2012-03-30,%20A%26MR%202012,%202%20Dublin-case%20NS-<u>ME%20Finally,%20an%20end%20to%20blind%20thrust%20across%20the%20EU%20-%20C.Costello.pdf</u>, p. 3
<sup>84</sup> Mallia, "Notes and Comments- Case of M.S.S. v. Belgium and Greece: A Catalyst in the Re-thinking of the Dublin II

Regulation" (2011), Refugee Survey Quarterly, 30:3, , 2011, p. 119

<sup>85</sup> ibid. p.120

<sup>&</sup>lt;sup>77</sup> ibid. § 224

<sup>&</sup>lt;sup>78</sup> ibid. § 227-228

<sup>&</sup>lt;sup>79</sup> ibid. § 229

<sup>&</sup>lt;sup>80</sup> ibid. § 235

<sup>&</sup>lt;sup>81</sup> Brouwer, "Mutual Trust and the Dublin Regulation: Protection of Fundamental Rights in the EU and the burden of proof", (2013) Utrecht Law Review, 9 p. 141

<sup>&</sup>lt;sup>82</sup> Mallia, "Notes and Comments- Case of M.S.S. v. Belgium and Greece: A Catalyst in the Re-thinking of the Dublin II Regulation" (2011), Refugee Survey Quarterly, 30:3, p. 124

obligations of providing medical treatment and at least the opportunity for housing arise from EU law (the Reception Conditions Directive) rather than from Article 3 of the Geneva Convention.

When understanding the judgement in the way that Article 3 is producing the positive obligations for specifically vulnerable groups and the Reception Conditions Directive is not playing a crucial role, one could argue that in certain circumstances removal to absolute poverty could breach Article 3.<sup>86</sup> Therefore, this would not only apply to asylum seekers but other specifically vulnerable groups such as disabled people the like.

Differently, when assigning critical importance to the Reception Conditions Directive in finding a breach of Article 3<sup>87</sup>, one needs to deal with the question if different standards of Human Rights exist in contracting states that are not member of the EU<sup>88</sup> and if there is a differentiation between states that are bound to the Directive and States that are not.<sup>89</sup> Clayton argues that the judgement can be understood equally, whereas she points out that the Reception Conditions Directive is most likely regarded as an aggravating factor for the breach of Article 3.<sup>90</sup> Concluding one can state that Brouwer, Costello, Moreno-Lax and Clayton are on the one hand of the opinion that the positive obligations arise from Article 3 whereas Costello<sup>91</sup> and Brouwer<sup>92</sup> assign less importance to the Reception Conditions Directive than Moreno-Lax<sup>93</sup> and Clayton.<sup>94</sup> Lavrysen and Mallia on the other hand conclude from the judgement that the breach of Article 3 is bound to the fact that the Reception Conditions Directive is part of the Greek legal order.<sup>95</sup> For the topic at hand it would be a greater impact if the Reception Conditions Directive plays an essential role as this would imply

http://www.migratieweb.nl/f\_\_\_\_/2012-03-30,%20A%26MR%202012,%202%20Dublin-case%20NS-ME%20Finally,%20an%20end%20to%20blind%20thrust%20across%20the%20EU%20-%20C. , p. 85

 <sup>&</sup>lt;sup>86</sup> Clayton, "Asylum Seekers in Europe: M.S.S. v Belgium and Greece" (2011), Human Rights Law Review 11: 4, p. 769
<sup>87</sup> Moreno-Lax," Dismantling the Dublin System: M.S.S. v Belgium and Greece" (2012), European Journal of Migration and

Law 14, p.22

<sup>&</sup>lt;sup>88</sup> Clayton, "Asylum Seekers in Europe: M.S.S. v Belgium and Greece"(2011), Human Rights Law Review 11: 4, p. 768

<sup>&</sup>lt;sup>89</sup> Brouwer, "Mutual Trust and the Dublin Regulation: Protection of Fundamental Rights in the EU and the burden of proof", (2013) Utrecht Law Review, 9, p. 141

 <sup>&</sup>lt;sup>90</sup> Clayton, "Asylum Seekers in Europe: M.S.S. v Belgium and Greece"(2011), Human Rights Law Review 11: 4, p.768
<sup>91</sup> Costello, "Dublin-case NS/ME: Finally, an end to blind trust across the EU?", retrieved from:

<sup>&</sup>lt;sup>92</sup> see Brouwer, "Mutual Trust and the Dublin Regulation: Protection of Fundamental Rights in the EU and the burden of proof", (2013) Utrecht Law Review, 9, p.141

<sup>&</sup>lt;sup>93</sup> Moreno-Lax," Dismantling the Dublin System: M.S.S. v Belgium and Greece" (2012), European Journal of Migration and Law 14, p. 22

 <sup>&</sup>lt;sup>94</sup> Clayton, "Asylum Seekers in Europe: M.S.S. v Belgium and Greece"(2011), Human Rights Law Review 11: 4, p. 767
<sup>95</sup> Lavrysen, "M.S.S. v Belgium and Greece (2): The Impact on EU Asylum Law", 1st May 2013, deprived from:

http://strasbourgobservers.com/2011/02/24/m-s-s-v-belgium-and-greece-2-the-impact-on-eu-asylum-law/ and Mallia, "Notes and Comments- Case of M.S.S. v. Belgium and Greece: A Catalyst in the Re-thinking of the Dublin II Regulation" (2011), Refugee Survey Quarterly, 30:3, , p. 119

that Member States, that are looking forward to remove an asylum seeker, would need to apply different conditions and scrutiny based on the fact if the receiving state is bound to the Directive or not resulting from the different Human Rights standards that need to be applied.

Next to the influence on positive obligations for Member States, the judgement has influence on the burden of proof which will be outlined in the following part.

#### 4.1.3 The burden of proof

Besides the violations of Article 3, Greece was found guilty of violating Article 13 of the Convention as well. According to M.S.S. there was a certain risk of refoulement due to the inexistence of an effective remedy in the Greek legislation to make complaints against breaches of Article 2 and Article 3 of the Convention resulting in a claim in the scope of Article 13 of the Convention. <sup>96</sup> In order to judge this claim, the Court needed to analyse if, according to them, the applicant can show that his removal to Afghanistan would imply a violation of Article 2 or Article 3 of the Convention.<sup>97</sup> The Court based its opinion on several reports by Amnesty International, the European Commissioner for Human Rights and the United Nations, which show "major structural deficiencies" in the Greek asylum system. <sup>98</sup> It has to be pointed out that the ECtHR did not intend to rule on whether a return of M.S.S. would imply a violation of Article 2 and Article 3<sup>99</sup>, which is criticised by Moreno-Lax as being a shortcoming of showing that removing the asylum seeker to Afghanistan would imply a violation of these obligations<sup>100</sup>, but to protect the applicant against direct or indirect removal to Afghanistan<sup>101</sup>. The ECtHR concluded that M.S.S. had an arguable claim under Article 13 in conjunction with Article 3<sup>102</sup> whereas the Court noted that it is not necessary to analyse the claim under Article 2 as well. This conclusion shows that the Court assigns more weight to the position of M.S.S., holding that he has a claim under Article 13, rather than to the position of the Greek authorities arguing that there is no such claim. An important aspect in this scope is the already named reports that resulted in the fact that the Court concluded that "systematic

<sup>&</sup>lt;sup>96</sup> ECtHR, M.S.S. v Belgium and Greece, 21. January 2011, § 265

<sup>&</sup>lt;sup>97</sup> ibid. § 294

<sup>&</sup>lt;sup>98</sup> ibid. § 296

<sup>&</sup>lt;sup>99</sup> ibid. § 298

<sup>&</sup>lt;sup>100</sup> Moreno-Lax," Dismantling the Dublin System: M.S.S. v Belgium and Greece" (2012), European Journal of Migration and Law 14, p.24

 $<sup>^{101}</sup>$  ECtHR, M.S.S. v Belgium and Greece, 21. January 2011,  $\$  § 298

<sup>&</sup>lt;sup>102</sup> ibid. § 300

deficiencies" existed in the Greek asylum application<sup>103</sup>. What is new in this regard, is the fact that M.S.S. was not in the position to prove that he himself had been a victim of the poor conditions in Greece but that general information on the asylum procedure and system in Greece sufficed to amount to a claim under Article 13 in conjunction with Article 3. Hence, attaching more weight to the applicant's version<sup>104</sup> results in a lowered burden of proof for the individual asylum seeker which has originally been shifted entirely to the asylum seeker with the judgement in K.R.S. What results from this observation is the fact that the M.S.S. judgement overcame the K.R.S. judgement in the sense that after K.R.S., the asylum seeker was in the position to prove maltreatment whereas this has shifted with the judgement at hand partly to the government agents.

Moreover, finding a breach of Article 13 might have a general influence on asylum procedures which tend to be cursory. <sup>105</sup> Normally, Article 6 of the Convention provides access to Court but excludes asylum applications. <sup>106</sup> Now, that a breach of Article 13 with regard to the deficient asylum procedure was found, the path is paved for "access to a process" that is capable of delivering effective remedy as a Human Rights. <sup>107</sup>

Besides Greece being regarded as violating Article 13 of the Convention, Belgium was regarded to have breached Article 13 as well. Due to the fact that the ECtHR acknowledged that Belgium did breach Article 3 of the Convention<sup>108</sup>, they concluded that the applicant's claim with regard to Article 13 might be correct. They came to this conclusion especially because the Belgian authorities automatically relied on the Dublin System without examining the substance of the claim accordingly. Moreover, the Court argued that on the one hand the Belgian authorities are automatically applying the Dublin Regulation without considering an exception under Article 3(2) while on the other hand, the simple fact that a nation state is member of an agreement stating the protection of Fundamental Rights, does not imply that the contracting state is truly respecting them.<sup>109</sup>

This development has an influence on the burden of proof. In the K.R.S. judgement, the burden of proof was entirely shifted to the asylum seekers (upon which the Belgian authorities

<sup>103</sup> ibid. § 208

<sup>&</sup>lt;sup>104</sup> Moreno-Lax," Dismantling the Dublin System: M.S.S. v Belgium and Greece" (2012), European Journal of Migration and Law 14, p. 24

<sup>&</sup>lt;sup>105</sup> Clayton, "Asylum Seekers in Europe: M.S.S. v Belgium and Greece"(2011), Human Rights Law Review 11: 4, p. 765 <sup>106</sup> ibid.

<sup>&</sup>lt;sup>107</sup> ibid.

 $<sup>^{\</sup>rm 108}$  this development will be explained in detail in part 2.2.4

<sup>&</sup>lt;sup>109</sup> ibid. § 353

relied as described in the next section) but this time, the Court clearly stated that the asylum seeker shall not bear the entire burden of proof.<sup>110</sup> Hence, certain positive obligations arise for the Belgian authorities in this case and Alien Offices in the Dublin System in general in the sense that they need to verify if the receiving states reception conditions and asylum procedure is complying with international and European obligations. <sup>111</sup> Clayton derives similar consequences from this part of the judgement but generalises it more by stating that Member States of the EU can no longer assume that the Dublin System absolves a sending State from its responsibility for the procedures applied in the receiving state with regard to the living conditions or the risk of refoulement from the receiving state.<sup>112</sup> Moreno-Lax's interpretation is similarly generalising but more practically orientated. He argues that Member States need to conduct three steps: 1. A material assessment of any direct risk of refoulement from the receiving State; 2. An analysis of the receiving Nation's compliance with Convention obligations; 3. If there is any real risk of indirect refoulement, the transfer has to be withheld. <sup>113</sup> Therefore one can conclude that the ECtHR changed the burden of proof, which normally lies with the asylum seeker according to common asylum law, partly to the responsible authorities in the sense as they need to make sure not to breach Fundamental Right obligations.

#### 4.1.4 The end of blind mutual trust

Similarly to Greece, Belgium is regarded to have breached Article 3 of the Convention as well. This fact is especially important for the topic at hand due to the fact that Belgium is regarded of violating the principle of non-refoulement although they did send M.S.S. to another Member State of the Dublin area within which, normally, the presumption of safety applies. Hence, one can for the first time observe an actual case where the presumption of safety was dismissed.

The reason for the Belgian authorities to remove M.S.S. to Greece was that, based on the Dublin Regulation, Belgium was not responsible for examining the asylum application.<sup>114</sup> The

 $<sup>^{110}</sup>$  ECtHR, M.S.S. v Belgium and Greece, 21. January 2011, , § 346

<sup>&</sup>lt;sup>111</sup> Brouwer, "Mutual Trust and the Dublin Regulation: Protection of Fundamental Rights in the EU and the burden of proof", (2013) Utrecht Law Review, 9, p. 141 <sup>112</sup> Clayton, "Asylum Seekers in Europe: M.S.S. v Belgium and Greece"(2011), Human Rights Law Review 11: 4, p. 761

<sup>&</sup>lt;sup>113</sup> Moreno-Lax," Dismantling the Dublin System: M.S.S. v Belgium and Greece" (2012), European Journal of Migration and Law 14, p. 29

<sup>&</sup>lt;sup>114</sup> ECtHR, M.S.S. v Belgium and Greece, 21. January 2011, § 326

Belgian authorities relied on the assurances given by the Hellenic Government through accepting responsibility for the asylum application, which is underlined by their point of view that M.S.S. failed to show that he is a victim of treatment prohibited by Article 3 of the Convention in Greece,<sup>115</sup> hence implying that the entire burden of proof rests with the asylum seeker. Additionally, with regard to the risk of refoulement, the Belgian authorities restated the judgement of the ECtHR in the K.R.S. case where Greece had given insurances to guarantee the respect of the Convention resulting in the applicability of the presumption of safety which, according to the Belgian authorities had not been reversed. <sup>116</sup> This assumption is supported by Judge Bratza who, in his dissenting opinion, points out that he does not doubt that the conditions in Greece amount to a violation of Article 3 but also states that only six months after the judgement.

In its judgement, the ECtHR not only referred to the K.R.S. judgement but to the T.I. judgement as well. Within this scope, emphasis was put on the obligations arising from EU membership and the European Convention of Human Rights. Therefore, with regard to the T.I. case, the ECtHR stated that "States must make sure that the intermediary country's asylum procedure affords sufficient guarantees to avoid an asylum seeker being removed, directly or indirectly, to his country of origin without any evaluation of the risks he faces from the standpoint of Article 3 of the Convention". <sup>118</sup> Although Germany was regarded to have an appropriate asylum procedure complying with Article 3 of the Convention. Therefore one could already expect Belgium to be condemned for a violation of Article 3. <sup>119</sup> The judgement of the T.I. case was confirmed in the K.R.S. case when the ECtHR strengthened the presumption of safety by stating that one has to assume that Member States are complying with their obligations if there is no proof of the opposite.<sup>120</sup>

The ECtHR points out three new developments between the K.R.S. case and the present M.S.S. case: Firstly, there are new, regularly published reports by reliable organisations all showing

<sup>&</sup>lt;sup>115</sup> ibid. § 327 - 328

<sup>&</sup>lt;sup>116</sup> ibid. § 329

<sup>&</sup>lt;sup>117</sup> within which it was stated that one could expect the Greek authorities to comply with their obligations if no proof of the contrary exists

<sup>&</sup>lt;sup>118</sup> ECtHR, M.S.S. v Belgium and Greece, 21. January 2011, § 342

<sup>&</sup>lt;sup>119</sup> Moreno-Lax," Dismantling the Dublin System: M.S.S. v Belgium and Greece" (2012), European Journal of Migration and Law 14, p. 25

<sup>&</sup>lt;sup>120</sup> ECtHR, M.S.S. v Belgium and Greece, 21. January 2011, § 343

the deficiencies of the Greek asylum procedure and the conduct of direct and indirect refoulement; <sup>121</sup> Secondly, the letter sent by the UNHCR in April 2009 advising the Belgian minister of immigration to stop transfers to Greece, has been assigned critical importance; <sup>122</sup> and thirdly, the reforms of the Dublin System that have been put forward by the Commission aiming at strengthening the protection of Fundamental Rights of asylum seekers.<sup>123</sup> These developments have been interpreted differently. Whereas Brouwer regards the latest argument as only supporting the conclusion of the ECtHR<sup>124</sup>, Mallia attached more value to the Commission proposal and characterised the CEAS as being in a phase of reform.<sup>125</sup>

But when concluding that Belgium was regarded to have breached Article 3 of the Convention, critical importance was put on the assumption that "the Belgian authorities knew or ought to have known"<sup>126</sup> that the situation for asylum seekers in Greece constituted a violation of Article 3. Therefore, Belgium is regarded to have breached not only the principle of indirect refoulement in the sense that by returning M.S.S. to Greece the risk of removal to Afghanistan exists due to the deficient asylum procedure in Greece, but of direct refoulement as well due to the reception conditions in Greece. A novelty with regard to this finding is the probative value that the Court attached to the general country information<sup>127</sup> which led to the fact that the Court expected the Belgian authorities to be aware of the situation in Greece. <sup>128</sup>

Hence, the general fact that the Belgium government is condemned of breaching Article 3 of the Convention (and therefore direct refoulement), the presumption of safety has been set aside. This fact is the aspect of the M.S.S. judgement that constitutes the greatest impact for mutual trust in the scope of the Dublin System and therefore for the topic at hand. What this implies for mutual trust in the scope of the Dublin System and the transfer of asylum seekers within such is not entirely clear. Moreno-Lax argues that the setting aside of the presumption of safety in this case does not completely overcome the presumption in general but shifts the

<sup>121</sup> ibid. § 347

<sup>&</sup>lt;sup>122</sup> ibid. § 349

<sup>&</sup>lt;sup>123</sup> ibid. § 350

<sup>&</sup>lt;sup>124</sup> Brouwer, "Mutual Trust and the Dublin Regulation: Protection of Fundamental Rights in the EU and the burden of proof", (2013) Utrecht Law Review, 9 , p.141<sup>125</sup> <sup>125</sup> Mallia, "Notes and Comments- Case of M.S.S. v. Belgium and Greece: A Catalyst in the Re-thinking of the Dublin II

Regulation" (2011), Refugee Survey Quarterly, 30:3, , p.124

<sup>&</sup>lt;sup>126</sup> ECtHR, M.S.S. v Belgium and Greece, 21. January 2011, , § 358

<sup>&</sup>lt;sup>127</sup> Moreno-Lax," Dismantling the Dublin System: M.S.S. v Belgium and Greece" (2012), European Journal of Migration and Law 14, p. 27

<sup>&</sup>lt;sup>128</sup> ECtHR, M.S.S. v Belgium and Greeece, 21 January 2011, § 354

balance of the rule and the exception. <sup>129</sup> Hence, she argues that mutual trust does no longer constitute per se a sufficient basis for intra-EU transfer of asylum seekers but requires Member States to conduct certain scrutiny ensuring the protection of standards with regard to Human Rights. <sup>130</sup> Which kind of scrutiny is required and how much of it is not clear from the judgement. Besides these questions, Clayton comes up with other uncertainties such as when is scrutiny necessary, is Belgium alone "outside" the Dublin system, or what informs the sending state of a necessary scrutiny? <sup>131</sup>

Therefore based on all these uncertainties and the fact that mutual trust and the presumption of safety have been an integral part of the Dublin System, one has to raise the question if the M.S.S. judgement overcomes Mutual trust in the Dublin System as such. Lavrysen argues that the "ruling more or less implies the end of mutual trust in European Asylum Law: transferring Member States should not just presume that other Member States comply with their international obligations. When an issue arises under Article 3 ECHR, they are obliged to apply the "sovereignty clause".<sup>132</sup> This interpretation of the scope of the judgement is extreme in the sense that Lavrysen expects the principle of mutual trust to be completely obsolete and therefore regards the sovereignty clause to produce an obligation for Member States. Milla, differently, points out the fact that in case of the risk of an asylum procedure that is not complying with international or European standards, would make the individual subject to treatment contrary to Article 3<sup>133</sup> which, for her, results in the need of something stronger than Article 3(2) of the Dublin Regulation<sup>134</sup> in order to make the Member States comply with their obligations. Moreno-Lax argues that on the one hand the judgement changes a founding rationale of the Dublin System (take back and take charge procedure) but on the other hand does not dismantle the system entirely. <sup>135</sup> One can see that Lavrysen's interpretation of the judgement has the strongest implication for the Dublin System but is regarded to be harsh. It is obvious that the idea of automatic mutual trust is overcome as it constituted a violation not

<sup>&</sup>lt;sup>129</sup> Moreno-Lax," Dismantling the Dublin System: M.S.S. v Belgium and Greece" (2012), European Journal of Migration and Law 14, p. 29

<sup>&</sup>lt;sup>130</sup> Moreno-Lax," Dismantling the Dublin System: M.S.S. v Belgium and Greece" (2012), European Journal of Migration and Law 14, p. 29

 <sup>&</sup>lt;sup>131</sup> Clayton, "Asylum Seekers in Europe: M.S.S. v Belgium and Greece"(2011), Human Rights Law Review 11: 4, p. 763
<sup>132</sup> Lavrysen, "M.S.S. v Belgium and Greece (2): The Impact on EU Asylum Law", 1st May 2013, deprived from:

http://strasbourgobservers.com/2011/02/24/m-s-s-v-belgium-and-greece-2-the-impact-on-eu-asylum-law/, p.224 <sup>133</sup> Mallia, "Notes and Comments- Case of M.S.S. v. Belgium and Greece: A Catalyst in the Re-thinking of the Dublin II Regulation" (2011), Refugee Survey Quarterly, p. 129

<sup>&</sup>lt;sup>134</sup> Mallia, "Notes and Comments- Case of M.S.S. v. Belgium and Greece: A Catalyst in the Re-thinking of the Dublin II Regulation" (2011), Refugee Survey Quarterly, p. 126

<sup>&</sup>lt;sup>135</sup> Moreno-Lax," Dismantling the Dublin System: M.S.S. v Belgium and Greece" (2012), European Journal of Migration and Law 14, p. 29

only of Article 3 but of Article 13 of the Convention as well. But this does not imply that the Dublin System cannot form a system of interstate cooperation when dealing with asylum seekers. The automaticity of the system has been overcome due to the fact that it led to Human Right violations. Nevertheless, it is obvious that several questions remain (such as the ones that have been posed in this part of the paper or by Clayton) which partly will be answered in the joined cases of N.S. and M.E. which will be analysed in the next part.

Concluding one can state that the M.S.S. judgement is clearly a landmark judgement that puts the protection of Fundamental Rights of asylum seekers over interstate trust and the efficiency of dealing with asylum seekers.

#### 4.2 The CJEU's judgement in the joined cases of N.S. and M.E.

Differently to the cases of K.R.S., T.I. and M.S.S. the following case is made of several questions referred to the CJEU from the Court of Appeal (England and Wales) and the High Court of the United Kingdom for a preliminary ruling.

The first case the CJEU was asked to deal with Case C411/10 about an Afghan national (N.S.) who applied for asylum in the United Kingdom. <sup>136</sup> Before travelling to the United Kingdom he was arrested in Greece where he did not lodge an asylum application on 24 September, 2008. After being arrested in Greece for four days, he was asked to leave the country within the next 30 days. While doing so, he was again caught by the police and, according to him, removed to Turkey where he was detained in appalling conditions for two months. After his successful escape from detention in Turkey, he travelled to the United Kingdom to arrive there on January 12, 2009, the same day he lodged an asylum application there. <sup>137</sup>

Due to the fact that he had entered the EU through Greece, according to Chapter III of the Dublin Regulation, Greece is responsible to deal with the claim. Therefore, on April 1 2009 the Secretary of State for the Home Department requested the Greek authorities to accept responsibility based on Article 17 of Regulation 343/2003. Due to the failure of the Greek authorities to respond within the time limit set out in the Dublin Regulation, it was expected that they accepted responsibility to deal with the asylum application on January 12 2009. <sup>138</sup>

 $<sup>^{136}</sup>$  CJEU, N.S. vs SSHD (C-411/10) and M.E. (C-493/10), 21. December 2011,  $\,\S$  34

<sup>&</sup>lt;sup>137</sup> ibid. § 35

<sup>&</sup>lt;sup>138</sup> ibid. § 36

Hence, the Secretary of State informed N.S. of his upcoming removal to Greece on August 6, 2009 which he tried to stop by arguing that this removal would violate his rights under the ECHR. <sup>139</sup> This argument was tried to be made redundant by the Secretary of State by stating that Greece is on the list of Safe Countries according to the Asylum Act of 2004. <sup>140</sup> On July 31, 2009 N.S. requested the Secretary of State to make use of the sovereignty clause and accept responsibility for the asylum application due to the risk that his Fundamental Rights might be violated when being removed to Greece. On August 4, 2009 the Secretary of State denied this request on the basis that the asylum seeker's fear was unfounded. <sup>141</sup>

Due to the fact that N.S. issued proceedings in order to seek judicial review, his issue was examined by the High Court of Justice (England and Wales). <sup>142</sup> According to the High Court of Justice, the risk of refoulement of N.S. to Greece was not substantial which was again contested by N.S.. Moreover, according to the Secretary of State, she was not obliged to take into account Fundamental Rights issues when exercising the discretion to make use of Article 3(2) of the Dublin Regulation which was regarded differently by the High Court of Justice.<sup>143</sup> Due to these uncertainties and indifferences, the High Court decided to refer several questions to the CJEU for a preliminary ruling.<sup>144</sup>

The first of the six questions asks whether the discretion to make use of Article 3(2) of Regulation 343/2003 falls within the scope of EU law for the purpose of Article 6 TEU or Article 51 of the Charter of Fundamental Rights. <sup>145</sup> Basically, this question asks the CJEU whether it has the jurisdictional competences to rule on the discretion of Member States and to make use of the sovereignty clause in order to safeguard Fundamental Rights of asylum seekers.

The second question is referring to the obligations of Member States and its agencies to observe Fundamental Rights when removing an asylum seeker to the Member States responsible according to Article 3(1) Regulation 343/2003. Thirdly, the Court of Appeal wants to have clarified if the obligation to respect and observe Fundamental Rights precludes the conclusive presumption that the receiving Member State will observe (i) the asylum seeker's Fundamental Rights and (ii) the minimum standards arising from the asylum Directives

<sup>144</sup>Ibid. § 48

<sup>&</sup>lt;sup>139</sup> Ibid. § 37

<sup>&</sup>lt;sup>140</sup> ibid. § 38

<sup>&</sup>lt;sup>141</sup> ibid. § 39

<sup>&</sup>lt;sup>142</sup> ibid. § 41 <sup>143</sup> ibid. § 46

<sup>&</sup>lt;sup>145</sup> Ibid. §50(1)

(Directive 2003/9; Directive 2004/83; Directive 2005/85).<sup>146</sup> Resulting from this is the fourth question which is asking if Member States are obliged, and if so under which circumstances, by EU law to make use of the sovereignty clause if a transfer to the Member State responsible would expose the asylum seeker to treatment contrary to Article 1, 4, 18, 19(2) and/or 47 of the Charter or the minimum standards laid down in the asylum Directives. <sup>147</sup>

The fifth question is asking whether the scope of protection of the rights of an asylum seeker is wider with regard to Articles 1, 18 and 47 of the Charter or the protection conferred by Article 3 ECHR. <sup>148</sup> Lastly, the Court wants to have clarified if the treatment of another Member State as a "safe country" that is responsible for the asylum claim, is in line with the rights set out in Article 47 of the Charter. <sup>149</sup> Whereas the CJEU answered the first question separately, the other five questions will be considered together with the questions referred to the CJEU in case C493/10 M.E.

Case C493/10 is about five unconnected asylum seekers who have been born in Afghanistan, Iran and Algeria. All five entered the EU through Greece where they were arrested for illegal entry before travelling further to Ireland. After arrival in Ireland they all lodged an asylum application.<sup>150</sup>

After confirmation through the Eurodac system that all had entered the EU through Greece, the Irish Agencies were aiming at removing them to Greece which they all resisted. The grounds for resistance in this case have been that, according to the asylum seekers, the procedures and conditions for asylum seekers in Greece is inhuman and therefore requires the Irish government to make use of Article 3(2) and accept responsibility for their asylum claims.<sup>151</sup> Before ruling on this matter, the High Court decided to refer the following two questions to the CJEU for a preliminary ruling: Firstly, they wanted to have clarified if the transferring Member State is obliged to assess whether the receiving Member State is treating asylum seekers in accordance with Article 18 of the Charter and the obligations arising from the asylum Directives. Secondly, the CJEU was asked, in case of an affirmative answer to the first question, if the transferring Member State is obliged to accept responsibility of the

- <sup>149</sup> Ibid. § 73
- <sup>150</sup> Ibid. § 51

<sup>146</sup> Ibid. § 50(3)

<sup>&</sup>lt;sup>147</sup> Ibid. § 50(4)

<sup>&</sup>lt;sup>148</sup> Ibid. § 50(5)

<sup>&</sup>lt;sup>151</sup> Ibid. § 52

asylum claim in case of non-compliance of the receiving Member State with its obligations arising from the legal documents referred to in question one.<sup>152</sup>

Due to the fact that the CJEU decided to deal with question two to six of the N.S. case and both questions of the M.E. case together, this chapter of the paper will be outlined as followed: at first, it will be clarified if the CJEU has the jurisdictional competence to rule on the discretion of Member States when making use of Article 3(2) of the Dublin Regulation (which constitutes the answer to question one of the N.S. case). Afterwards it will be outlined how the Court answered the other questions and how this influences mutual trust in the scope of the Dublin System.

#### 4.2.1 The CJEU's competence to rule on the sovereignty clause

As already stated, the CJEU needed to deal with the question if it is within its legal competences to rule on whether a decision of a Member State to deal with an asylum application, which is not its responsibility under Article 3(2) of the Dublin Regulation, falls within the scope of EU law for the purpose of Article 6 TEU.<sup>153</sup> It is necessary to deal with this question due to the fact that the Charter only applies to Member States where they are "implementing EU law".<sup>154</sup> Therefore this question is of great significance when it comes to the determination of the degree of state sovereignty and automaticity in the scope of the Dublin Regulation.<sup>155</sup>

In the scope of the answer to this question several international Non-Governmental Organizations (NGOs) as well as the representatives of Member States gave their opinion. Whereas the NGOs, the Commission, the French, the Dutch and the Finish governments argued, why the CJEU has the competence to rule on this matter, the Irish, the British, the Belgian and the Italian governments argued that decisions in the scope of Article 3(2) Regulation 343/2003 do not fall in the scope of EU law.

The NGOs such as Amnesty International and Advice on Individual Rights regard the Dublin Regulation as a Fundamental Rights Regulation aiming at securing rights for the asylum

<sup>&</sup>lt;sup>152</sup> Ibid. § 53

<sup>&</sup>lt;sup>153</sup> Ibid. §50(1)

<sup>&</sup>lt;sup>154</sup> EUCHR Art. 51

<sup>&</sup>lt;sup>155</sup> Mitsilegas, "The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual", (2012) Yearbook of Europeal Law, 31, p.355

seekers. Therefore they see Article 3(2)of Regulation 343/2003 as necessary to be used as a clause safeguarding Fundamental Rights in order to use the Dublin Regulation in its entire scope. <sup>156</sup> The Finish government argued that the Dublin Regulation forms a part of a set of rules which establishes a system and therefore is within the judicial competence of the CJEU. <sup>157</sup> This view is supported by Peers who, in line with the opinion of the Advocate General (AG), argues that if there was no system, Member States could decide that another Member State is responsible but there would be no guarantee that the other Member State would accept responsibility.<sup>158</sup> Hence, arguing that it is not only part of the system to determine which Member State is responsible (application of Chapter III of the Dublin Regulation) but to apply Article 3(2) as well. Similarly, the Commission is of the opinion that, in general, when a Regulation is referring discretionary power to a Member State, this power has to be exercised in accordance with EU law and therefore is binding the Member State to the procedural obligations of the EU. <sup>159</sup>

Differently, the British Government argues that the CJEU has not the competence to rule on the discretion of Member States with regard to the sovereignty clause because that clause does not implement EU law. Moreover, they point out that the non-application of the clause does not imply a violation of Fundamental Rights due to the fact that the Member States of the EU are bound by the Geneva Convention and the ECHR. <sup>160</sup> Moreover, and in line with the Belgian, the Irish and the Italian government, decisions under Article 3(2) are referred to as "sovereignty" or "discretionary clause" in Commission documents making the raison d'etre of this clause an option rather than an obligation. <sup>161</sup>

The Court argues that: Firstly, Article 3(2) forms an integral part of the CEAS established through the TEU; Secondly, in line with the Commission arguments, every discretionary decision has to be in line with other provisions; Thirdly, if Member States make use of Article 3(2), according to Article 3(1), Member States are obliged to inform the other Member States making Article 3(2) part of the determination of the Member State responsible and therefore part of the CEAS. <sup>162</sup> Hence the CJEU concludes that a "decision by a Member State on the

<sup>&</sup>lt;sup>156</sup> CJEU, N.S. vs SSHD (C-411/10) and M.E. (C-493/10), 21. December 2011, § 58

<sup>&</sup>lt;sup>157</sup> ibid. § 59

<sup>&</sup>lt;sup>158</sup> Peers, "Court of Justice: The NS and ME Opinions - The Death of "Mutual Trust"?", retrieved from: http://www.statewatch.org/analyses/no-148-dublin-mutual-trust.pdf, p. 2

<sup>&</sup>lt;sup>159</sup> CJEU, N.S. vs SSHD (C-411/10) and M.E. (C-493/10), 21. December 2011, § 60

<sup>&</sup>lt;sup>160</sup> ibid. § 62

<sup>&</sup>lt;sup>161</sup> ibid. § 61

<sup>&</sup>lt;sup>162</sup> ibid. § 64-68

basis of Article 3(2) Regulation No 343/2003 whether to examine an asylum application which is not its responsibility according to the criteria laid down in Chapter III of that Regulation, implements European Union law for the purpose of Article 6 TEU and/or Article 51 of the Charter". <sup>163</sup>

Resulting, due to the fact that the CJEU has the jurisdictional competence to deal with a Member State's discretionary power to make use of Article 3(2), one can argue that the legal basis to make the use of that clause an obligation is present. Resulting is the possibility of the CJEU to oblige Member States to make use of the discretionary clause under circumstances that are not in line with EU law (for example violations of the Charter). Therefore it may be possible for the CJEU to stop automaticity in the application of the Dublin Regulation due to the fact that a judgement would be able to require Member States to make sure that they are not obliged to make use of the sovereignty clause. Hence, requiring Member States to make sure that the treatment of asylum seekers, that are being removed in the scope of the Dublin System, is in line with Fundamental Rights (even in another Member State).

#### 4.2.2 The refutability of the presumption of safety

Among the questions that have been referred to the Court underlies the question if, and if so when, the presumption of safety can or is to be set aside. The CJEU stresses the fact that the CEAS is based on the assumption that all Member States respect their Fundamental Rights obligations according to the Geneva Convention and the ECHR and that there is confidence among the Member States that these obligations are respected. <sup>164</sup> This general assumption is following the reasoning of the ECtHR <sup>165</sup> while the CJEU outlines that the mutual confidence that is underlying the Dublin Regulation is there to speed up asylum claims on the one hand and to avoid asylum shopping on the other hand. <sup>166</sup> But the CJEU also acknowledges that the system is not without flaws leading to the fact that Fundamental Rights issues arise. <sup>167</sup>

Therefore the CJEU argues in its judgement that an application of the Dublin Regulation, which is based on the conclusive presumption that the asylum seeker's Fundamental Rights are

<sup>&</sup>lt;sup>163</sup> ibid. § 69

<sup>&</sup>lt;sup>164</sup> CJEU, N.S. vs SSHD (C-411/10) and M.E. (C-493/10), 21. December 2011, § 78

<sup>&</sup>lt;sup>165</sup> Brouwer, "Mutual Trust and the Dublin Regulation: Protection of Fundamental Rights in the EU and the burden of proof", (2013) Utrecht Law Review, 9, p.143

<sup>&</sup>lt;sup>166</sup> CJEU, N.S. vs SSHD (C-411/10) and M.E. (C-493/10), 21. December 2011, § 80

<sup>&</sup>lt;sup>167</sup> ibid. § 82

respected in the Member State, which is responsible according to Chapter III of the Dublin Regulation, is in itself inconsistent with the interpretation and application of the Dublin Regulation in compliance with Fundamental Right obligations.<sup>168</sup> Hence, if a conclusive presumption of Fundamental Right compliance would form a part of the Dublin Regulation, the Dublin Regulation, as a legal document, would undermine the safeguards to ensure compliance with Fundamental Right obligations. <sup>169</sup> Moreover, the CJEU stresses, as did the ECtHR in its judgements in K.R.S. and M.S.S., that the ratification of Human Right Conventions cannot result in the conclusive presumption that Member States comply with the obligations arising from such Conventions.<sup>170</sup> Therefore, the CJEU concludes that EU law precludes the application of a conclusive presumption that Member States observe Fundamental Rights. <sup>171</sup> This rejection of the conclusive presumption marks a turning point in interstate co-operation in the sense that it displays the end of automaticity. <sup>172</sup> This end of automaticity implies that national authorities need to examine transfers that fall in the scope of the Dublin Regulation on a case-by-case basis in order to make sure that Fundamental Rights are not breached. <sup>173</sup> Hence, this judgement introduced a mandatory ground for refusal of transfers based on Fundamental Right implications. <sup>174</sup> Concluding, one can say that this clearly indicates the end of blind mutual trust among Member States of the Dublin Regulation. The CJEU showed the necessity to set aside the presumption of safety in favour of the respect of Fundamental Right obligations. But when is this the case? Under which circumstances is the presumption to be set aside?

The CJEU in its judgement concludes that not every infringement of a Fundamental Right or the slightest infringements of the Directives 2203/9, 2004/83 or 2005/85 alters the obligations of Member States to comply with the Dublin Regulation. <sup>175</sup> But it is clearly stated that "if there are substantial grounds for believing that there are systemic flaws in the asylum procedure and reception conditions for asylum applicants in the Member State responsible, resulting in inhuman or degrading treatment, within the meaning of Article 4 of the Charter, of

<sup>175</sup> ibid. § 82-84

<sup>&</sup>lt;sup>168</sup> ibid. § 99

<sup>&</sup>lt;sup>169</sup> ibid. § 100

<sup>&</sup>lt;sup>170</sup> ibid. § 103

<sup>&</sup>lt;sup>171</sup> ibid. § 105

<sup>&</sup>lt;sup>172</sup> Mitsilegas, "The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual", (2012) Yearbook of Europeal Law, 31, , p. 358

<sup>&</sup>lt;sup>173</sup> Mitsilegas, "The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual", (2012) Yearbook of Europeal Law, 31, p.359

<sup>&</sup>lt;sup>174</sup> Mitsilegas, "The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual", (2012) Yearbook of Europeal Law, 31, , p.359

asylum seekers transferred to the territory of that Member State, the transfer would be incompatible with that provision". <sup>176</sup> But what this conclusion by the CJEU concretely implies is interpreted differently.

Mitsilegas interprets this conclusion as the establishment of a high threshold of incompatibility with Fundamental Rights in order for a removal to be stopped. <sup>177</sup> Therefore, showing that there need to be substantial violations in order to set the presumption of safety aside. But when interpreting the notion of "systemic deficiencies" as an additional requirement, the test that needs to be conducted in order to say if the asylum seeker is or is not to be removed to another Member State, one can observe a difference in the assessment of the reputability of the presumption of safety on grounds of Article 3 ECHR as interpreted by the ECtHR in M.S.S. and Article 4 EUCFR as interpreted by the CJEU in this case. This would imply that the Luxembourg Court would undermine, by its interpretation of Article 4 EUCFR, the interpretation of Article 3 ECHR by the Strasbourg Court<sup>178</sup> although it has no mandate to do so. <sup>179</sup> Therefore, Costello strongly recommends not to interpret the notion of "systemic flaws" as an additional requirement but rather as an element of the risk assessment. <sup>180</sup>

Similarly, with regard to the requirements to set the presumption of safety aside, the explicit mentioning of Article 4 of the Charter plays an important role. It is possible to interpret this mentioning as a minimum requirement to stop a removal of an asylum seeker from happening which would imply that only a known and certain violation of Article 4 of the Charter would result in the non-removal of an asylum seeker whereas violations of other Fundamental Rights are not regarded to be sufficient to set the presumption of safety aside. But, instead of regarding the reference to Article 4 of the Charter as a minimum requirement, it is possible that violations of other Fundamental Rights may lead to the obligation to derogate from the Dublin Regulation.<sup>181</sup> Brouwer regards the latter interpretation, which clearly is the broader, to be more adequate due to the fact that the CJEU concluded that EU law precludes in itself a

<sup>&</sup>lt;sup>176</sup> ibid. § 86

<sup>&</sup>lt;sup>177</sup> Mitsilegas, "The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual", (2012) Yearbook of Europeal Law, 31, 359

<sup>&</sup>lt;sup>178</sup> Costello, "Dublin-case NS/ME: Finally, an end to blind trust across the EU?", retrieved from: http://www.migratieweb.nl/f\_\_\_\_/2012-03-30,%20A%26MR%202012,%202%20Dublin-case%20NS-ME%20Finally,%20an%20end%20to%20blind%20thrust%20across%20the%20EU%20-%20C. , p. 89 <sup>179</sup> Ibid. p. 89

<sup>&</sup>lt;sup>180</sup> Costello, "Dublin-case NS/ME: Finally, an end to blind trust across the EU?", retrieved from: http://www.migratieweb.nl/f\_\_\_\_\_/2012-03-30,%20A%26MR%202012,%202%20Dublin-case%20NS-ME%20Finally,%20an%20end%20to%20blind%20thrust%20across%20the%20EU%20-%20C. , p.89

<sup>&</sup>lt;sup>181</sup> Brouwer, "Mutual Trust and the Dublin Regulation: Protection of Fundamental Rights in the EU and the burden of proof", (2013) Utrecht Law Review, 9, p. 144

conclusive presumption of safety<sup>182</sup> which would incorporate not only violations of Article 4 but violations of other Fundamental Rights as well. Due to the fact that the opinions in this case not only referred to Article 4 EUCFR but to Article 1, 4, 18 and 19, Costello doubts the interpretation of Brouwer but argues that the Court left this open because the inclusion of the other Articles would not only apply to asylum seekers but to other refoulement claims as well.

Concluding, it becomes obvious that the CJEU followed the ECtHR with its judgement in the M.S. /N.E. case in the sense that there is the possibility of the refutability of the presumption of safety which constitutes the end of blind mutual trust and automated processes when dealing with asylum applications. But the conditions under which this is the case are not entirely clear. Whereas the Court outlines that there have to be "systematic flaws" while stressing the importance of Article 4 of the Charter, the threshold to stop a removal of an asylum seeker in the scope of the Dublin System is relatively high which is supported through the concrete mentioning that not any infringement of a Fundamental Right constitutes a reason to suspend a transfer. Besides the uncertainties that exist with regard to the concrete requirements to stop a transfer, it needs to be clarified who carries the burden of proof: the asylum seeker or the responsible asylum office? This question is addressed by the Court in the judgement and will be analysed in the following part.

#### 4.2.3 The N.S. /M.E. case and its impact on the burden of proof

With its judgement in M.S.S., the ECtHR showed that, according to them, it does not entirely rest with the asylum seeker to proof that he or she is subject to inhuman or degrading treatment. Again, it is paragraph 86 of the N.S. judgement that constitutes a central point in answering the question of who has the burden of proof, the responsible Aliens Office or the asylum seeker?

Generally, the notion of the fact that there have to be "substantial grounds" for believing that there are "systemic flaws" can be interpreted as being in line with the general principle of asylum law procedures which require asylum seekers to submit grounds to show that they

<sup>&</sup>lt;sup>182</sup> Brouwer, "Mutual Trust and the Dublin Regulation: Protection of Fundamental Rights in the EU and the burden of proof", (2013) Utrecht Law Review, 9, p. 144

<sup>&</sup>lt;sup>183</sup> Costello, "Dublin-case NS/ME: Finally, an end to blind trust across the EU?", retrieved from: http://www.migratieweb.nl/f\_\_\_\_/2012-03-30,%20A%26MR%202012,%202%20Dublin-case%20NS-ME%20Finally,%20an%20end%20to%20blind%20thrust%20across%20the%20EU%20-%20C., p. 90

would face inhuman or degrading treatment in the Member States they are about to be sent to. <sup>184</sup> But another part of the judgement states that in order to ensure compliance with Fundamental Rights obligations, Member States may not transfer an asylum seeker to another State where they "cannot be unaware" that "systemic deficiencies" exist. <sup>185</sup> "Cannot be unaware of systemic deficiencies" leaves space for interpretation but it can be argued that this notion reflects the possibility of Member States to be hold responsible under Article 4 of the Charter although the asylum seeker in question did not submit any grounds for the stopping of his or her removal.<sup>186</sup> Hence, the burden of proof would be shifted to the responsible Aliens Office which would need to have the necessary means to ensure compliance with Fundamental Rights obligations. Brouwer describes this shift of the burden of proof as fair, due to the fact that it is outside of the reach or influence of an asylum seeker to decide on his or her transfer to another country.<sup>187</sup>

Differently, the "cannot be unaware" clause can be interpreted as a reflection of the possibility of the refutability of the presumption of safety based on information available in the public domain.<sup>188</sup> When shifting the burden of proof in its entity onto the national authorities, the processing of asylum claims might take an unreasonable amount of time due to too strict requirements which would or may constitute a violation of the principle of effectiveness<sup>189</sup> and therefore would be contrary to one of the main reasons of the development of the Dublin Regulation. However, Costello concludes that the judgement leaves it for the national systems to develop rules on who is carrying the burden of proof and how asylum applications are processed while stressing the need to comply with the principle of effectiveness and equivalence. <sup>190</sup>

Differently, one could argue that when agencies "cannot be unaware of systemic flaws", this could imply that the responsible agency needs to be certain that systemic flaws do not exist. Therefore, they would need to make sure that the asylum seeker does not face a real risk of

http://www.migratieweb.nl/f /2012-03-30,%20A%26MR%202012,%202%20Dublin-case%20NS-

ME%20Finally,%20an%20end%20to%20blind%20thrust%20across%20the%20EU%20-%20C., p.89

<sup>189</sup> Ibid. p.89

<sup>&</sup>lt;sup>184</sup> Brouwer, "Mutual Trust and the Dublin Regulation: Protection of Fundamental Rights in the EU and the burden of proof", (2013) Utrecht Law Review, 9, p.143

<sup>&</sup>lt;sup>185</sup> CJEU, N.S. vs SSHD (C-411/10) and M.E. (C-493/10), 21. December 2011, § 94

<sup>&</sup>lt;sup>186</sup> Brouwer, "Mutual Trust and the Dublin Regulation: Protection of Fundamental Rights in the EU and the burden of proof", (2013) Utrecht Law Review, 9, p.143

<sup>&</sup>lt;sup>187</sup> Brouwer, "Mutual Trust and the Dublin Regulation: Protection of Fundamental Rights in the EU and the burden of proof", (2013) Utrecht Law Review, 9, p.144 <sup>188</sup> Costello, "Dublin-case NS/ME: Finally, an end to blind trust across the EU?", retrieved from:

<sup>&</sup>lt;sup>190</sup> Ibid. p.92
being subject to inhuman or degrading treatment. This interpretation is closest to the one by Brouwer. In general, it is regarded that when Member States or their agencies "cannot be unaware" of something, they need to make sure that this is not the case by conducting certain scrutiny. For mutual trust, this implies the complete abolition of any automaticity.

Although it is unclear what the CJEU intended to invoke with the mentioning of the "cannot be unaware" clause, it is clear that this notion introduced the obligation for Member States of the Dublin System to deal with asylum applications on a case-by-case basis in order to ensure compliance with Fundamental Right obligations. Therefore it is no longer possible for Member States to automatically send an asylum seeker to another Member State because when suspending an asylum seeker automatically, one cannot be unaware of systemic differences due to the procedure. Therefore, automaticity in the removal procedure of an asylum seeker would undermine an integral aspect of the judgement at hand and hence might result in a breach of the Fundamental Rights obligations.

Therefore, the agencies would need to have the power to conduct scrutiny over the receiving Member States' compliance with Fundamental Rights obligations on the one hand. On the other hand, it is questionable what this scrutiny would imply and how far it would need to be conducted. In the following part it will be outlined what can be derived from the judgement in the N.S. case about the scrutiny that Member States or their agencies need to conduct.

## 4.2.4 Scrutiny in the scope of the Dublin System and the acceptability of Information

Due to the fact that scrutiny of a Member States' compliance with Fundamental Rights obligations implies the allocation of Information, this part will not solely deal with the scrutiny Member States need to conduct but outline which information is accepted as reliable and important by the Court in order to stop a removal to the responsible Member State. Belgium, Italy and Poland argued that the national asylum systems do not have the necessary capacities and competences to conduct scrutiny about the compliance of a receiving Member States' Fundamental Rights obligations and therefore argue that it is not possible to comply with this obligation. <sup>191</sup> Moreover, the Irish, Italian, Dutch, Czech, Polish and Finnish governments argued that a duty to examine another Member States' compliance would go too far whereas

 $<sup>^{191}</sup>$  CJEU, N.S. vs SSHD (C-411/10) and M.E. (C-493/10), 21. December 2011,  $\,\S\,91$ 

the Greek and the Portuguese governments argue that such a step would be contrary to EU law. <sup>192</sup>

The Court rejects these views but argues, by following the M.S.S. judgement, that unanimous reports by international NGOs, correspondence by the UNHCR and the Commission reports on the Dublin Evaluation enables Member States to assess the risks asylum seekers face in other Member States. <sup>193</sup> Although the CJEU relied upon the information that has already been accepted as formulating considerable evidence by the ECtHR in the M.S.S. case, both judgements are not laying down certain criteria for information that may be used to, or is sufficient to rebut, mutual trust. <sup>194</sup> What can be derived from this fact, is the idea that information that is available in the public domain like reports by NGOs or the Evaluation of the Dublin System by the Commission, shows where there are possible flaws in the system. Therefore, it might be possible for national Aliens Offices to get general knowledge about the asylum procedures and its general Fundamental Right compliance in other Member States, making it possible to identify Member States where the risk of Human Rights incompliance arises and Member States where this is not the case. Nevertheless, in order that one cannot be unaware of systemic flaws, it is necessary to conduct scrutiny, at least in the Member States which are regarded as potentially violating the Fundament Rights of asylum seekers.

But this task of scrutiny seems not be further defined by the CJEU<sup>195</sup> or embedded into a system of obligations and rules of procedure. <sup>196</sup> However, a general aspect of scrutiny of other Member States will inevitably involve an analysis of the Fundamental Rights compliance of the receiving Member State on a case by case basis. <sup>197</sup>

Generally, one can state that Member States have a greater duty to make sure that asylum seekers they transfer, do not face treatment contrary to Article 4 ECHR but it is not entirely clear what they have to invest in order to ensure this compliance and rebut the presumption of safety. Hence, mutual trust has come under general scrutiny in the scope of the Dublin

http://www.migratieweb.nl/f /2012-03-30,%20A%26MR%202012,%202%20Dublin-case%20NS-

ME%20Finally,%20an%20end%20to%20blind%20thrust%20across%20the%20EU%20-%20C., p. 92

<sup>&</sup>lt;sup>192</sup> Costello, "Dublin-case NS/ME: Finally, an end to blind trust across the EU?", retrieved from:

<sup>&</sup>lt;sup>193</sup> CJEU, N.S. vs SSHD (C-411/10) and M.E. (C-493/10), 21. December 2011, § 92-93

<sup>&</sup>lt;sup>194</sup> Brouwer, "Mutual Trust and the Dublin Regulation: Protection of Fundamental Rights in the EU and the burden of proof", (2013) Utrecht Law Review, 9, p. 145

 <sup>&</sup>lt;sup>195</sup> Brouwer, "Mutual Trust and the Dublin Regulation: Protection of Fundamental Rights in the EU and the burden of proof", (2013) Utrecht Law Review, 9, p. 143
<sup>196</sup> Mitsilegas, "The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice: From Automatic Inter-State

<sup>&</sup>lt;sup>196</sup> Mitsilegas, "The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual", (2012) Yearbook of Europeal Law, 31, , p. 357

<sup>&</sup>lt;sup>197</sup> Mitsilegas, "The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual", (2012) Yearbook of Europeal Law, 31, , p.357

System. First of all, the responsible agencies need to collect publicly available information to comply with their investigative tasks. But what concretely constitutes enough evidence for inhuman or degrading treatment of asylum seekers remains open. What is clear is that if the Aliens Office is not sure if a transfer would result in such a treatment, it is better off when not transferring the asylum seeker in order to prevent the government from being prosecuted for a breach of Fundamental Right obligations. If this is the case, it is necessary to know what the consequences are and who is responsible for the asylum claim. Therefore, the next part will deal with this scenario and outline when it becomes an obligation for a Member State to make use of Article 3(2) in order to prevent an asylum seeker from treatment contrary to his Fundamental Rights.

## 4.2.5 The obligation to make use of the sovereignty clause

After the decision of a Member State not to transfer an asylum seeker to another Member State due to the risk of inhuman or degrading treatment, he or she may face in the Member State responsible, Chapter III of the Dublin Regulation is the first place to look for the "next" Member State responsible. <sup>198</sup> Whereas it has to be pointed out that the Member State where the asylum seeker is present, may not worsen the situation of the asylum seeker through a procedure which takes "an unreasonable amount of time". <sup>199</sup> Therefore the CJEU concludes, and this constitutes one of the main differences to the M.S.S. judgement which did not go this far and into detail, that "if necessary the [...] Member State must itself examine the application in accordance with the procedure laid down in Article 3(2) of Regulation 343/2003". <sup>200</sup>

With this ruling, the CJEU follows the ECtHR's judgement in M.S.S. in the sense that Article 3(2) is interpreted as a Human Rights clause due to the fact that the use of it is subject to Fundamental Rights compliance whereas the CJEU points out that the hierarchical order of criteria for the Member State responsible, as set out in Chapter III of the Dublin Regulation, applies first . <sup>201</sup> Therefore, the discretion of the Member States to apply Article 3(2) is limited to and required to comply with Fundamental Rights. <sup>202</sup> Again, it is criticized that the CJEU did

<sup>&</sup>lt;sup>198</sup> CJEU, N.S. vs SSHD (C-411/10) and M.E. (C-493/10), 21. December 2011, § 95

<sup>&</sup>lt;sup>199</sup> CJEU, N.S. vs SSHD (C-411/10) and M.E. (C-493/10), 21. December 2011, § 107

<sup>&</sup>lt;sup>200</sup> ibid. § 108

<sup>&</sup>lt;sup>201</sup> Mitsilegas, "The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual", (2012) Yearbook of Europeal Law, 31, , p. 362

<sup>&</sup>lt;sup>202</sup> Mitsilegas, "The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual", (2012) Yearbook of Europeal Law, 31, , p. 361

not refer to certain criteria for the transfer of asylum seekers within the scope of the Dublin System and its underlying automaticity. <sup>203</sup> Nevertheless, by clearly stating that Article 3(2) may constitute an obligation for Member States to deal with an asylum claim, although they are not responsible, changes mutual trust and especially automatic mutual trust entirely. Member States, before the M.S.S. judgement, were able to rely on the Dublin System when automatically processing asylum applications and transfer the asylum seeker to the Member State responsible. With M.S.S., this automaticity in transfers came to an end due to the fact that Belgium was regarded as breaching the principle of non-refoulement. But with the judgement of the CJEU, Member States of the Dublin System were shown that their obligations arising from ECHR and the ratification of the Geneva Convention exceeded their interest of rapidly dealing with asylum applications on a legal basis.

Concluding, one can state that the judgement of the CJEU in the joined cases of N.S. and M.E. generally follows the line of the ECtHR in its M.S.S. judgement by placing the need to comply with Fundamental Right obligations over the need to comply with the Dublin Regulation and therefore over interstate trust. A novelty is the obligation to make use of the sovereignty clause which is an additional requirement for Member States to deal with asylum applications on a case by case basis. With regard to mutual trust it is to state that the general ideas of mutual trust and the assumption of compliance are still applied but do not form any legal basis to rely upon when dealing with asylum applications, which might have an influence on the Area of Freedom, Security and Justice in general. What these changes imply in detail and how mutual trust has changed and is regarded to be applied in the future, will be outlined in the next part of this paper.

## 4.3 Mutual trust 2.0 – How the two judgements by the ECtHR and CJEU changed the Dublin System

Mutual trust in the scope of the Dublin System has been an integral part of the system, especially in the beginning, which led to automated processes when dealing with asylum applications due to the presumption of safety. This assumption has already been challenged by the ECtHR in the T.I. case where it has been pointed out that agreements between nation

<sup>&</sup>lt;sup>203</sup> Mitsilegas, "The Limits of Mutual TrustMutual Trust in Europe's Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual", (2012) Yearbook of Europeal Law, 31, , p. 362

states (in this case the Dublin Regulation) do not affect the responsibility of the Member States arising from other agreements such as the Geneva Convention. <sup>204</sup> Therefore, the Court introduced the principle of indirect refoulement to the Dublin System by requiring the UK to make sure that a transfer of T.I. to Germany does not result in a direct removal to Sri Lanka. This fact, for the first time, showed the possibility of the presumption of safety on the grounds of a violation of the principle of non-refoulement.

Differently to the T.I. judgement of the ECtHR, which weakened the presumption of safety, in the K.R.S. judgement, the ECtHR strengthened the presumption of safety and underlined its applicability in the scope of Dublin transfers. Besides arguing that there was no refoulement from Greece to Iran at the time of the application as well as the possibility of K.R.S. to apply for asylum in Greece, the ECtHR argued that, in general, it must be assumed that Greece is complying with its obligations arising from Fundamental Right agreements.<sup>205</sup> This conclusion is regarded to strengthen the presumption of safety by making clear that in general it is assumed that Greece is following its obligations although certain NGO reports (which have been accepted as reliable and valid in the M.S.S. judgement) point out certain deficiencies in the Greek system. Therefore, with this conclusion, the ECtHR is regarded to have supported the automaticity that has dominated the asylum procedures in several Member States and therefore reinforced "blind mutual trust".

With its judgement in the M.S.S. case, the ECtHR overcame its judgement in the K.R.S. case with regard to the presumption of safety. For the first time, the assumption that a Member State (Greece) is complying with its Human Right obligations, led the Court to regard the sending Member State (Belgium) as having violated its Fundamental Right obligations with regard to Article 3 of the Convention. Therefore, the ECtHR pointed out that on the basis of certain Human Right violations, the presumption of safety is to be refuted by the Member States in order to safeguard Fundamental Rights. Hence, the Court showed that the need to comply with Fundamental Rights exceeded the idea of interstate confidence and hence, mutual trust as it has developed in the scope of the Dublin System until the M.S.S. judgement. An aspect of mutual trust in the Dublin System until this judgement had been the possibility to rely upon the assumption that other Member States are complying with their Fundamental Right obligations which led the Member States to transfer asylum seekers to other Member

<sup>&</sup>lt;sup>204</sup> (ECtHR), T.I. v UK, Appl. No. 43844/98

<sup>&</sup>lt;sup>205</sup> (ECtHR), K.R.S. v United Kingdom, Appl. No. 32733/08.

States regardless of the situation asylum seekers would face in that country. This aspect of mutual trust was referred to as "blind" and has come to an end with this judgement due to the higher need to respect and safeguard the Fundamental Rights of asylum seekers. Nevertheless, this judgement is not regarded as overcoming the Dublin System as a whole because it is still able to lay down rules for the processing of asylum applications which still might be based on mutual trust but cannot be relied upon blindly.

The CJEU followed this direction of the ECtHR but generalized it more in its judgement. In the joined cases of N.S. & M.E., the CJEU concluded that a conclusive presumption is undermining the interpretation of the Dublin Regulation inconsistency with Human Right obligations. <sup>206</sup> Therefore, the CJEU showed that EU law precludes the application of a conclusive presumption of safety resulting in the end of automatic mutual trust and the start of the need for the Member States to deal with asylum applications on a case-by-case basis in order to ensure the safeguarding of Human Rights. It is not clear, from neither of the judgements, what constitutes a breach of Fundamental Right obligations that is sufficient to put down the presumption of safety whereas the CJEU referred to violations of Article 4 of the ECHR. Similarly to this, the Council forwarded a legislative act to the European Parliament in the scope of the co-decision procedure on May 31, 2013 which is aiming at replacing the Dublin Regulation as it has been discussed in this paper. The new Regulation that is underlying the CEAS in its current form<sup>207</sup> has, besides other aspects, a completely renewed Article 3(2) which states that "[w]here it is impossible to transfer an applicant to the Member State primarily designated as responsible because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union, the determining Member State shall continue to examine the criteria set out in Chapter III ...". <sup>208</sup>

This new Article 3(2) shows on the one hand that the policy makers are following the Courts in the sense that Article 3(2) has become a Human Rights clause. Similarly, Article 4 of the ECHR has been referred to as an indicator for the stopping of a transfer in the scope of the Dublin

<sup>&</sup>lt;sup>206</sup> CJEU, N.S. vs SSHD (C-411/10) and M.E. (C-493/10), 21. December 2011, § 43

<sup>&</sup>lt;sup>207</sup> The author wants to point out that the document cannot be regarded as current law yet due to the fact that it has not been agreed upon by all institutions but already gives an indication of what the final Regulation will look like.

<sup>&</sup>lt;sup>208</sup> Council of the European Union, May 2013, Regulation (EU) No. .../2012 of the European Parliament and of the Council, retrieved from: register.consilium.europa.eu/pdf/en/12/st15/st15605-re02.en12.pdf ,Art.3(2)

System but it has not been clarified (yet) if this composes a minimum requirement or if it can be applied to other Human Right obligations as well. It might be up to the Courts to determine the exact scope of this Article after it becomes a legally binding agreement. Recently, the ECtHR, in the case Mohammad Hussein v. the Netherlands and Italy of April 2013, showed that it is not sufficient to constitute a breach of Fundamental Right obligations resulting in a suspension of a removal of an asylum seeker in the scope of the Dublin System. A Somali national claimed to have her rights violated according to Article 3 of the Convention by being returned from the Netherlands (where she was staying and wanted to stay) to Italy (the Member State responsible according to Chapter III of the Dublin Regulation).- <sup>209</sup> The ECtHR rejected her claim based on the information that the Italian government did not only forward to the Court but to the Dutch agencies as well.<sup>210</sup> This information seemed to prove that the asylum seeker in question received financial and medical assistance upon arrival in Italy as well as she was provided with accommodation.<sup>211</sup> Therefore the ECtHR concluded that the Italian asylum procedure is sufficiently safeguarding the Fundamental Rights of asylum seekers. This judgement shows that not every claim for the suspension of a removal will be granted in front of the ECtHR but that Fundamental Rights need to be substantially disregarded. Hence, one can say that the development that came along with the M.S.S. case of 2011 and the joined cases of N.S. and M.E. of 2012 did not start the revolution of the CEAS but showed situations where Fundamental Right obligations exceed the application of the Dublin Regulation.

On the other hand, this new Article 3(2) incorporated the refutability of the presumption of safety into the legal document itself, showing not only its importance but displaying the end of blind mutual trust through a change in the procedural Regulation. Moreover, the "discretionary aspect" of the former Article 3(2) was overcome entirely but newly introduced in Article 17 which solely refers to the possibility of Member States to examine an asylum application although they are not responsible for the application according to the criteria set out in the regulation. <sup>212</sup> Again, one can see that the new Dublin Regulation seems to be following the judgements of the Courts. Based on the judgement of the CJEU it is an obligation to safeguard Fundamental Rights and eventually make use of the sovereignty clause of Regulation 343/2003 in order to safeguard Fundamental Rights. Due to the fact that the new

<sup>&</sup>lt;sup>209</sup> ECtHR, Samsam Mohammed Hussein and Others v. the Netherlands and Italy, 02. April 2013 § 56

<sup>&</sup>lt;sup>210</sup> Ibid. § 79

<sup>&</sup>lt;sup>211</sup> Ibid. § 43-46

<sup>&</sup>lt;sup>212</sup> Council of the European Union, May 2013, Regulation (EU) No. .../2012 of the European Parliament and of the Council, retrieved from: register.consilium.europa.eu/pdf/en/12/st15/st15605-re02.en12.pdf, Article 17

Article 3(2) clearly states this rather than giving Member States the opportunity to deal with an asylum application, incorporates the respect of Fundamental Rights into the Regulation itself. Therefore, one can say that the new Dublin Regulation, as it is at the moment, might be achieve more in safeguarding of Fundamental Rights of asylum seekers in the EU.

Besides these aspects of the New Dublin Regulation there are several aspects of the New Regulation which are similar to the old Regulation 343/2003. Chapter III again determines a hierarchical structure of criteria laying down which Member State is responsible for examining an asylum application. <sup>213</sup> One of these criteria is again that the Member State where the asylum seeker illegally crossed the border is responsible for examining the asylum claim. <sup>214</sup> Hence, one can see that the major burden to deal with asylum seekers still lies with the border Member States which is an important aspect that partly led to the Human Right violations which resulted in the cases of M.S.S. and N.S. & M.E. Hence, showing that the new Dublin Regulation is not a revolutionary document that is putting the respect of Fundamental Rights of asylum seekers at the heart of the CEAS what results in the fact that it still rests with individuals to litigate in order to fight for the respect of Fundamental Rights.

A similar development can be observed when looking at the changes that will be made to the Reception Conditions Directive (Directive 2003/9/EC) and the Asylum Procedures Directive (Directive 2005/85/EC). Rather than setting minimum standards for the Reception Conditions of Asylum seekers in order to prevent treatment contrary to Fundamental Right obligations (such as the one that M.S.S. had to suffer in Greece), the amended proposal for laying down standards for the reception of asylum seekers solely lays down more simplified reception standards.<sup>215</sup> Hence, one can argue that this document is not aiming at significantly increasing the Reception Conditions for asylum seekers by setting minimum standards but looks at simplifying the procedures for the Member States. With regard to the Asylum Procedures Directive, the new proposal reduces the obligations of Member States to document interviews

<sup>&</sup>lt;sup>213</sup> Council of the European Union, May 2013, Regulation (EU) No. .../2012 of the European Parliament and of the Council, retrieved from: register.consilium.europa.eu/pdf/en/12/st15/st15605-re02.en12.pdf, Art. 7

<sup>&</sup>lt;sup>214</sup> Council of the European Union, May 2013, Regulation (EU) No. .../2012 of the European Parliament and of the Council, retrieved from: register.consilium.europa.eu/pdf/en/12/st15/st15605-re02.en12.pdf, Art. 13

<sup>&</sup>lt;sup>215</sup> European Commission, June 2011, Amenden proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of asylum seekers, retrieved from: <u>http://eur-lex.europa.eu/LexUriServ.LexUriServ.do?uri=COM:2011:0320:FIN:EN:PDF</u>, Part 3.1.1

with asylum seekers, <sup>216</sup> the possibility of asylum seekers to be granted legal aid <sup>217</sup> and the possible restriction of lawyers to government officials. <sup>218</sup> When looking at the bigger picture one can conclude that these legal documents set lower standards than the existing Directives <sup>219</sup> although the ECtHR already showed that the Reception and Detention Conditions M.S.S. suffered in Greece die not comply with the standards that should persist in an area of freedom, security and justice.

How this will be influenced by the accession of the EU to the ECHR remains to be seen. But by incorporating the ECtHR into the EU's legal system the way is paved for the ECtHR to not only control the EU but to enhance its influence making it possible to make sure that not only the Member States but the EU itself is bound to respect Fundamental Right obligations. Therefore, it might even be possible that the ECtHR needs to deal with the issue of a conclusive presumption of safety. A possible result of this might even be an abolishment of the presumption of safety in general due to the incompatibility with its application and Human Right obligations arising from the Convention.

Concluding, one can state that the judgements discussed in this paper put an end to blind mutual trust in the scope of the Dublin System in favour of safeguarding the Fundamental Rights of asylum seekers. Therefore, it became necessary for Alien Offices to deal with every asylum claim on a case-by-case basis in order to make sure that the asylum seeker's Fundamental Rights are not systematically disrespected in the Member State responsible according to the Dublin Regulation. This seems to be partly supported by European policy makers due to the fact that the sovereignty clause/ the former Article 3(2) seems to turn into the Human Rights clause of the new Dublin Regulation. Another aspect of the necessity to deal with every asylum application on a case-by-case basis, is the question to the necessity to conduct scrutiny. Neither the judgements nor the draft of the new Dublin Regulation clearly outline requirements and guidelines in this scope. But the recent judgement of the ECtHR

<sup>&</sup>lt;sup>216</sup> European Commission, June 2011, Amended Proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status, Retrieved from: http://ec.europa.eu/dgs/home-affairs/what-is-new/news/pdf/1 act part1 v121 319 en.pdf, Art.17

<sup>&</sup>lt;sup>217</sup> European Commission, June 2011, Amended Proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status, Retrieved from: <u>http://ec.europa.eu/dgs/home-affairs/what-is-new/news/pdf/1\_act\_part1\_v121\_319\_en.pdf</u>, Art.20

<sup>&</sup>lt;sup>218</sup> European Commission, June 2011, Amended Proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status, Retrieved from: http://ec.europa.eu/dgs/home-affairs/what-is-new/news/pdf/1\_act\_part1\_v121\_319\_en.pdf, Art.21

<sup>&</sup>lt;sup>219</sup> Peers, (2011) "Revised Asylum proposals: "Lipstick on a pig"", Retrieved from: http://www.statewatch.org/analyses/no-132-asylum.pdf

might give an indication on how this topic might possibly be dealt with. Among the central information for the conclusion of the Court, were documents the Italian government provided. Differently to the generalized documents forwarded in the M.S.S. case by Greece to Belgium, the Italian authorities were able to provide information about the personal well-being of the asylum seeker. Therefore, it might serve the idea to protect Fundamental Rights to document the processing of asylum seekers in more detail in every Member States beyond the monitoring mechanisms of the Commission that is in place in order to be able not only to show but to guarantee the respect of Fundamental Rights in every country. This would help to answer the question of scrutiny by increasing co-operation and introducing a new way building trust: rather than just assuming that all Member States respect their Fundamental Right obligations, it would be up to every Member State to document the respect of Fundamental Rights and to share this information with the other Member States. This would not just increase the building of real trust and safeguard the respect of Fundamental Right obligations but would also give the Member States the opportunity to evaluate its own system in more detail.

## 5. Conclusion

In 2012 the EU has been awarded the Nobel Peace Price which does not only constitute an award of safeguarding the peace in Europe since World War II but also displays the EU's ambition to be an area of Freedom, Security and Justice. The Human Right violations that have been taken place in the CEAS due to procedural shortcoming show a different picture.

The blind assumption of safety that did prevail in the Dublin System has led to several shortcomings when safeguarding Fundamental Rights inside the legal system of the EU. It seemed, before the M.S.S. judgement of the ECtHR that the interest of the contracting state to rapidly and efficiently deal with asylum applications while avoiding asylum shopping exceeded the interest to safeguard Fundamental Rights of asylum seekers.

The introduction of the principle of indirect-refoulement with the T.I. firstly showed that it is necessary for Alien Offices, even when transferring an asylum seeker within the Dublin System, to care about the asylum seeker's Fundamental Rights even after leaving the country. Nevertheless, the ECtHR overcame this first step by itself through its judgement in the K.R.S. case where the assumption of safety and therefore blind mutual trust has been reinforced.

This development came to a fast end with the case of M.S.S. where the ECtHR ruled that even when transferring an asylum seeker from one Dublin state to another there is the possibility to breach the principle of non-refoulement and therefore Human Rights obligations. This fact changed the idea of mutual trust entirely as the automated processes of dealing with asylum seekers needed to be changed to case-by-case processes in order to make sure that the Fundamental Rights of every asylum seeker are safeguarded. This new obligation opened up questions according to the amount of scrutiny required and the necessity to make use of the sovereignty clause.

After ruling that the CJEU has the legal competences to deal with this issue it ruled that the application of blind mutual trust and an irrefutable assumption of safety are contrary to the application of the Dublin II Regulation in line with Human Rights obligations. Therefore not only putting the respect of Human Rights over interstate trust and interstate cooperation but showing that the CEAS as it was at that stage needed to change. With the EU's accession to the ECHR this issue might come up again before the ECtHR due to the fact the EU's measures and policies come under general scrutiny with regard to is compliance with Human

Rights. A possible result might be that the ECtHR rules that a general assumption of safety is contrary to Human Right obligations and therefore making this part the Dublin Regulation obsolete.

This development seems to have been recognized and respected by European policy makers who, in the current stage of the next Regulation which is changing the Dublin System, followed the Courts in their assessment and included the refutability of the presumption of safety into the legal document itself. Moreover it is clearly outlined that the need to respect Fundamental Rights exceeds the interest of applying the Dublin Regulation.

Although this development displays a movement to a more Human Rights centred asylum policy in the EU one aspect is striking: the TEU, which forms the legal competence for the EU to pass legislation on asylum matters, clearly outlines the need for solidarity inside the EU when dealing with asylum applications. When taking into account that 90% of the illegal immigrants of the EU enter the EU through Greece (which clearly played its role in the deficiencies of the Greek asylum procedure which led the ECtHR to conclude that Belgium breached Article 3 of the Convention) and an important aspect of the Dublin System is the criterion that the Member State of first entry is the one responsible, it may seem as if the Northern Member States want to get rid of their obligation to help people find asylum but leave this obligations with Greece and the other Southern Member States. Taking this into account in times of a critical Economic Crisis in Southern Europe (especially in Greece), the Member States of the Dublin System should be advised to change the focus of their asylum policy to an even more Human Rights centred approach. Rather than looking forward to avoid asylum shopping and deal with asylum applications as soon as possible the focus should be to help people in need in order to have their Fundamental Rights respected because this is one of the aspects that make the EU not only earn the Nobel Peace Price but be the archetype of a system of Freedom, Security and Justice that is extending of Nation State borders.