

# ELENA

EUROPEAN LEGAL  
NETWORK ON ASYLUM

## Information Note

Dublin transfers post-Tarakhel: Update on European case law and practice



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## Introduction

1. The Dublin system<sup>1</sup> is the legal base for deciding the EU Member State that is responsible for determining an asylum claim. Eighteen years have passed since its inception, yet inconsistencies and problems remain in its operation. This is due both to the intrinsically flawed premise that the Dublin system rests upon: a level playing field across Europe with harmonized standards of protection as well as due to deficiencies within the Regulation itself.<sup>2</sup> Dublin transfers are being massively litigated at the national and European level, and the growing body of jurisprudence from the European Court of Human Rights (ECtHR), the Court of Justice of the EU (CJEU) and domestic courts play a crucial role in the evolution of the Dublin system across Europe.
2. The aim of this information note is to contribute to a better understanding of the policy and practice evolution following the ECtHR Grand Chamber ruling in *Tarakhel v. Switzerland* ([GC], no. 29217/12), a significant jurisprudential development in relation to Dublin transfers.
3. Our research in no way purports to provide a comprehensive assessment of the interpretation of the judgment by all Member States, applying the Dublin system,<sup>3</sup> but rather highlights divergences in its interpretation by national courts and authorities, both good and bad practice and important developments in the Member States. We have focused on Member States in which there has been a significant evolution in case-law and national practice following the *Tarakhel* judgment.
4. The note is based on primary data obtained from the [European Legal Network on Asylum](#) (ELENA) national coordinators and members complemented by an analysis of several secondary resources in the form of published articles, reports and literature that was publicly available. This research was carried out between January and September 2015 and written by Zarina Rahman, Amanda Taylor and Julia Zelvenska. We would like to thank the following ELENA coordinators for their contributions: David Chirico (UK), Halvor Frihagen (Norway), Holger Hoffmann (Germany), Julia Ivan (Hungary), Marjaana Laine (Finland), Seraina Nufer and Adriana Romer (Switzerland), Dorte Smed (Denmark), Sadhia Rafi (the Netherlands), Tristan Wibault (Belgium) and Michael Williams (Sweden).
5. In view of the substantial amount of litigation being conducted at present challenging Dublin transfers, and the ongoing developments at Member State and European level, major jurisprudential and practice developments as of October 2015 will be reported in [the ELENA Weekly Legal Update](#).
6. The note is organised into the following chapters:
  - I. *Background to the Tarakhel judgment*
  - II. *The Tarakhel judgment*
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  - IV. *Pending cases at the European Court of Human Rights*
  - V. *Post-Tarakhel – Court of Justice of the European Union*
  - VI. *Post-Tarakhel: United Nations Human Rights Committee*
  - VII. *Post-Tarakhel: Selected domestic case law and practice*
    - Belgium*
    - France*
    - Finland*
    - Germany*
    - The Netherlands*
    - Norway*
    - Sweden*
    - Switzerland*
    - The United Kingdom*
  - VIII. *Conclusion*

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1. Council of the European Union, Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), 29 June 2013, OJ L.

2. The Dublin Transnational Network Project, [The Dublin II Regulation Lives on Hold](#), European Comparative Report, February 2013.

3. All 28 EU countries and four Schengen Associated States: Switzerland, Liechtenstein, Iceland and Norway.

## I. Background to the Tarakhel judgment

7. A thorough history of the case law relating to the Dublin system prior to the *Tarakhel* judgment is beyond the scope of this note. However, to provide necessary context, the most pertinent points arising from the leading European Courts judgments prior to *Tarakhel* are summarised below.
8. In *M.S.S. v Belgium and Greece*,<sup>4</sup> the Grand Chamber of the ECtHR found that Belgium had violated Article 3 of the [European Convention on Human Rights](#) (ECHR) by transferring an asylum applicant to Greece under the Dublin II Regulation<sup>5</sup> where he was exposed to risks arising from the deficiencies of the asylum procedure in Greece, and poor detention and living conditions. With regard to the national appeal procedure in Belgium, the Court held that Belgium was in violation of Article 13 in conjunction with Article 3 because of the lack of an effective remedy against the Dublin decision.
9. The Court stated that Member States cannot presume that the applicant would be treated in conformity with ECHR obligations upon a Dublin transfer, but that it is up to the national authorities to first verify how the Greek authorities applied their legislation on asylum in practice before returning asylum seekers there. This by corollary also applies whenever there is evidence that any Member State is not treating asylum seekers in conformity with its ECHR obligations in practice. Where this is the case, the sovereignty clause should be used instead of transfer.
10. In its judgment, the ECtHR emphasised the particular vulnerability of asylum seekers, with a broad consensus at the international and European level concerning the need for special protection for this group. In addition, it made clear that failure to secure the positive obligations in the Reception Conditions Directive, could lead to Article 3 violation: that was because the breach of positive obligations amounted to ‘treatment’ such as to engage Article 3.
11. The CJEU followed the ECtHR’s findings in the joined cases of *N.S. v United Kingdom* and *M.E. v. Ireland*.<sup>6</sup> It confirmed, in line with *M.S.S.*, that EU law like Convention law prevents the application of a conclusive (irrebuttable) presumption that Member States observe all the fundamental rights of the European Union. Article 4 of the [Charter on Fundamental Rights of the European Union](#) (CFR) must be interpreted as meaning that a Member State may not transfer an asylum seeker to the Member State responsible within the meaning of the Regulation where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to “substantial grounds for believing that the asylum seeker would face a real risk” of being subjected to inhuman or degrading treatment within the meaning of the provision. Once it is impossible to transfer the asylum seeker to the responsible Member State then, subject to the sovereignty clause, the State can check if another Member State is responsible by examining further criteria under the Regulation. This should not take an unreasonable amount of time and if necessary then the Member State concerned must examine the asylum application. The difficulty with the *N.S.* Judgment, however, was its reference to ‘systemic’ deficiencies. There were at least two possible readings of this. On one reading, which was favoured by the governments of many member states, the CJEU was introducing an additional legal test: only evidence of ‘systemic’ deficiencies could rebut a presumption that member states complied with their international obligations towards refugees and asylum-seekers. On a second reading, favoured by the UNHCR, NGOs and representatives of refugees and asylum-seekers, the existence of ‘systemic’ deficiencies in the destination state was only one example of a circumstance in which the return of an individual under the Dublin III Regulation would breach his/her fundamental rights.

## II. The Tarakhel judgment<sup>7</sup>

12. In this judgment<sup>8</sup> the Court held that the responsible Member State in the case of an Afghan family with children must obtain individual guarantees from the Italian authorities that they would be taken charge of in a manner adapted to the age of the children and that the family would be kept together, in order for a Dublin transfer to be compatible with Article 3 ECHR, in light of the circumstances in Italy.
13. The Court confirmed that the presumption that States participating in the Dublin system will comply with their human rights obligations is rebuttable by evidence, which requires a case-by-case examination of risk, and may require detailed and reliable assurances from the State of proposed transfer where arguable grounds for a risk of violation have been demonstrated.<sup>9</sup>

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4. *M.S.S. v Belgium and Greece* [GC] Application no. 30696/09 - 21 January 2011

5. Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national. This was in force at the time but has been recast since.

6. C-411/10 *N.S. v United Kingdom* and C-493/10 *M.E. v Ireland* - 21 December 2011

7. *Tarakhel v. Switzerland*, Application no. 29217/12 - 4 November 2014

8. ECRE, Amnesty International and the AIRE Centre submitted a third party intervention in this case. The joint submissions are available [at this link](#).

9. ‘Vulnerability, the Right to Asylum and the Dublin System’, Maria Henessy

14. Upholding the findings of the UK Supreme Court in *EM (Eritrea)*<sup>10</sup> it clarified that in order to rebut this presumption, it is not necessary to show evidence of a 'systemic deficiency' in the receiving State's asylum procedures or reception conditions. The correct test is that set out in *Soering v. the United Kingdom*: where substantial grounds have been shown for believing that the person concerned faces a real risk upon removal of being subjected to treatment contrary to Article 3 in the receiving country.<sup>11</sup> This requires sending States to make a thorough, individualised examination of the situation of the person concerned, and to suspend enforcement of the removal order if this risk is established.
15. It underlined its previous findings in *M.S.S. v Belgium and Greece* that asylum seekers as a particularly underprivileged and vulnerable population group are in need of special protection. With more specific reference to children, the Court established that it is important to bear in mind that the child's extreme vulnerability is the decisive factor and takes precedence over considerations relating to the status of illegal immigrant.<sup>12</sup> Children have specific needs that relate in particular to their age and lack of independence, but also to their asylum-seeker status. The Court has observed that the Convention on the Rights of the Child (CRC)<sup>13</sup> encourages States to take the appropriate measures to ensure that a child who is seeking to obtain refugee status enjoys protection and humanitarian assistance, whether the child is alone or accompanied by his or her parents (Popov, § 91).<sup>14</sup>
16. As the individual facts of this case relate to young children, a dominant theme of the judgment was the best interests of the child and family unity. However, there is nothing in the judgment to suggest that individualised guarantees or even an assessment need only be provided for families with young children.
17. The judgment explicitly states that all asylum seekers require special protection under Article 3 due to their vulnerability, which means that authorities should have regard to the specific situation of other especially vulnerable groups such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of human trafficking, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence.<sup>15</sup> Similarly, the focus in this case was on deficiencies in material reception conditions, but this is equally applicable to deficiencies in asylum procedures, with the content of the guarantees necessary dependent on the facts of the case.
18. Although the Court did not comment on the position for beneficiaries of international protection (BIPs), given that the applicants in this case were asylum-seekers, it is arguable that from its reasoning there is no basis for categorical distinction between asylum-seekers and refugees,<sup>16</sup> both of which are prima facie vulnerable groups,<sup>17</sup> with the focus being on the risk faced by the individual.

## Implementation of the judgment

19. The Swiss government submitted information to the Committee of Ministers of the Council of Europe, on measures it had taken to comply with the ECtHR judgment. It stated that it had suspended all Dublin returns to Italy concerning families with children, and had made a request to the Italian authorities to obtain individual guarantees for the *Tarakhel* family in line with the judgment. Once these had been provided, experts from the State Secretariat for Migration (SEM) were sent to verify these. Following the dismissal of the family's request for review, and their withdrawal of a subsequent appeal, they expressed a wish to be returned to Italy as soon as possible. They left Switzerland on 31 March 2015 with six escorts, including a representative of the SEM. They were paid just satisfaction of 7000 Euros.
20. Switzerland submitted an **action report** in April 2015 which contained a general guarantee from the Italian authorities to the Dublin Unit in Switzerland concerning the reception of families with minors, and confirmed that the SEM systematically approaches them for more detailed individual guarantees before transfer. On this basis, the Committee of Ministers decided to close the examination of the execution of the judgment and adopted a **final resolution** on 11 June 2015.

10. *R(on the application of EM(Eritrea)) v. Secretary of State for the Home Department*, UKSC 2012/2072-2075

11. *Soering v the United Kingdom*, Application no. 14038/88 – 7 July 1989

12. *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, Application no. 13178/03, and *Popov v. France*, Application nos. 39472/07 and 39474/07

13. United Nations *Convention on the Rights of the Child*, Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 entry into force 2 September 1990, in accordance with article 49

14. *EDAL Journal: Tarakhel v. Switzerland: where does the Dublin system stand now?*, Amanda Taylor, 4 December 2014

15. See Article 20(3) Recast Qualification Directive and Article 32(1) Dublin III Regulation

16. For more information see ECRE, Amnesty International and the AIRE Centre third party intervention in this case and the joint submissions [available here](#)

17. See *Hussein and others v. Italy and the Netherlands* no. 27735/10

### III. Post-Tarakhel: European Court of Human Rights

21. Since the *Tarakhel* judgment, the ECtHR has had the opportunity to apply it on a number of occasions. These decisions must be read taking into consideration that they turn on a highly fact sensitive assessment of the situation of the asylum seeker, with individual risk factors and vulnerabilities being decisive for the prohibition of transfer.
22. As the ECtHR has no particular provision on the protection of asylum seekers and refugees, expulsion cases are primarily analysed through the lens of Article 3, so that Member States must refrain from transfer if in the Member State responsible pursuant to the Dublin Regulation, the asylum seeker would risk inhuman or degrading treatment. This sets a high threshold, as the Article 3 jurisprudence requires ill-treatment to attain a minimum level of severity to fall within its scope, due to its absolute and unqualified nature.
23. There has been a growth in the number of cases in which the ECtHR has applied interim measures to prevent Dublin transfers pending examination by the Court as to whether this would violate the applicant's Convention rights, which raises questions as to the operation of the Dublin system as a whole.<sup>18</sup>
24. The Court found that Belgium had violated Article 3 in the case of *V.M. and others v Belgium*<sup>19</sup> as the authorities had not taken due account of the vulnerability of the applicants as asylum seekers and children, by exposing them to conditions of extreme poverty for four weeks, where they were left to live on the street without provision for their basic needs. It reiterated the jurisprudence introduced in *M.S.S. v. Belgium and Greece* in relation to the positive obligation to provide adequate material reception conditions for asylum seekers, who required special protection as a vulnerable group. It affirmed the findings in *Tarakhel* requiring greater protection for families with children, which was heightened here given that there were young children, including an infant and a disabled child. In addition, the family were Roma, part of a particularly marginalised group which further increased their vulnerability.
25. The judgment highlights the relevance of effective access to asylum procedures, as well as reception conditions, as it was the length of time and lack of suspensive effect of their appeal that led to violation. It also makes it apparent that States will still be held liable even if their asylum system is in an exceptional state of crisis, as the reception system was in Belgium at the time of these events. This further indicates that 'systemic deficiencies' are not required.
26. In *A.M.E. v. the Netherlands*<sup>20</sup> the Court found the complaint of an Article 3 violation regarding the return of a Somali national to Italy from the Netherlands was manifestly ill-founded and therefore inadmissible. The applicant had already been granted a residence permit for subsidiary protection in Italy and the Court considered that bearing in mind how he was treated by the Italian authorities on arrival, he had not established that his future prospects upon return, whether taken from a material, physical or psychological perspective, disclosed a sufficiently real and imminent risk of hardship severe enough to fall within the scope of Article 3. Despite reiterating the individualised assessment and particular vulnerability of all asylum seekers as highlighted in *Tarakhel*, the Court submits that the facts of the case were in no way synonymous to those of the *Tarakhel* family given that the applicant was 'an able young man with no dependents'.
27. This restrictive approach to vulnerability was sustained by the Court in its ruling in *A.S. v. Switzerland*.<sup>21</sup> It found that there would be no violation of Article 3 or Article 8 to transfer a Syrian asylum seeker who suffered from severe PTSD and had family in Switzerland, to Italy, who had taken charge of the application. The Court relied on its jurisprudence in Article 3 health cases in finding that the applicant's case did not disclose 'very exceptional circumstances' to meet the minimum level of severity. It upheld its previous finding that problems in the Italian reception system were not so severe as to bar all removals there. It then considered the applicant's particular circumstances and found that his condition was not critical and he would be able to receive appropriate psychological and medical treatment in Italy.
28. The Court seems to have considered this case primarily in relation to its jurisprudence in Article 3 health human rights removal cases,<sup>22</sup> where the threshold for violation is extremely high, amounting to a test of exceptionality. This high threshold has been subject to much criticism as being incompatible with the spirit of Article 3. It is striking that the judgment refers to no evidence at all about conditions in Italy. Taking a different approach from that in *Tarakhel*, it focuses on the availability of medical treatment in Italy, rather than on all material reception conditions. These cases do not relate to Dublin transfers, but the removal of seriously ill migrants without leave to remain, and as such a different regime is applicable. The Court fails to assess the applicant's medical needs in light of the fact that he is part of an inherently vulnerable group in need of special protection, in this ruling that considerably jeopardises the protection of ill asylum seekers under the Dublin regulation.<sup>23</sup> When assessing the

18. For further information, see [ECRE/ELENA Research on Rule 39 interim measures](#)

19. *V.M. and others v. Belgium* Application no. 60125/11)

20. *A.M.E. v. the Netherlands* Application no. 51428/10 - 5 February 2015

21. *A.S. v. Switzerland*, Application no. 39350/13 - 30 June 2015

22. *N. v. the United Kingdom* [GC], Application no. 26565/05

23. For further analysis see: <http://strasbourgobservers.com/category/cases/a-s-v-switzerland/>

outcomes of the judgment, it should be borne in mind that the Court's assessment is limited to the facts of the case and issues raised in the complaint as presented by the parties.

#### IV. Pending cases at the European Court of Human Rights

29. The pending case of *S.M.H. v. the Netherlands*<sup>24</sup> relates to a Somali national who claims that her removal to Italy with her children without any individual guarantees from the Italian authorities on access to an asylum procedure and suitable reception conditions would be contrary to Article 3 ECHR. The Court has requested the Dutch government to submit observations in light of *Tarakhel*, on whether any steps will be taken in response to the judgment and what guarantees, if any, it had obtained from the Italian authorities in relation to the applicant's transfer.
30. The same information is requested from the Dutch government in the pending joined cases of *U.A.H.M. v. the Netherlands and Italy*<sup>25</sup> and *L.N.T. v the Netherlands and Italy*.<sup>26</sup> The Italian government is also asked for information on what guarantees, if any, it had given.
31. The first applicant is a Somalian national HIV positive single mother with a young daughter who claims that their removal to Italy will violate Article 3 due to inadequate guarantees of medical care, poor living conditions and a risk of refoulement without proper examination of her asylum claim. The second applicant is an Eritrean national who was pregnant at the time the Dutch authorities refused her asylum claim and decided to transfer her to Italy. She complains that her removal would be contrary to Article 3 due to her increased vulnerability, as well as a violation of her Article 8 rights by the failure of the Dutch authorities to take responsibility for her asylum request despite her being pregnant and her husband's presence in the Netherlands. She further submits that her appeal had no suspensive effect and her Article 3 argument was not properly examined, in violation of Article 13. She lastly complains under Article 13 that there are no effective remedies for addressing the lack of care and reception facilities and the dire circumstances in which asylum seekers find themselves when staying in a reception centre in Italy.
32. The pending case of *M.G. and E.T. v. Switzerland*<sup>27</sup> relates to an Eritrean national and her young daughter, who used a smuggler to get to Switzerland where they had family members. They entered the EU using Maltese visas and Switzerland refused their asylum request on the basis that Malta was responsible under the Dublin II regulation. They rely on Articles 3 and 8 ECHR claiming there is a real risk of exposure to inhuman and degrading living conditions, contrary to the best interests of the child. They also complain of being denied an effective remedy as their appeal did not have suspensive effect, there was no individualised examination of their situation and they were denied legal aid. The parties are requested to submit observations (among others) on the vulnerability, the young age of the second applicant and the reception conditions in Malta in light of *Tarakhel*.
33. It is hoped that the responses in these cases will clarify national practice post-*Tarakhel* leading to greater legal certainty and consistency. As the decisions under challenge in each of these cases were made prior to the *Tarakhel* judgment, it also provides the Court with an opportunity to give more guidance on the scope and extent of the enhanced protection that must be given to vulnerable asylum seekers.

#### V. Post-Tarakhel – Court of Justice of the European Union

34. Since the entry into force of the Treaty of Lisbon, the CJEU's role in interpreting EU asylum law has increased, opening the door to the possibility of increased safeguards for those in need of international protection in the Dublin system by the application of the EU Charter of Fundamental Rights (CFR) and general principles of EU law. Article 18 specifically guarantees the right to asylum with Articles 1, 4, 6, 7, 41 and 47 also potentially applicable depending on the factual circumstances of the case.<sup>28</sup>
35. Analysis of the CJEU case law shows that the court generally considers Dublin returns in light of Article 4 (which corresponds to Article 3 ECHR)<sup>29</sup> and Article 47. The latter is of particular relevance in all cases relating to Dublin transfers by requiring Member States to ensure that applicants have an effective remedy against a decision to deny them legal access to asylum procedures on the basis that another Member State is responsible for determining their claim.
36. The CJEU has not yet given a ruling following the *Tarakhel* judgment but there are pending preliminary references from Sweden in *Karim v. Migrationsverket*<sup>30</sup> and from the Netherlands in *Ghezelbash v. Staatssecretaris van Veiligheid en Justitie*.<sup>31</sup> These relate to the scope of challenge to the criteria for transfer under the new

24. Application no. 5868/13, lodged on 17 January 2013

25. Application no. 49929/11, lodged on 11 August 2011

26. Application no. 28686/14, lodged on 15 April 2014

27. *M.G. and E.T. v Switzerland*, no. 26456/14, lodged 4 April 2014, communicated 1 July 2015

28. For more information, see 'The application of the EU Charter of Fundamental Rights to asylum procedural law', ECRE and DCR, October 2014

29. Official Journal of the European Union (OJEU), 14.12.2007, No C 303/18, Explanations relating to the Charter of the Fundamental Rights

30. C-155/15, *George Karim v. Migrationsverket*

31. C- 63/15, *Mehrdad Ghezelbash v. Staatssecretaris van Veiligheid en Justitie*

provisions on effective legal remedies in Article 27, and recital 19 of the preamble to the Dublin III Regulation. They provide an opportunity for the CJEU to depart from its restrictive ruling in *Abdullahi*,<sup>32</sup> relating to the Dublin II Regulation, in which it considered that the only basis for challenging the choice of criteria for allocating responsibility was to show ‘systemic deficiencies’ in the asylum procedures or reception conditions which provide substantial grounds for believing that the applicant would face a real risk of being subjected to treatment contrary to Article 4 of the CFR. This was rejected in *Tarakhel* with the ECtHR making it clear that systemic deficiencies or flaws are only one potential way to demonstrate a risk of ill-treatment on return, in light of the individual circumstances of the applicant.

37. In particular, Article 27 requires all persons subject to the Dublin system to have the right to an effective remedy, in the form of an appeal or review, in fact and in law, against a transfer decision before a court or tribunal. In line with the ECtHR’s case law,<sup>33</sup> recital 19 specifies that this should cover both the examination of the application of the Dublin Regulation as well as the legal and factual situation in the Member State to which the applicant is transferred. This should give the asylum applicant the right not only to challenge violations of fundamental rights but also to challenge the grounds of transfer. As a consequence, systemic deficiencies are not the only situation where Member State compliance may be challenged and an Article 3 violation triggered.<sup>34</sup>
38. Unfortunately our research shows some Member States have followed the more restrictive approach of the CJEU requiring systemic deficiencies or flaws, rather than focusing on individual risk. Given the increased procedural rights and strengthened provisions on the right to an effective legal remedy under the Dublin III Regulation, which better reflect the fundamental rights contained in the CFR and ECHR this approach is not tenable.

## VI. Post-Tarakhel: United Nations Human Rights Committee<sup>35</sup>

39. In its recent Views under Article 5, paragraph 4, of the Optional Protocol regarding Communication No. 2360/2014,<sup>36</sup> the UN Human Rights Committee found that Denmark’s proposed return of an asylum seeking single mother and her three children to Italy,<sup>37</sup> would be in violation of their rights under Article 7 of the International Covenant on Civil and Political Rights (ICCPR), which prohibits torture or cruel, inhuman or degrading treatment.
40. The applicant submitted that reception conditions and basic human standards for beneficiaries of international protection with valid or expired residence permits in Italy did not comply with international obligations of protection. The objective information indicated that those who had previously been granted a form of protection in Italy had no right to accommodation or social assistance. She argued that her past experience was indicative of systemic failures in basic support for asylum seekers and refugees in Italy, and as a vulnerable group, her and her children would be likely to face homelessness and destitution with limited access to medical care and no prospects of finding a durable solution as they had no funds to renew her residence permit or find shelter and food while awaiting renewal.
41. The Committee recalled that States need to give sufficient weight to the real and personal risk a person might face if removed. This required an individualised assessment of the risk faced by the applicant, rather than reliance on general reports and on the assumption that, having been granted subsidiary protection in the past, the applicant would in principle be entitled to work and receive social benefits.
42. It found that Denmark had failed to adequately consider the applicant’s personal experience and the foreseeable consequences of her forcible return to Italy. In addition, bearing in mind the *Tarakhel* judgment, Denmark had failed to consider seeking assurances from Italy that the applicant and her three children would have their residence permits renewed, would not be deported from Italy, and would be received in conditions adapted to their age and vulnerability. As such it concluded that their removal to Italy would violate Article 7 ICCPR. Denmark must now reconsider her claim, in view of this conclusion and the need to obtain individual assurances from Italy.

## VII. Post-Tarakhel: Selected domestic case law and practice

43. In the immediate aftermath of the *Tarakhel* judgment most states changed their national practice in order to implement it in directly analogous situations, thus requiring individual guarantees as to accommodation and family unity prior to the return of families with children to Italy.
44. Sweden,<sup>38</sup> Switzerland<sup>39</sup> and Norway<sup>40</sup> issued legal positions or instructions on how this should be implemented

32. C-394/12, *Shamso Abdullahi v. Bundesasylamt*

33. *VM and others v. Belgium*, Application no. 6125/11

34. For further analysis, see EDAL Journal ‘The Dublin system and the Right to an Effective remedy – the case of C-394/12 *Abdullahi*’, Maria Hennessy; and ‘The Dublin System and the Right to an Effective Remedy – Observations on the preliminary references in the cases of C-155/15 – *George Karim v Migrationsverket* and C- 63/15 - *Mehrdad Ghezlbash v Staatssecretaris van Veiligheid en Justitie*’, Daphné Bouteillet-Paquet

35. The case relates to a potential transfer to Italy as the first country of asylum and is not related to Dublin transfer.

36. CCPR/C/114/D/2360/2014, 4 September 2015

37. For further information on the case details see, *The ELENA Weekly Legal Update*, 11 September 2015

38. Lifos database, no. 33561

39. *Italy and Switzerland agree on how to proceed with Dublin returns*, 27 November 2014

40. Document GI-03/2015, 19 February 2015

in practice, whilst this was left primarily to the courts in other States.

45. There has been a significant amount of litigation on Dublin transfers in national courts attempting to delineate the scope of the duty to obtain individual assurances, in relation to transfers to Italy and elsewhere. Courts have become more vigilant in relation to transfers to Italy as the *Tarakhel* judgment concentrated their attention on the delicate and evolving situation there, which authorities and courts can no longer be unaware of.
46. Some national courts, such as those in the UK and Switzerland<sup>41</sup> have seen the application of *Tarakhel* to families with children as the full scope of the judgment, considering the judgment to be highly fact specific relating solely to the situation of the *Tarakhel* family and the extreme vulnerability of children. It is explained later why such an approach is not legally tenable.<sup>42</sup>
47. German jurisprudence on this matter has given excellent interpretations of *Tarakhel*, recognising that the ECtHR had condemned the material reception conditions for all asylum seekers in Italy, leading to a potential violation of Article 3 in light of being part of this particularly vulnerable group.
48. Other courts require applicants to show a higher degree of vulnerability to engage Article 3, undermining the findings in *M.S.S. and Tarakhel*. However there are inconsistencies both between domestic courts in the same Member State, and between Member States, on the relative degree of vulnerability needed before individual guarantees should be sought.
49. Courts in Belgium, the Netherlands and Germany have also recognised the wider application of the judgment to Member States other than Italy where concerns have been raised about reception conditions and asylum procedures such as Bulgaria,<sup>43</sup> Hungary,<sup>44</sup> Malta<sup>45</sup> and Spain.<sup>46</sup>
50. The requirement to undertake a thorough and individualised assessment of the situation in the Member State of return in light of the needs of the asylum seeker, has been taken seriously by some national courts,<sup>47</sup> which give detailed consideration to objective reports of human rights organisations as well as ministerial statements, and contemporaneous press reports. There is a tendency however to place undue weight on the observations, or lack thereof, of UNHCR in making this assessment disregarding UNHCR's own warnings against attaching too much weight to its position when assessing risk.<sup>48</sup> It is apparent that national courts have also been assessing the specific circumstances of the person concerned taking into account factors that have a bearing on their vulnerability, such as age, family situation and mental health, as required by the judgment.
51. There are differing interpretations of the relevant test to prevent transfer, with most national authorities holding fast to the necessity of 'systemic deficiencies'. While the judiciary have shown willingness to challenge this in some states, it evidences a worrying trend, given the litigious pressure of preparing cases under extremely urgent procedures for injunctions as well as the impact this has on vulnerable asylum seekers some of whom already suffer from mental health problems.

## Belgium

### Transfers to Italy

52. In Belgium there have been a number of cases<sup>49</sup> in which Dublin transfers to Italy have been suspended, which tend to be on procedural grounds.<sup>50</sup> The Council of Aliens Law Litigation (CALL) in its decisions has interpreted the requirements of *Tarakhel* robustly ensuring that the Belgian authorities do not abrogate their duty to conduct a thorough and individualised assessment.

**Positive practice:** In February 2015, CALL suspended the transfer to Italy of a single Senegalese man under the 'extremely urgent necessity' procedure. It criticised the Belgian authorities for taking a piecemeal approach to the objective information, and provided guidance on how to assess Dublin Italy transfer cases.

It stated that: all cases in which a Dublin transfer to Italy is being considered must be assessed with great caution, with any decision being based on an up-to-date, comprehensive and rigorous examination of the available information.

41. Please note that there are exceptions to this. See the individual country sections.

42. See paragraphs 111-129

43. VG Düsseldorf B. v. 14.11.2014 17 L 2283/14.A; VG Gelsenkirchen B. v. 17.12.2014 – 18 a L 1808/14.A

44. VG Magdeburg B. v. 08.12.2014 – 9 B 433/14.MD; VG Berlin B.v. 15.01.2015 – VG 23 L 899/14; VG Düsseldorf B. v. 12.01.2015 – 13 L 3109/14.A; RvV 148492; Rb Den Haag, 07.07.2015 AWB 15/11536; AWB 15/2751, 15 October 2015

45. VG Minden, 12.01.2015, 1 L 551/14.A; Rb Den Haag, 24.07.2014, AWB 15/5045

46. CALL no. 170 924/V

47. For example: CALL CCE no. 138950, 22.02.2015 and Rb Den Haag, 07.07.2015 AWB 15/11536

48. See the intervention which UNHCR made in the Supreme Court of the UK in R (*EM (Eritrea)*) v SSHD [2014] UKSC 12, and para. 74 of the judgment

49. For example: Raad voor Vreemdelingenbetwistingen, 30.01.2015, No. 166 764/IV

50. It must be noted that this practice is not consistent, with case law often diverging between the French speaking and Dutch speaking chambers, with the latter taking a more restrictive approach.



53. Similarly, under the ‘extremely urgent necessity’ procedure for a suspension request (which requires the applicant to show extreme urgency, serious grounds to justify suspension of the transfer, and grave and irreparable harm upon transfer)<sup>51</sup> other Dublin transfers to Italy have been suspended for ‘single, relatively young, healthy men’<sup>52</sup> on the basis that they could be at risk of treatment contrary to Article 3 due to reception conditions in Italy.
54. The decision to transfer the Senegalese applicant was **annulled** when the matter came back before CALL, which, significantly, rejected the argument that the applicant was required to show how he would personally be subjected to treatment contrary to Article 3 based on poor reception conditions in Italy. Instead, given that the situation in Italy is delicate and evolving, which Belgium cannot be unaware of; the authorities are obliged to take great care when assessing all information relevant to the transfer.<sup>53</sup> If they had done so in this case, they could not have reached the conclusion that a single man would be able to access accommodation on return to Italy.

## Transfers to other Member States

55. CALL has suspended transfers on the basis of procedural failings in the country of transfer, rigorously assessing whether the principle of ‘mutual’ or ‘interstat’ trust can be applied. A decision by the Aliens Office to transfer an Afghan asylum seeker to Hungary was **suspended**<sup>54</sup> due to conflicting and unclear information by the Hungarian authorities on how his asylum case would be considered there, leading to a risk that it would not be examined by an EU member state at all.
56. CALL also urgently **suspended a transfer**<sup>55</sup> to Spain, later **upholding**<sup>56</sup> this decision under the normal procedure, for a single Guinean male suffering from a psychological condition relating to persecution in his country of origin, stating that there was a risk of ill-treatment if he were to be returned to Spain. It found that in Spain there was no specific procedure to identify vulnerable persons and there was a risk that he would not be able to introduce a new claim for international protection in Spain. Although there were no systemic deficiencies in the Spanish asylum system, in the absence of guarantees to counter these concerns his return would expose him to a risk of ill-treatment and therefore the return decision was suspended. While this decision does not cite *Tarakhel*, it is apparent that its jurisprudence on closely examining the necessity and content of any guarantees in light of individual vulnerability is being applied.

## France

### Transfers to Italy

57. Similarly in France, the Nantes Administrative Court annulled<sup>57</sup> a decision to transfer a single female to Italy where there had not been a full and rigorous examination of the consequences for the applicant upon transfer, given the delicate and evolving situation in Italy.
58. The same Court recently granted an injunction<sup>58</sup> against transfer to Italy of a single man who suffered from Hepatitis B. It noted the recent arrivals of large numbers of migrants into Italy, and the European Council proposals to relocate 40,000 from Italy and Greece. It found that there were no guarantees from Italy that the applicant would be received in conditions adapted to his personal circumstances particularly as Italy had not explicitly accepted his return. There was therefore a serious risk that his asylum claim would not be treated by the Italian authorities in a manner guaranteeing his fundamental rights.

## Finland<sup>59</sup>

### Transfers to Italy

59. The Finnish authorities generally require guarantees for any proposed transfer of families or single parents with children to Italy, who are asylum seekers in Italy, that have not yet received an initial decision. Where no guarantees are received, the case will be examined by Finland. The Supreme Administrative Court has considered that those with long term resident status in Italy (in a case relating to a single mother with a child) have broader fundamental rights, so there is no reason to apply the sovereignty clause.<sup>60</sup>
60. As the Finnish courts use a case-by-case, fact-specific approach, there is no consistent, coherent practice and reasoning from the Administrative Court and Supreme Administrative Court. The Administrative Courts have however prevented several transfers of families and other applicants in a particularly vulnerable position to

51. For further information, please see the [AIDA Country Report for Belgium](#), February 2015

52. For further information: see CALL decisions of [27 April 2015](#) and [28 April 2015](#) respectively relating to male Iraqi and Congolese applicants

53. See also; [CALL no. 153 160 23.09.2015, with an English summary here](#)

54. [RvV 173 763, 25.06.2015](#)

55. [CALL no. 133 559 20.11.2014](#)

56. [CALL no. 144 454 29.04.2015](#)

57. [Tribunal Administratif de Nantes, 22 June 2015, No. 1505089](#)

58. [Tribunal Administratif de Nantes, 24 July, No. 1506136](#)

59. Based in information provided by Marjaana Laine, ELENA Coordinator in Finland

60. [1743 KHO:2015:100](#), 22 June 2015

Italy. This includes victims of trafficking and families with children even if they have a residence permit in Italy. In some cases the Court has required Finland to exercise the sovereignty clause and examine the merits of the asylum application itself.

61. In July 2015, the Administrative Court did not prevent the transfer of an Iraqi family with prematurely born twins and an interim measure was granted by the ECtHR.<sup>61</sup> The case is still pending before both courts.

## Germany

### Transfers to Italy

62. German first instance Administrative courts (VG), the venue in which an asylum applicant can appeal against a rejection decision by the Federal Office, have consistently ruled that a transfer would only be possible if a violation of Article 3 can be ruled out on the basis of individual guarantees from the Italian authorities. Transfers to Italy have been prevented where an applicant suffered from a mental illness, confirming that *Tarakhel* obliges States to get individual guarantees in such cases.<sup>62</sup> Removal has also been prevented on procedural grounds on the basis that an international protection status does not correspond with EU law obligations, such as access to the labour market.<sup>63</sup>
63. The Hannover court has repeatedly asserted that there are systemic deficiencies in the Italian reception and procedural system requiring guarantees from the Italian authorities for accommodation, nutritional, hygiene and medical needs,<sup>64</sup> after concerns were raised by the Federal Constitutional Court.<sup>65</sup>

**Positive practice:** This was confirmed in a decision by the Gießen Court citing reports which evidence significant capacity constraints in accommodation facilities for asylum seekers which meant that it could not be excluded that a significant number of asylum seekers are placed in overcrowded facilities without any privacy or returned to homelessness or destitution. Transfer will only be permissible if Italy issues individual guarantees as to adequate housing and care. According to the court this applies not only to vulnerable people but to single male applicants as well. There is no inference from *Tarakhel* that a person who is not particularly vulnerable can be returned to Italy. In fact this is quite the opposite given that the probability for individuals (without dependents) of not finding accommodation is higher than for families with children.

64. The Schwerin Administrative Court ruled in February 2015<sup>67</sup> that simple confirmation by the Italian authorities that the applicant would be placed in the ERF STEP<sup>68</sup> did not constitute a sufficient guarantee in line with *Tarakhel* as it failed to include concrete guarantees regarding the facility in which the asylum seeker would be accommodated. It considered that the ECtHR in *Tarakhel* had examined reception conditions in Italy independently from the particular case of the *Tarakhel* family and had found them to be in violation of the ECHR. As such, these concerns were not limited to families with young children, and guarantees prior to removal could also be extended to individuals.
65. The Federal Constitutional Court ruled on Dublin transfers from Germany to Italy<sup>69</sup> on two occasions in April 2015. It held that for families with minor children, a detailed individualised examination is required prior to transfer to Italy. A written assurance from the Italian authorities is necessary in every case, confirming that adequate accommodation for that specific family will be available in Italy after return. The guarantees and assurances given should be assessed to ensure that they are sufficient and valid according to German law.
66. This guidance should create greater certainty<sup>70</sup> and avoid the inconsistency in earlier decisions of first instance courts whereby some left it to the Federal Office of Migration to decide whether general rather than specific assurances from Italy were sufficient to guarantee adequate accommodation upon transfer; and others found general assurances were not detailed or concrete enough.
67. In both cases, Germany decided to consider the asylum applications on the merits. It appears that Italy no longer issues individual assurances to the German Federal Office for Migrants and Refugees, based on information it provided to the Wiesbaden Administrative Court on 24 April 2015.<sup>71</sup> As the practice of the German au-

61. Application No. 32275/15

62. VG Darmstadt B. v. 10.11.2014 – 3 L 1344/14.DA

63. VG Köln b. v. 27.11.2014 – 8 L 2288/14.A

64. See for example: VG Hannover B. v. 22.12.2014 – 10 B 11507/14; VG Hannover, 29.01.2015 - 3 B 13203/14 and VG Hannover, 04.02.2015 - 3 B 388/15

65. Bundesverfassungsgericht, 17.9. 2014, 2 BvR 732/14

66. VG Gießen 13.01.2015 1 L 3772/14.GI.A

67. VG Schwerin, 24 February 2015, 3 B 1023/14 As

68. STEP Italy and STEP V Italy are the European Refugee Fund (ERF) funded projects providing accommodation for those transferred under Dublin system and arriving at Bologna Airport.

69. BVerfG – Beschluss - 17.4.15 – 2 BvR 602/15; BVerfG – Beschluss - 30.4.15 – 2 BvR 746/15

70. Although as part of the civil law system principle, judges are not bound by precedent, judgments by the Federal Administrative Court on points of law should be followed and derogation by Administrative Courts from the case law of the Higher Administrative Court or the Federal Constitutional Court, as higher instances, is a [ground for admitting an appeal](#). For further information, please see the [AIDA Country Report on Germany](#) at pages 20-22.

71. This has since been confirmed by the German authorities in its response to a request from the Danish Immigration Service. For further information see [here](#)

thorities requires specific guarantees as to accommodation to be given at the time of a transfer decision where this involves children under 16, it no longer actively pursues such transfers to Italy.

## Transfers to other Member States

68. The German Courts have been very active in Dublin cases preventing transfers to Bulgaria, Hungary, and Malta on a case-by-case basis, if there are no individual assurances from authorities of these countries.

**Positive practice:** Post-*Tarakhel* transfers to Bulgaria have been prevented due to a child's medical condition in the case of a single mother with a diabetic child and a lack of an integration programme and employment opportunities for recognised persons with refugee and/or subsidiary protection status.

This makes it apparent that no distinction is being made between asylum seekers and BIPs when assessing whether the proposed country of return complies with its international obligations.

69. Transfers to Hungary have also been stopped due to systematic detention practices,<sup>72</sup> lack of an individualised assessment<sup>73</sup> and lack of an effective remedy against detention.<sup>74</sup> In a number of recent decisions from different courts,<sup>75</sup> removals to Hungary have been prevented on the basis that its asylum system is suffering from 'systemic weaknesses', in light of its recent amendments to its asylum procedures and law, *inter alia* its inclusion of Serbia<sup>76</sup> on its list of safe third countries,<sup>77</sup> detention conditions and the lack of reception capacity. There now appears to be a consistent trend in case law to prevent Dublin transfers to Hungary.<sup>78</sup>
70. The Minden Administrative Court gave suspensive effect<sup>79</sup> to an appeal against a transfer decision to Malta on account that if the applicant were to be transferred he could, as an asylum seeker, face the possibility of being subjected to unreasonable detention conditions for a prolonged period of time, without access to an effective remedy.
71. On 24 August 2015, the German Ministry of Interior (BAMF) issued **internal instructions** on the suspension of Dublin transfers of Syrian nationals, a policy which is now in practice, and has led to increased numbers of Syrian asylum seekers travelling to Germany.<sup>80</sup> The legal basis for this decision was by invoking the sovereignty clause of the Dublin regulation, as all Member States are entitled to do and means that Germany is voluntarily taking responsibility for examining the asylum claims of Syrian asylum seekers that it is not otherwise required to under the Dublin criteria. This decision represents a challenge to the Dublin system as a whole by recognising its ineffectiveness and the undue responsibility it places on Member States at the EU's external borders.

## The Netherlands

### Transfers to Italy

72. In the Netherlands, individual guarantees in line with *Tarakhel* are required from the Italian authorities for families or single parents with minor children. Judgments pre-dating *Tarakhel* in which guarantees were not sought are being annulled by the courts on a case by case basis.
73. The Raad van State has clarified the correct procedures and safeguards that must be complied with prior to transfer to Italy to avoid a violation of Article 3 ECHR in its ruling of 20 May 2015.<sup>81</sup> The Dutch authorities will receive a general guarantee from the Italian authorities relating to accommodation and unity mentioning the asylum seeker and children by name. It will then give 15 days' notice of the date of transfer, but the transfer cannot take place until the Italian authorities communicate the specific place of accommodation.<sup>82</sup> Otherwise, the transfer will be in violation of Article 3 of the ECtHR.
74. The Supreme Court has subsequently ruled<sup>83</sup> that the Dutch authorities should be trusted to follow these steps, with an appeal possible against the factual transfer if upon the Italian authorities communicating the specific place of accommodation, it appears that this is insufficient. If no guarantees are received the Dutch authorities assure the courts that the family will not be transferred to Italy. There are concerns as to the uncertainty this causes, particularly within such a short time period prior to the transfer, as if no guarantees are provided, or those provided are inadequate, there is insufficient time and opportunity to object to the actual transfer to Italy.

72. VG Magdeburg B. v. 08.12.2014 – 9 B 433/14.MD

73. VG Berlin B.v. 15.01.2015 – VG 23 L 899/14

74. VG Düsseldorf B. v. 12.01.2015 – 13 L 3109/14.A

75. See [bordermonitoring.eu](http://bordermonitoring.eu)

76. For more information see: [ELENA/EDAL desk research](#) on the procedural and reception system for asylum seekers in Serbia; HHC Information Notes, [August 2015](#) and [September 2015](#)

77. For example: VG Dusseldorf, 03.09.2015, 22 L 2944/15.A and VG Potsdam, 04.09.2015, \$L 810/15.A

78. Some examples of recent decisions are reported in the ELENA Weekly Legal Update - [Germany: Courts annul Dublin transfers to Hungary](#). See also VG Minden, 02.10.15, 19 L 923/15.A

79. VG Minden, 12.01.2015, 1 L 551/14.A

80. For more information see [AIDA database](#)

81. [Uitspraak 201407654/1/V3, 20.05.2015](#)

82. Generic guarantees are insufficient: [Rb Den Haag 02.07.2015 AWB 15/7281, Ruling 201404508/1 / V3](#)

83. [Uitspraak 201404272/1/V3, 26.06.2015](#)

**Positive practice:** Dutch courts have repeatedly stated that *Tarakhel* does not apply solely to families with young children, and that individual guarantees may therefore be required in other circumstances, based on the specific vulnerabilities of the applicant. They point towards paragraph 118 and 119 of the ruling in noting that all asylum seekers have been recognised as needing special protection, with the ECtHR finding that this applied to children ‘*in particular*’, rather than exclusively.

75. For example, the Hague District Court explicitly stated in a **recent judgment**<sup>84</sup> that *Tarakhel* did not apply exclusively to families with children and found that it could equally apply to an adult asylum seeker who needs special protection because of medical problems. However, in a number of cases Dutch courts have found it implausible that applicants would not receive suitable medical care and accommodation in Italy in the absence of additional guarantees, especially given that the Italian authorities are informed about applicants’ state of health prior to transfer.<sup>85</sup>
76. In another case, the District Court did not rule out the possibility that serious psychological problems could trigger the *Tarakhel* duty given that the judgment requires authorities to consider “all the circumstances of the case, such as the duration of the treatment and its physical or mental effects and, in some instances, the sex, age and state of health of the victim”.<sup>86</sup>
77. Dutch courts have also indicated that individual guarantees are required for pregnant women,<sup>87</sup> even in the early stages of pregnancy (9 weeks)<sup>88</sup> and elderly people with medical problems.<sup>89</sup> However, they have found that beneficiaries of international protection in Italy are outside the scope of *Tarakhel*.<sup>90</sup>

## Transfers to other Member States

78. In relation to Hungary, an injunction was granted<sup>91</sup> to prevent a Dublin transfer on the basis of public announcements that the Dublin system would be suspended for returns. Even though this was reversed the following day, the court considered that due to the short time lag, further information and clarification as to the current policy was necessary. This is indicative of the level of scrutiny some Courts are subjecting Dublin transfers to, and the need for national authorities and the judiciary to maintain awareness of developments in other Member States.
79. Moreover, recent decisions of the same court noted that the ECHR in the *Tarakhel* judgment has considered that the need for special protection of asylum seekers is particularly important when considering a transfer of the families with children, because of their particular vulnerability. The conditions provided to these families must be adapted to the age of the children, to ensure that these cause them no state of anxiety and stress, with particularly traumatic consequences. The Court also submitted that in view of large numbers of asylum seekers in Hungary – the Hungarian asylum system is not (any more) able to deal with vulnerability, as there is no screening mechanism to identify people with special needs and considered that the reception situation in Hungary is similar to the reception situation in Italy as assessed in the *Tarakhel* judgment.<sup>92</sup>
80. The Dublin transfer of an asylum seeker to Malta was recently suspended<sup>93</sup> on the basis of deficiencies in the asylum procedure there which led to a risk that the applicant would be detained upon transfer to Malta, with without access to an effective remedy, in contravention of Article 5 and 13 ECHR. This meant that Netherlands were obliged to properly investigate his claim.

## Norway<sup>94</sup>

### Transfers to Italy

81. The Norwegian authorities required guarantees for families with minor children as well as women expecting children. This applied only to those who have the right to stay in reception facilities, therefore excluding people with immigration status in Italy.<sup>95</sup>
82. However, the Norwegian Ministry of Justice issued new instructions<sup>96</sup> concerning the transfer of children and

84. [Rb Den Haag, 25.06.2015 AWB 15/9055, 15/9051](#)

85. See at 84 re applicant with tuberculosis and hepatitis B. See also Administrative Law Division no. 201410601/1/V3, 17.04.2015 re 69 year old man with medical problems.

86. [The district court Rb Haarlem, 17 April 2015, nr. 15/3284](#)

87. [The district court Rb Haarlem, nr. 14/26474 and 14/26480, 26 March 2015](#)

88. [17 April 2015, nr. 15/3275 and 15/3280](#)

89. [Rb Middelburg, 27 May 2015, nr. 15/6934](#)

90. See for example [Rb Den Haag 24.07.2015 14/16081](#) re pregnant applicant with young child with refugee status; and [Administrative Court 06.08.2015 201500009/1/V3](#) where applicant had subsidiary protection

91. [Rb Den Haag, 07.07.2015 AWB 15/11536](#)

92. [Rb Den Haag, 16.20.2015, AWB 15/11534](#)

93. [Rb Den Haag, 24.07.2014, AWB 15/5045](#)

94. Norway is not a member of the EU and does not participate in the EU asylum acquis. However, it is an associated Dublin state and as such it has opted in to participate in the Dublin system which includes the Eurodac regulation.

95. Based on information provided by Halvor Frihagen, ELENA Coordinator, Norway

96. [Document GA-09/2015: Instructions on the interpretation of the Immigration Act s.32 – Transfer of children and families to Italy under the Dublin III Regulation, 01.07.2015](#)

families to Italy under the Dublin III Regulation, reversing a previous position, based on the circular letter by the Italian government dated 8 June 2015 indicating an improvement in its reception capacity. It now considers that individual guarantees are no longer necessary before transfer as conditions in Italy have now reached an acceptable minimum level. However an individual and specific assessment should still be made with the decision left to the Directorate. The Norwegian authorities intend to resume transfers of families with children to Italy from 1 July 2015. However, the Immigration Appeals Board is not bound to follow the Ministry's instructions and it is yet to decide its practice on this matter.<sup>97</sup> At present it grants suspensive effect to all appeals from families with children challenging Dublin transfers to Italy, which are pending, so no recent transfers have taken place.<sup>98</sup>

## Sweden

### Transfers to Italy

83. As in Norway, the Swedish Migration Agency has also issued a new legal position<sup>99</sup> on Dublin returns to Italy on 3 June 2015, in reliance on new information from the Italian authorities, in a letter communicated by the Italian authorities to the European Commission in April 2015.
84. This reverses its **previous position** on the interpretation of *Tarakhel*, of 21 November 2014, whereby guarantees were required only for families with children, excluding other vulnerable groups and those who had been granted a residence permit in Italy. The Swedish authorities now consider that "Italy currently fulfils the requirements of the European Court and that guarantees now provided are sufficient so that transfers of families with children to Italy can be carried out without additional measures". It no longer requests individual guarantees and concludes that families with children will be placed in adequate SPRAR accommodation.

## Switzerland

### Transfers to Italy

85. Given that guarantees are provided with regards to family unity and appropriate conditions for children,<sup>100</sup> transfers from Switzerland to Italy continue to take place, including of families where Italy have provided the required guarantees, such as for the *Tarakhel* family. The Swiss authorities stressed that the ECtHR did not deem transfer to be contrary to ECHR, but that guarantees were necessary. However, guarantees are only required in cases where families or one parent with a child is involved.
86. This has been applied very strictly, with Swiss courts considering that individual guarantees are not required for other vulnerable persons. For example, it has previously ruled that individual guarantees are not required for asylum seeking pregnant women, as according to the court this does not yet constitute a family.<sup>101</sup> In many cases judges state that there are no 'systemic deficiencies' in Italy.
87. In its judgment of 12 March 2015<sup>102</sup> the Swiss Federal Administrative Court stated that the guarantees regarding accommodation for children and family unity required in *Tarakhel*, constituted a substantive precondition to the legality of a transfer to Italy, rather than merely a transfer modality. It found that individual guarantees with specific reference to the applicants' personal details should be given at the time of the Dublin transfer decision by the first instance authority, to enable them to have access to a legal remedy to challenge this on appeal. Provision of such guarantees prior to actual transfer would be too late. On appeal, the Swiss authorities are required to produce the guarantees before the Court and are obliged to grant the applicant the opportunity to make a statement regarding the guarantee prior to return. The Courts have upheld this practice in a number of cases since this ruling.<sup>103</sup>
88. The Administrative Court has refused a number of appeals where applicants challenged transfer to Italy on health grounds, for example<sup>104</sup> in relation to a sufferer of hepatitis B and C who was also depressed and at risk of suicide.

### Transfers to other Member States

89. With regard to Hungary, in a decision very soon after *Tarakhel*, the Federal Administrative Court considered that the Migration Office should request guarantees on accommodation and access to medical treatment prior to the transfer of an Afghan asylum seeker suffering from post-traumatic stress disorder. This seems to be an exceptional case, and similar guarantees were not considered necessary<sup>105</sup> for an asylum seeker with medical problems, in reliance on *A.S. v Switzerland*.

97. Based on information provided by Halvor Frihagen, *ibid* at 86.

98. Response of Norway to query from the Danish Immigration Service. For more information see [here](#)

99. *Europadomstolens dom i målet Tarakhel mot Schweiz, ansökan nr 29217/12, SR 22/2015*

100. *Italy and Switzerland agree on how to proceed with Dublin returns, 27.11.2014*

101. Based on information provided by Adriana Romer and Seraina Nuffer, ELENA coordinators, Switzerland

102. *Federal Administrative Tribunal, 12.03.2015 no. E-6629/2014*"

103. See for example: *21.04.2015 E-936/2015 ; 19.05.2015 E-6236/2014*

104. 8 July 2015 D-7367/2014

105. 15 July 2015 D-3371/2015

90. In recent judgments<sup>106</sup> (prior to the entry into force of amendments to Hungary's asylum law), relating to single mothers with children, who the Court acknowledged were vulnerable, it considered that no individual guarantees were required from the Hungarian authorities in relation to access to the asylum procedure and reception conditions. In an exceptional case<sup>107</sup> the Swiss Federal Administrative Court asked for individual guarantees regarding reception conditions and medical care in Hungary for a single man with psychiatric problems. In a judgment of 29 September 2015<sup>108</sup> regarding a couple with a three year old child, the Court stated that the first instance authority had not examined the current situation in Hungary and the specific situation of the applicants in case of return to Hungary. It sent the case back to the first instance authority for further clarifications.
91. The Court has also allowed a transfer<sup>109</sup> to Bulgaria for an Afghan asylum seeker with physical and mental health conditions who had self-harmed and complained of being ill-treated in Bulgaria. It considers that the presumption that Bulgaria complies with its international law obligations is not displaced by current evidence.<sup>110</sup>
92. With regard to Malta, although the Court considers that it is Dublin transfers are generally permissible,<sup>111</sup> it instructed the Swiss authorities to examine the asylum claim of a Libyan family with two children rather than transfer them to Malta as there was no specific guarantee against the risk of violations of their rights due to deficiencies in the asylum procedure and reception conditions, in light of their specific vulnerability. In this case, the authorities had requested information on where the family would be accommodated from Maltese authorities but had not received any substantive response prior to adopting the decision to transfer them.<sup>112</sup>
93. The Court has ruled against the transfer to Slovenia of a single man with psychiatric problems<sup>113</sup> highlighting the need for individual guarantees by the Slovenian authorities in relation to access to health care and accommodation prior to the transfer. However, no reference was made to the *Tarakhel* judgment.

## The United Kingdom

### Transfers to Italy

94. The first question raised by *M.S.S. and N.S.* was whether it is necessary to identify 'systemic' deficiencies in a receiving state in order to prove that a removal under the Dublin Regulations would breach a person's fundamental ECHR or Charter Rights. In the UK, that question was resolved by the Supreme Court's judgment in *EM (Eritrea)*. The leading judgment was given by Lord Kerr, who was plainly extremely sympathetic to the evidence of the claimants. He concluded that the single test for breach of Article 3 ECHR was the Soering test. If, for whatever reason and on the basis of whatever evidence, there are substantial grounds for believing that a person will face a breach of his/her Article 3 rights upon removal, then that removal is unlawful. It does not matter whether the reasons arise out of 'systemic' deficiencies, or out of questions relating to the personal history or characteristics of the Claimant.
95. In the UK context, this was an extremely important reiteration of the absolute nature of Article 3 protection. On the other hand, the Court in *EM (Eritrea)* continued to hold that there was a "significant evidential presumption" that member states would comply with their international obligations. So, the *EM (Eritrea)* judgment removed the damaging and legally incorrect view that only 'systemic' violations could give rise to an Article 3 risk where a proposed removal was compliant with the Dublin II Regulation. The effect was that, almost immediately, the UK government began to take decisions in which it took a two-stage approach, first deciding whether a 'presumption of compliance' had been displaced by evidence of systemic violations, and secondly deciding whether a person's individual circumstances might give rise to a breach. That segregated approach itself gives rise to real problems: how can a decision-maker properly consider whether a person's individual characteristics put him/her at real risk of a breach of his/her rights, if that decision maker has already presumed that the member state complies with its international obligations. This difficulty underlies the later decisions of first-instance courts in the UK. *EM (Lebanon)* was itself later adopted and followed by the Grand Chamber in *Tarakhel*.
96. The difficulties in applying *EM (Eritrea)* and *Tarakhel* are apparent from the Upper Tribunal case of *R (Weldgaber)*<sup>114</sup> in which a male Eritrean asylum seeker challenged his removal to Italy. The judgment directed the Home Office to undertake a thorough and individuated examination of the situation and circumstances of the person concerned in Dublin cases, but the judge considered that the ECtHR had only prevented transfer in *Tarakhel* due to the specific needs and vulnerabilities of the children in that case, which made it incumbent upon Switzerland to obtain appropriate information and assurances from Italy. The judge found no reason to depart from a previous finding of the UK courts<sup>115</sup> that there was no general risk of ill-treatment upon transfer to Italy,

106. 21 April 2015, D-1053/2015; 11 May 2015, D-1923/2015

107. Decision D-6089/2014 of 10 November 2014 (Hungary).

108. Federal Administrative Court, Decision E-5961/2015 of 29 September 2015.

109. 5 March 2015, D-7339/2014

110. 31 July 2015, E-4578/2015; July 14 2015 E-4168/2015

111. E-2423/2015 23 April 2015

112. 7 July 2015, D-4441/2014

113. Federal Administrative Court, judgment D-2677/2015 of 25 August 2015

114. *Weldgaber, R (on the application of) v Secretary of State for the Home Department (Dublin Returns - Italy)* (12 January 2015)

115. *Tabrizagh & Others* [2014] EWHC 1914 (Admin)

and considered that the applicant had not demonstrated any particular personal vulnerability to engage Article 3. With regard to individual guarantees, according to the Tribunal, the ECtHR in *Tarakhel* ‘was not purporting to promulgate a general rule or principle that a sending state is required to secure specific assurances from the destination state as to accommodation or the like’ and it was open to the domestic authorities based on its assessment of the evidence, to find ‘no systemic deficiency nor serious operational failure in the conditions prevailing in Italy for the reception, processing and treatment of asylum seekers’. The appeal from *Weldegaber* is pending before the Court of Appeal.

97. In *R (MS, NA and SG)*<sup>116</sup> the Administrative Court considered the cases of three individuals, who had all been diagnosed with severe mental health problems and were assessed as being at risk of suicide; it considered in particular whether they were at risk of treatment contrary to Article 3 ECHR if transferred to Italy on account of the reception conditions for asylum seekers and BIPs. After a controversial review of the domestic and European jurisprudence, medical evidence and international and expert reports, the Judge found that the evidential presumption that Italy would comply with its international obligations in relation to reception conditions had not been rebutted. The Judge’s approach to the evidence is one of the subjects of the three claimants’ appeals to the Court of Appeal. The Judge limited the practical effect of the *Tarakhel* judgment by finding that it was confined to the very specific evidence before the ECtHR about the shortage of adequate accommodation. The Judge did not consider that the claimants before him had demonstrated a similar shortage.
98. The approach to *Tarakhel* is another question raised in the Claimants’ appeal to the Court of Appeal because the Judge concluded that there would, in fact, be adequate reception conditions for the three applicants, considered that each of the applicants would be accommodated, and that effective arrangements would be made by the Italian authorities to ensure their access to appropriate healthcare and manage their risk of suicide. The claimants in that case have argued that the evidence did not support those extremely optimistic conclusions, but the effect of those findings was the Judge did not have to look at the question whether *Tarakhel* created any separate obligation on the part of the removing state. The claimants in *MS* have sought permission to appeal the first-instance judgment to the Court of Appeal; the decision on permission remains outstanding.

## Transfers to other Member States

99. The case of *R(AI)*<sup>117</sup> concerned a challenge to a Dublin transfer to France on the basis that removal would breach the right to asylum, the right not to be subjected to inhuman treatment and the right to an effective remedy provided for in the EU Charter. It focuses on the procedural guarantees in France and the risk of refoulement from France to Sudan. A particular issue raised was the difference in approach to Darfuri asylum seekers in the UK and in France: in the UK, the policy is to grant status to non-Arab Darfuris, wherever they have arrived from; in France it is not. The Administrative Court judgment relies on the fact that the UNHCR had not made any recommendation to suspend returns under the Dublin Regulation to France; on that basis it concludes that it is not itself required to make an individualised assessment of risk. That conclusion would appear to be contrary to the approach of the courts in the UK, Strasbourg and Luxembourg. The Court also stated that no evidence had been presented to show that France has removed applicants in breach of its international obligations. The Court worryingly stated that ‘the whole purpose of the Dublin Regulation is to set the criteria which determine the Member State that is responsible for considering the substantive asylum claim of an individual and to permit removal to that Member State by another Member State without substantive consideration, seeing it as governing relations between Member States, rather than protecting the rights of asylum seekers.’<sup>118</sup> Permission has been granted to *AI* to appeal the Administrative Court’s judgment.
100. The Upper Tribunal, exercising its jurisdiction as an administrative court, issued guidance in respect of Dublin transfers to Malta,<sup>119</sup> in May 2015, finding that despite shortcomings in the Maltese system for the reception, processing and treatment of asylum seekers, these fell short of systemic deficiency, ‘particularly in circumstances where the consistent trend is one of progressive improvement and fortification’. It found that the transfer of a young adult male in good physical health to Malta would not violate his rights pursuant to Article 3 ECHR, Articles 18 or 47 of the EU Charter or Article 33 of the Refugee Convention, despite the fact that he suffered from mental health problems and asserted a risk of suicide.
101. The President of the Upper Tribunal refused to grant permission<sup>120</sup> to apply for judicial review against transfers to Hungary on 29 January 2015 finding that the cases were ‘intensely fact sensitive’ raising no issue of general principle. Subsequently, however, permission was granted to challenge removals to Hungary, and a lead case on that issue is due to be heard shortly. Similarly, after a long period of fighting by the UK authorities, the Administrative Court and the Upper Tribunal in the UK have now granted permission in at least 10 cases challenging removals to Bulgaria. Three lead cases are due to be heard in the Administrative Court on 1st and 2nd May

116. *The Queen on the application of MS, NA and SG v. The Secretary of State for the Home Department* [2015] EWHC 1095 (Admin) (22 April 2015)

117. *AI, R (On the Application Of) v SSHD* [2015] EWHC 244 (Admin) (09 February 2015)

118. For further analysis see: <https://asadakhan.wordpress.com/2015/02/16/presidential-guidance-on-dublin-cases/#more-5457>

119. *R (on the application of Hagos) v Secretary of State for the Home Department (Dublin returns – Malta)* (IJR)

120. *R (on the applications of Leila Simaei and Mehmet Arap) v Secretary of State for the Home Department (Dublin returns – Hungary)* (IJR)

2016.<sup>121</sup>

102. Meanwhile the UK authorities are, from time to time, conceding Dublin cases where they relate to people with particular vulnerabilities. This is, however, done on a low-key basis, which creates no precedents, and appears quite arbitrary.

### Italy: Individual Guarantees

103. The novelty of the use of individual guarantees introduced by *Tarakhel* increased the procedural burden for the Italian authorities. The specific modalities of providing individual assurances where requested depends on the Member States, with some courts (e.g. in Germany) critically assessing whether they are sufficiently detailed and particularised to meet the needs of the asylum seeker. On the other hand, in some States it appears to have become no more than a box ticking exercise to enable transfers to continue.
104. In view of indications that the Italian authorities are no longer issuing specific guarantees, it seems that they are attempting to circumvent this need by providing general assurances of improvements to its reception capacity, which is clear from a [circular letter sent by Italy's Interior Minister to all Dublin units](#) in June 2015. This letter was sent by the Interior Minister for Italy to all Dublin units and enclosed a list of SPRAR accommodation and reception centres,<sup>122</sup> indicating that 161 places were specifically reserved for family groups. It provided further information about integrated reception projects for asylum seekers. It concluded that “despite the objective difficulties which Italy is facing on the grounds of the high number of migrants and international protection applicants...the guarantees requests by Member States concerning the reception standards specifically ensured to family groups with minors can be regarded as fulfilled, also in consideration of the principle of mutual trust, underlying the legislation which regulates the relations among member states”.
105. Authorities have also sought other methods of circumventing the application of the sovereignty clause and proceeding with transfer where Italy has not responded to requests for individual guarantees. A [joint report from the Dutch, German and Swiss authorities provides information on the SPRAR system](#)<sup>123</sup> (the Italian system for the accommodation of asylum seekers and refugees) following a fact-finding mission to two of the 161 centres reserved for families. The report is purely descriptive and does not provide any information about how individual guarantees are taken into consideration.
106. A query was sent by the Danish Immigration Service to the Dublin Units of various Member States, following which it published a [Memorandum on post-Tarakhel practice](#) regarding transfers to Italy in view of the circular letter.<sup>124</sup> The responses show that it has been relied on by authorities of a number of Member States, to avoid the necessity of obtaining specific, individual guarantees for families with minor children. While Switzerland uses it as a ‘starting point’ to indicate that families will be accommodated at a listed SPRAR centre before requesting further information<sup>125</sup> other States interpret it as sufficient in itself.<sup>126</sup>
107. The Finnish authorities have not yet adopted an official position but note that it is possible that the SPRAR places listed will not be sufficient to accommodate all the families to be transferred. Worryingly their response states that in view of Italy no longer issuing individual guarantees, ‘from a practical point of view, we don’t have any other option than to consider those guarantees as sufficient’. In contrast, Germany has stated that the letter is insufficient as it does not amount to an individual guarantee, and in the absence of these, no longer pursues transfers of families with children to Italy.
108. There is limited information to date on how these developments will be interpreted by courts. It has however been considered by the Federal Administrative Court in Switzerland, which found in one case that the circular letter constituted sufficient guarantee by the Italian authorities, in combination with the fact that the Italian authorities recognized the applicants as a family, leaving it to the Italian authorities to decide on the centre of accommodation upon their arrival.<sup>127</sup> Although this appears to contradict its previous ruling of 12 March 2015<sup>128</sup> this case has since been relied on by the SEM.
109. The Hague Administrative Court<sup>129</sup> found that in light of the huge number of asylum seekers in Italy, these reports could not lead to the inference that there had been a relevant improvement in the shortage of accommodation for vulnerable groups, or that they would be appropriately collected. It therefore annulled the transfer decision. This highlights the low number of places, with very few in large cities. Given the reference in *Tarakhel*

121. Information provided by David Chirico, the UK ELENA coordinator

122. Please see [here](#) for more information on reception facilities in Italy

123. Information provided by Germa Lourens, NIDOS

124. Danish Immigration Service, [Memorandum on national practice post-Tarakhel](#), 7 September 2015

125. I.e. the name and date of birth of the persons concerned as proof that Italy knows that special arrangements are needed

126. Austria, the Netherlands and Norway. However, the position has not yet been considered by the Federal Administrative Court of Austria, or the Immigration Appeals Board in Norway.

127. [Federal Administrative Court, Decision D-4394/2015 of 27 July 2015](#). In this case it was clear which region the family would be sent to, and there were two centres with places reserved for families in that region, according to the list.

128. See above at para. 87

129. [Rb Den Haag, 27.07.2015, VK-15/13248 and 15/13247](#)



to 'the glaring discrepancy between the number of asylum applications...and the number of places available in the facilities belonging to the SPRAR network', it is hoped that other courts will take a similar view.

110. On 22 September 2015 the Justice and Home Affairs Council (JHA) reached a decision to relocate 120,000 people in clear need of international protection<sup>130</sup> from Italy and Greece as a temporary derogation from Article 13(1) of the Dublin Regulation. The figure of 120,000 is in addition to the decision to relocate 40,000 people that the JHA adopted earlier in September 2015. The first group of asylum seekers has been relocated from Italy to Sweden on 9 October 2015<sup>131</sup> and further relocation programme is ongoing. In the circumstances, where an exceptional solidarity measure has been triggered in relation to a particular Member State, Dublin transfers to this country do not seem to be appropriate.<sup>132</sup>

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130. Which applies to nationalities of applicants with an EU-wide average recognition rate of 75% or higher. On the basis of current date, this would apply to applicants from Syria, Iraq and Eritrea.

131. For further information see, UNHCR, [First group of asylum seekers relocated from Italy to Sweden](#), News story, 9 October 2015

132. For further information see, [ECRE Memorandum](#) to the Extraordinary Justice and Home Affairs Council Meeting of 14 September 2015.

## VIII. Conclusion

111. In November 2014 a number of academics and legal practitioners commented<sup>133</sup> that the *Tarakhel* judgment speeded up the end of the Dublin system. Even though its importance cannot be overestimated, the judgment reaffirmed the fundamental flaws of the Dublin system and the absence of harmonised asylum procedures in the EU Member States by reiterating that the presumption of EU compliance with fundamental rights is rebuttable by evidence. It also importantly advanced that the special needs of vulnerable asylum seekers should be guaranteed if the transfer were to be implemented. It has been a regrettable, but politically predictable, that Member States, particularly those which are not usually first points of overland / oversea arrival for refugees, have often sought to minimize the impact of the judgment.
112. This note shows discrepancies in the application of the common European asylum system, and the Dublin III Regulation in particular, as well as inconsistent implementation of ECtHR and CJEU jurisprudence across Europe, including the judgment in *Tarakhel v Switzerland*. This highlights the need for a holistic and comprehensive application of the *Tarakhel* judgment across Europe in light of the inherent vulnerabilities of asylum seekers and necessity for a fundamental reform of the Dublin system.
113. The application of the *Tarakhel* judgment cannot be limited to Dublin returns to Italy of families with children. Its correct reading suggests its applicability to any (Dublin) returnee and to any (Dublin) Member State “where substantial grounds have been shown for believing that the person concerned faces a real risk of being subjected to torture or inhuman or degrading treatment or punishment in the receiving country” in line with the Court’s case law with regards to expulsions.<sup>134</sup>
114. States are bound by the findings of the European Court of Human Rights, in that they are required to ensure that ongoing violations of the Convention are brought to an end, and that no such violations occur in the future, and considering that the ECtHR is constrained by the factual basis of a particular case, it could be argued that the respondent state is obliged to ensure that violations in similar cases are prevented. It may be deduced from Article 1 of the ECHR that states have to take into account the interpretation of the Convention by the Court when they “secure” the Convention’s rights, giving an erga omnes effect to the judgments of the Court.
115. A need for a non-restrictive interpretation of *Tarakhel* also follows from the fact that there is no scope for any doctrine of a margin of appreciation in the assessment of the Article 3 rights: these are absolute rights, rather than relative or qualified rights.<sup>135</sup> The Court has held on repeatedly that “the absolute nature of the protection” afforded by Article 3 is such that, in determining whether the issue of state responsibility arises there is no room for “balancing the risk of ill-treatment against the reasons for expulsion”.<sup>136</sup>
116. In case of a potential violation of an Article 3 Convention right, the Court does not accord any room for manoeuvre to the national authorities in fulfilling their obligations under the European Convention on Human Rights. States are permitted a certain level of discretion when interpreting their obligations under the ECHR, however it should be done in line with Article 31 (1) of the Vienna Convention on the Law of Treaties, 1969. The latter provides that international conventions should be interpreted in good faith according to the ordinary meaning of their terms in their context and in the light of their overall object and purpose. The purpose of the Convention<sup>137</sup> is for the Parties to secure to everyone within their jurisdiction the rights and freedoms recognised by the Convention rather than the enforcement of mutual obligations between States.<sup>138</sup>
117. The present research shows that broad interpretative approach to the judgment has been applied by the judiciary in a number of the EU Member States, including Germany, Belgium and the Netherlands.<sup>139</sup> In numerous judgments domestic Courts ruled against Dublin transfers to a number of EU Member States, including Bulgaria, Hungary, Italy, Malta, Slovenia and Spain, finding that lack of adequate reception conditions, deficiencies in asylum procedures, systematic detention practices with no recourse to effective remedies and absence of integration prospects might result in breach of the Article 3 for the removing States in relation to inter alia families with children, asylum seekers with special medical needs or single, healthy, young male asylum seekers.
118. Both domestic jurisprudential best practice and the *Tarakhel* judgment reiterated that the key in deciding on proposed transfers to other Member States is a rigorous individualised assessment taking into consideration the personal circumstances of the applicant, including previous experiences, as well as the general situation prevailing in that Member State.

133. See Steve Peers, *Tarakhel v Switzerland: Another nail in the coffin of the Dublin system?*, November 2014; Nesa Zimmermann, *Tarakhel v. Switzerland: Another Step in a Quiet (R)evolution?*, December 2014

134. *Soering v. the United Kingdom*, Application no. 14038/88

135. J. Callewaert, “Is there a Margin of Appreciation in the Application of Articles 2, 3 and 4 of the Convention?” (1998) 19 Human Rights Law Journal 6-9.

136. *Chahal v. The United Kingdom*, Application no 22414/93; *Ahmed v. Austria*, Application no 25964/94

137. Article 1, the European Convention on Human Rights, 1950, as amended by Protocols Nos. 11 and 14; and supplemented by Protocols Nos. 1, 4, 6, 7, 12 and 13

138. Van Dijk and Van Hoof, *Theory and Practice of the European Convention on Human Rights*, 1998

139. See *VG Schwerin*, 24 February 2015, 3 B 1023/14 As; *Belgium - Council for Alien Law Litigation*, 22 February 2015, no.138950

119. The research has, however, demonstrated a lack of comprehensive guidance to date from either European or higher domestic courts in relation to what an individualised assessment must entail, normally leaving it to discretion of decision makers in every particular case and resulting in significant litigation. However, there are some benchmarks in the ECtHR jurisprudence<sup>140</sup> suggesting that the assessment should be considered relative to all the circumstances of the case such as the duration of the treatment, its physical or mental effects and the age, sex, vulnerability and state of health of the applicant.
120. Moreover, EU Member States must take active steps to assess the individual needs of asylum seekers and cannot rely solely on an asylum seeker's self-identification to effectively guarantee his/her rights under EU law. The recast provisions in both the Asylum Procedures Directive and the Reception Conditions Directive require Member States to conduct an assessment of applicants' special individual procedural and reception needs. Once a person has been identified as vulnerable, the transferring Member State must then assess the conditions in the responsible Member State with respect to that person's individual circumstances.<sup>141</sup>
121. Furthermore, Dublin III, which had only very recently come into force at the time of the hearings in *Tarakhel*, has extended procedural safeguards specifically stressing the need for an effective remedy within the Dublin system which should 'cover both the examination of the application of this regulation and of the legal and factual situation in the Member State to which the applicant is transferred' which should be read alongside Article 47 of the EU Charter.
122. The requirement to undertake a thorough and individualised assessment of the situation in the Member State of return in light of the needs of the asylum seeker, has been taken seriously by some national courts,<sup>142</sup> which give detailed consideration to objective reports of human rights organisations as well as ministerial statements, and contemporaneous press reports. Such assessment often resulted in the courts finding that in light of the general situation in a country of a proposed return, a specific group of asylum seekers, even if lacking additional vulnerabilities, would not have access to adequate reception conditions or asylum procedures, which would act as a bar to a Dublin transfer.<sup>143</sup>
123. The outcomes of such an assessment will then dictate the content of the specific guarantees if any that are required by the Court prior to transfer. The concept of individual guarantees prior to return under the Dublin Regulation, introduced by the *Tarakhel* judgment, seems to be increasingly applied by the ECtHR in the pending cases<sup>144</sup> as well as domestic courts across Europe. Again the assurances required should be individual, sufficiently detailed and take into account specific needs of an asylum seeker so as to render Convention guarantees practical and effective and not theoretical and illusory.<sup>145</sup>
124. The note has shown that individual assurances where requested depend on the Member States, with some courts<sup>146</sup> critically assessing whether they are sufficiently detailed and particularised to meet the needs of the asylum seeker. On the other hand, in some States it appears to have become no more than a box ticking exercise to enable transfers to continue. The countries with the latter practices should be reminded that guarantees prior to return need to take into account the general situation in the countries of proposed transfer, whose capacities to provide adequate reception conditions, access to asylum procedures and integration might be significantly overstretched in some cases, e.g. Italy.<sup>147</sup>
125. Another important achievement of the judgment was that it confirmed that the application of the concept of systemic deficiencies as a necessary prerequisite to a potential violation to Article 3 ECHR is contrary to the classic Soering test. As the UK's jurisprudence in the *EM (Eritrea)* litigation had confirmed, a dangerous consequence of the NS decision in the CJEU had been that member states would treat 'systemic deficiencies' as an additional and necessary threshold test before an Article 3 breach could be proved. The judgment of the UK Supreme Court in *EM (Eritrea)* put an end to that argument in the UK, and the Grand Chamber in *Tarakhel*, adopting the *EM (Eritrea)* judgment, did the same on a Europe-wide basis. However, the CJEU's regressive judgment in *Abdullahi* shows the need for continuing vigilance on this point at the level of EU law.
126. The *Tarakhel* judgment makes absolutely clear that proof of individual risk of Article 3 violation is sufficient, irrespective of whether it emanates from systemic or non-systemic deficiencies and irrespective of the precise

140. *Neulinger and Shruk v. Switzerland*, Application no 41615/07, judgment [GC] 6 July 2010; *X. v Latvia*, Application no 27853/09, 2013; *Sharifi and others v Italy and Greece*, Application no 16643/09.

141. See [Written Submissions](#) before the ECtHR on behalf of the AIRE Centre, ECRE and ICJ in *Bilalova v Poland*, Application no. 23685/14, March 2015; [Vulnerability, the Right to Asylum and the Dublin System](#), Maria Hennessy

142. For example: CALL CCE no. 138950, 22.02.2015 and Rb Den Haag, 07.07.2015 AWB 15/11536

143. CALL decisions 144 188 of 27 April 2015 and 144 400 of 28 April 2015 relating to suspension of returns of male Iraqi and Congolese applicants; Gießen Court also ruled that the probability for individuals without dependents of not finding accommodation is higher than for families with children. ([VG Gießen 13.01.2015 1 L 3772/14.GI.A](#))

144. See for example *S.M.H. v. the Netherlands*, Application no. 5868/13, lodged on 17 January 2013

145. *Hirsi Jamaa and others v Italy*, Application no. 27765/09

146. See German jurisprudence for more information: [VG Schwerin, 24 February 2015, 3 B 1023/14 As](#)

147. Proposal for a Council Decision establishing provisional measures in the area of international protection for the benefit of Italy, Greece and Hungary, 9 September 2015, COM(2015) 451 final, 2015/0209 (NLE)

form of that proof.<sup>148</sup> No evidential threshold with respect to the source of the evidence, frequency of reports, or unanimity is required as this would be inconsistent with effective judicial protection conferred by EU law, long recognised as a general principle and now codified in Article 47 Charter, which is itself derived from Articles 6 and 13 of the Convention.

127. It is also necessary to ensure that individual risks are, in fact, individually interpreted instead of being subject to a superficial analysis with undue deference being given to the presumption that the member state will protect individual rights. In other words, while the decision-maker may make express reference to the need to examine 'individual' circumstances, in reality that examination is often foreclosed by the presumption that, absent 'systemic' deficiencies, the destination state will act in accordance with its international obligations and protect the individual. On the face of it, such an approach is simply not consistent with the judgment in *Tarakhel*.
128. Finally, in *Tarakhel* the Court has reiterated the concepts of best interests of the child and family unity.<sup>149</sup> Child asylum seekers form part of an extremely vulnerable group – qua children and qua asylum seekers - and therefore the best interests principle applies with particular strength in the context of a Dublin transfer and any decision-making process affecting children must include an evaluation of the possible impact of the decision on the child and any decision must expressly refer to this.<sup>150</sup> The judgment emphasized that it is essential that the asylum seeking children are guaranteed access to reception facilities adapted to their age and preserving family unity. This part of the judgment is uncontentious in principle, particularly given the strengthened guarantees in Articles 6 and 8 of the recast Dublin Regulation which explicitly acknowledge that the best interests of the child is a primary consideration within the Dublin system, with particular reference to maintaining family unity.
129. The present analysis argues that the *Tarakhel* ruling is relevant to all state parties to the Convention both in and outside the European Union when a situation "similar", but "not equivalent" to that in the *Tarakhel* case occurs. The judgment should sufficiently be taken into account by all parties to the Convention when assessing their human rights obligations under Article 3 of the Convention in relation to removal of asylum seekers to another state and ensuring that the special needs of this particularly vulnerable group are guaranteed prior to the transfer. In this regard practitioners and courts across Europe should follow the Article 3 ECtHR jurisprudence and best practice by domestic courts by conducting an individualised assessment that takes into consideration the personal circumstances of the applicant and the general situation prevailing in a Member State of a proposed return.



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148. For further analysis, see EDAL Journal '[The Dublin system and the Right to an Effective remedy – the case of C-394/12 Abdullahi](#)'

149. It should be noted that Dublin III Regulation puts a strong emphasis on the obligation for Member States to give precedence to these principles both in law and in practice. See recitals 13-17, and Art. 6, Art. 8, Arts. 9-11, Arts. 16-17 of the recast Regulation.

150. Article 24 of the EU Charter; Article 3 UN Convention on the Rights of the Child; C-648/11, MA, BT and DA v Secretary of State of the Home Department, 6 June 2013



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