

Dublin-case NS/ME: Finally, an end to blind trust across the EU?

The much awaited decision of the Court of Justice of the EU (CJEU or Luxembourg) in NS (*Saeedi*) and ME (*Edris*)¹ brings the Court of Justice into an area of long-standing legal controversy concerning the fundamental rights obligations of Member States when they seek to transfer asylum seekers under the Dublin system.²

I. Introduction

In Dublin cases, governments generally argue they are entitled to presume other states are safe for asylum seekers and that their claims will be properly processed, while asylum seekers frequently resist transfer under Dublin on fundamental rights grounds, whether to prevent onward *refoulement* or mistreatment in the other Dublin State. National courts and the ECtHR have long been embroiled in these questions. Luxembourg is the latecomer to the scene as its jurisdiction over Dublin trans-

fers was non-existent or restricted³ until the entry into force of the Treaty of Lisbon in 2009. The ruling also examines a second Lisbon constitutional change, the now binding EU Charter of Fundamental Rights (EUCFR or Charter) and Protocol 30 on the position of the UK and Poland vis-à-vis the Charter.

The CJEU ruling follows that of the European Court of Human Rights (ECtHR or Strasbourg) in *MSS v Belgium and Greece*⁴ closely. In this article, I recap the Strasbourg and pertinent English caselaw in Part II. Part III focuses on the Luxembourg ruling, examining (1) the litigation and (2) the resolution of the legal issues in turn. Busy readers may wish to turn straight to (3) the analysis and critique of the test set out in the case, before reading my (4) critique of the reasoning on mutual trust and

* The author thanks Professor Elspeth Guild, Mr Flip Schuller and Mr Jonathan Tomkin BL for their most helpful comments. All errors remain, of course, the author's own.

1 Joined Cases C-411/10 *NS v Secretary of State for the Home Department* and C-493/10 *ME v Refugee Applications Commissioner & Minister for Justice, Equality and Law Reform* 21 December 2011, references from the UK Court of Appeal and Irish High Court respectively. For an analysis by the legal team in the former case, see M Henderson & A Pickup 'The Saeedi / NS judgment: Using the EU Charter of Fundamental Rights in Dublin cases and more widely' Paper presented at ILPA / Doughty Street Seminar, 25 January 2012.

2 The Dublin System comprises the Dublin Regulation (Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national [2003] OJ L50) (DR), which replaces the Dublin Convention (Convention Determining the State Responsible for Examining Applications for Asylum Lodged in one of the Member States of the European Communities [1997] OJ C254/1) and the Eurodac database (Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention [2000] OJ L316/1). Prior to the Dublin Convention, the Schengen Convention contains analogous rules.

3 Until the Treaty of Amsterdam, it had no jurisdiction over the Dublin Convention. Thereafter, it had limited jurisdiction in that only courts of final instance were empowered to make preliminary references. There was only one such ruling on the DR, being Case C-19/08 *Migrationsverket v Petrosian* 29 January 2009 [2009] ECR I-495.

4 Application No 30696/09 *MSS v Belgium and Greece* [GC], 21 January 2011, (2011) 53 EHRR 2. For commentary, see Patricia Mallia 'Case of M.S.S. v. Belgium and Greece: A Catalyst in the Re-thinking of the Dublin II Regulation' (2011) 30 *Refugee Survey Quarterly* 107-128; Francesco Maiani & Constantin Hruschka 'Le partage des responsabilités dans l'espace Dublin, entre confiance mutuelle et sécurité des demandeurs d'asile' (2011) 2 *Revue suisse pour la pratique et le droit d'asile (ASYL)* 12; Jean-Yves Carlier & Sylvie Sarolea 'Le Droit d'Asile dans l'Union européenne contrôlé par la Cour européenne des droits de l'homme' (2011) 6436 *Journal des Tribunaux* 353; V Moreno Lax 'Dismantling the Dublin System: *MSS v Belgium and Greece*' Available on SSRN; G Clayton 'Asylum Seekers in Europe: *MSS v Belgium and Greece*' (2011) 11 *Human Rights Law Review* 758.

(5) observations on the interaction between Luxembourg and Strasbourg evident in the case. Part IV contains some observations on the impact of the ruling on the on-going Dublin reform process.

The structure of the Dublin Regulation (DR) is deceptively simple. It establishes a hierarchy of criteria of responsibility for processing asylum claims,⁵ with the aim of bringing a swift determination of the single responsible Member State.⁶ The criteria are mainly premised on the notion that the state responsible for the asylum seeker's entry onto EU territory should examine the asylum application. Most of the asylum seekers in the cases examined entered the EU via Greece, triggering Greek responsibility. The CJEU noted that Greece was the point of entry of 90% of the 'illegal immigrants' into the EU in 2010.⁷ Under Article 3(2) DR, Member States may derogate from the allocation criteria and process claims under what is colloquially known as the 'sovereignty clause'. That there may be legal duty to exercise this discretion is suggested by the existence of appeal rights against transfer, although the DR does not specify the grounds of appeal.⁸ The interaction between the discretion under the DR and fundamental rights obligations has led to much legal controversy.

The early Dublin cases illustrate concerns about divergent interpretation and application of the Refugee Convention (ie the 1951 Geneva Convention and 1967 Protocol). Some of these concerns have been alleviated by the adoption of the EU Asylum Directives: the Qualification Directive (QD)⁹ and Procedures Directive (PD)¹⁰ and Reception Conditions Directive (RCD).¹¹ A central question thus becomes whether the mere existence of these EU minimum standards affects the fundamental rights obligations, in particular whether they permit higher presumptions of safety. As we know, these EU standards themselves permit divergent approaches, and have not, at least as yet, led to a convergence in practice or recognition rates across the EU. The asylum lottery is well-documented.¹² As AG Trstenjak put it, there is a 'wide gulf' between the legal standards and the actual practice.¹³

II. ECHR and UK Case law

Before examining the *NS/ME* ruling, it is important to recap briefly the Strasbourg caselaw on Dublin transfers. The Strasbourg court's approach has evolved considerably, with domestic judicial and legislative responses thereto affecting not only its caseload, but also the jurisprudential trajectory.

Back in 2000 in *TI v UK*,¹⁴ the ECtHR held that the duties of the transferring Member State under the ECHR remained notwithstanding the Dublin Convention, so the UK had to examine the risks posed by removal to Germany, in particular the risks posed of onward removal to the country of origin, Sri Lanka. The fact that Germany was a party to the ECHR did not diminish the UK's duties to make this assessment. While *TI* accordingly entailed a strong endorsement of the individual duties of the Member States under the ECHR, in practice it was weak in that the UK was permitted to rely on assumptions and assurances about German law and practice. While the Court held that an irrebuttable presumption of safety was unacceptable, it allowed *TI*'s transfer, based on a generous reading of the German law.¹⁵ The applicant's fear of Germany was rooted in the shortcoming in German asylum law at that time concerning persecution by non-state actors. The Court acknowledged the 'apparent gap in protection', but regarded it as 'at least to some extent' closed by a residual statutory provision,¹⁶ despite admitting that the provision in question had never been used to reopen an asylum case.¹⁷ Shockingly, as Mole reports '[d]espite assurances given to the Court in *TI* by the Government of Germany, [TI] was neither permitted to submit a fresh claim nor to access the discretionary procedures and was sent by the border guards onward to his own country where he was arrested and ill-treated.'¹⁸

In the subsequent UK case of *Ex p Adan and Aitseguer*,¹⁹ the applicants had (to borrow Endicott's characterisation) 'fled to Germany to escape persecution by a rival clan [in Somalia]; then ... fled to Britain to escape the German interpretation of the [Refugee Convention].'²⁰ Previous domestic caselaw was premised on a strong notion of transnational judicial comity, which required UK courts to allow transfers unless the standards in other states were 'outside the range of tolerance.'²¹ In contrast, the House of Lords in *Adan* applied *TI* and refused removal. The UK government's response was to introduce legislation containing an irrebuttable statutory presumption that EU Member States were 'safe' for the purposes of return, thus precluding judicial enquiry into whether those states would provide effective protection.²² It was this statutory presumption that was at issue in *NS*.

5 Chapter III DR.

6 Recitals 4 & 5 DR.

7 Judgment, para 87.

8 Articles 19 & 20 DR.

9 Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] OJ L/304/12.

10 Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status [2005] OJ L326/13.

11 Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers [2003] OJ L31/18.

12 See, for instance, <http://www.ecre.org/topics/areas-of-work/protection-in-europe/121.html>.

13 *ME* Opinion, para 51.

14 Application No 43844/98 *TI v UK* 7 March 2000. For analysis, G Noll 'Formalism v Empiricism: Some Reflections on the Dublin Convention on the Occasion of Recent European Case Law' (2001) 70 *Nordic Journal of International Law* 161.

15 *Ibid*, 17.

16 *Ibid*, 17, citing Section 53(6) of the Aliens Act.

17 'It is true that the Government have not provided any example of Section 53(6) being applied to a failed asylum seeker in a second asylum procedure. [...] While it may be that on any re-examination of the applicant's case the German authorities might still reject it, this is largely a matter of speculation and conjecture.' *Ibid*, 18.

18 *N Mole Asylum and the European Convention on Human Rights* (Council of Europe, Strasbourg, 3rd Edition, 2007), 48.

19 *R v Secretary of State for the Home Dept ex parte Adan and Aitseguer* [2001] 2 AC 477. See further, Noll, above n 14; A Nicol and S Harrison, 'The Law and Practice of the Application of the Dublin Convention in the UK' (1999) 1 *EJML* 465.

20 T Endicott 'International Meaning': Comity in Fundamental Rights Adjudication' (2002) 14 *IJRL* 280.

21 *Kerrouche v Secretary of State for the Home Department* [1997] Imm AR 610, per Lord Woolf, cited in Endicott, *ibid*, 285.

22 Immigration and Asylum Act 1999, section 11(1). As Thomas notes, 'The effect of the 1999 Act has been to nullify the effect of *Adan*', R. Thomas, 'The Impact of Judicial Review on Asylum' (2003) *Public Law* 479, 496-497. The presumption is now contained in Paragraph 3 of Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004.

In 2007, the UK High Court in *Nasseri*²³ precluded the return of a 17 year old Afghan to Greece, although he had previously claimed asylum there. As the statutory presumption rendered it impossible for him to challenge the safety of Greece in his case, and there was considerable evidence that Greece would not be 'safe', the High Court declared the provision incompatible with Article 3 ECHR. A 'declaration of incompatibility' is the most extreme remedy under the UK Human Rights Act 1998, connoting that it is not possible for the Court to reinterpret the impugned provision in line with the UK's ECHR obligations.²⁴ However, the Court of Appeal and the House of Lords overruled the High Court, and upheld the irrebuttable presumption of safety. In the Court of Appeal, Lord Justice Laws LJ accepted that the Greek asylum procedures were 'to say the least shaky' yet noted that there were no deportations or removals to Afghanistan.²⁵ In 2009, the House of Lords up-

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held the Court of Appeal's ruling largely on the basis of the Strasbourg ruling in *KRS*.²⁶ *Nasseri* brought new judicial review proceedings later that year, and for reasons specific to the case, he was replaced as lead applicant by *Saeedi (NS)*.²⁷

In the meantime, concerns about the Greek practices led to an increasing volume of emergency applications to the ECtHR to preclude transfers.²⁸ Of these, one unexpectedly came to a full ruling, being *KRS v UK*.²⁹ *KRS* concerned an Iranian asylum seeker resisting transfer back to Greece. Whilst accepting the 'independence, reliability and objectivity' of UNHCR, and the genuineness of its concerns about the standards of asylum reception and adjudication in Greece,³⁰ the ECtHR nonetheless 'consider[ed] that they cannot be relied upon to prevent the UK from removing the present applicant to Greece.'³¹ The reasoning is open to criticism on three main grounds. Firstly, Strasbourg only considered removal practices, rather than the Greek asylum system more generally. Secondly, the supposition that Article 3 ECHR violations would be adequately dealt with in the Greek domestic system is open to empirical challenge. Thirdly, and most disturbingly, the Chamber judgment was premised on a presumption that the entire EU asylum system, protected fundamental rights, 'as regards both the substantive guarantees offered and the mechanisms controlling their observance'³² and complied with the EU Asylum Directi-

ves.³³ In effect, no individual assessment of the risks posed to the applicant was carried out.

Post-*KRS*, domestic courts and indeed governments across the Dublin system took divergent views of their EU and ECHR obligations in the context of Dublin returns.³⁴ As a result, the Strasbourg Court's Rule 39 jurisdiction came under immense strain, as thousands of asylum seekers resisting Dublin transfer sought a supranational judicial remedy.³⁵

The Grand Chamber judgment in *MSS v Belgium and Greece*³⁶ of 21 January 2011 provided the much needed opportunity for the Grand Chamber to revisit the *KRS* ruling. The Grand Chamber distinguished *KRS* on the facts, attaching 'critical importance' to the UNHCR letter of April 2009 requesting Belgium to suspend transfers to Greece in light of the deteriorating si-

tuations there.³⁷ The judgment is a resounding reassertion of each state's responsibility to ensure that the ECHR guarantees were practical and effective. It held unanimously that the detention conditions in Greece violated Article 3 ECHR, and by a majority (16:1), that the living conditions in Greece violated Article 3 ECHR. The latter finding is legally ground-breaking, being based on an acknowledgement that the legal commitments to provide reception conditions, in particular under the EU Reception Conditions Directive (RCD),³⁸ together with asylum seekers' particular vulnerability, create specific positive obligations under Article 3 ECHR.

The impact of this jurisprudential development is evident in *Sufi and Elmi*.³⁹ concerning return to Somalia. The Court distinguished between dire humanitarian conditions 'solely or even predominantly attributable to poverty or to the State's lack of resources to deal with a naturally occurring phenomenon, such as a drought' and humanitarian crisis due to the 'direct and indirect actions of the parties to the conflict.'⁴⁰ In

23 *Nasseri v Secretary of State for the Home Department* [2007] EWHC 1548 (Admin).

24 Sections 2 and 3 Human Rights Act 1998.

25 *R (Nasseri) v Secretary of State for the Home Department* [2008] EWCA Civ 464.

26 *R (Nasseri) v Secretary of State for the Home Department* [2009] UKHL 23; [2009] WLR (D) 148, 6 May 2009.

27 Henderson & Pickup, above n 1, para 6.

28 See further, ECRE *Information Note ECtHR Interim Measures (Rule 39) to stop Dublin transfers* (ECRE, Brussels, 19 June 2009).

29 Application No 32733/08 *KRS v UK* 2 December 2008.

30 *Ibid* 16-17.

31 *Ibid* 17.

32 *Ibid*, 16.

33 *Ibid*, 17.

34 See, for example, UNHCR *Information Note on National Practice in the Application of Article 3(2) of the Dublin II Regulation in particular in the context of intended transfers to Greece*, available at: <http://www.unhcr.org/refworld/pdfid/4c18e6f92.pdf>.

35 Statement of the President of the European Court of Human Rights concerning requests for interim measures (Rule 39 of the Rules of the Court), 11 February 2011.

36 Application No 30696/09 *MSS v Belgium and Greece* [GC], 21 January 2011, (2011) 53 EHRR 2. For commentary, see Patricia Mallia 'Case of M.S.S. v. Belgium and Greece: A Catalyst in the Re-thinking of the Dublin II Regulation' (2011) 30 *Refugee Survey Quarterly* 107-128; Francesco Maiani & Constantin Hruschka 'Le partage des responsabilités dans l'espace Dublin, entre confiance mutuelle et sécurité des demandeurs d'asile' (2011) 2 *Revue suisse pour la pratique et le droit d'asile (ASYL)* 12; Jean-Yves Carlier & Sylvie Sarolea 'Le Droit d'Asile dans l'Union européenne contrôlé par la Cour européenne des droits de l'homme' (2011) 6436 *Journal des Tribunaux* 353; V Moreno Lax 'Dismantling the Dublin System: *MSS v Belgium and Greece*' Available on SSRN; G Clayton 'Asylum Seekers in Europe: *MSS v Belgium and Greece*' (2011) 11 *Human Rights Law Review* 758.

37 *MSS*, para 344.

38 Above n 11.

39 Applications nos. 8319/07 and 11449/07 *Sufi and Elmi v UK* 28 June 2011.

40 *Ibid*, para 282.

the former situation, the test in *N v UK*⁴¹ would be applicable, while in the latter the *MSS* approach would apply. The former test is extremely difficult to meet, as it requires applicants to show the humanitarian conditions are 'very exceptional', and that it was 'highly probable' that the applicant would not have access to the basic necessities of life, and that these deficiencies

general information 'relating to conditions at *other* premises at times *other* than the material one.'⁴⁸ Decisive for him was the failure of the Greek government to prove that the detention did not take place in an 'overcrowded place in appalling conditions of hygiene and cleanliness.'⁴⁹

The judgment in MSS v Belgium and Greece held that the living conditions in Greece violated Article 3 ECHR. That finding is legally ground-breaking.

would result in an immediate threat to life or the impossibility of maintaining human dignity. The line between humanitarian conditions which are due to direct or indirect state action, and those which are simply natural misfortune, will no doubt be tested in subsequent cases. The workability of the distinction is doubtful, and it will often be arguable that the state (or non-state authorities as in the Somali case) is complicit in humanitarian crises to the requisite extent.

The Grand Chamber in *MSS* also held unanimously that the Greek asylum procedures violated Article 13 ECHR. For our purposes, of greatest interest is the finding that Belgium violated Article 3 ECHR, in exposing the applicant to risks linked to the deficiencies both in the asylum procedure and in the detention and living conditions in Greece (15:2). Of note is that the ECtHR applies its standard test concerning Article 3 risks, and finds Belgium in violation as it 'knowingly' exposed the application to conditions which violated Article 3 ECHR.⁴² The Court also held that Belgium violated Article 13 ECHR in failing to provide an adequate remedy to prevent the transfer to Greece.

As one separate concurring Opinion noted, the focus is entirely on the conditions in Greece, rather than on the specific risks posed if removed to Afghanistan.⁴³ The ECtHR laid great emphasis on a series of reports published since 2006 by the Council of Europe, EU, UNHCR and respected NGO sources.⁴⁴ Its assessment of the detention conditions was premised on the reports' evidencing the 'systematic' practice of detaining asylum seekers on arrival for periods from a few days to a few months.⁴⁵ Similarly generalised findings were accepted in relation to the poor detention conditions.⁴⁶ Also pertinent was the fact that the Court had in the previous two years found degrading detention conditions in three cases against Greece.⁴⁷ Whether the applicant had been subjected to the prevailing practices was in dispute, but the Court treated the general information as supporting the applicant's allegations. Even Judge Sajó, who otherwise dissented, shared this finding in spite of his hesitancy to ground the finding relating to the particular applicant in

III. The NS/ME Ruling

1. The Litigation

The applicant in *NS* was an Afghan asylum seeker seeking to resist removal from the UK to Greece under the DR. His domestic appeal rights were precluded by the previously mentioned irrebuttable statutory presumption.⁵⁰ On this basis, the High Court dismissed his claim, but allowed the appeal to the Court of Appeal, which in turn referred seven detailed questions to Luxembourg. The applicants in *ME* were five asylum seekers from Afghanistan, Iran and Algeria. The Irish High Court referred two questions on the transferring Member States' obligations to assess the receiving states' compliance with Article 18 EUCFR, the Asylum Directives and DR, and the consequences of finding the receiving state in breach. The Irish court had applied *KRS* and assumed that there was no breach of Article 3 ECHR.

Both references predated *MSS*,⁵¹ so at the time Strasbourg's guidance, in the form of contradictory Rule 39 rulings and *KRS*, was unclear.

Twelve Member States⁵² intervened, together with Switzerland (a participant in the Dublin system) and the European Commission. In addition, due to their interventions in the domestic proceedings, UNHCR, the AIRE (Advice on Individual Rights in Europe) Centre, Amnesty International and the UK Equality and Human Rights Commission (in *NS* only) also made submissions. The contribution of the interveners is noteworthy. In previous refugee law cases before the Luxembourg court, even UNHCR was precluded from intervening, as it had not secured intervention rights in the domestic proceedings.⁵³

Although the cases were joined and there is a single judgment, AG Trstenjak gave two Opinions.⁵⁴ The *NS* Opinion is the more comprehensive, with that in *ME* citing the former extensively.

41 Application No 26565/05 *N v UK* [GC] 27 May 2008. See further V Mantouvalou 'N v UK: No Duty to Rescue the Nearby Needy?' (2009) 72 *MLR* 815.

42 *MSS*, paras 365-367.

43 Concurring Opinion of Judge Villiger, *MSS*, p 93-99.

44 *MSS*, para 160 lists.

45 *MSS*, para 167.

46 Judgment, para 230.

47 Application No 53541/07 *SD v Greece* 11 June 2009; Application No 8256/07 *Tabesh v Greece* 26 November 2009; Application No 12186/08 *AA v Greece* 22 July 2010.

48 *MSS*, p 100.

49 *MSS*, p 101.

50 *NS* Opinion, para 47.

51 *ME* Opinion, paras 53 & 55.

52 Belgium, Germany, Finland, France, Greece, Ireland, Italy, the Netherlands, Austria, Poland, the UK and the Czech Republic.

53 For example, in Case C-31/09 *Bolbol* [2010] ECR I-0000 AG Sharpston referred to the brief of UNHCR as an 'informal amicus curiae brief' (Opinion, para 16), but there were in fact no formal NGO or IO interventions.

54 Opinions of AG Trstenjak in Cases C-411/10 *NS v Secretary of State for the Home Department* and C-493/10 *ME et al v Refugee Application Commissioner & Minister for Justice, Equality and Law Reform*, 22 September

2. The Legal Issues

- i. Does the exercise of the 'sovereignty clause' fall within the scope of EU law?

The first NS question was whether decisions under Article 3(2) fall within the scope of EU law. The governments of Ireland, the UK, Belgium and Italy argued that they did not. The NS Opinion noted that the EUCFR binds the Member States when 'implementing EU law', which, as the Explanations clarify,⁵⁵ is to be read as co-extensive with the pre-existing caselaw, covering both cases where Member States 'implement' and 'derogate from' EU norms.⁵⁶ As to the DR, the AG noted that it established 'exhaustive rules' on the allocation of responsibility for the processing of asylum claims, and rules governing the consequences of decisions under Article 3(2). Accordingly, these decisions do amount to 'implementing EU law.'⁵⁷ The Court followed this conclusion.⁵⁸

- ii. When is transfer under the DR prohibited?

The Opinions

The AG opined that if there was a 'serious risk' of violations of human dignity (Article 1 EUCFR) or of 'inhuman or degrading treatment' (Article 4 EUCFR), removal should be precluded, as well as in cases where Article 19(2) EUCFR applied.⁵⁹ The duty not to return derived from the positive protective function in-

The AG's conclusions in NS/ME envisage breaches of any fundamental right enshrined in the Charter as precluding transfer.

herent in Articles 1 and 4.⁶⁰ In addition, the right to asylum under Article 18 EUCFR precluded both direct and indirect *refoulement*,⁶¹ so if transferees were 'at risk' of indirect *refoulement*, Dublin transfer would also be prohibited.⁶² While the reasoning focuses on these particular Articles, the AG's conclusions envisage breaches of *any* fundamental right enshrined in the Charter as precluding transfer.⁶³ Article 4 EUCFR risks should be assessed first, with Article 1 being regarded as inapplicable if a violation of the more specific rights were identified.⁶⁴ In contrast, not all breaches of the Asylum Directives would prevent transfer. Only where breaches of the Directives

also entail breaches of fundamental rights would these be pertinent.⁶⁵

The Judgment

The Court emphasised that the Dublin system as a product of 'the principle of mutual confidence' between all the participating states (EU and non-EU), that all observe fundamental rights 'including the rights based on the [Refugee Convention], and on the ECHR'⁶⁶, leading to a presumption that the treatment of asylum seekers in all Member States complies with the requirements of the Charter, the Refugee Convention and the ECHR.⁶⁷ For the Court, the 'raison d'être' of the EU was at issue. In a remarkably unclear paragraph, it stated that 'At issue here is the raison d'être of the European Union and the creation of an area of freedom, security and justice and, in particular, the Common European Asylum System, based on mutual confidence and a presumption of compliance, by other Member States, with European Union law and, in particular, fundamental rights.'⁶⁸

As will be discussed further below in Part III.4, the reasoning seems to confuse the ends and means, the processes and products of European integration.

In sharp contrast to the Opinions, the Court held that not every infringement of fundamental right would affect the obligations under the DR.⁶⁹ Nor would infringement of any aspect of the Asylum Directives preclude transfer.⁷⁰ Apparently due to the importance attributed to mutual confidence and pre-

sumption of compliance, the Court established a significantly higher threshold than that suggested by AG Trstenjak for precluding Dublin transfers. Member States, including national courts, may not transfer asylum seekers to the responsible State 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 and degrading treatment within the meaning of Article 4 of the Charter.'⁷¹

- iii. Is protection against removal under the EUCFR more extensive than under the ECHR?

The fifth question concerned whether Article 1, 18 and 47 of the EUCFR, and the general principles of EU law, were wider

2011. For analysis, see Steve Peers, Statewatch Analysis, *Court of Justice: The NS and ME Opinions - The Death of "Mutual Trust"?* available at www.statewatch.org/analyses/no-148-dublin-mutual-trust.pdf.

55 Article 52(7) EUCFR. The Explanations are found at [2007] OJ C303/17.

56 NS Opinion, para 76-78.

57 NS Opinion, para 80. In paras 81-82, the AG drew an analogy with the seminal case of *Case 5/88 Wachauf* [1989] ECR 2609.

58 Judgment, paras 64-69.

59 NS Opinion, para 112; ME Opinion, para 65: 'If there were a serious risk ... of a violation of the asylum seekers' fundamental rights, as enshrined in Articles 1, 4 or 18 of the [EUCFR], the other Member States may not transfer asylum seekers ..., but are obliged, in principle, to exercise the right to assume responsibility under Article 3(2) DR.'

60 NS Opinion, para 112; ME Opinion, footnote 17.

61 NS Opinion, para 114; ME Opinion, para 62.

62 NS Opinion, para 115.

63 NS Opinion, para 127; para 178(2); ME Opinion, para 79(1).

64 NS Opinion, footnote 44.

65 NS Opinion, para 123-126; ME Opinion, para 66.

66 Judgment, para 78-79.

67 Judgment, para 80.

68 Judgment, para 83.

69 Judgment, para 82.

70 Judgment, para 84.

71 Judgment, para 94. See also, para 86 where the test is identified and para 106 where this test is stated as a requirement of Article 4 EUCFR.

in scope than Article 3 ECHR. The salience of the question was high at the time when *KRS* was the governing Strasbourg ruling. If there was no Article 3 ECHR issue (as was held in *KRS*), could removal nonetheless breach the EUCFR? *MSS* made this question less important, so the AG chose not to answer it, instead clarifying the status of the *MSS* ruling in EU law.⁷² In light of Article 52(3) EUCFR, Strasbourg caselaw, although not ‘a source of interpretation with full validity,’ had ‘particular significance and high importance’⁷³ in the areas of overlap. The *NS* Opinion noted the *de facto*, but not *de jure*, parallel between the RC, ECHR and rights under EU law.⁷⁴

The Judgment

The Court integrated its response to the questions on the threshold to prevent removal and the evidential assessment.⁸¹ Although it is not for the CJEU on a preliminary reference to assess the facts, it incorporated the Strasbourg finding in *MSS* that there was a ‘systemic deficiency’ in the Greek asylum system.⁸² It noted that Strasbourg had taken into account the ‘regular and unanimous reports’ of NGOs, the input of UNHCR, and Commission Reports on Dublin as well as the proposals for a recast DR.⁸³ Accordingly, it rejected the arguments of the Belgian, Italian and Polish governments that they lacked the ‘instruments necessary’ to assess other Member States’

Following the Opinion, the Court held that conclusive presumptions of compliance with the Asylum Directives were incompatible with EU law.

The Court emphasised that the ECtHR in *MSS* had ‘reviewed its position [in *KRS*] in light of new evidence.’⁷⁵ Following the AG, the Court simply stated that Articles 1, 18 and 47 EUCFR did not lead to a different response to the questions posed.⁷⁶ This statement clearly only applies to the case at hand, and does not exclude the possibility that these rights may provide more extensive protection against return in an appropriate case. In particular, the Court has yet to examine whether the right to asylum under the Charter was a free-standing right which prevented removal, or the extent to which the right to dignity is a free-standing right under EU law.

- iv. How are the risks posed by transfer to be assessed?

The Opinions

The AG opined that a conclusive presumption of compliance with fundamental rights was ‘incompatible with the Member States’ duty to interpret and apply [the DR] in a manner consistent with fundamental rights.’⁷⁷ Nor could there be a conclusive presumption regarding compliance with the Asylum Directives, which would have the same effect as the former presumption.⁷⁸ However, a rebuttable presumption was permissible, provided the asylum seeker was procedurally entitled to rebut the presumption in accordance with the principle of effectiveness.⁷⁹ The precise working of the procedure for rebutting the presumption ‘were a matter for the legal orders of the individual Member States.’⁸⁰ No doubt questions should be referred to the CJEU on these workings, if it is felt that ostensibly rebuttable presumptions are conclusive in practice. If this is so, then the domestic system can be said to violate the EU general principle of effectiveness.

fundamental rights compliance.⁸⁴ Following the Opinion, the Court held that conclusive presumptions of compliance were incompatible with EU law.⁸⁵ Safe country provisions could not be conclusive.⁸⁶ Irrebuttable presumptions were ‘precluded’ by EU law.⁸⁷

- v. If removal is prohibited, is there a duty to process the claim?

The Opinion frames the entire case as if the prohibition of transfer implies a duty to process the claim.⁸⁸ In contrast, the Court held that even if transfer was prevented on fundamental rights grounds, this did not create an automatic duty to examine the application. Instead, the Member State could use the Dublin criteria to find yet another State responsible, subject only to the requirement that that processes should not ‘worsen a situation where the fundamental rights of that applicant have been infringed by using a procedures for determining the Member State responsible which takes an unreasonable length of time.’⁸⁹

This difference between the Opinion and Judgment could be highly significant in individual cases.

- vi. Protocol No 30 on the position of the UK and Poland under the EUCFR

The seventh question in *NS* relates to Protocol No 30 on the application of the EUCFR to Poland and to the United Kingdom. The Opinion confirms that Article 1(1) thereof is merely an ‘express confirmation’ of Article 51 EUCFR.⁹⁰ In contrast, Article 1(2) did seem to ‘rule out new EU rights and entitlements

72 *NS* Opinion, para 141-142.

73 *NS* Opinion, para 146.

74 *NS* Opinion, para 153.

75 Judgment, para 112.

76 Judgment, paras 113-115.

77 *NS* Opinion, para 131.

78 *NS* Opinion, para 132.

79 *NS* Opinion, para 133-136; *ME* Opinion, para 74-77.

80 *NS* Opinion, para 135; *ME* Opinion, para 77.

81 Judgment, para 74.

82 Judgment, para 87.

83 Judgment, para 90.

84 Judgment, para 91.

85 Judgment, para 99.

86 Judgment, para 101. The Court noted that Article 36 PD on STC required that countries actually observe the provisions of the RC and ECHR.

87 Judgment, para 105.

88 *NS* Opinion, para 3.

89 Judgment, para 108.

90 *NS* Opinion, para 171.

being derived from Articles 27 to 38 [EUCFR]’ against the UK or Poland.⁹¹ These are the ‘solidarity rights’ in the Charter, including the right to family and professional life (Article 33) and the right to healthcare (Article 35). As these rights were not at issue in the case, the AG declined to go any further in her analysis.⁹² Article 2 was also of limited effect,⁹³ so all in all, Protocol 30 did not alter the findings vis-à-vis the UK. The Court too affirmed that Article 1(1) of Protocol No 30 merely ‘explains’ Article 51 EUCFR, and does not exempt the Member States concerned.⁹⁴ This is an important clarification for there was some confusion about whether the Protocol was an opt-out.⁹⁵

However, it remains to be seen how the solidarity rights limitation in Article 1(2) will evolve. The CJEU was able to avoid this issue. Strasbourg had made the legal innovation in *MSS* using Article 3 ECHR to impugn the reception conditions in Greece, so the question of using these Charter provisions to prevent return to face extreme suffering from destitution or homelessness did not need examination.

There is some indication that English judges are reading MSS as in effect requiring a UNHCR statement akin to that made in relation to Greece, before transfer to other countries will be stopped.

3. Analysis & Critique of the NS/ME Test

The *NS/ME* test entails several elements: Dublin transfer is prohibited if the transferring Member State authorities cannot be unaware that systemic deficiencies amount to substantial grounds for believing that there is a real risk of treatment contrary to Article 4 EUCFR.⁹⁶ Each element warrants examination in turn:

‘Cannot be unaware’

Given that the test imports the demanding onerous Strasbourg notion of ‘substantial grounds,’ it would be difficult to justify an interpretation of this requirement that set a higher burden of proof than Strasbourg. The better reading is that the ‘cannot be unaware’ notion reflects the permissibility of a presumption of compliance with fundamental rights, with that presumption rebuttable on the basis of evidence in the public domain. If the requirements on the types and volume of evidence are too strict, it will infringe the EU general principle of effectiveness. For instance, there is some indication that English judges are reading *MSS* as in effect requiring a UNHCR

statement akin to that made in relation to Greece, before transfer to other countries will be stopped.⁹⁷ Such strict readings of the Strasbourg caselaw and rigid evidential requirements are a dereliction of judicial authority. The notion of effective judicial protection requires judges to make a fulsome assessment of all types of available evidence, rather than establishing rigid requirements which in effect delegate authority to other organisations.

‘Systemic deficiencies’

The CJEU includes a requirement of ‘systemic deficiency’ in the test to preclude removal. It also refers in its assessment to the existence of ‘major operational problems’ imperiling fundamental rights.⁹⁸

In contrast, in *MSS*, the ECtHR takes the various reports as evidence of systemic shortcomings, which then makes it easier for the applicant to establish a risk in his individual case. As a matter of fact, it finds systemic deficiencies, but this is not

a legal requirement under the ECHR. In this respect, *MSS* can be read with *NA v UK*⁹⁹ and *Sufi & Elmi*.¹⁰⁰ as part of the general Strasbourg trend where general risks are sufficient to trigger protection under Article 3 ECHR, without the applicant having to show that she is somehow singled out from those exposed to that risk. Luxembourg’s ruling in *Elgafaji*¹⁰¹ may be seen as influential in this Strasbourg trend.

The CJEU test seems more difficult to meet than the ECtHR, if we read ‘systemic deficiencies’ as an additional requirement to be met. However, I urge that such a reading be rejected. Luxembourg has no mandate to interpret Article 4 EUCFR in a manner that undermines Strasbourg’s interpretation of Article 3 ECHR.¹⁰² Moreover, the CJEU itself in *NS/ME* was emphatic that it was faithful to *MSS*. Accordingly, we should adopt an interpretation of the Luxembourg test which does not treat ‘systemic deficiency’ as an additional hurdle for applicants, but rather an element of the risk assessment.

This reading is also logically preferable. It is difficult to justify a test that protects only against risks from ‘systemic deficiencies’. The Article 3 ECHR risk is no greater or lesser for emerging from systemic or non-systemic factors. It ought to be enough to show the requisite risk of torture, inhuman or degrading treatment.

91 *NS* Opinion, para 173.

92 *NS* Opinion, para 174.

93 *NS* Opinion, para 176. It was not a ‘general opt-out’ as it only related to those provisions which refer to ‘national laws and practices.’

94 Judgment, para 120.

95 See further, Catherine Barnard ‘The ‘Opt-Out’ for the UK and Poland from the Charter of Fundamental Rights: Triumph of Rhetoric over Reality?’ available at www.law.cam.ac.uk/faculty-resources/download/barnard-uk-opt-out-and-the-charter-of-fundamental-rights/7309/pdf.

96 Judgment, para 94. See also, para 106 where this test is stated as a requirement of Article 4 EUCFR.

97 See, for example, concerning removal to Italy: *R (Medhanye) v SSHD* [2011] EWHC 3012 (Admin). Note, however, that final judgment in this case was stayed pending the CJEU ruling in *NS/ME*.

98 Judgment, para 81.

99 Application No 25904/07 *NA v UK* 17 July 2008.

100 Application Nos 8319/07 and 11449/07 *Sufi and Elmi v United Kingdom*, 28 June 2011.

101 Case C-465/07 *Elgafaji and Elgafaji* [2009] ECR I-921.

102 Article 52(3) EUCFR.

'Substantial grounds for believing there is a real risk'

The phrase 'substantial grounds for believing there is a real risk' mirrors the Strasbourg Article 3 caselaw,¹⁰³ and indeed the EU QD.¹⁰⁴

The threshold is explained as appropriate to removal cases as they do not concern the direct responsibility of the Contracting State for the infliction of harm.¹⁰⁵ The 'substantial grounds' threshold is demanding. However, the Strasbourg case law has integrated concerns about the specificities of the asylum process and tempered the evidential assessment accordingly.¹⁰⁶

The 'real risk' criterion in contrast is not so demanding. It means a 'foreseeable risk,'¹⁰⁷ going beyond a mere possibility of ill-treatment. Article 19(2) EUCFR differs on its face from the Strasbourg caselaw, in that it refers to a 'serious risk' rather than a 'real risk.' However the Explanation to Article 19(2) stipulates that it is intended to reflect the Article 3 ECHR caselaw.¹⁰⁸ The AG's Opinions used the 'serious risk' criterion. In contrast, the Court integrates the Strasbourg test into Article 4 EUCFR, following Strasbourg's lead more faithfully. This is welcome, given that the Charter text itself purports to reflect the Strasbourg standards.

'treatment contrary to Article 4 EUCFR'

The Judgment only deals with treatment contrary to Article 4 EUCFR. The extent to which breaches of other EU fundamental rights should prevent removal remains to be seen. The Opinions, in contrast, considered Articles 1, 4, 18 and 19 EUCFR, ultimately envisaging breaches of any fundamental rights enshrined in the Charter as potentially precluding transfer.¹⁰⁹ Gi-

The Judgment only deals with treatment contrary to Article 4 EUCFR. The extent to which breaches of other EU fundamental rights should prevent removal remains to be seen.

ven the extensive social rights in the Charter, this would have opened up the possibility for different *non-refoulement* claims, not only in the Dublin context, but more broadly. In limiting its judgment to Article 4 EUCFR, the Court has left for another day the extent to which other Charter rights entail *non-refoulement* obligations, although it does make clear that not just 'any infringement of a fundamental right' will do.¹¹⁰

103 In the seminal Application No 14038/88 *Soering v UK* 7 July 1989 (1989) 11 EHRR 439, the UK government suggested a test of 'certain, imminent or serious risk (para 83). However, the ECtHR applied the test of 'substantial grounds' of a 'real risk' of treatment contrary to Article 3 ECHR. (para 91).

104 Article 2(e) QD. Above n 9.

105 Application No 44599/98 *Bensaid v UK* 6 February 2001, para 40.

106 Application No 2345/02 *Said v the Netherlands* 15 June 2005, para 49: 'incumbent on persons who allege that their expulsion would amount to a breach of Article 3 to adduce, to the greatest extent practically possible, material and information allowing the authorities of the Contracting State concerned, as well as the Court, to assess the risk a removal may entail.' For further assessment, see T. Spijkerboer 'Subsidiarity and "Arguability": the European Court of Human Rights' Case Law on Judicial Review in Asylum Cases' (2009) 21 *IJRL* 48.

107 *Soering*, above n 100, para 100.

108 See further M Eliantonio & A Wiesbrock 'EU Migration Law in national courts: The role of national procedural rules and the ECJ's requirements in the Dutch courts' (2011) 3 *A&MR* 104.

109 *NS* Opinion, para 127; para 178(2); *ME* Opinion, para 79(1).

110 Judgment, para 82.

It seems inevitable that further references will follow on this point, particularly given that the Strasbourg caselaw prevents removal in cases of 'flagrant breach' of other Convention rights, as is discussed further in Part III.5 below.

4. The Reasoning on Mutual Trust and Presumptions of Compliance with Fundamental Rights

The difference in approach between the AG and Court is informed by the Court's emphasis on mutual confidence and presumption of compliance with fundamental rights as a necessary feature of the CEAS.¹¹¹ Its reasoning seems flawed. If it means that mutual trust and presumptions of compliance are the 'raison d'être' of the CEAS, this is clearly wrong. Mutual recognition and presumptions of compliance are but one regulatory tool in the creation of the CEAS (and thereby the AFSJ).¹¹² It also suggests that because the Dublin system embodies trust across the Member States, we must assume that that trust is justified by enshrining presumptions of compliance with fundamental rights. This comes close to asserting that because we believe it, it must be true. Just because there is trust, does not mean that trust is warranted. Moreover, trust between Member States would be better sustained by ensuring checks for fundamental rights protection, rather than permitting governments to turn a blind eye to the others' shortcomings.¹¹³

In the case of the vulnerable category of asylum seekers, it is worth questioning the basis for presumptions of compliance

with fundamental rights. Contrast say, the transfer of a criminal suspect under the EAW in *Stapleton v Ireland*.¹¹⁴ In that case, the same criminal law and procedure as applies to UK citizens at home would be applied to transferee. There is a sound empirical basis for assuming that the UK would protect fundamental rights. In contrast, asylum seekers are inherently more vulnerable, as the ECtHR in *MSS* recognises. They are strangers to the polity, and no national is subject to the indignities of the asylum process. A strong presumption of compliance with fundamental rights has little rational basis in the asylum context. The structure of mutual recognition in the asylum context reflects its exclusionary logic. The CEAS enshrines more mutual recognition of negative than positive decisions. The recognition of an asylum seeker as a refugee in one Member State does not create EU obligations for the others, except under the

111 Judgment, para 83.

112 See further N Walker 'In Search of the Area of Freedom, Security and Justice: A Constitutional Odyssey' in N Walker (ed) *Europe's Area of Freedom, Security and Justice* (OUP, Oxford, 2004), 5.

113 See further, O de Schutter 'The Promotion of Fundamental Rights by the Union as a contribution to the European Legal Space (I): Mutual Recognition and Mutual Trust in the Establishment of the Area of Freedom, Security and Justice' REFGOV-FR-2 Working Paper 2006.

114 Application No 56588/07 *Stapleton v Ireland* 4 May 2010.

recently adopted amendment to the Long-Term Residents Directive.¹¹⁵ Member States use mutual recognition as a selective tool, to limit responsibility, rather than to share it.

The most pressing practical question is then the standard for rebutting the presumption of compliance with fundamental rights. As is discussed in the next section, Strasbourg has developed some important principles on this point.

5. Fundamental Rights: Luxembourg lets Strasbourg lead, for now

The EU Charter must protect human rights at least to the Strasbourg standard.¹¹⁶ Luxembourg accords Strasbourg caselaw a privileged position in honing the general principles of EU law. The referring national courts in *NS/ME* invited the CJEU to go further than the ECHR, and explore the Charter's additional protections. However, the Court declined, instead focusing only on Article 4 EUCFR (Article 3 ECHR). There are many legally innovative paths not taken. The AG reads the right to

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asylum in terms of *non-refoulement*, avoiding its transformative potential as an individual right to be granted asylum (in contrast to the orthodox right to seek asylum).¹¹⁷ The judgment is strikingly economical, in that the CJEU traces a path already worn by Strasbourg.

Rights other than Article 3 ECHR?

The CJEU only considers Article 4 EUCFR risks. In contrast, Strasbourg has examined *non-refoulement* claims in relation to other rights.¹¹⁸ It has explicitly recognised this possibility, for instance, as regards Articles 4,¹¹⁹ 5,¹²⁰ 6,¹²¹ 8,¹²² and 9.¹²³

The workings of the 'flagrant breach' test can be seen by contrasting *Stapleton v Ireland*¹²⁴ and *Othman (Abu Quatada) v UK*.¹²⁵ In

the former case, an Irish national sought to resist transfer to the UK under the European Arrest Warrant (EAW). His claim was dismissed as inadmissible: As the UK had ratified and incorporated the ECHR, and the UK courts were better placed to assess any possible unfairness in the trial, transfer raised no question under the ECHR. In contrast, for the first time in January 2012, the Court found that the 'flagrant breach' standard had been met in relation to Article 6 ECHR in *Othman*, where there were substantial grounds to believe that there was a real risk the applicant's trial in Jordan would use evidence obtained by means of torture. The Court stated that 'the admission of torture evidence is manifestly contrary ... to ... Article 6 ... It would make the whole trial not only immoral and illegal, but also entirely unreliable in its outcome. It would, therefore, be a flagrant denial of justice if such evidence were admitted in a criminal trial.'¹²⁶ The Court clarified the meaning of the flagrant breach or 'flagrant denial of justice.' It went 'beyond mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of Article 6 if occurring within the Contracting State itself. What is required is a breach of the principles of fair trial guaranteed by Article

6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article.'¹²⁷

The 'flagrant breach' test reflects a hierarchy between Article 3 ECHR and other qualified ECHR rights. AG Trstenjak's Opinions seemed to set an undifferentiated test for breaches of all fundamental rights, which would appear to protect against removal more than the ECHR. The Court focused on Article 4 EUCFR (Article 3 ECHR) risks alone. It remains to be seen whether the CJEU will follow the ECtHR and develop a rights hierarchy in the pending case on the EAW, *Radu and Melloni*.¹²⁸

The Burden of Proof

The contested nature of the burden of proof to rebut the presumption of compliance is reflected in the range of arguments presented to the CJEU on this point: The applicants, AI and AIRE Centre argued that the transferring state was obliged to assess compliance with Article 18 EUCFR, the Asylum Directives and DR and indeed, all the EUCFR provisions.¹²⁹ In contrast, Belgium, Germany, France, the European Commission and UNHCR all argued that there was a presumption of compliance with EU law, although it was rebuttable. The UK sought a high threshold for rebutting this presumption, only arising in 'extraordinary circumstances' of clear rebuttal.¹³⁰ The Irish, Ita-

115 Directive 2011/51/EU of 11 May 2011 amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection [2011] OJ L132/1.

116 Article 52(3) EUCFR.

117 See further MT Gil-Bazo 'The Charter of Fundamental Rights of the European Union and the Right to be Granted Asylum in the Union's Law' (2008) 27 *Refugee Survey Quarterly* 33.

118 M Den Heijer 'Whose Rights and Which Rights? The Continuing Story of *Non-refoulement* under the European Convention on Human Rights' (2008) 10 *EJML* 277.

119 Application No 42367/98 *Ould Barar v Sweden* 19 January 1999 illustrates that the ECtHR is open to claims under Article 4 ECHR, but found no risk of treatment contrary to Article 4 ECHR on return in the particular case.

120 Application No 17387/03 *Tomic v UK* 14 October 2003.

121 *Soering*, above n 100; Application No 12747/87 *Drozdz and Janousek v France and Spain* 26 June 1992 (1992) 14 EHRR 745; Application Nos 46827/99 and 46951/99 *Mamatkulov v Turkey* 4 February 2005; Application No 71555/01 *Einhorn v France* 16 October 2001; Application No 35865/03 *Al-Moayad v Germany* 20 February 2007; Application No 56588/07 *Stapleton v Ireland* 4 May 2010; Application No 8139/09 *Othman (Abu Qatada) v United Kingdom* 17 January 2012.

122 Application No 17341/03 *F v UK* 22 June 2004.

123 Application No 27034/05 *Z and T v UK* 28 February 2006.

124 Above n 114.

125 Application No 8139/09 *Othman (Abu Qatada) v United Kingdom* 17 January

2012. Strasbourg came to a different conclusion to the House of Lords (who had unanimously come to the opposite conclusion in *RB (Algeria) v Secretary of State for the Home Department* [2009] UKHL 10, [2010] 2 AC 110).

126 *Ibid*, para 237.

127 *Ibid*, para XXX.

128 Cases C-396/11 *Radu* and C-399/11 *Melloni* (pending).

129 *ME* Opinion, para 41.

130 *ME* Opinion, para 42.

lian, Netherlands, Czech, Polish and Finnish governments all argued against a duty to examine compliance with the named sources, with Greece and Portugal going so far as to contend that it would be contrary to EU law for one Member State to review the conformity of the actions of another with EU law.¹³¹ The Court did not need to engage in the most pressing practical question, namely the standard for rebutting the presumptions of compliance. To resolve the case at bar, it simply stated the conclusive presumptions are 'precluded' by EU law.

NS/ME was an easy case, as the Strasbourg ruling in *MSS* is relied upon. The Court endorsed the approach of the Strasbourg Court, in particular its reliance on reports by NGOs, UNHCR and EU bodies. Yet, it explicitly left it up to the national systems to establish the rules on the burden and standard of proof. The principles of equivalence and effectiveness are applicable here, and may be invoked to challenge discriminatory or unduly restrictive evidential rules.¹³²

Strasbourg's approach to this matter has shifted over time. Although *TI v UK* established a strong principle, it was weak in practice given the low standards demanded in order to le-

NS/ME was an easy case, as the Strasbourg ruling in MSS is relied upon. The Court endorsed the approach of the Strasbourg Court.

gitimise the transfer. In light of *MSS*, it is tempting to sideline *KRS* as an aberrant Chamber decision, in particular for institutionalizing such strong presumptions of compliance as to allow for blind trust across the EU. The Grand Chamber in *MSS*, strongly endorsed by Luxembourg in *NS/ME*, reasserts *TI*'s strong principle of individual state responsibility, but requires authorities to have regard to general information, to the benefit of asylum seekers resisting transfer.

Against the backdrop of this Strasbourg resurgence, Luxembourg looks like a less robust human rights court. Its rhetoric seems to sanitise the Greek practices. Greece is 'overloaded' and that 'overloading' has 'effects' on asylum seekers. It bears the burden of 'illegal immigration' to the EU. However, in spite of these rhetorical quibbles, a Luxembourg endorsement of a Strasbourg ruling is legally transformative. For instance, when the CJEU in *NS/ME* holds the conclusive presumptions are 'precluded', this requires national judges to ignore any such legislative presumptions and give effective protection to the EU rights. Even if we read *NS/ME* as following Strasbourg to the letter, its transplantation to the EU context brings additional procedural protections.

IV. The Dublin Reform Process

The Court's systematic reading of the DR supports the view that there is a duty to apply the responsibility criteria in the DR. This reading of the DR belies the reality that the criteria

are rarely applied in practice at all. The asylum seekers who find themselves caught up in Dublin proceedings are the unlucky few. In fact, it appears that the criteria are 'unworkable and dysfunctional'¹³³, in that 'responsibility ultimately lies, in the vast majority of cases, with the State where the application was first filed.'¹³⁴ Article 80 TFEU now, post-Lisbon, provides that EU asylum policy is to 'be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States.' The entire Dublin System violates this principle. The ongoing reform process has failed to engage in a fundamental re-think of Dublin, much as it is needed.

The Commission's proposal to recast the DR entailed a suspension mechanism aimed to ensure that Member States whose asylum systems were under particularly heavy pressure were not placed under more pressure, and also to protect asylum seekers.¹³⁵ It now seems that the suspension mechanism has little political support within the Council. Instead, there is support for a mechanism for 'early warning, preparedness and management of asylum crises'.¹³⁶

The *NS/ME* ruling should not be seen as removing the need for a suspension mechanism. However the test for preventing removal is formulated, there are inherent institutional limits to a judicial remedy of suspending transfer in individual cases. Any such fundamental rights exception will always be reactive and *ad hoc*, rather than proactive and systematic.

V. Conclusion

Although a fundamental rethink of Dublin is warranted, in its absence, *NS/ME* is an important legal vindication of the rights of asylum seekers, with Luxembourg bolstering the Strasbourg ruling. Both Courts are agreed: Blind trust between governments is incompatible with fundamental rights. Legally, Luxembourg must protect human rights as least as robustly as Strasbourg. With that in mind, this note interprets the *NS/ME* test in line with *MSS*, mindful that Luxembourg will be called on to clarify whether EU law provides more extensive protection in due course.

131 *ME* Opinion, para 43.
132 Above n 108.

133 F Maiani & V Vevstad *Reflection Note on the Evaluation of the Dublin System and the Dublin III Proposal* (European Parliament, March 2009), 1. Available at: www.ulb.ac.be/assoc/odysseus/CEAS/PE410.690.pdf.

134 *Ibid*, 2. The authors' analysis is based mainly on the EU's own studies. They note in particular the scarcity of 'take charge' requests overall, in contrast to 'take back' requests, where a previous application was lodged in another Member State. Even if there is a 'take back' or 'take charge' request, transfers take place in an even smaller proportion of cases again.

135 Article 31, Recast Proposal for the Dublin Regulation. COM(2008) 820 final.

136 <http://www.statewatch.org/news/2011/nov/eu-council-dublin-ii-16782-11.pdf>