



THE DUBLIN III SYSTEM: MORE DEROGATIONS TO THE DUTY TO TRANSFER INDIVIDUAL ASYLUM SEEKERS?

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ABSTRACT: In the *C.K. et al. v. Republika Slovenija* ruling (judgment of 16 February 2017, case C-578/16 PPU), the Court of Justice ruled that the transfer of the asylum seeker should be suspended if the particular medical condition of the applicant is so serious as to provide substantial grounds for believing that the transfer would result in a real risk of inhuman or degrading treatment, within the meaning of Art. 4 of the Charter of Fundamental Rights of the EU. The Court thus qualifies its prior case law, ruling that not only risks stemming from systemic flaws but also circumstances affecting the individual situation of an asylum seeker can preclude the transfer under the Dublin system, in exceptional circumstances. After outlining the Court's reasoning, this contribution argues that this judgment changes the Court's approach to derogations under the Dublin system in a positive yet limited way; and that its case law on mutual trust as well as its approach to the case law of the European Court of Human Rights on the matter largely seems to remain unaffected.

KEYWORDS: CJEU – European Court of Human Rights – Dublin system – mutual trust – fundamental rights – systemic flaws.

I. INTRODUCTION

On 16 February 2017 the Court of Justice delivered its judgment in the case of *C.K. et al. v. Republika Slovenija*,¹ concerning the transfer of asylum seekers under the Dublin III Regulation.² The request for preliminary ruling has been made by the Slovenian Supreme Court in the proceedings between C.K., H.F. as well as their child and the Repub-

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¹ Court of Justice, judgment of 16 February 2017, case C-578/16 PPU, *C.K. et al. v. Republika Slovenija*.

² Regulation (EU) 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.

lic of Slovenia. This is the first case in which the Court is given the opportunity to comment on the new versions of Art. 3, para. 2, and Art. 17, para. 1, of the Dublin III Regulation as they resulted from a legislative reform in 2013.

Art. 3, para. 2, now enshrines in legislation a compulsory derogation from the duty to transfer asylum seekers among Member States where

“there are substantial grounds for believing that there are *systemic flaws* in the asylum procedure and in the reception conditions for applicants in [the Member State primarily designated], resulting in a risk of inhuman or degrading treatment within the meaning of Art. 4 of the Charter of Fundamental Rights” [emphasis added].

This derogation is inspired from the ruling of the Court of Justice in *N.S. et al.*³ according to which the possibility for a Member State to deal with an asylum application itself by virtue of the early version of the so-called “discretionary clause” was turned into an obligation in case of systemic flaws such as now described in Art. 3, para. 2.

The *C.K.* case allows the Court to clarify the relationship between the requirement of “systemic flaws” in the designated receiving State under the said Art. 3, para. 2, interpreted previously as the only ground for preventing transfers,⁴ and the discretionary clause that now stands as a distinct mechanism in the new Regulation under Art. 17, para. 1. This opportunity came up in the context of diverging case law between the Court of Justice and the European Court of Human Rights on the conditions to be met for compulsory derogations to the duty to transfer asylum seekers. While the European Court of Human Rights merely requires the existence of flaws which affect the *individual* situation of applicants for asylum, the Court of Justice maintains a higher threshold based on the existence of *systemic* flaws. The Court of Justice seeks to thereby protect the principle of mutual trust among the Member States of the EU on which the Dublin system is based.

The underlying question in *C.K.* was therefore whether Art. 3, para. 2, containing the systemic flaws test established by the Court of Justice, is the only compulsory derogation based on fundamental rights’ violation to the obligation to transfer asylum seekers among Member States; or whether, instead, this threshold should be lowered to ensure compliance with the European Convention on Human Rights’ (ECHR or Convention) standards in which case provisions such as the discretionary clause in Art. 17, para. 1, could be constructed so as to add compulsory derogations. As we shall see, the ruling *C.K.* constitutes only a mild step towards convergence of the two lines of case law. The facts of the case are as follows.

³ Court of Justice, judgment of 21 December 2011, joined cases C-411/10 and C-493/10, *N.S. et al. v. Secretary of State for the Home Department*.

⁴ This was decided in the specific “procedural” context of the case of *Abdullahi*; see Court of Justice, judgment of 10 December 2013, case C-394/12, *Shamso Abdullahi v. Bundesasylamt*.

II. FACTS AND LEGAL ISSUES BEFORE THE COURT

Ms C.K., a Syrian national who was six months pregnant, and her husband, Mr H.F., an Egyptian national, entered the territory of the Member States via Croatia on 16 August 2015. They were in possession of tourist visas issued by Croatia. The following day Ms C.K. and Mr H.F. entered Slovenia with false Greek identity papers, and lodged an application for international protection. Following the application, the Slovenian authorities submitted a request to Croatia, the Member State responsible pursuant to the Dublin III Regulation, to take over the responsibility for examining the applications.

In the meantime, Ms C.K. gave birth to a son, A.S., and lodged an application for international protection on his behalf. In January 2016, the Slovenian authorities received the medical records of the applicants, which described Ms C.K.'s high-risk pregnancy and her difficulties following childbirth, providing that she and her new-born son should remain at the reception centre in Slovenia because they were in need of care. Further psychiatric assessments indicated that Ms C.K. had suffered depression and periodic suicidal tendencies, attributable to the uncertainty surrounding her status.

Due to the critical circumstances in the case, the Slovenian authorities sought assurances from their Croatian counterparts concerning the appropriate reception conditions for the applicants and the Croatian authorities confirmed that the applicants would be provided with accommodation, appropriate care and necessary medical treatment. Consequently, the Slovenian authorities requested transfer of the applicants to Croatia.

By judgment of 1 June 2016, the Administrative Court in Slovenia annulled the transfer decision and suspended its enforcement, pending the adoption of a final decision in the administrative proceedings. Subsequently, the Supreme Court set aside the judgment of the Administrative Court holding that the second subparagraph of Art. 3, para. 2, of the Dublin III Regulation was not applicable since the existence of systemic flaws in the asylum procedure and reception conditions in Croatia had not been established. A report by the United Nations High Commissioner for Refugees (UNHCR) made it clear that the situation in Croatia is good, the access to care is guaranteed and emergency situations are accounted for. This was especially true for the Kutina Centre in Croatia, which is intended for vulnerable groups of asylum seekers and which is the centre that the applicants would be transferred to.

The last step for the appellants was a constitutional complaint before the Constitutional Court in Slovenia. On 28 September 2016, the Constitutional Court set aside the Supreme Court's judgment and referred the case back to that court. While the Constitutional Court agreed that the second subparagraph of Art. 3, para. 2, of the Dublin III Regulation was not applicable, since there are no systemic flaws in the asylum procedure and in the reception conditions in Croatia which might result in a risk of inhuman or degrading treatment within the meaning of Art. 4 of the Charter of Fundamental Rights of the EU (Charter), it considered that the applicants could not be transferred to Croatia before the Slovenian authorities have examined all the relevant circumstances, including the person-

al situation and state of health of the applicants. The Court referred to recital 32 of the Dublin III Regulation, which states that Member States must respect the requirements of Art. 33, para. 1, of the Geneva Convention on *non-refoulement* as well as Art. 3 ECHR prohibiting inhuman or degrading treatment and the relevant case law of the European Court of Human Rights, and pointed out that the criterion for examination under those provisions is wider than that of “systemic flaws” provided in Art. 3, para. 2, of the Dublin III Regulation. In the Constitutional Court’s view, the transfer itself could be injurious to the state of health of Ms C.K. and her son and this something the Slovenian authorities needed to examine before executing the transfer.

Following the judgment of the Constitutional Court, the Supreme Court decided to stay the proceedings and refer four questions to the Court of Justice in Luxembourg. The main question, in the view of the Constitutional Court, related to whether Art. 4 of the Charter must be interpreted as meaning that, in circumstances in which the transfer of an asylum seeker with a particularly serious mental or physical illness would result in a real and proven risk of a significant and permanent deterioration in the state of health of the person concerned, that transfer would constitute inhuman and degrading treatment within the meaning of that article. If the answer to the latter question would be affirmative, the referring court also asked whether it would be required to apply the discretionary clause (Art. 17, para. 1, of the Dublin III Regulation) and examine the asylum application itself.

The following section presents the Court’s decision, including a brief consideration of the Opinion of AG Tachev.⁵

III. KEY ASPECTS OF THE OPINION OF THE ADVOCATE GENERAL AND THE JUDGMENT

The AG Tachev concluded that only systemic flaws in the asylum procedure and reception conditions of the Member State responsible could require the prevention of the Dublin transfer. This restrictive interpretation of the obligation not to transfer applicants under the new version of Art. 3, para. 2, in the Dublin III Regulation was based on the need to ensure effectiveness of the Dublin system and referring to the importance of the principle of mutual trust between the States.⁶ The Advocate General referred to the *N.S. et al.*⁷ and *Abduallahi*⁸ judgments. In the latter case, which pre-dates the Dublin III reform, the Court of Justice explicitly stated that *only* systemic flaws could justify

⁵ Opinion of AG Tachev delivered on 9 February 2017, case C-578/16 PPU, *C.K. et al. v. Republika Slovenija*.

⁶ *Ibid.*, para. 52.

⁷ *N.S. et al. v. Secretary of State for the Home Department*, cit.

⁸ *Shamso Abdullahi v. Bundesasylamt*, cit.

the prevention of the Dublin transfer.⁹ AG Tanchev acknowledged that his position did not meet the ECHR standards,¹⁰ but insisted that the Court of Justice is not required to follow the approach taken by the European Court of Human Rights and “it would therefore be wrong to regard the case-law of the European Court of Human Rights as a source of interpretation with full validity in connection with the application of the Charter”.¹¹

Yet, the Court of Justice deviates in its judgment from the approach suggested by the Advocate General. The Court ruled that the transfer of the asylum seeker should be suspended if the particular medical condition of the applicant is so serious as to provide “substantial grounds for believing” that the transfer itself would result in “a real risk of inhuman or degrading treatment, within the meaning of Art. 4 of the Charter”.¹² National courts should determine if this is indeed the case and if so, suspend the transfer until the health of the applicant permits it.¹³

In this case, there was no evidence that there were “systemic flaws” in the asylum procedure and the conditions for the reception of asylum seekers in Croatia; on the contrary, it was clear from the assurances obtained that the appellants in the proceedings would receive accommodation, the necessary medical treatment and appropriate care.¹⁴

The Court, however, emphasised that it cannot be ruled out that the transfer itself, irrespective of the reception conditions in Croatia, could result in a real risk of inhuman and degrading treatment for the person concerned due to her particularly serious state of health.¹⁵ Accordingly, the authorities of the Member State concerned are under an obligation to assess the risk of such consequences before deciding on the transfer.¹⁶

The Court stressed that the change in its approach, whereby it now allows for a derogation to the duty to transfer besides that to be found in Art. 3, para. 2, of the Dublin III Regulation on “systemic flaws”, stems from the increased standard of fundamental rights protection in the Dublin III Regulation in comparison to the Dublin II.¹⁷ Moreover,

⁹ *Ibid.*, para. 60.

¹⁰ AG Tanchev pointed out that while the Court Justice requires “systemic flaws” in the Member State responsible in order to prohibit the transfer of an applicant to that Member State, the European Court of Human Rights merely requires existence of flaws which affect the applicant’s individual situation (Opinion of AG Tanchev, *C.K. et al. v. Republika Slovenija*, cit., para. 47).

¹¹ Opinion of AG Tanchev, *C.K. et al. v. Republika Slovenija*, cit., para. 53.

¹² *C.K. et al. v. Republika Slovenija*, cit., para. 90.

¹³ *Ibid.*

¹⁴ *Ibid.*, para. 71. In addition, both the Supreme Court and the Constitutional Court considered in their judgments that there were no systemic flaws in the asylum procedure and in the reception conditions for asylum seekers in Croatia, which resulted in a risk of inhuman or degrading treatment within the meaning of Art. 4 of the Charter.

¹⁵ *C.K. et al. v. Republika Slovenija*, cit., paras 65-66 and 73.

¹⁶ *Ibid.*, para. 75.

¹⁷ *Ibid.*, paras 62-63 and 94. The expression “Dublin II Regulation” refers to Council Regulation (EC) 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member

this interpretation was held to fully respect the principle of mutual trust “since it ensures that the exceptional situations are duly taken into account by the Member State [requesting the transfer]”.¹⁸ Indeed, the Court’s solution is closely linked to the very exceptional situation of an asylum seeker whose state of health is particularly serious.¹⁹ As for the Member States’ responsibility under the discretionary clause contained in Art. 17, para. 1, of the Dublin III Regulation, the Court held that the Member State in question has the possibility to examine the asylum application itself if the state of health of the asylum seeker was not expected to improve. The Court emphasised, however, that this provision does not oblige a Member State hosting an asylum seeker to examine the said application itself, even when read in the light of Art. 4 of the Charter.²⁰

IV. COMMENTS

The *C.K.* judgment has been perceived as a positive development in the Court’s case law on the Dublin system.²¹ The Court qualifies its prior case law, ruling that not only risks stemming from systemic flaws but also flaws affecting the individual situation of an asylum seeker may preclude the transfer under the Dublin system in given circumstances.²² This is indeed a step in favour of greater fundamental rights’ protection (see, *infra*, sub-section IV.1). Yet, the ruling remains closely connected to the facts of the case and does not seem to affect the Court’s position on mutual trust (*infra*, sub-section IV.2). As a consequence, the relationship between the Court’s case law and that of the European Court of Human Rights on the matter remains a grey zone (*infra*, sub-section IV.3).

IV.1. ONE STEP FORWARD

In *C.K.*, the Court of Justice decided to allow a new form of derogation to the duty to return asylum seekers under the Dublin system besides that provided for in Art. 3, para. 2, on “systemic flaws” in the Dublin III Regulation. The Court has therefore interpreted the said Art. 3, para. 2, as not excluding the possibility that considerations linked to real and proven links of inhuman and degrading treatment, within the meaning of Art. 4 of the Charter, might, in exceptional situations such as those envisaged in this judgment, prevent the transfer of a particular asylum seeker. This approach brings the Court of Justice’s case law one step closer to that of the European Court of Human Rights.

State responsible for examining an asylum application lodged in one of the Member States by a third-country national.

¹⁸ *C.K. et al. v. Republika Slovenija*, cit., paras 88 and 95.

¹⁹ *Ibid.*, para. 74.

²⁰ *Ibid.*, para. 88.

²¹ C. RIZCALLAH, *The Dublin system: the ECJ Squares the Circle Between Mutual Trust and Human Rights Protection*, in *EU Law Analysis*, 20 February 2017, eulawanalysis.blogspot.nl.

²² *Shamso Abdullahi v. Bundesasylamt*, cit., para. 60.

The Court of Justice stated that this change in its Dublin case law stems from the increased standard of fundamental rights protection in the Dublin III Regulation in comparison to the Dublin II Regulation, which was applicable in its earlier rulings. It emphasised that the Dublin III Regulation differs in “essential respects” from the Dublin II Regulation, in terms of the rights given to asylum seekers.²³ In this context, the Court first referred to recital 9 in which the EU legislature expressed the intention to make the necessary improvements in the Dublin system with respect to its effectiveness but also to the protection granted to asylum seekers. Furthermore, the Court referred to recital 32 and 39 which now explicitly provide that Member States are bound by their obligations under instruments of international law, including the relevant case law of the European Court of Human Rights, and by Art. 4 of the Charter.

These references to the European Court of Human Rights are noteworthy since this Court is more protective of applicants in asylum cases than the Court of Justice that only makes derogation to mutual trust when there exist “systemic flaws”, as noted in section I.²⁴ The disagreement between Luxembourg and Strasbourg on the application of, and derogations to, the principle of mutual trust has been one of the reasons why the Court of Justice rejected the Draft Accession Agreement and, ultimately, the EU’s accession to the ECHR. In Opinion 2/13,²⁵ the Court of Justice determined, *inter alia*, that accession is problematic because it would require EU Member States to check another Member State’s observance of fundamental rights notwithstanding the obligation of mutual trust, which governs the relationship between those States. The Court of Justice insisted that the principle of mutual trust is of fundamental importance in EU law and that it requires EU Member States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law.²⁶ This imposed mutual trust does not sit well with the ECHR system, however, since ECHR Contracting Parties are required to ensure that the Convention rights are respected rather than relying on or trusting other States to comply with fundamental rights.²⁷

Unsurprisingly, Opinion 2/13 has caused much tension between the two courts. The former President of the European Court of Human Rights, Dean Spielmann, commented on the Opinion in unusually strong language, saying that Opinion 2/13 was a “great disappointment” and that the Court will do what it can in cases before it to “protect citizens

²³ *C.K. et al. v. Republika Slovenija*, cit., para. 62. See also Court of Justice, judgment of 7 June 2016, case C-63/15, *Ghezelbash*, para. 34.

²⁴ This was also pointed out in the judgment of the Slovenian Constitutional Court.

²⁵ Court of Justice, opinion 2/13 of 18 December 2014.

²⁶ *Ibid.*, paras 191-195.

²⁷ This is the *Soering* line of cases; see European Court of Human Rights, judgment of 7 July 1989, no. 14038/88, *Soering v. United Kingdom*. However, the Court has made exceptions too, e.g. European Court of Human Rights, judgment of 18 June 2013, no. 3890/11, *Povse v. Austria*.

from the negative effects of this situation”.²⁸ The Court of Justice’s approach in *C.K.* may thus be seen as an attempt to restore that relationship, which has generally been one of comity and cooperation.

IV.2. MUTUAL TRUST UNAFFECTED

While this reading of the Dublin III Regulation does allow for an alternative route to exclusive reliance on Art. 3, para. 2, in order to derogate from the duty to transfer, the Court of Justice’s approach in *C.K.* does not however seem to call into question the “systemic flaws” test, which will continue to apply in most cases. This is apparent in the wording of the Court throughout the judgment, where the Court stressed several times the exceptional nature of the situation and the seriousness of the state of health of the applicants.

Furthermore and importantly, the principle of mutual trust is not affected in this case. The obligation to ensure that Art. 4 of the Charter is respected lies solely on the Slovenian authorities having requested the Dublin transfer since they are required to ensure that the transfer *itself* would not result in inhuman and degrading treatment of the applicants, and thus does not raise questions of mutual trust between Slovenia and Croatia. The Slovenian court may decide to postpone the transfer because the transfer itself could result in inhuman and degrading treatment of the persons concerned, not because the Slovenian authorities do not trust the Croatian authorities’ compliance with fundamental rights.

The Court seems to exclude that the same derogation would apply if it is not the transfer itself that could lead to inhuman and degrading treatment of the applicants but rather the asylum procedure and reception conditions in the Member State responsible, where no systemic flaws have been established in those respects.²⁹ It remains to be seen, given the Court’s general reluctance to acknowledge any derogation to the principle of mutual trust,³⁰ to what extent and under which circumstances the Court will be willing to permit derogations such as that granted in *C.K.*, besides that provided in Art. 3, para. 2, of the Dublin III Regulation.

²⁸ Registry of the European Court of Human Rights, Annual Report 2014, March 2015, p. 6, echr.coe.int.

²⁹ The Court made this distinction too in paragraph 94 of the judgment, stating that the outcome in this case differs from the outcome in *Abduallah*, since the latter judgment involved a national who had not claimed that his transfer would, in itself, be contrary to Art. 4 of the Charter.

³⁰ E.g. Court of Justice, judgment of 29 January 2013, case C-396/11, *Radu*; Court of Justice, judgment of 26 February 2013, case C-399/11, *Melloni*; and also Opinion 2/13, cit.

IV.3. THE RELATIONSHIP WITH THE ECHR AND THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS: STILL A GREY ZONE

As a consequence, it is questionable whether this judgment is in full compliance with the Convention as interpreted by the European Court of Human Rights. In the present case, the Court of Justice placed specific emphasis on compliance with Art. 3 of the ECHR and stated that “case-law of the European Court of Human Rights relating to Article 3 of the ECHR [...] *must* be taken into account when interpreting Article 4 of the Charter” [emphasis added].³¹ This is quite remarkable as the Court has held previously that the ECHR “does not constitute, as long as the European Union has not acceded to it, a legal instrument which has been formally incorporated into EU law”. While the Court has always recognised the importance of the ECHR and the Strasbourg case law in view of Art. 6 TEU and Art. 52, para. 3, of the Charter, it does not consider itself formally bound by it when interpreting EU law. The Court went as far as to hold that EU law must therefore be examined “solely in the light of the fundamental rights guaranteed by the Charter”.³² The situation is different in *C.K.*, presumably because recital 32 of the Dublin III Regulation unequivocally provides that in the context of this Regulation Member States are bound by the relevant case law of the European Court of Human Rights.

Nevertheless, the *C.K.* ruling by the Court of Justice as examined above seems to contrast with the approach of the European Court of Human Rights in its *Tarakhel* judgment. In *Tarakhel*, the European Court of Human Rights ruled that Member States must carry out a “thorough and individualised examination of the situation of the person concerned” before making the transfer when there is a risk of inhuman and degrading treatment, irrespective of the source of that risk.³³ This suggests a more flexible description of “exceptional situations” justifying a derogation to the duty to transfer under the Dublin system than the one provided in the *C.K.*, which remains case-specific and narrow. In that context, it is interesting to note that the Court of Justice did not refer to the *Tarakhel* ruling in its analysis and did not fully explain how its interpretation of Art. 4 of the Charter relates to the European Court of Human Rights interpretation of Art. 3 of the Convention.

³¹ *C.K. et al. v. Republika Slovenija*, cit., paras 67-68.

³² Court of Justice, judgment of 15 February 2016, case C-601/15 PPU, *J.N. v. Staatssecretaris voor Veiligheid en Justitie*, paras 45-46. See also Court of Justice, judgment of 24 November 2010, case C-571/10, *Kamberaj*, paras 60-61 and Court of Justice, judgment of 26 February 2013, case C-617/10, *Akerberg Fransson*, para 44.

³³ European Court of Human Rights, judgment of 4 November 2014, no. 29217/12, *Tarakhel v. Switzerland*, paras 103-104.

V. CONCLUSION

The *C.K.* ruling thus introduces welcome flexibility in making derogations to the duty to transfer under the Dublin III Regulation possible. Yet, this flexibility is built in the transfer in itself having to comply with the prohibition of inhuman or degrading treatment within the meaning of Art. 4 of the Charter. The ruling does not affect the test to be applied when the asylum procedure and conditions for the reception of asylum seekers in another Member State are a threat to the said fundamental right. In that context, Art. 3, para. 2, of the Dublin III Regulation requesting the existence of “systemic flaws” is not exclusive of other derogations but continues to act as the gate keeper to mutual trust in the view of the Court of Justice of the EU.