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**An Individual Legal Remedy against the Refusal of a Take Charge Request under the Dublin III
Regulation**

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1. Introduction

This expert opinion was written at the request of lawyer Flip Schüller from law firm Prakken d'Oliveira, who represents an applicant in a recent case of the District Court of The Hague (*Rechtbank Den Haag*).¹ It concerns the question whether an individual has the right to seek a legal remedy under the Dublin III Regulation against a refusal of a take charge request submitted by another EU Member State.²

This question is relevant in the situation where an asylum seeker enters Member State A but has a family member who is an applicant for international protection (hereinafter: asylum seeker) or beneficiary of international protection in Member State B. Under Article 21 of the Dublin III Regulation, authorities in Member State A can ask Member State B to take responsibility (take charge) of the asylum seeker's application. If Member State B rejects this take charge request, the question arises whether the asylum seeker can appeal the decision of Member State B.

In practice, this is a common situation, in particular for asylum seekers arriving into Greece who wish to be transferred to where family members are, usually the Netherlands, Germany, Austria, or Sweden. This is a common situation for two reasons. Firstly, Greece is geographically the first point of entrance to Europe for many asylum seekers. Secondly, the Netherlands, Germany, Austria and Sweden have received many asylum seekers and granted international protection to many of them in the past.³ Resultantly, many asylum seekers have relatives who have been granted asylum or who are still in the asylum procedure in those countries. Out of 3,275 outgoing requests based on family reunification provisions in 2019, 1,819 were accepted by other Member States.⁴

In a report by the NGO Safe Passage and the Greek organisation Praksis, the complications and realities of take charge requests were explored. This report exposed that many requests are rejected in the first instance and delayed due to lack of legal support at reception centres in Greece.⁵ It also highlighted that delays were often caused by the Member State being asked to take charge of the procedure, singling out the Netherlands as being one of the States to take over 90 days to respond to requests, despite reminders from the Greek Dublin Unit.⁶ Furthermore, issues have been raised with requested Member States rejecting take charge requests by imposing strict evidentiary requirements (such as translated and authenticated proof of the family ties) and DNA tests.⁷ This is a particular issue

¹ District Court The Hague, 9 July 2019, ECLI:NL:RBDHA:2019:6868.

² Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) [2013] OJ L 180/31 (Dublin III Regulation). If not designated another piece of legislation, Articles mentioned in this piece refer to the Dublin III Regulation.

³ Pew Research Centre, 'Number of Refugees to Europe Surges to Record 1.3 Million in 2015' available at <https://www.pewresearch.org/global/2016/08/02/number-of-refugees-to-europe-surges-to-record-1-3-million-in-2015/> (Accessed 20 July 2020).

⁴ See <https://www.asylumineurope.org/reports/country/greece/asylum-procedure/procedures/dublin> (Accessed 7 July 2020).

⁵ Safe Passage and Praksis, 'Caught in the middle: Unaccompanied children in Greece in the family reunification process' available at <https://static1.squarespace.com/static/5c2531f131d4dfb9bfbfd68af/t/5dc190d5010ac0270836d6b5/1572969631866/Caught+in+the+Middle.pdf> (Accessed 20 June 2020).

⁶ Ibid.

⁷ European Council on Refugees and Exiles (ECRE), 'The Implementation of the Dublin Regulation 2018' (March 2019) Asylum Information Database (AIDA) available at http://www.asylumineurope.org/sites/default/files/aida_2018update_dublin.pdf (Accessed 20 June 2020) p 9.

with regard to take charge requests coming from Greece, where 70% of its outgoing requests in 2018 were in relation to family reunification.⁸ Evidentiary requirements imposed by Member States that go beyond those stipulated in the Dublin III Regulation may undermine an effective and fast determination of the Member State responsible and therefore ultimately frustrate the aim of the Regulation. This can be further exacerbated by the lack of an effective remedy in the requested Member State.

In the case that gave rise to this expert opinion, the Dutch highest administrative court (*Afdeling bestuursrechtspraak van de Raad van State*, hereinafter: Council of State) held that an individual applicant does not have the right to a remedy before the national courts in the Netherlands (the requested state) against the rejection of the take charge request.⁹ However, courts in other Member States have found the opposite.

In the absence of an *acte clair*, it is suggested in this expert opinion that the lack of legal clarity must be resolved by the Court of Justice of the European Union (CJEU). This expert opinion will therefore formulate preliminary questions that could be submitted to the CJEU. Moreover, it will provide an opinion as to how the questions should be answered.

1.1 Factual Background to the Expert Opinion

In December 2018, the Council of State ruled that Article 27 of the Dublin III Regulation only provides a legal remedy against a ‘transfer decision’ and that allowing an appeal against the refusal of a take charge request would be contrary to the aim of the interstate resolution procedures in the Dublin III Regulation.¹⁰ These procedures are laid down in Article 37 of the Dublin III Regulation and Article 5(2) of the Implementing Regulation¹¹. The Council of State’s ruling explicitly denies the right to appeal against the refusal of a take charge request, resulting in a lack of remedies for those asylum seekers separated from their families.

Following this, in July 2019, the District Court of The Hague held that the reasoning of the Council of State (that a right to appeal against a refusal of a take charge request would interfere with the interstate reconsideration mechanism in the Dublin III Regulation) did not apply in the case before it, due to the time limits for this procedure already being expired.¹² It ruled that a decision by a Member State to refuse a take charge request constitutes a factual act of an administrative authority, which can be objected to under administrative law and then appealed before the national court.

1.2 Necessity of Preliminary Questions

Contrary to the Dutch Council of State, courts in other Member States like Germany and the United Kingdom have allowed a legal remedy in the requested Member State against the refusal of a take

⁸ European Council on Refugees and Exiles (ECRE), ‘The Implementation of the Dublin Regulation 2018’ (March 2019) Asylum Information Database (AIDA), p 9. available at http://www.asylumineurope.org/sites/default/files/aida_2018update_dublin.pdf (Accessed 20 June 2020).

⁹ Council of State 21 December 2018, ECLI:NL:RVS:2018:4298.

¹⁰ Ibid, paras 3.1. and 3.2.

¹¹ Commission Implementing Regulation (EU) No 118/2014 of 30 January 2014 amending Regulation (EC) No 1560/2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national [2014] OJ L 39 (Implementing Regulation).

¹² District Court The Hague 9 July 2019, ECLI:NL:RBDHA:2019:6868.

charge request.¹³ At the same time, in Sweden and Austria an individual remedy has been refused. Thus, there is a discrepancy in the interpretation of the individual remedies under the Dublin III Regulation. Lacking an *acte clair*, these divergences in judicial decisions with regard to the scope of the fundamental right to effective judicial protection related to the fundamental right to family reunification and the best interest of the child under EU law, requires clarification by the CJEU.¹⁴

The broader view of this expert opinion is the consideration of the importance of family unity and the best interests of the child in the context of remedies under Dublin III. The urgency to ask preliminary questions is paramount when one is aware of the devastating living conditions asylum seekers and especially (unaccompanied) minors in Greece are exposed to. Described by NGOs as 'uninhabitable', 'alarming' and 'vermin infested'¹⁵, the conditions in Greek camps are not adequate for any individual for a long period of time, and especially not for a minor, who is entitled to join family somewhere else.¹⁶

NGO reports and the national case law discussed in chapter 6 of this expert opinion illustrate that cases in the Netherlands like the one before the District Court of The Hague are not stand-alone cases and preliminary questions could therefore benefit an even broader group than originally evident.

1.3 Outline of the Expert Opinion and Methodology

This expert opinion will first briefly introduce the Dublin system and explain the difference between requests to take charge of application for international protection (hereinafter: asylum application) and requests to take back an asylum seeker. Chapter 3 highlights the fundamental rights at stake in take charge requests based on Articles 8-10 of the Dublin III Regulation in order to show the importance of the right to an effective remedy. It particularly discusses the right to family life and the best interests of the child. Chapter 4 will then examine the right to an effective remedy laid down in Article 27 of the Dublin III Regulation in the light of Article 47 of the Charter of Fundamental Rights of the European Union¹⁷. It will conclude that in light of the fundamental rights at stake, an asylum seeker should have an effective remedy against a Member State's decision to reject the request to take charge of the applicant's asylum claim. Chapter 5 will then assess whether the interstate conciliation and re-examination procedures provide such effective remedy. It concludes that this is not the case. Finally, Chapter 6 employs a comparative legal analysis of domestic case law from five Member States. This Chapter shows that there is divergent case law concerning the interpretation of Article 27 of the Dublin III Regulation, which may be reason to refer preliminary questions to the CJEU.

Methodology

The research is based on a normative legal approach. The relevant EU law provisions and their link to the problem at hand were investigated, by looking at the corresponding case law and literature. Other

¹³ See further Chapter 6 of this expert opinion.

¹⁴ CJEU Case 283/81 *C.I.L.F.I.T.* [1982].

¹⁵ 'No end in sight, the mistreatment of asylum seekers in Greece' (Refugee Rights Europe, 2019) https://refugee-rights.eu/wp-content/uploads/2019/08/RRE_NoEndInSight.pdf (Accessed 20 June 20). (Accessed 20 June 20).

¹⁶ See for example Safe Passage and Praxis, 'Caught in the middle: Unaccompanied children in Greece in the family reunification process' available at <https://static1.squarespace.com/static/5c2531f131d4dfb9bfbfd68af/t/5dc190d5010ac0270836d6b5/1572969631866/Caught+in+the+Middle.pdf> (Accessed 20 June 20).

¹⁷ Charter of Fundamental Rights of the European Union [2012] OJ C 326/391 (the Charter).

sources chosen were reports from NGOs, which gave practical information and insight into those affected by the lack of legal clarity investigated. A valuable source was direct communication with Equal Rights Beyond Borders, an NGO that is specialised in family reunification cases and works in the hotspot refugee camp in Chios as well as in Athens and Berlin.¹⁸

This research does not provide a complete overview of the topic discussed, as it is limited to available case law, accessible information and documents in languages that the authors are familiar with. Therefore, this opinion can only present a selective view of the questions at stake but does so in the detail and analysis needed to provide a relevant and well-supported stance on the problem at hand.

1.5 Preliminary questions

This expert opinion proposes the following preliminary questions to the national courts of the Member States:

1. Must Article 27 of the Dublin III Regulation, read in conjunction with Recital 19 of that Regulation, and in the light of Article 47 of the Charter, be interpreted as meaning that it requires a Member State that is requested to take charge of an application for international protection under Articles 8-10 of that Regulation by another Member State, to provide the applicant for international protection concerned an effective remedy against the decision to reject this request?
2. Should the Court answer the first question in the negative, does Article 47 of the Charter in conjunction with the fundamental right to family life and the best interests of the child, as protected in Article 7, respectively Article 24 of the Charter, and as set out in Articles 8-10 and Recital 19 of the Dublin III Regulation, directly require a Member State that is requested to take charge of an application for international protection under Articles 8-10 of that Regulation by another Member State, to provide the applicant for international protection concerned an effective remedy against the decision to reject this request?

¹⁸ See for information: <https://www.equal-rights.org/> (Accessed 7 July 2020).

2 The Dublin III Regulation

This expert opinion concerns the Dublin III Regulation and its application by Member States, particularly with regard to an individual's right to an effective remedy. This chapter will provide a brief background to the Dublin III Regulation. It will first outline its system. Subsequently, it explains the difference between a take charge request and a take back request within the legal framework. This is a crucial distinction regarding the explicit availability of legal remedies in Article 27 Dublin III Regulation.

2.1 The Dublin System: an Overview

The Dublin system was formed to establish a mechanism that efficiently determines the Member State responsible for an asylum application lodged in the EU territory, to ensure that only one Member State has the task of examining such a request. The allocation of responsibility for asylum requests amongst Member States was deemed necessary, in order to protect the integrity of the internal open border regime of Schengen. It was established to prevent 'forum shopping', whereby asylum seekers move from State to State with a view of choosing a destination with the perceived most generous asylum policies. Efficient responsibility allocation mechanisms would furthermore prevent a situation of 'refugees in orbit', securing the aim of access to asylum protection in Europe.¹⁹

The Dublin system was originally established by the Dublin Convention in 1997²⁰, but was later replaced by the Dublin II Regulation²¹ in 2003 to form a part of the Common European Asylum System (CEAS). In 2013, the Dublin system was subject to a recast procedure to form the Dublin III Regulation, which remains in force today. Proposals to adopt a Dublin IV Regulation are currently being discussed.²²

A hierarchy of criteria was created in the Dublin system for Member States to allocate responsibility. The Dublin III Regulation contains two different types of responsibility determining rules, which can be distinguished on the basis of their fundamental rights implications. On the one hand, Articles 8-11, but also Article 16 of the Regulation, serve to promote family unity deriving from fundamental rights. On the other hand, there are rules based solely on administrative procedures – the existence of visas, residence permits, illegal entry or failure to comply with time limits by the Member States.²³

Where no responsible Member State can be designated on the basis of the criteria, the first Member State in which the asylum claim is lodged, is responsible.²⁴ When an asylum application is made in a Member State, that State can either, on the basis of the Dublin system, transfer the asylum

¹⁹ Hemme Battjes, *European Asylum Law and International Law* (Leiden/Boston: Martinus Nijhoff Publishers, 2006) p 388 and CJEU Cases C-411/10 and C-493/10 *N.S. and Others* [2011] para 79.

²⁰ Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities [1997] OJ C 254/1 (Dublin Convention).

²¹ Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national [2003] OJ L 50/1 (Dublin II Regulation).

²² Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) COM/2016/0270 final.

²³ Arts 12-15 Dublin III Regulation.

²⁴ Art 3(2) Dublin III Regulation.

seeker lodging the application to the responsible Member State through a take charge or take back request,²⁵ or examine the application itself through a discretionary clause.²⁶

2.2 Take Charge and Take Back Requests

Under the Dublin system, there are two different mechanisms available for Member States to request another Member State to take responsibility for an asylum application. On the one hand, a take charge request is issued when the requesting State (the State sending the take charge request) believes that another Member State (the requested state) is responsible based on the determined criteria. Take charge requests usually concern applicants who have not applied for international protection in another Member State or previously entered another Member State. This includes applicants, who have family in the requested State or other documentation and legal entry reasons for their application to be considered in the requested state.²⁷ On the other hand, a take back request refers to situations where the asylum seeker (who is in the requesting state) has already submitted an asylum application or had a Eurodac hit in the Member State receiving the request.

Both responsibility assigning mechanisms, if accepted, can lead to a transfer decision, according to which the applicant will be transferred to the Member State deemed responsible under the criteria. The distinction between the grounds under which a take charge request can be made compared to a take back request is important, as it highlights that a take charge request refers to situations where the correct application of the criteria in the Dublin system is at stake.

Take charge request

Article 21(1) of the Dublin III Regulation provides the possibility for a Member State, where an application for asylum has been lodged, to request another Member State to take charge of the applicant. In its case law, the CJEU has clearly stated that a Member State where an application has been lodged, may send another Member State a take charge request, *only* if the first Member State considers that the second Member State is responsible for examining that application in accordance with the Dublin criteria laid down in Chapter III of the Regulation.²⁸ This must be done within three months of the date on which the asylum application was lodged. The requested Member State must then provide a decision within two months of receipt of the request.

Article 22(2) to (5) of the Dublin III Regulation outlines the examination of the elements of proof and circumstantial evidence enabling the Dublin criteria to be applied, and sets out the standard of proof required to establish that the requested Member State is responsible.

Take back request

Articles 23(1) and Article 24(1) of the Dublin III Regulation govern the take back procedure. Article 23(1) states that a Member State may submit a take back request, if it considers that another Member State is responsible in accordance with Article 20(5) and Article 18(1)(b), (c) or (d) of the Dublin III Regulation. These Articles refer to situations where the applicant has made an application in a

²⁵ Arts 21(1), 23(1) and 24(1) Dublin III Regulation.

²⁶ Art 17 Dublin III Regulation.

²⁷ Eurostat, 'Dublin statistics on countries responsible for asylum application', data extracted September 2019 available at https://ec.europa.eu/eurostat/statistics-explained/index.php/Dublin_statistics_on_countries_responsible_for_asylum_application#Dublin_requests (Accessed 7 July 2020).

²⁸ CJEU Joined Cases C-582/17 & 583/17 *H. and R.* [2019] para 55. Emphasis added.

Member State, which is either under examination, or has been withdrawn or refused and the applicant has re-applied in another Member State where he or she does not have a residence document. Article 24(1) also outlines situations where a Member State may submit a take back request when no new application for asylum has been lodged, but the applicant has no legal residence and the Member State considers another Member State responsible on the grounds of Article 18(1)(b), (c) or (d) or Article 20(5) of the Dublin III Regulation.

Similar to a take charge request, a take back request must be made within two months of receiving a Eurodac hit. If it is based on any other evidence, it must be sent to the requested Member State within three months of the date on which the asylum application was lodged. A take back request must be submitted using a standard form and must include the same proof or circumstantial evidence as outlined for take charge requests.²⁹

However, as highlighted by the CJEU in its judgment in *H & R*, there are substantial differences between the two procedures.³⁰ This case concerned the right to an effective remedy in take back procedures under the Dublin III Regulation. The CJEU held that the competent authorities of the requesting Member State are not required to determine the Member State responsible by taking consideration of the criteria laid down in Chapter III of the Dublin III Regulation, before they make a take back request. It considered that, unlike a take charge request, for which the process of determining the Member State responsible for examining the application on the basis of these criteria is of 'crucial importance', a take back request can only be made in relation to Articles 18 and 20(5) of the Regulation.³¹

Justiciability

As outlined previously in the introduction, this expert opinion concerns the justiciability of a Member State's refusal to accept a take charge request. In light of the family unity considerations, which are a priority in the Dublin criteria, the outcome of take charge requests thus have significant implications for the rights of the applicant. The next chapter will address these implications, in order to show the importance of the right to an effective remedy for these applicants.

²⁹ Art 24(5) Dublin III Regulation.

³⁰ CJEU Joined cases C-582/17 & 583/17 *H. and R.* [2019].

³¹ *Ibid* paras 57-65.

3. Fundamental Rights at Stake

This chapter will examine the fundamental rights at stake, in the situation where an asylum seeker enters Member State A but has a family member who is an asylum seeker or beneficiary of international protection in Member State B, and Member State A for this reason refers a take charge request to Member State B. It will first show that, in the history of the Dublin system, the protection of fundamental rights has become stronger. After that, the right to family life and the best interests of the child will be discussed. The aim of this chapter is to show the importance of the applicant's ability to challenge a decision to refuse a take charge request.

3.1 History of the Dublin System: towards stronger protection of fundamental rights

Although originally established as a system to allocate responsibility for asylum applications between Member States, the Dublin system has always included provisions to protect the fundamental rights of asylum seekers within this process, especially family unity and the best interests of the child. From its infancy, the EU Member States establishing the Dublin system, have recognised that in the criteria on the determination of the responsible Member State, the protection of minors and family reunion should take precedence over other criteria.³² Although a focus on the establishment of an efficient responsibility determination mechanism was evident in the Dublin II Regulation, it still explicitly allowed for derogations on humanitarian grounds or considerations of family union.³³

The Dublin III Regulation reflects a further step towards the protection of individuals' rights, with family unity being valued as an equally important aim of the Dublin system as speedy responsibility allocation procedures. Recitals 5 and 9 of the Dublin III Regulation both show that the Dublin system not only demands a 'swiftness and rapidity in the interest of States' and the 'effectiveness of the Dublin system'³⁴, but also 'objective and fair criteria for the person concerned' and 'the protection granted to applicants under that system'. Recital 4 and Article 1 of the Dublin III Regulation seek for a 'clear and workable method for determining the Member State responsible for the examination of an asylum application'.

The increasing emphasis in the Dublin system towards recognising individual rights of asylum seekers has been acknowledged in CJEU jurisprudence. In the landmark decision of *Ghezelbash*, the CJEU held that the Dublin III Regulation was not confined to merely govern relations between Member States for the purpose of determining the Member State responsible. It considered that the Regulation also enhanced rights and mechanisms to guarantee the involvement of asylum seekers in the process.³⁵ This case confirmed that the fundamental rights considerations in the Dublin system not only take precedence over the other determining criteria, but also establish subjective rights for the individuals to challenge wrongful application of the Dublin criteria. Indeed, the CJEU has also ruled in *Petrosian and Others* that 'the legislator did not intend to sacrifice judicial protection guaranteed by Member States to the requirement of expedition in processing asylum applications'.³⁶

³² See Article 4 Dublin Convention.

³³ Recitals 6 and 7 Preamble Dublin II Regulation.

³⁴ M Garlick, 'The Dublin System, Solidarity and Individual Rights' in V Chetail, P de Bruycker and F Maiani (eds) *Reforming the common European asylum system: The new European refugee law* (Brill/Nijhoff, 2016) 159, p 161.

³⁵ CJEU Case C-63/15 *Ghezelbash* [2016] para 46.

³⁶ CJEU Case C-19/08 *Petrosian and Others* [2009] para 48.

3.2 The Right to Family Life

The first fundamental right at stake in the take charge requests discussed in this expert opinion, is the right to respect for family life. The most relevant provisions relating to family life in the Dublin III Regulation are Articles 8-11, which are also the first in the hierarchy of responsibility criteria. Article 11 can be excluded from the following considerations, as it refers to situations where the nuclear family is already present in the Member State in which the application is submitted. This provision rather highlights that separation should be prevented. In addition, the discretionary clauses of Article 16 as well as 17(1) and (2) of the Regulation are relevant for family reunion, as they explicitly state that family considerations shape the discretion of Member States.³⁷

The goals of Articles 8-11 are further reinforced by Recitals 14 and 16-18 of the Regulation. These recitals comprehensively proclaim the importance of family unity in the Dublin system and provide detailed aims to ensure that the application of the Regulation leads to the processing of claims of family members together. This referencing is extensive and the weight given to individual rights and family unity is considered to be even more substantial than that offered in many human rights treaties.³⁸ In accordance with these principles, responsibility for the asylum procedure is automatically transferred to the Member State in which the nuclear family resides, if the conditions of Articles 8-10 are met. Despite the automatic responsibility transfer, a take charge request still has to be made by the Member State in which the applicant is present. The applicant can only be transferred, if the requested responsible Member State accepts the take charge request.

According to the hierarchy of the determination criteria established in Article 7 Dublin III Regulation, the distribution criteria in the Dublin III Regulation relating to the right to family life and the rights of the child (Articles 8-11 Dublin III Regulation) have priority over the subsequent distribution rules (Articles 12-15 Dublin III Regulation). This underlines the impact that the right to family life has on the Regulation.

As well as strengthening the overarching aim of family unity in the Dublin system, the Dublin III Regulation has expanded the definition of 'families' from the previous definitions provided in the Dublin Convention and Dublin II Regulation. The definition of families now includes aunts, uncles and grandparents in the notion of 'relatives' to promote the priority of unaccompanied minors to reunite with family members legally resident in another Member State.³⁹ Article 9 of the Dublin III Regulation has also been widened to include individuals benefiting from subsidiary protection to family reunification under the Dublin system.

Furthermore, to enhance family reunification under the Dublin III Regulation, the European Parliament Research Service in its 2020 assessment proposed a 'less stringent standard of proof' for more success in transfer requests in family reunification cases.⁴⁰ The provision on dependent persons

³⁷ ECRE/ELENA, 'Case Law Note on the Application of the Dublin Regulation to Family Reunion Cases' (2018) available at <https://www.asylumlawdatabase.eu/sites/default/files/aldfiles/ECRE%20-%20Case%20Law%20Note%20on%20The%20Application%20of%20The%20Dublin%20Regulation%20to%20Family%20Reunion%20Cases.pdf> (Accessed 7 July 2020) p 4.

³⁸ U Brandl, 'Family Unity and Family Reunification in the Dublin System: Still Utopia or Already Reality?' in V Chetail, P de Bruycker and F Maiani (eds) *Reforming the common European asylum system: The new European refugee law* (Brill/Nijhoff, 2016) 143, pp 150-151.

³⁹ Art 2(h) Dublin III Regulation.

⁴⁰ European Parliamentary Research Service, 'Dublin Regulation on international protection applications: European Implementation Assessment' [2020], p 89.

as well as the discretionary clauses ‘could be used far more widely to support family unity’.⁴¹ Generally, the European Parliament Research Service demands to:

‘[s]upport realisation of the right to family life by ensuring that family unity is one of the primary considerations in the application of the Regulation, as dictated by the hierarchy in the Regulation. Otherwise provisions on family unity remain illusory.’⁴²

In conclusion, the Dublin system has protected the family unity of incoming asylum seekers from the very beginning. In its most recent version, a stronger emphasis on the applicant’s fundamental rights has been adopted and confirmed by the CJEU.

Protection in other EU legislation concerning migrants

Under EU law, a number of provisions regarding family reunification and family unity illustrate that the EU legislator aimed to protect family unity in all contexts of migration decision-making. Therefore, the importance of family unity in the migration context can be considered a general principle that has been reiterated in various provisions that oblige Member States to ensure that children are able to stay with their family members and that spouses can stay together.⁴³ This is most explicitly enshrined in the Family Reunification Directive.⁴⁴ Recital 4 of that Directive shows that the very purpose of it is the protection of family life. Recital 2 refers to provisions in international law that protect family life. The CJEU confirmed the importance of family unity in *Chakroun*, stating that family reunification should be granted as a rule and that any given margin of appreciation must not undermine the aim of the Family Reunification Directive, which is to promote family reunification and its effectiveness.⁴⁵

In some aspects the Dublin III Regulation even provides more protection of family unity than the Family Reunification Directive. Unlike the Family Reunification Directive, it does not confine the reunion of families to recognised refugees, but also opens it to persons enjoying subsidiary protection, to persons that have not yet received a final decision on their asylum application as well as situations of family procedures.⁴⁶ Moreover, the Family Reunification Directive allows Member States to demand further requirements to be fulfilled, like sufficient financial means, suitable accommodation, health

⁴¹ Ibid.

⁴² European Parliamentary Research Service, 'Dublin Regulation on international protection applications: European Implementation Assessment' [2020] p 90.

⁴³ See also: European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European law relating to the rights of the child* (2015) available at <https://fra.europa.eu/en/publication/2015/handbook-european-law-relating-rights-child> (Accessed 7 July 2020) p 169.

⁴⁴ Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L 251/12 (Family Reunification Directive).

⁴⁵ CJEU Case C-578/08 *Chakroun* [2010] paras 43-44. See for other provisions concerning family unity Arts 23 and 31(5) of Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted [2011] OJ L 337/9 (Qualification Directive), Art 5(b) of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L 348/98 (Return Directive) and Recital 9 of the Preamble and Art 12 of the Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) [2013] OJ L 180/96 (Reception Conditions Directive).

⁴⁶ Arts 9-11 Dublin III Regulation.

insurance and previously acquired language skills (unless where it concerns refugees⁴⁷).⁴⁸ This probably has to do with the fact that the Family Reunification concerns the right to residence in a Member State, while the Dublin III Regulation is a mechanism merely to determine responsibility for an asylum claim that will be dealt with within the Dublin area anyway. Consideration of family unity may therefore be more generous.

Protection in the Charter of Fundamental Rights

Recital 14 of the Dublin III Regulation refers to the Charter which enshrines the right to respect for family life in Article 7, and the ECHR where the right to respect for family life is protected in Article 8. To further protect families, Article 33 of the Charter states that families shall enjoy legal, economic and social protection.

The right to family life most importantly protects the right to live together as a family.⁴⁹ According to the case law of the European Court of Human Rights (hereinafter: ECtHR), a violation of the right can be caused by State interference with family life (for example, the separation of family members) as well as by not protecting families and a failure to comply with positive obligations.⁵⁰ The CJEU underlined in the case *J. McB v L.E.* that the provisions in the Charter correspond to those in the ECHR, but are not limited by them, and therefore may provide further protection.⁵¹

3.3 The Best Interests of the Child

Secondly, the rights of the child are at stake, where a take charge request concerns the reunion of parents and their minor children. References to the best interests of the child can be found four times in the Recitals of the Dublin III Regulation⁵², once in the definitions⁵³ and most importantly in Article 6. According to Recital 13 of the Regulation, the best interests of the child should be a primary concern of the Member States during the application of the Regulation. Article 6 of the Regulation establishes a strong connection to family unity by stating that minors should preferably be united with their families. Additionally, it provides for special guarantees for minors and explicitly obliges Member States to assess the best interests of the child, as well as to closely cooperate to take family reunification possibilities into account.⁵⁴

Protection in other EU legislation concerning migrants

The best interests of the child play an important role in EU legislation concerning asylum and migration. The Procedures Directive mentions that the best interests of the child should be a primary

⁴⁷ Art 12 Family Reunification Directive.

⁴⁸ Arts 6-8 Family Reunification Directive.

⁴⁹ See ECtHR 26 February 2002 *Kutzner v Germany* Appl no 46544/99.

⁵⁰ Luis López Guerra, 'European Convention on Human Rights and Family Life. Primary issues' in Maribel Gonzalez Pascual and Aida Torres Perres (eds) *The right to family in the European Union* (Routledge, 2017) 11, p 12.

⁵¹ CJEU Case C-400/10 PPU *J. McB v L.E.* [2010] para. 53. See also Sara Iglesias Sánchez and Keiva Carr, 'The right to family life in the EU Charter of Fundamental Rights', in Maribel Gonzalez Pascual and Aida Torres Perres (eds) *The right to family in the European Union* (Routledge, 2017) 40, p 43; see also CJEU Case C-400/10 PPU *J. McB v L.E.* [2010].

⁵² Recitals 13, 16, 24 and 35 Preamble Dublin III Regulation.

⁵³ Art 2(k) Dublin III Regulation.

⁵⁴ ECRE/ELENA, 'Case Law Note on the Application of the Dublin Regulation to Family Reunion Cases' (2018), p 4.

consideration when applying that Directive.⁵⁵ 'In assessing the best interest of the child, Member States should in particular take due account of the minor's well-being and social development, including his or her background'. This means that unaccompanied minors should be represented during the asylum procedure, in order to ensure their best interests.⁵⁶ It may be derived from this that it is in the interest of minor asylum seekers to be represented by an adult in the asylum procedure in order to ensure his or her best interests. In most cases the most suitable representative would be the child's family members.⁵⁷

Protection in the Charter of Fundamental Rights

Recital 13 of the Dublin III Regulation also refers to Article 24 of the Charter, which enshrines the rights of the child. This includes the right to protection that is necessary for the child's well-being, along with the right for the child's views to be heard and considered, mirroring the obligations of Article 12 of the Convention on the Rights of the Child (hereinafter: CRC).⁵⁸ Article 24(2) of the Charter also explicitly states that the best interests of the child have to be a primary consideration of public authorities and private institutions, which is based on Article 3 CRC. Article 24(3) protects the right of the child to have direct contact with both parents. In the present case, this can be achieved by uniting those families under the Dublin III Regulation, where one or both parents have lodged an asylum application or are beneficiaries of international protection in the requested Member State, while the child is present in the requesting Member State. This also applies for the opposite situation in which the child has received or applied for international protection in the requested Member State and the parents are present in the requesting Member State. In this context it is relevant to note that Article 10 CRC requires States to deal with family reunification in a positive, humane and expeditious manner.

The CJEU has attached important weight to the rights of the child in the context of the Dublin Regulation and other EU legislation concerning migration. In *MA and others* the CJEU considered that Article 6 of the Dublin II Regulation concerning unaccompanied minors (now Article 8 of the Dublin III Regulation) cannot be interpreted in such a way that it disregards the fundamental rights of the child.⁵⁹ It also held, referring to Article 24(2) of the Charter, that the child's best interests must be a primary consideration in all decisions adopted by the Member States on the basis of the special Dublin criteria concerning unaccompanied minors laid down in Article 6 Dublin II Regulation.⁶⁰ The CJEU stated: 'Since unaccompanied minors form a category of particularly vulnerable persons, it is important not to prolong more than is strictly necessary the procedure for determining the Member State responsible, which means that, as a rule, unaccompanied minors should not be transferred to another Member State'.⁶¹ It concluded that a Member States may not transfer an unaccompanied minor with no member of his family legally present in the territory of a Member State to another Member State, even if the minor has already applied for asylum in this other Member State.

⁵⁵ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection [2013] OJ L 180.

⁵⁶ Art 2(n) and 25 of the Procedures Directive.

⁵⁷ See for more references to the best interests of the child in EU asylum and migration legislation, Recitals 18, 19, 27 and 38 Preamble and Arts 20(5) and 31(4) and (5) Qualification Directive, Recitals 9 and 22 Preamble and Arts 2(j), 11(2), 23 and 24 Reception Conditions Directive, Recital 22 Preamble and Arts 5, 10(1) and 17(5) of the Return Directive and Art 5(5) Family Reunification Directive.

⁵⁸ Convention on the Rights of the Child [1989] 1577 UNTS 3 (CRC).

⁵⁹ CJEU Case C-648/11 *MA and others* [2012] para 58.

⁶⁰ *Ibid*, para 59.

⁶¹ *Ibid*, para 55.

The CJEU also recognised the importance for minor children to live together with their family members. It considered in its judgment in *E.*, which concerned the Family Reunification Directive, that the circumstance that granting the application for family reunification ‘could be the only means of ensuring that E. has the opportunity to grow up in a family environment’ is ‘liable to influence the extent and intensity of the examination required’.⁶² It also held that ‘while the competent national authorities are permitted to take steps for the purpose of detecting fraudulent applications for family reunification’ [...] that fact does not free those authorities from the obligation to have regard to the best interests of a child’.⁶³

3.4 Sub conclusion

This section has illustrated that the application of the Dublin III Regulation and particularly a request to take charge of an asylum application to a Member State where the applicant has family members who are asylum seekers or beneficiaries of international protection, engages a number of fundamental rights protected in EU law. In particular, the right to family life and the rights of the child are central. In many circumstances, the rejection of such take charge request risks denying an asylum seeker these fundamental rights. This underlines the importance of the ability to challenge the refusal of a take charge request before a court or tribunal. Therefore, the next chapter will examine the applicant’s right to an effective remedy.

⁶² CJEU Case C-636/17 *E.* [2019] para 77.

⁶³ *Ibid*, para 78.

4. The Right to an Effective Remedy against the Refusal to Take Charge

In this section, the right to individual legal remedies against the decision of a Member State to reject a request of another Member States to take charge of an asylum application will be elaborated on. The chapter will first explain that it is unclear whether the right to an effective remedy laid down in Article 27 of the Dublin III Regulation applies to such decision. The following sections will examine the meaning of Article 27 of the Dublin III Regulation in the context of its history and Article 47 of the Charter. It will conclude that Article 27 read in light of Article 47 the Charter requires that an asylum seeker be granted an effective remedy against a Member State's decision *not to transfer* him/or her as a result of the rejection of a take charge request.

4.1 The Scope of Article 27 of the Dublin Regulation

Article 27(1) of the Dublin III Regulation provides a right to an effective remedy for applicants, or any other person referred to in Article 18(1)(c) or (d), against a 'transfer decision'. 'Applicants' are defined in Article 2(c) of the Regulation as meaning third-country nationals or stateless persons who made an asylum application. Hence, Article 27(1) applies to all those applicants subject to take charge procedures under Articles 21 and 22 of the Regulation. In addition, Article 27(1) provides an individual legal remedy for third-country nationals or stateless persons, who are subject to a take back procedure. It concerns applicants who have withdrawn their asylum application in one Member State or their asylum application in one Member State has been rejected and they have subsequently lodged an asylum application in another Member State.⁶⁴

The question is whether the right to an effective remedy laid down in Article 27 of the Regulation applies to the situation in which Member State A refuses the request of Member State B to take charge of an asylum application, even though the applicant's family members are residing in Member State A as an asylum seeker or beneficiary of international protection. Here the interpretation of the term 'transfer decision' is crucial.

There is no definition of the term 'transfer decision' in the Dublin III Regulation. Article 26 of the Regulation also refers to this term ('notification of a transfer decision'). It merely outlines it as 'the decision to transfer [the applicant]' after a take charge or take back request has been accepted'. This may not include decisions *not to transfer* an applicant after a request to take charge has been refused. At the same time, recital 19 of the Regulation demands Member States to establish a right to an effective remedy 'regarding transfers'. This may include both a decision to transfer and a decision *not to transfer* an applicant. The text and system of the Dublin III regulation thus do not give a clear answer to the mentioned question regarding the scope of application of Article 27.

The next sections will examine the history of the right to an effective remedy in the Dublin system. It shows that the right to an effective remedy has been strengthened in the Dublin III Regulation in comparison to the Dublin II Regulation. It also explains that the CJEU has recognised that an asylum seeker has a subjective right to the correct application of the Dublin Regulation.

⁶⁴ See Art 18(1)(c) and (d) Dublin III Regulation.

4.2 The History of the Right to an Effective Remedy in the Dublin System

Article 19(2) and Article 20(1)(e) of the Dublin II Regulation stated that the transfer decision following a take charge (Article 19) or a take back request (Article 20) 'may be subject to an appeal or review'. Consequently, Dublin II referred to legal remedies in the national laws of the Member States. In its analysis of the Regulation, the Commission found a lack of clarity with regard to the scope and the effectiveness of such appeals against Dublin decisions.⁶⁵ As a lesson learned, the Commission intended to guarantee a right to appeal that is 'fully compatible with fundamental rights as general principles of Community as well as international law'.⁶⁶

The Dublin III Regulation has introduced several procedural rights and guarantees for applicants, such as the right to be informed about the criteria for determination of the responsible Member State⁶⁷ or the right to a personal interview where family ties can sufficiently be elaborated on.⁶⁸ Article 6 Dublin III Regulation provides for special guarantees for minors, prioritising children's best interests throughout the procedure and advocating increased protection for applicants' children, family members, dependent persons and relatives. All these provisions are embraced by Article 27, read in light of Recital 19 of the Dublin III Regulation, which creates an obligation to guarantee the right to an effective remedy against a transfer decision based on the incorrect application of the Dublin criteria and legal assistance free of charge upon request at the appeal stage.

4.3 A Subjective Right to Correct Application of the Dublin Regulation

In its landmark decision *Ghezelbash*, the CJEU interpreted the construction of the Dublin III Regulation and concluded that there is a subjective right to the correct application of the criteria set out in Chapter III of the Dublin III Regulation.⁶⁹ The CJEU focused on Article 27, read in conjunction with Recital 19 of the Dublin III Regulation, which underlines the importance of ensuring an effective legal remedy against decisions regarding transfers by referring to Article 47 of the Charter.

In *Ghezelbash* the CJEU abandoned its earlier judgment in *Abdullahi*⁷⁰, which was based on the Dublin II Regulation.⁷¹ In this judgment the CJEU limited the subjective right to an appeal against Dublin transfers to situations where a transfer would entail the risk of a violation of the principle of non-refoulement following from Article 4 of the Charter. AG Sharpston, in her Opinion for *Ghezelbash*, described the reduction of Dublin III to a purely interstate instrument as 'over-simplistic'.⁷² She also stated that 'the effectiveness of the judicial review guaranteed by Article 47 of the Charter requires an assessment of the lawfulness of the grounds which are the basis of the decision, and whether the

⁶⁵ Commission staff working document: Accompanying document to the Report from the Commission to the European Parliament and the Council on the evaluation of the Dublin system, SEC (2007) 742 [2007], p 33. See also C. Hruschka and F. Maiani in: K. Hailbronner, D.Thym (eds.). *EU Immigration and Asylum Law – A Commentary*, 2nd edition, Hart/Beck, 2016 p. 1566.

⁶⁶ COM(2008) 820 final (n 27), p 12.

⁶⁷ Art 4 Dublin III Regulation.

⁶⁸ Art 5 Dublin III Regulation; see also Recitals 17–8 Dublin III Regulation.

⁶⁹ CJEU Case C-63/15 *Ghezelbash* [2016] para 44.

⁷⁰ CJEU Case C-394/12 *Abdullahi* [2013] paras 52–3; CJEU Case C-4/11 *Puid* [2013], Opinion of A-G Jääskinen, paras 54, 58.

⁷¹ CJEU Case C-63/15 *Ghezelbash* [2016], paras 46–53.

⁷² CJEU Case C-63/15 *Ghezelbash* [2016], Opinion of A-G Sharpston, para 70.

latter is taken on a sufficiently solid factual basis'.⁷³ The CJEU followed AG Sharpston and pronounced an individual subjective right against the incorrect application of the Dublin criteria. This ruling was explicitly confirmed by the CJEU in *Karim*.⁷⁴

The CJEU has thus confirmed the importance of the availability of an effective remedy in the context of the Dublin III Regulation, given the objective in Recital 19 and its referral to the guarantees enshrined in Article 47 of the Charter.⁷⁵ According to the CJEU, even application of the objective responsibility criteria of the Dublin system can be legally challenged by the individual. It may therefore be argued that this should evidently also apply to the application of the criteria, which are linked to fundamental rights such as the right to family life or best interests of the child.

However, the CJEU has not ruled yet that an applicant should have an effective remedy against a Member State's decisions *not to transfer* him or her, in the context of a refusal of a request by another Member State to take charge of an asylum application. In order to find out whether Article 47 of the Charter would require such broad interpretation of the scope of Article 27 of the Dublin III Regulation, the next section will first discuss Article 47 of the Charter in more detail. Section 4.5 will subsequently examine whether Article 47 of the Charter may require a broad interpretation of a remedy provision provided for in EU legislation.

4.4 Article 47 of the Charter

The right to an effective remedy is a right deeply rooted in EU law. Its early development can be found in jurisprudence of the CJEU in the mid-1980s, where the Court pronounced that a general principle of effective judicial protection underlies the constitutional traditions common to all EU Member States.⁷⁶ After the Treaty of Lisbon came into force in 2009, the right to an effective remedy was given expression in primary EU law by Article 47 of the Charter. Within the realm of the Treaty on the European Union,⁷⁷ Article 19(1) mirrors Article 47 of the Charter, also stipulating that Member States shall provide remedies sufficient to ensure effective legal protection in fields covered by Union law.

Firstly, Article 47(1) provides that everyone has the right to an effective remedy before a tribunal, if their rights and freedoms guaranteed by EU law have been violated. Furthermore, it states that everyone has the right to a fair and public trial within a reasonable time by an independent and impartial tribunal, and that everyone must have the possibility of being advised, defended and represented.⁷⁸ The final paragraph of Article 47 ensures that legal aid is to be made available to those who lack sufficient resources, insofar as such aid is necessary to ensure effective access to justice.⁷⁹

From a literal interpretation of the provision, Article 47 applies to individuals alleging a violation of any rights and freedoms conferred upon them by EU law and thus provides extensive protection. Furthermore, Article 51(1) of the Charter stipulates that its provisions address both EU institutions and Member States when applying Union law. As the Dublin III Regulation is an EU legal instrument, the interpretation of the provisions at stake falls directly within the scope of EU law.

⁷³ Ibid, para 89.

⁷⁴ CJEU Case C-155/15 *Karim v Sweden* [2016] para 22.

⁷⁵ CJEU Case C-163/17 *Jawo* [2019] para 68; CJEU C-201/16 *Shiri* [2017] paras 44 and 46; CJEU Case C-360/16 *Hasan* [2018] para 31.

⁷⁶ CJEU Case 222/84 *Johnston v Chief Constable of the RUC* [1986].

⁷⁷ Treaty on European Union [2012] OJ C 326/13 (TEU).

⁷⁸ Art 47(2) of the Charter.

⁷⁹ Art 47(3) of the Charter.

The principles enshrined in Article 47 stem in part from Articles 6 and 13 ECHR. The relationship between the two instruments is outlined in Article 52(3) of the Charter. It provides that the meaning and scope of the right to an effective remedy guaranteed by Article 47 must be the same, or more extensive, as the meaning and scope of the rights laid down in Articles 6 and 13 ECHR. Accordingly, the CJEU may use jurisprudence from the ECtHR to support its interpretation of Article 47. In contrast to Article 6 ECHR, Article 47 of the Charter is not limited to civil or criminal matters. Moreover, in comparison to Article 13 ECHR, Article 47 may be relied upon by individuals alleging a violation of *any* rights conferred upon them by EU law and not only 'arguable claims' under the Charter.⁸⁰ In the case of *Samba Diouf*, Advocate General Cruz Villalón illustrated this distinction by stating, that 'the right to effective judicial protection, as expressed in Article 47 of the Charter has [...] acquired a separate identity and substance under that article, which are not the mere sum of the provisions of Article 6 and 13 of the ECHR'.⁸¹

This suggests that the protection afforded to individuals under Article 47 has a wider scope and can be relied on as a separate individual remedy in situations where EU law is applied. The CJEU has found in *Europese Gemeenschap v Otis NV* that the right to an effective remedy under Article 47 is broad and comprises several different elements.⁸² These include the right of defence, the right to be heard, the principle of equality of arms, the right to access a court, the right to be advised and the right to a fair legal process.⁸³ These rights are interpreted flexibly by the CJEU and often overlap, but together create clear principles to be protected in the EU legal order.⁸⁴

4.5 A Broad Interpretation of Remedy Provisions?

Case law from the CJEU regarding Article 47 and its scope suggests that its protection is not limited only to certain decisions made by Member States, but can be invoked in *all* situations where there is an alleged breach of a right or freedom protected by EU law.⁸⁵ The relevant fundamental rights protected in relation to the issue at hand are the right to respect for family life, enshrined in Article 7 of the Charter and Article 8 ECHR and the best interests of the child protected in Article 24 of the Charter and established by Article 3(1) CRC.

In the case of *Heylens*, when discussing the scope of Article 47, the CJEU held that 'the existence of a remedy of a judicial nature, against any decision of a national authority refusing the benefit of [the fundamental right to free access of employment] , is essential in order to secure for the individual effective judicial protection of his right'.⁸⁶ A refusal of a take charge request may have the effect of depriving an applicant of the fundamental right to family life and infringing the rights of the child. It

⁸⁰ S Prechal, 'The Court of Justice and Effective Judicial Protection: What has the Charter Changed?' in C. Paulussen et al. (eds.), *Fundamental Rights in International and European law* (Asser Press, 2016) p 149.

⁸¹ CJEU Case C-69/10 *Brahim Samba Diouf v Ministre du Travail* [2011], Opinion of the Advocate General Cruz Villalón, para 39.

⁸² CJEU Case C-199/11 *Europese Gemeenschap v Otis NV and Others* [2012] para 48.

⁸³ CJEU Case C-199/11 *Europese Gemeenschap v Otis NV and Others* [2012] para 48; K Gutman, 'The Essence of the Fundamental Right to an Effective Remedy and to a Fair Trial in the Case-Law of the Court of Justice of the European Union: The Best is Yet to Come?' *German Law Journal* (2019) pp 884–903.

⁸⁴ S Prechal, 'The Court of Justice and Effective Judicial Protection: What has the Charter Changed?' in C. Paulussen et al. (eds.) *Fundamental Rights in International and European law* (Asser Press, 2016) p 149.

⁸⁵ CJEU Case C-69/10 *Brahim Samba Diouf v Ministre du Travail* [2011], Opinion of the Advocate General Cruz Villalón, para 42.

⁸⁶ CJEU Case 222/86 *Georges Heylens* [1987] para 14.

follows from *Heylens* that the right to an effective remedy should be considered essential to secure the effective protection of these rights. This also follows from the CJEU's judgment in *Liivimaa Lihaveis*. The CJEU, also referring to this Article 19 (1) TEU, ruled in that judgment that legislation or practices that exclude the possibility of a legal remedy against a decision that restricts fundamental rights constitute a violation of Article 47 of the Charter.⁸⁷

An extensive interpretation of legal remedies provided in secondary EU law in light of Article 47 of the Charter is common in the CJEU's case law. Various aspects, including the scope or applicability of the available remedy or the suspensive effect of an appeal, have been interpreted widely to meet the standards in Article 47. An example is the CJEU's case law concerning remedies against return decisions taken on the basis of the Return Directive. In *Gnandi*,⁸⁸ the CJEU ruled that the characteristics of remedies against return decisions Return Directive must be determined in a manner that is consistent with Article 47.⁸⁸ Article 13(2) of the Return Directive only grants the deciding administrative authority or court *the competence* to temporarily suspend the enforcement of return decisions. The CJEU found in *Gnandi* that in order to ensure the effectiveness of the remedy against a return decision, the appeal must automatically have suspensive effect.⁸⁹ Here the CJEU followed up on its earlier judgment in *Abdida*, where the CJEU already went beyond the wording of Article 13(2) and established that suspensive effect must be established in cases where the applicant's return poses a serious risk of grave and irreversible deterioration of his or her health.⁹⁰

The case *El Hassani* dealt with the right to appeal in visa procedures. Here, the CJEU underlined that Article 47 of the Charter requires that an administrative decision that does not itself satisfy the conditions of independence and impartiality, must be subject to a subsequent control by a judicial body. This body must in particular have jurisdiction to consider all the relevant issues. Article 32(3) of the Visa Code solely stipulates that 'applicants who have been refused a visa shall have the right to appeal'.⁹¹ The CJEU found that Article 32(3) of the Visa Code, read in line with Article 47 of the Charter requires Member States to provide an appeal procedure against visa refusals and that those proceedings must, at a certain stage, guarantee an appeal before a court or tribunal.⁹² Thus, the CJEU provided an interpretation of the available legal remedy in the Visa Code in a manner that complies with Article 47 of the Charter.

4.6 Sub conclusion

In the scenario illustrated in this expert opinion, where a take charge request on the basis of Article 8-10 Dublin III Regulation has been rejected, rights guaranteed by EU law, namely the right to family life and the principle of the best interests of the child are at stake. Moreover, the subjective right to the correct application of the Dublin criteria may have been violated. It follows from the previous sections that, if the applicant is not granted an effective legal remedy to challenge the rejection of a take charge request, this would violate Article 47 of the Charter. Therefore, it should be concluded that the term

⁸⁷ CJEU Case C-562/12 *Liivimaa Lihaveis* [2014] para 74.

⁸⁸ CJEU Case C-181/16 *Gnandi* [2018] para 52.

⁸⁹ *Ibid* para 54.

⁹⁰ CJEU Case C-562/13 *Abdida* [2014] paras 45, 50-51, 64.

⁹¹ Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code), OJ L 243 [2009].

⁹² CJEU Case C-403/16 *El Hassani* [2017] paras 39-42.

'transfer decision' as mentioned in Article 27 Dublin III Regulation, read in light of Article 47 of the Charter should include the decision *not to transfer*.

The next section will describe two existing interstate procedures: the Conciliation Procedure laid down in Article 37 Dublin III Regulation and the re-examination procedure mentioned in Article 5 of the Implementing Regulation. As will be discussed in Chapter 6, several Member States have mentioned these procedures as remedies against the rejection of a request to take charge of an asylum application on the basis of Articles 8-10 of the Regulation. It will be investigated whether these interstate mechanisms provide an effective remedy to the asylum applicant concerned.

5. Interstate Procedures in the Dublin III Regulation: effective remedies?

As will be pointed out in Chapter 6 of this expert opinion, Member States have been interpreting the issue of legal remedies regarding take charge requests differently. The Netherlands, Sweden and Austria, in their rejection of an individual appeal against the rejection of a take charge request, refer to the procedures already available in the Dublin system, namely Article 37 of the Dublin III Regulation and Article 5 of the Implementing Regulation. As we will see below, the Dutch highest administrative court has ruled that the right to appeal against the rejection of a take charge request would interfere with these interstate procedures. The following section will look in detail at these interstate mechanisms, arguing that they do not provide an effective legal remedy for an applicant and therefore cannot be considered to provide sufficient judicial protection, in situations where an applicant seeks to appeal the rejection of a take charge request.

It should be noted that an applicant does not have an effective remedy in the Member State, which requested the other Member State to take charge of the asylum application. The national courts of the requesting Member State are not competent to oblige another Member State to accept a request. Therefore, even if such national court would find that the requested Member State has wrongly applied the Dublin criteria, the remedy cannot be considered effective.

5.1 The Conciliation Procedure: Article 37 Dublin III Regulation

Article 37 of the Dublin III Regulation concerns conciliation procedures within the Dublin system. It stipulates a dispute resolution mechanism for states in circumstances where there is a dispute regarding responsibility to examine an application for asylum. Both Swedish and Dutch courts have referred to this conciliation procedure as an argument to exclude the availability of an individual remedy against the rejection of a take charge request.⁹³ However, it is important to note that applicants have no right or possibility to invoke the initiation of such an interstate procedure.

Instead, Member States can ask the Dublin Committee to initiate a conciliation procedure. The procedure can only take place, if both Member States agree to participate. The Chairman of the Committee then appoints three members of the Committee who represent three different Member States (who are non-parties to the dispute). The Committee representatives will then receive the submissions of the parties and propose a solution within one month. The proposed solution is final and irrevocable, but the disputing parties are free to adopt or reject it.

The evaluation of the implementation of the Dublin III Regulation published by the DG Migration and Home Affairs of the European Commission on 16 March 2016 indicates that up until 2016 the procedure has not been applied, even though it has existed, at least in principle, since 1990.⁹⁴ Member States noted that they do not make use of the mechanism as it is too formal, leading to lengthy procedures and inefficient resolutions of disputes.⁹⁵ They preferred resolving disputes informally.⁹⁶

⁹³ District Court The Hague 9 July 2019, ECLI:NL:RBDHA:2019:6868; Swedish Migration Court 26 February 2020, UM14005-19 available at <https://lagen.nu/dom/mig/2020:4> (Accessed 12 May 2020).

⁹⁴ European Commission, DG Migration and Home Affairs, *Evaluation of the Implementation of the Dublin III Regulation, Final Report* (2016) available at https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/asylum/examination-of-applicants/docs/evaluation_of_the_implementation_of_the_dublin_iii_regulation_en.pdf (Accessed 8 July 2020) p 83.

⁹⁵ *Ibid* p 84.

⁹⁶ *Ibid*.

Alternatives to the procedure include bilateral agreements, liaison officers, informal contacts and the Dublin Contact Group – an expert group created to share information with the European Commission regarding the application of the Dublin III Regulation.⁹⁷

Notably, the Netherlands intended to initiate a conciliation procedure in 2018, but Hungary refused to enter the process. The dispute regarded applicants, who travelled through Hungary and applied for asylum in the Netherlands (for the first time) and applicants, who had already applied for asylum in Hungary and applied again in the Netherlands.⁹⁸ Hungary did not accept responsibility for these applicants under the Dublin Regulation.

In conclusion, Article 37 of the Regulation is *de facto* dormant, and does not provide any effective mechanism for an individual to challenge the incorrect application of the Dublin criteria. In this regard, it should also be taken into consideration that, according to the current rules, individual applicants do not have the right to be heard or to submit evidence within this interstate conciliation procedure. Additional safeguards granted by EU law also do not apply in this procedure, which leaves the individual with a level of protection that is not comparable to the protection guaranteed by EU law under Article 47 of the Charter, as will be developed below.

Furthermore, the result of the procedure is not binding, leading to increased uncertainty with regard to the determination of the responsible Member State under the Dublin III Regulation. Because of this fact, the Dublin Committee also cannot be considered a ‘court or tribunal’ in the meaning of Article 27 of the Dublin II Regulation and 47 of the Charter.⁹⁹

5.2 The Re-Examination Procedure: Article 5(2) Implementing Regulation

An additional possibility for Member States to challenge the rejection of a take charge request is included in Article 5(2) of the Implementing Regulation. This provision stipulates that the requesting Member State can ask the requested Member State to re-examine a take charge request in circumstances where it was refused. The re-examination request must be lodged within three weeks after the rejection and the requested Member State is encouraged to answer within two weeks. The CJEU found, in its judgment *X. and X.* of 13 November 2018, that a requested State, which receives a request for re-examination shall endeavour to reply within two weeks in the spirit of ‘sincere cooperation’.¹⁰⁰ However, if it fails to do so, the requesting Member State will become responsible for examining the asylum application.

The aforementioned issues in the context of Article 37(2) Dublin III Regulation also apply to procedures under Article 5(2) Implementing Regulation. Firstly, the applicant is unable to initiate or participate in the procedure. Secondly, the lack of enforceability of the procedure is problematic, especially in light of the *X. and X.* ruling, which automatically assigns the asylum application to the requesting Member State, if the two-week deadline has passed.

5.3 Sub conclusion

⁹⁷ European Commission, DG Migration and Home Affairs, *Evaluation of the Implementation of the Dublin III Regulation, Final Report* (2016) p 84.

⁹⁸ AIDA Country Report Netherlands, Update April 2019, available at <https://www.asylumineurope.org/reports/country/netherlands> (Accessed 8 July 2020) p 34.

⁹⁹ See CJEU Case C-175/11 *H.I.D. and B.A.* [2011] para 83

¹⁰⁰ CJEU Joined Cases C-47/17 and C-48/17 *X. and X.* [2018] para 77.

It should be concluded that the conciliation procedure and the re-examination procedure do not provide an effective remedy, which meets the standards established by Articles 27 of the Dublin Regulation or 47 of the Charter. This means that in order to be able to challenge a decision of a Member State to reject a take charge request of an asylum application on the basis of Articles 8-10 of the Dublin III Regulation, the asylum seeker should be offered an effective remedy before the national court or tribunal of the rejecting Member State. Furthermore, whereas in practice these interstate procedure are rarely used and their outcome is non-binding, granting such an individual right of appeal will not interfere with these interstate procedures.

The next chapter will show that the national courts of some Member States agree with this conclusion. Other Member States share the interpretation of the Dutch Council of State that no individual remedy should be offered against a decision to reject the request to take charge.

6. Practice in EU Member States

The point of departure for this expert opinion was the divergent case law dealing with the right to effective legal remedies against decisions on take charge requests. In this chapter, the differences in interpretation of the Dublin III Regulation and Article 47 of the Charter will be highlighted.

6.1 The Netherlands

In 2018, the Dutch Council of State interpreted Article 27 of the Dublin III Regulation narrowly and ruled that it only provides a legal remedy against a decision to transfer an asylum applicant to another Member State. It also stated that an appeal against the refusal of a take charge request would be contrary to the interstate mechanisms outlined in Article 37 of the Dublin III Regulation (conciliation procedure) and Article 5 of the Implementing Regulation (re-examination procedure).¹⁰¹

This issue was raised again before the lower courts of the Netherlands in 2019. The District Court of The Hague examined a case, which involved a Turkish family who arrived in Greece together. The wife and child of the applicant travelled to the Netherlands to apply for asylum and the responsibility of their application was accepted by the Netherlands. However, when the Greek authorities requested the Netherlands to take charge of the applicant's asylum claim under Article 10, pursuant to Article 17(2) of the Dublin III Regulation, the Netherlands rejected this request.¹⁰²

The District Court of The Hague held that the reasoning of the Council of State (that a right to appeal against a refusal of a take charge request would interfere with the interstate reconsideration mechanism in the Dublin III Regulation) did not apply, because the time limits for this procedure had already expired.¹⁰³ It ruled that a decision by a Member State to refuse a take charge request constitutes a factual act of an administrative authority in relation to a foreign national. Such administrative act is defined in Article 72(3) of the Dutch Aliens Act (*Vreemdelingenwet 2000*) and can therefore be objected to under administrative law and only after that appealed to the national court. Thus the Dutch District Court held that it had no jurisdiction to hear the appeal and transferred the decision back to the administrative body in accordance with Article 6:15(2) of the General Administrative Law Act in order to decide on the objection against the decision not to transfer.

Following this, the State Secretary of Justice and Security lodged a higher appeal arguing that there is no right of administrative objection against a letter to another Member State refusing a take charge request, and that the letter did not qualify as an administrative act.¹⁰⁴ In 2020, the Dutch Immigration Service (hereinafter: IND) granted asylum to the applicant. For this reason, the Council of State decided in June 2020 that the request for higher appeal was inadmissible, lacking any procedural interest.¹⁰⁵ This means that the Council of State did not address the aforementioned decision of the District Court of The Hague.

¹⁰¹ Council of State 21 December 2018, ECLI:NL:RVS:2018:4298, para 3.2.

¹⁰² Art 17 was used, because the time limits for applying through Arts 8-11 had expired.

¹⁰³ District Court The Hague, 9 July 2019, ECLI:NL:RBDHA:2019:6868.

¹⁰⁴ *Staatsecretaris van Justitie en Veiligheid*, Hoger Beroepschrift of 1 August 2019 against the judgment of the District Court The Hague, 9 July 2019, ECLI:NL:RBDHA:2019:6868.

¹⁰⁵ Council of State 24 June 2020, ECLI:NL:RVS:2020:1450.

6.2 The United Kingdom

In the UK, there have been several court decisions in which it has been recognised that an applicant has the right to an effective remedy against the refusal of a take charge request.¹⁰⁶ In the case of *MK, HK and IK*, which involved two Iraqi children in France trying to reunite with their mother in the UK, the Upper Immigration Tribunal recognised that Article 27 of the Dublin III Regulation provides a legal remedy against the refusal of take charge requests. In this decision, the Tribunal also held that there was nothing in the Dublin III Regulation that suggests that ‘a decision on a take charge request is in all cases final and conclusive, subject only to legal challenges in Article 27’.¹⁰⁷ The Tribunal did not elaborate on this further, but stated that the ‘phenomenon of renewed take charge requests and successive take charge decisions is [...] implicitly recognised in the Dublin Regulation’.¹⁰⁸ In recognising this, the Tribunal reaffirmed that the refusal of a take charge request is not the end of the procedure, and that decisions made regarding transfers, including decisions *not to transfer*, may be challenged.

In 2018, the UK Upper Immigration Tribunal provided further guidance on the interpretation of Article 27 of the Dublin III Regulation and the scope of judicial protection in the case of *MS and MAS*, concerning an unaccompanied asylum seeking child in France seeking reunification with his brother in the UK.¹⁰⁹ The question at stake was whether the scope of appeal against the refusal to take charge was limited to public law grounds or also included the correct application of the Dublin criteria. The Tribunal had to consider whether the remedy envisaged in Article 27, and the term ‘transfer decision’, applied to situations in which a take charge request was rejected.

The Tribunal stated that a narrow reading of the term ‘transfer decision’ was incorrect. It recognised that Recital 19 had ‘broader import’¹¹⁰, as it referred to ‘an effective remedy in respect of decisions *regarding* transfers’.¹¹¹ The Tribunal found that a rejected take charge request was a decision ‘regarding’ a transfer as per Recital 19.¹¹² Furthermore, drawing on arguments from *Ghezelbash*¹¹³ and *Mengesteab*¹¹⁴ regarding the scope of Recital 19 and Article 27 of the Dublin III Regulation, the Tribunal argued that to only allow an individual to challenge the application of the criteria in circumstances where it will lead to a transfer would be ‘arbitrary and [...] unwarranted’.¹¹⁵ Indeed, it argued that what should be subject to an effective remedy was the application of the criteria, regardless of ‘whether the effect of the decision led to the individual’s transfer to another Member State or, as in this case, left him or her in the Member State in which he or she was currently present’.¹¹⁶ The Tribunal concluded that their broad interpretation of Article 27 of the Dublin III

¹⁰⁶ See Upper Immigration Tribunal cases: *R (on the application of HA & Others) v Secretary of State for the Home Department* [2018] UKUT 00297 (IAC); *R (on the application of FwF & FrF) v Secretary of State for the Home Department* [2019] JR 1626; *R (on the application of MS & MAS) v Secretary of State for the Home Department* [2018] JR 9682; *R (on the application of MK, IK & HK) v Secretary of State for the Home Department* [2016] JR 2471.

¹⁰⁷ *R (on the application of MK, IK & HK) v Secretary of State for the Home Department* [2016] JR 2471, para 41.

¹⁰⁸ *Ibid.*

¹⁰⁹ *R (on the application of MS & MAS) v Secretary of State for the Home Department* [2018] JR 9682.

¹¹⁰ *Ibid.*, para 187.

¹¹¹ Recital (19) Dublin III Regulation.

¹¹² *R (on the application of MS & MAS) v Secretary of State for the Home Department* [2018] JR 9682, para 187.

¹¹³ CJEU Case C-63/15 *Ghezelbash* [2016].

¹¹⁴ CJEU Case C-670/16 *Mengesteab v Bundesrepublik Deutschland* [2017].

¹¹⁵ *R (on the application of MS & MAS) v Secretary of State for the Home Department* [2018] JR 9682, para 188.

¹¹⁶ *Ibid.*

Regulation underlined the approach of the CJEU in previous case law, along with regard to Article 47 of the Charter and the significance of family reunion in the Dublin III Regulation.¹¹⁷

6.3 Austria

The Austrian Federal Administrative Court (*Bundesverwaltungsgericht*) concluded that the only option following a refusal of a take charge request by a Member State, would be the submission of a re-examination request by the other Member State.¹¹⁸ This case concerned a child from Afghanistan, who was residing in a Greek camp with his grandmother. The child's parents had lodged asylum claims in Austria, which were still pending. The child had not fled to Europe with his parents due to insufficient financial funds. As the child's grandmother was transferred to Sweden, where one of her other daughters resided, a take charge request was lodged on behalf of the child to be reunited with his parents in Austria

The Austrian court concluded that an asylum seeker cannot act directly against the negative decision nor bring it to appeal, as this take charge procedure is a purely intergovernmental procedure.¹¹⁹ The court explicitly considered the Dublin III Regulation to be a self-contained system of legal protection, which does not provide for a subjectively enforceable right to the correct application of the Dublin criteria when it comes to the rejection of a take charge request. It therefore dismissed the applicant's references to the underlying fundamental rights of Article 7 of the Charter, Article 8 ECHR and ultimately also Article 47 of the Charter.

The only option the court saw to further appeal the authorities' rejection of the take charge request besides the mechanisms explicitly provided for in the Dublin III Regulation or demanded by CJEU case law like *Ghezelbash*, *Karim* or *Mengesteab* would be an infringement procedure against Austria.¹²⁰ Regarding the situation at hand, the Austrian court argued that EU law does not provide for any sanctions for possible misinterpretations of EU law and that it is thus upon the requesting Member State Greece to initiate an infringement procedure according to Article 259 of the Treaty on the Functioning of the European Union¹²¹. Only the European Commission or another Member State can initiate this procedure to find out whether one Member State is acting in compliance with EU legislation. Individuals have no direct means to initiate this procedure.

6.4 Sweden

In Sweden, the Migration Court has ruled in February 2020 on the issue, in a case concerning an applicant who initially applied for asylum in Greece, and then informed the Greek authorities that his wife had been granted international protection in Sweden. Accordingly, the Greek authorities submitted a take charge request to Sweden in accordance with Article 9 Dublin III Regulation. The Swedish authorities refused this request.¹²² The applicant tried to challenge this refusal of the take

¹¹⁷ R (on the application of MS & MAD) v Secretary of State for the Home Department [2018] JR 9682, para 189.

¹¹⁸ BVwG Österreich W175 2206076-1 [2018] ECLI:AT:BVWG:2018:W175.2206076.1.00.

¹¹⁹ Ibid.

¹²⁰ Ibid.

¹²¹ Treaty on the Functioning of the European Union [2012] OJ C 326/47 (TFEU).

¹²² Swedish Migration Court 26 February 2020 UM14005-19 available at <https://lagen.nu/dom/mig/2020:4> (Accessed 12 May 2020). See also European Database of Asylum Law, 'Sweden: Request for Sweden to take over responsibility of asylum application from Greece cannot be appealed' (26 March 2020) available at

charge request, invoking Article 27 of the Dublin III Regulation and highlighting the importance given to family unity in the Regulation. However, the Swedish Migration Court found on that appeal that Article 27 was not applicable. Specifically, the Court found that the refusal of a take charge request was not a 'transfer decision' within the meaning of Article 27(1) of the Regulation. A refusal to take over responsibility would not affect any actual transfer of the applicant, as stipulated in Article 26(1) of the Regulation, and can therefore not be considered as equivalent to a transfer decision. Consequently, only a positive decision to transfer would be a 'transfer decision' in the sense of the Dublin III Regulation.

The Swedish Migration Court ruled that the refusal to take charge would affect the Member States concerned more than the individual directly and concluded that resultantly, it was not necessary to seek a preliminary ruling from the CJEU. The Migration Court claimed that the purpose of the Dublin system, to expediently determine the Member State responsible, would be frustrated in case of a remedy against the refusal to take charge. The equally important second purpose, to respect individual rights, was dismissed with a reference to family reunification under other EU instruments like the Family Reunification Directive and the possibility for the applicant to apply for family reunification, once s/he would be granted with a legal residence permit.

6.5 Germany

Lastly, in Germany, there have been multiple decisions by administrative courts ruling on the situation of an appeal against refused take charge requests. Yet, all the cases referred to subsequently, are cases before Administrative Courts (*Verwaltungsgericht* or VG). They are first instance courts – no higher court has ruled on the issue yet.

One case before the Federal Administrative Court of Germany (*Bundesverwaltungsgericht* or BVerwG),¹²³ must be highlighted, even if the case concerned a take back situation. In this case, the Federal Administrative Court held that already in the preceding Dublin II Regulation the criteria related to unaccompanied minors were:

‘protective of the individual if they not only govern relationships between Member States, but (also) serve to protect fundamental rights. If that is the case, the asylum seeker has a *subjective right* to have his asylum application examined by the Member State that has responsibility under such rules, and he can successfully challenge a decision by the Federal Office [for Migration and Refugees] that is not consistent with them’.¹²⁴

Although that case concerned a take back situation, the underlying rationale was later also applied by lower courts in a situation where Germany rejected a take charge request from Greece based on Article 8(2) Dublin III Regulation.¹²⁵ In several other cases concerning the application of Articles 8–10 of the Dublin III Regulation, and where the competent Federal Office for Migration and Refugees (Federal Office) rejected the take charge request, the applicants challenged this successfully. The administrative courts in these cases explicitly ruled in favour of an individual legal remedy against

<https://www.asylumlawdatabase.eu/en/content/sweden-request-sweden-take-over-responsibility-asylum-application-greece-cannot-be-appealed> (Accessed 8 July 2020).

¹²³ Third instance and highest court of appeal in administrative law.

¹²⁴ Translation of the authors of BVerwG Case 1 C 4.15 [2015] ECLI:DE:BVerwG:2015:161115U1C4.15.0, para 24.

¹²⁵ VG Bremen Case 5 V 2557/19 [2020].

the rejection of a take charge request on the basis of Article 27 Dublin III Regulation, while referring to Article 47 of the Charter and the right to effective legal protection as protected in the German Constitution or Basic Law.¹²⁶

For instance, the Administrative Court Münster (*Verwaltungsgericht Münster*) found that the individual has a subjective right to an asylum procedure in the Member State that is responsible for the procedure according to the criteria of the Dublin III Regulation that serve the best interests of the child and family unity.¹²⁷ The Administrative Court Münster put forward that when such a subjective and enforceable right to the correct interpretation of the Dublin criteria is assumed, this cannot be confined to the mere appeal *against* a 'transfer decision' but must also include an appeal to *insist on* a transfer.¹²⁸ Otherwise the subjective right to the correct application would be rendered ineffective.¹²⁹

According to the Court, his subjective right and its justiciability derives from Article 19(4) German Basic Law (*Grundgesetz*), Article 47 of the Charter and the fundamental rights at stake, as underlined by Recital 19 of the Dublin III Regulation.¹³⁰ When applying the Dublin III Regulation, generally, fundamental rights like Articles 7 and 24 of the Charter must be taken into account.¹³¹ The Administrative Court Münster hence explicitly mentioned the necessity of an individual legal remedy against the rejection of a take charge request in cases where the fundamental rights of the best interests of the child and family unity are at stake. Limiting legal remedies under the Dublin III Regulation to the explicit wording of Article 27 would undermine the protection of the applicant's fundamental rights and ultimately even frustrate the purpose of the Dublin III Regulation.

Even in a situation where the re-examination request according to Article 5(2) Implementing Regulation was sent after the expiry of the deadline, the Administrative Court of Berlin ruled in a case: 'Even though Article 27 of the Dublin III Regulation only contains a provision on appeals against a transfer decision, Article 47 of the Charter [...] requires that applicants be given an effective legal remedy also in the present case situation'.¹³² The case underlying this court's decision concerned a married couple who arrived in Greece. On finding out they had a minor son living in Germany enjoying subsidiary protection, Greece requested Germany to take charge of the couple, applying Article 9 of the Dublin III Regulation.

The Administrative Court of Berlin argued that especially since Greek authorities cannot oblige the Federal Office to take charge of the applicants, the legal remedy must be sought in Germany (the requested Member State).¹³³ Moreover, the subjective right to a legal remedy against the refusal of a take charge request would not be in conflict with Article 27 of the Dublin III Regulation as it is worded now.¹³⁴ On the contrary, the remedy the German court saw necessary to effectively implement the

¹²⁶ For further case law, see Equal Rights Beyond Borders strategic litigation on Family Reunion, available at: <https://www.equal-rights.org/litigation-family-reunion> (Accessed 8 July 2020).

¹²⁷ Verwaltungsgericht Münster Case 2 L 989/18.A [2018] ECLI:DE:VGMS:2018:1220.2L989.18A.00, para 24.

¹²⁸ *Ibid*, para 32.

¹²⁹ Verwaltungsgericht Münster Case 2 L 989/18.A [2018] ECLI:DE:VGMS:2018:1220.2L989.18A.00.

¹³⁰ *Ibid*, para 36; CJEU Case C-01/16 *Shiri* [2017] paras 44-46; CJEU Case C-670/16 *Mengesteab* [2017], Opinion of A-G Sharpston, paras 62-63.

¹³¹ Verwaltungsgericht Münster Case 2 L 989/18.A [2018] ECLI:DE:VGMS:2018:1220.2L989.18A.00, para 31.

¹³² Translation of the authors of Verwaltungsgericht Berlin Case 23 L 706.18 A [2019] ECLI:DE:VGBE:2019:0315.23L706.18A.00, para 21.

¹³³ *Ibid*. For that same reasoning see also Verwaltungsgericht Trier Case 7 L 398/20.TR [2020] p 4 and Verwaltungsgericht Trier Case 7 L 1027/19.TR [2019] p 3.

¹³⁴ Translation of the authors of Verwaltungsgericht Berlin Case 23 L 706.18 A [2019] ECLI:DE:VGBE:2019:0315.23L706.18A.00, para 21.

Dublin III Regulation is directed towards the same goal as Article 27 of the Regulation – the effective protection of fundamental rights of individuals in the Dublin III Regulation.

Additionally, other German court rulings dealt with the material aspects of the refusals of take charge requests – such as the time limits for the request and the re-examination procedure and the standard of proof to verify family ties – without reiterating the line of argumentation regarding the availability of a legal remedy but indirectly confirming that an appeal has to be granted.¹³⁵

6.6 Sub conclusion

It should be concluded that the interpretations of national courts regarding a possible remedy against the rejection of a take charge request are divergent. They range from dismissals of the fundamental rights implications (Sweden and Austria) to detailed considerations of the fundamental rights at stake (Germany and the United Kingdom), explicitly granting an effective legal remedy against the refusal of a take charge request.

In particular, the German courts have emphasised the overarching importance of family unity and the best interests of the child to substantiate the necessity of a legal remedy against the refusal of a take charge request to guarantee an effective implementation of the Dublin III Regulation. Similarly, UK courts have favoured a broad interpretation of Article 27 Dublin III Regulation in light of the fundamental rights at stake. The Council of State in the Netherlands rejected individual remedies if they could interfere with interstate solution mechanisms. However, the District Court of The Hague granted access to a remedy before the national court, in a case where the time limits for interstate mechanisms had expired.

The divergent interpretation in the Member State is a good reason for national courts to refer preliminary questions to the CJEU about the interpretation of Article 27 of the Dublin III Regulation in light of Article 47 of the Charter. In the introduction of this expert opinion, we formulated such preliminary questions. The final chapter of this expert opinion will draw conclusions and propose an answer to these preliminary questions.

¹³⁵ See among others: Administrative Court Berlin 04.07.2019 – 37 L 277.19.A; Administrative Court Münster 06.05.2019 – 2 L 392/19.A; Administrative Court Potsdam 25.09.2018 – 11 L 751/18.A; Administrative Court Trier 27.03.2019 – 7 L 1027/19.TR.

7 Conclusions and Answers to the Preliminary Questions

This opinion concerned an individual's right to challenge the rejection by the Netherlands, of a take charge request under the Dublin III Regulation by Greece, before the Dutch national courts. Research has shown that many of outgoing take charge requests from Greece deal with family reunification. With the high rate of rejections of such requests, it is suggested that the fundamental rights of applicants are at risk of being violated.¹³⁶

Throughout this expert opinion, this question has been explored through a comprehensive analysis of the development, content, and aims of the Dublin III Regulation and the meaning of Article 47 of the Charter. Article 27 of the Dublin III Regulation provides for the right to an effective remedy against a 'transfer decision'. It does not follow from the text of Article 27 nor the system of the Dublin III Regulation whether this term also includes decisions *not to transfer*.

Protection of fundamental rights

The history and development of the Dublin III Regulation clearly shows that the different objectives of the Regulation ought to be balanced, placing an increasingly greater emphasis on family unity and suggesting that this is equally as important as the aim of fast procedures. The Court confirmed this in *Ghezelbash*. However, the protection of the applicant's fundamental rights cannot be guaranteed if a legal remedy is not available.

The judicial review of rejected take charge requests offers protection against misinterpretation and misapplication of the relevant law and is therefore ultimately a safeguard of the rule of law.¹³⁷ It would undermine the integrity of the Dublin system to only grant a remedy against a decision *to transfer*, but not against the decision *not to transfer*.¹³⁸ The right to family unity, the best interests of the child and the right to the correct application of the Dublin criteria are protected under EU law and are at stake during take charge procedures. It was concluded in this expert opinion that Article 27 Dublin III Regulation, read in light of Article 47 of the Charter, obliges Member States to provide an effective remedy before a court or tribunal against a decision *not to transfer* in the context of the rejection of a take charge request.

Interstate resolution mechanisms

This expert opinion subsequently examined whether the interstate resolution mechanisms, namely Article 37 of the Dublin III Regulation and Article 5 of the Implementing Regulation can provide an effective remedy against the rejection of a take charge request. In Member States that rejected the right to appeal against a take charge request, courts referred to the interstate mechanisms amongst others arguing that a right to appeal would interfere with these mechanisms. Accordingly, this expert opinion examined these procedures. Core elements of the right to an effective remedy such as the right to be heard, the right for an individual to submit evidence and the opportunity for an individual to raise proceedings independently are not provided for in these provisions. Indeed, the mechanisms are reserved for Member States to use and individual applicants are unable to invoke them. It was

¹³⁶ ECRE, 'The Implementation of the Dublin III Regulation in 2018', (March 2019) Available at:

http://www.asylumineurope.org/sites/default/files/aida_2018update_dublin.pdf (Accessed 20 June 2020).

¹³⁷ CJEU Case 26/62 *Van Gend & Loos* [1963]; regarding the context of *Ghezelbash* see CJEU Case C-63/15 *Ghezelbash* [2016], Opinion of A-G Sharpston, para 74.

¹³⁸ R Nestler and V Vogt, 'Dublin-III reversed – Ein Instrument zur Familienzusammenführung?' *Zeitschrift für Ausländerrecht und Ausländerpolitik* (2017) p 23.

therefore concluded that these mechanisms do not provide an effective legal remedy for an individual. The courts in the *requesting* Member State cannot oblige the *requested* Member State to accept the take charge request and can therefore not provide an effective remedy either. Furthermore, as the interstate procedures in practice are rarely used and their outcome is non-binding, it cannot be said that an individual remedy interferes with these mechanisms. Therefore, an effective remedy must be available before a court or tribunal in the Member State, which has taken the decision not to transfer in the context of a take charge request.

Diverging interpretation of Article 27 Dublin III Regulation

The national courts of the Member States interpret the scope of the right to an effective legal remedy, laid down in Article 27 of the Dublin III Regulation in different ways. This emphasises the need for preliminary questions to seek uniform interpretation of the Dublin Regulation. The interpretations range from dismissals of the fundamental rights implications (Sweden and Austria) to explicitly granting a legal remedy against the refusal of a take charge request in light of the fundamental rights at stake (Germany). In particular, the German courts emphasised the overarching importance of family unity and the best interests of the child to substantiate the necessity of a legal remedy against the refusal of a take charge request to guarantee an effective implementation of the Dublin III Regulation. Similarly, the courts in the United Kingdom have favoured a broad interpretation of Article 27 Dublin III Regulation in light of the fundamental rights at stake.

In the Netherlands, the Council of State has ruled against individual remedies because of their interference with interstate mechanisms. However, the District Court of The Hague found in a more recent case that an administrative objection procedure must be granted (which may be followed by an appeal before the national court) when the time limits for the re-examination procedure between the Member States has passed and an interference is consequently no longer possible. Therefore, there is an urgency for clarification of the question on the availability of a legal remedy against refusals of take charge requests.

Answers to the preliminary questions

We thus propose national courts to refer preliminary questions to the CJEU, which were formulated in section 1.5 of this expert opinion.

On the basis of our research we suggest the CJEU to answer the proposed preliminary questions as follows:

1. Article 27 of the Dublin III Regulation, read in the light of Article 47 of the Charter, must be interpreted as meaning, that it requires a Member State that is requested to take charge of an application for international protection under Articles 8-10 of that Regulation by another Member State, to provide the applicant for international protection concerned an effective remedy against the decision to reject this request before a national court or tribunal.

Only if the CJEU answers the first proposed preliminary question in the negative, it is necessary to answer the second preliminary question. Then we propose to answer this question as follows:

2. Article 47 of the Charter read in conjunction with the fundamental rights of family union and the best interests of the child, as set out in Articles 8-10 as well as Recital 19 of the Dublin III

Regulation, directly requires a Member State that is requested to take charge of an application for international protection under Articles 8-10 of that Regulation by another Member State, to provide the applicant for international protection concerned an effective remedy against the decision to reject this request before a national court or tribunal.