DUBLIN REGULATION: REBUTTING THE PRESUMPTION OF SAFE THIRD COUNTRY

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Abstract

The Dublin Regulation together with its supporting instruments comprises the Dublin system, a system based on *mutual trust* and the presumption that all participating states, so-called Dublin states are to be considered as *safe third countries* due to their recognition of the principle of *non-refoulement* as a binding obligation.

Observing Iceland as a Dublin state, this thesis seeks to examine whether or not an individual subject to removal from Iceland can or should be able to rebut the presumption of *safety* within the country identified as responsible for examining his or her application for asylum.

In so doing, this thesis critically analyses the Supreme Court of Iceland's assessment in its first two Dublin removal cases *SCJ Iceland v Samuel Ugbe* and *SCJ Okoro Osahon v Iceland*. Further, it includes a comparative analysis of Iceland's Dublin asylum procedures and case-laws with those of the other Nordic states.

The thesis is supported mainly by the relevant international, regional and domestic legislation and jurisprudence as well as reports and the writings of scholars.

The core findings of the research indicate that while individuals subject to removal from Iceland are not precluded from rebutting the presumption of safety *in theory*, it is impossible for them to do so *in fact*. This is mainly attributed to the fact that the Court requires that in order for suffering to meet the threshold for a *non-refoulement* obligation to be triggered, it must be caused by "systemic deficiency" in the receiving state's asylum procedures and reception conditions. However, "systemic deficiency" is a stricter condition which although compatible with the EU law is incompatible with that of the ECHR's well-established standards.

Following this conclusion the thesis presents some possible recommendations aimed at addressing this legal fragmentation which in turn will safeguard the fundamental rights of the Dublin returnees.

Dyflinnarreglugerð: Réttur hælisleitenda til að andmæla endursendingu til öruggs þriðja ríkis

Útdráttur

Dyflinarreglugerðin ásamt sínum stuðnings reglugerðum og tilskipunum grundvallar Dyflinarkerfið, sem er kerfi byggt á *gagnkvæmu trausti* og þeirri grundvallarforsendu að öll aðildarríki hin svokölluðu Dyflinarríki, séu álitin *örugg þriðju ríki* vegna viðurkenningar þeirra allra á meginreglunni um bann við endursendingum á ofsóttum flóttamönnum til heimaríkis (e. principle of non-refoulement).

Ritgerð þessi beinir kastljósinu að Íslandi sem Dyflinarríki, og hvort hælisleitandi með yfirvofandi brottvísun héðan geti véfengt að virt sé sú grundvallarforsenda að móttökuríkið sé *öruggt* hvað málsmeðferð og aðbúnaður hælisleitenda varðar.

Með þetta að markmiði er rýnt í tvo fyrstu dóma Hæstaréttar Íslands um Dyflinar-endursendingar; *íslenska ríkið gegn Samuel Ugbe* og *Okoro Osahon gegn íslenska ríkinu*. Ennfremur er gerð samanburðarrannsókn á íslenskri stjórnsýsluframkvæmd varðandi Dyflinar-endursendingar og slíkri framkvæmd hjá hinum Norðurlandaþjóðunum.
Er ritgerð þessi grundvölluð á alþjóðlegri og innlendri löggjöf, dómaframkvæmd, skýrslum sem og á fræðiritum.

Meginniðurstöður þessarar rannsóknar eru að þrátt fyrir að hælisleitendur sem eigi yfir höfði sér brottvísun geti látið reyna á réttmæti slíkrar ákvörðunar í orði, er raunverulegur möguleiki þeirra á endurskoðun raunverulega ekki fyrir hendi. Byggir niðurstaðan á þeirri staðreynd að Hæstiréttur hefur túlkað það sem svo að málsmeðferð og aðstæður í viðtökuríki þurfi að vera haldin *kerfislegum ágöllum* til þess að einstaklingur teljist í nægilega slæmri stöðu til að náð sé þeim þröskuldi sem gert er ráð fyrir í reglu um bann við endursendingu á hættusvæði. Þrátt fyrir að krafa um *kerfislegan ágalla* samrýmist kröfum Evrópulöggjafar er hún strangari en þau viðmið sem sett hafa verið af Mannréttindadómstól Evrópu um þessi mál.
Í ljósi fyrrgreindrar niðurstöðu er bent á leiðir til draga úr þeirri lagalegu togstreitu sem hefur myndast á þessu réttarsviði með það að markmiði að tryggja grundvallarréttindi "Dyflinnar-hælisleitanda" hérlendis.

Preface

"man is a citizen both of his State and of the world"

John Peters Humphrey (1905–1995)

The idea of people migrating to Iceland from countries outside of Europe is a fairly new phenomenon. Just over 12 years ago an 18-year-old Jamaican girl in search of adventure and love *chose* to leave her friends and family behind and migrate to Iceland. Not knowing where she was going or what to expect, she arrived at Keflavík airport on 17 December 2001 a few minutes past midnight. Greeted by unfamiliar language, darkness and a cold temperature, she appreciated the warm welcome and instant support she received from her new found family. That girl was me. Asylum seekers and myself have one thing in common, at a certain point in our lives we found ourselves outside our countries of origin, but unfortunately that's where our similarities part.

Unlike my situation, an asylum seeker does not *choose* voluntarily to leave his country of origin, friends and family. Rather, he is forced to flee either because his country is incapable or unwilling to afford him protection, thus eliminating *choice* from the equation. Equally, an asylum seeker who arrives in Iceland not only faces an inevitable cold temperature, but also a cold reception. In fact, in most cases asylum seekers are prosecuted in contravention of Article 31 of the Refugee Convention for illegal entry into Icelandic territory. In other cases, they are sent back to their country of origin or to a so-called safe country.

Having had the experience as an immigrant in Iceland as well as the opportunity to work with other immigrants and asylum seekers since 2011 through various voluntary projects, my contribution to this field of law is both humbling and extremely gratifying.

However, the completion of this thesis would not have been possible without the assistance and support of a number of persons to whom the author will be eternally grateful. First, I would like to offer my sincerest gratitude to my supervisor Dr. Davíð Þór Björgvinsson, who has been a tremendous supervisor and without whom this thesis would not have been completed. I thank him for all his suggestions and recommendations and for allowing me the freedom to explore this topical issue.

Second, I would like to thank the Swedish Migration Board (Migrationsverket) and especially Hans Nidsjö, the Board's statistical officer who has been truly remarkable in assisting me with acquiring the necessary information.

Third, I also express my gratitude to the Norwegian Appeals Board (UNE) and especially Kristin Søvik, the Board's legal advisor who has been extremely patient and forthcoming in providing information and replies to my numerous written enquiries as well as phone calls. Her assistance has been invaluable.

Fourth, it gives me great pleasure to express my appreciation for the assistance provided by Judge Juha Rautiainen at the Helsinki Administrative Court and as well as the staff at the Asylum Unit of the Finnish Immigration Service. Especially noteworthy is the eagerness and positive attitude of the Finnish authorities who were very welcoming and forthcoming in answering my queries.

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Sixth, I will forever be indebted to my colleagues at Réttur Aðalsteinsson and Partners who believed in me and opened their doors and accepted me as part of a truly remarkable "legal family". Their belief in me is truly inspiring which in turn armed me with the confidence to explore this topic.

Seventh, I cannot find words to express my gratitude to Julie Ingham, School Director of Enskuskólinn for lending her proofreading expertise to this paper.

Although difficult to put into words, I express finally my deepest gratitude to my family, and especially to my twin boys Owen Rúnar and Aaron Freyr, who have been unbelievably patient and understanding, my rock, Hafsteinn Birgir Arason who has been extremely supportive throughout this process and to my dearest mother in Jamaica who has been with me on Skype throughout this entire process, keeping me awake at times, for encouraging me to continue and for knowing before I did that my aspiration in life was to become a lawyer. I look forward to celebrating this milestone with her.

Table of Contents

Table of Legislation and Other Instruments

INTERNATIONAL TREATIES

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85

Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137

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Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217A (III)

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EUROPEAN REGIONAL INSTRUMENTS

Charter of Fundamental Rights of the European Union [2012] OJ C 326/391

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 39/1

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Council Decision of 7 March 2011 on the conclusion of a Protocol between the European Community, the Swiss Confederation and the Principality of Liechtenstein on the accession of the Principality of Liechtenstein to the Agreement between the European Community and the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland [2011] OJ L 160/37

Council Directive 2003/9/EC of 27 January 2003 laying down Minimum Standards for the Reception of Asylum Seekers [2003] OJ L 31/18

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

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Council Regulation (EC) 2725/2000 of 11 December 2000 concerning the establishment of EURODAC for the comparison of fingerprints for effective application of the Dublin Convention [2000] OJ L 62/1

Council Regulation (EC) No 407/2002 of 28 February 2002 laying down certain rules to implement Regulation (EC) No 2725/2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention [2002] OJ L 62/1

Declaration Annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007 Concerning the Charter of Fundamental Rights of the European Union 2010 OJ C 83/335

Directive 2011/95/EU of the European Parliament and 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 (recast) [2011] OJ L 337/9

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 180/60

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 [2013] OJ L 180/96

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

Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 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 and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast) [2013] OJ L 180/31

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American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123

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DOMESTIC LEGISLATION

Iceland

Laws and Regulations

Act on Civil Procedure No 91/1991

Act on Foreigners No 96/2002

Administrative Procedures Act No 37/1993

Regulation on Foreigners No 53/2003

Parliamentary Documents

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Finland

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EXECUTIVE COMMITTEE OF UNCHR

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CASES BEFORE INTERNATIONAL TREATY BODIES

United Nations Human Rights Committee

Kindler v Canada, CCPR/C/48/D/470/1991, 11 November 1993

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European Court of Human Rights

Judgments

Abdulaziz, Cabales and Balkandali v UK (1985) ECHRR Series A 94

Ben Khemais v Italy App no 246/07 (EctHR, 24 February 2009)

Chahal v UK (1996) 23 EHRR 413

Cruz Varas and Others v Sweden (1991) 14 EHRR 1

Conka v Belgium App no 51564/99 (EctHR, 5 February 2002)

Hamidovic v Italy App no 31956/05 (EctHR, 4 December 2012)

Hirsi Jamaa and Others v Italy [GC] App no 27765/09 (EctHR, 23 February 2012)

Jabari v Turkey App no 40035/98 (EctHR, 11 July 2000)

Mohammed v Austria App no 2283/12 (EctHR, 6 June 2013)

M.S.S. v Belgium and Greece [GC] App no 30696/09 (EctHR, 21 January 2011)

NA v UK App no 25904/07 (EctHR, 17 July 2008)

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Sufi and Elmi v UK App no 8319/07 (EctHR, 28 June 2011)

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Admissibility Decisions

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Andric v Sweden (dec) no 45917/99, 23 February 1999

Halimi v Austria and Italy (dec) no 53852/11, 18 June 2013

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K.R.S. v UK (dec) no 32733/08, 2 December 2008

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T.I. v UK (dec) no 43844/98, 2 March 2000

Venkadajalasarma v Netherlands no 58510/00, 17 February 2004

European Court of Justice (CJEU)

Preliminary Rulings

Case C-394/12 *Abdullahi v Bundesasylamt* [2013] not yet published

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Iceland v Solomon Ugbe SCJ 24 October 2013, case no 405/2013

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Okoro Osahon v Iceland SCJ 17 December 2013, case no 445/2013

The Prosecution v Gudmundur Breifjord Aegirsson SCJ 9 January 1990 case no 120/1989

Reykjavík District Court Judgments

A v Iceland RDCJ 5 May 2014 case no E-910/2014

Ali Hussein Aljazem v Iceland RDCJ 25 May 2011 case no E-4446/2010

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United Kingdom

EM v *Secretary of State for the Home Department [2012] EWCA Civ 1336*

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R v Secretary of State for the Home Department, ex parte Yogathas [2002] UKHL 36

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Norway

Ref no 09-143086ASD-BORG/03 *A v the Norwegian Appeals Board*, February 2010

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Finland

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KHO 2241/1/10 (Helsinki Supreme Administrative Court)

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I. Introduction

"Sometimes I feel like I am not even human because of the way people look at me and treat me. They refuse to believe me that there is danger in my country and that's why I had to leave. Now they [Iceland] have decided to send me back to Norway because I am "Dublin", I don't know what will happen to me next. Norway will send me back to my country. Maybe it's best that they just send me back so I can finally go and die".

(The words of a "Dublin returnee", 8 February 2014)

These words reflect the reality of many asylum seekers, and in this particular instance that of the "Dublin returnee." The above statement allows for a slight glimpse into the mind of an asylum seeker revealing a sense of anguish, a certain level of fear of the unknown as well as a sense of hopelessness.

The concept *freedom of movement* is one of the four fundamental freedoms that form the basis of the European Union.[1] This freedom is afforded to nationals of all Member States as well as their families within the Union.[2] However, freedom of movement is not extended to asylum seekers; instead their movement is regulated by the Dublin system.

Pending discussion below, the term 'Dublin system' is used to refer to the four instruments which serve to determine the Member State responsible for examining an asylum application, the Dublin Regulation, its implementing Regulation, the EURODAC Regulation and its implementing Regulation.[3] The Dublin system is applicable within all the EU Member States as well as Norway, Iceland, Liechtenstein and Switzerland on the basis of special agreements.

While the Dublin system is aimed at allocating responsibility to examine a claim for asylum to one particular Member State,[4] it also seeks to control the secondary movement of asylum seekers.[5] Such a restriction on the movement of asylum seekers has been justified on the basis of *mutual trust* between states and the presumption that all Dublin states (i.e. all EU and EFTA Member States) are *safe*.[6]

Conversely, there has been an on-going debate that the concept *"safe third country"* employed by the EU within its asylum system threatens to undermine international law with

[1] Elspeth Guild, 'The Europeanisation of Europe's Asylum Policy' (2006) 18 International Journal of Refugee Law 633 <http://ijrl.oxfordjournals.org/content/18/3-4/630> accessed 13 March 2014. Hereinafter: EU.
[2] Guild Ibid.
[3]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' (COM 2007) 742 5 <http://www.refworld.org/docid/47fdfb080.html>.
[4] Hemme Battjes, *The Principle of Mutual Trust in European Asylum, Migration, and Criminal Law: Reconciling Trust and Fundamental Rights* (FORUM, Institute for Multicultural Affairs 2011) 9.
[5] Guild (n 1) 633.
[6] Dublin II Regulation, Recital 2.

regard to refugee rights and human rights.[7] Despite this debate, states remain reluctant to find alternative ways to protect their interests while respecting the fundamental right of the individual to seek asylum and enjoy asylum. To this contended practice, Iceland as a Dublin state is no exception.

As a Dublin state, Iceland would be classified as a transferring or requesting state rather than a requested or receiving state, in other words, it sends more requests to other Dublin states to take-back applicants for asylum under the Dublin Regulation, rather than it receives from other Dublin states.[8] In 2012 Iceland decided to return 39 applicants for asylum to other Dublin states, whilst receiving no request from other Dublin states to take back an applicant during the same period.[9] However, two of those 39 Dublin returnees brought proceedings before the Icelandic national courts in an effort to stop their transfer to so-called *safe countries* under the Dublin II Regulation[10].

The cases involved two Nigerian citizens who sought among other things to rebut the presumption of *safe country*, citing that a return to Sweden and Italy respectively, the countries Iceland identified as responsible for examining their application for asylum would be equivalent to *refoulement.*[11] These are the first Dublin removal cases before the Icelandic Supreme Court.[12] In both cases the SCJ held that the identified countries were *safe* since the appellants were unable to show a "systemic deficiency" in the asylum procedures of the receiving states.

The requirement for "systemic deficiency" in the asylum procedures of the receiving states is, in the view of the Supreme Court, compatible with the standard of suffering that was established by the European Court of Human Rights[13] in its *M.S.S. v Greece and Belgium judgement*.[14] However, it raises the question as to whether or not Dublin returnees

[7] Eva Nanopoulos, 'Trust Issues and the European Common Asylum System: Finding the Right Balance', vol. 72 (Cambridge Law Journal 2013) 7 <http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=8948772> accessed 29 March 2014.

[8] Matiada Ngalikpima and Maria Hennessy, 'Dublin II Regulation: Lives on Hold- European Comparative Report' (European Council, ECRE 2013) 120 <http://www.dublin-project.eu/dublin/Dublin-news/New-report-Dublin-II-regulation-lives-on-hold> accessed 29 March 2014.

[9] Rauði kross Íslands, 'Yfirlit um fjölda hælisumsókna á árinu 2012 og ákvarðanir Útlendingastofnunar ásamt úrskurðum innanríkisráðuneytisins á árinu 2012' (Rauði kross Íslands 2013) 3 <http://www.raudikrossinn.is/doc/10417613?wosid=false> accessed 17 April 2014.

[10] Hereinafter: DRII or The Regulation.

[11] *Iceland v Samuel Ugbe* SCJ 24 October 2013, case no 405/2013; Hereinafter: SCJ Samuel and *Okoro Osahon v Iceland* SCJ 17 December 2013, case no 445/2013**;** Hereinafter: SCJ Okoro.

[12] Hereinafter: SCJ.

[13] Hereinafter: ECtHR or the Court.

[14] *M.S.S. v. Belgium and Greece* [GC] App no 30696/09 (ECHR, 21 January 2011); Hereinafter: M.S.S.; Case C-411/10 and C-493/10 *NS and Others v SSHD* [2011] ECR I-13905; Hereinafter: NS.

are to be considered as a category of persons without individual human rights to be free from *refoulement.* Additionally, it raises the question as to whether or not this interpretation of *M.S.S.* by the Icelandic Supreme Court is far too narrow, and thus excludes from the Court's assessment a rigorous scrutiny of the general situation in the receiving country as well as the personal circumstance of the asylum seeker in that country.

I. Research Question

In light of the foregoing, using the aforementioned Icelandic Supreme Court case-laws as points of reference, the main objective of this research is to determine whether or not an *individual* asylum seeker, in particular a Dublin returnee has or should have the right to rebut the presumption that a particular country is *safe* in light of the principle of *non-refoulement*.

II. Research Methodology

The method used to approach the research question is two-fold. The first method entails an examination of the relevant legal sources; national, EU law, international human rights and refugee instruments, a case study, the writings of scholars along with other relevant subject areas. The second method is in the form of a legal comparative analysis, where a comparison will be made between the Icelandic Dublin removal case-laws and those of its neighbouring states specifically Norway, Finland, Denmark and Sweden, the purpose of which is to identify whether or not "systemic deficiency" is also required to establish substantial grounds for a real risk of violation of the principle of *non-refoulement*. Due to the close relationship between Iceland and these countries, especially Norway, a comparative analysis between their case-laws is appropriate and serves to assist the researcher in arriving at an accurate conclusion.

III. Research Structure

Based on the application of the two research methods outlined above this thesis is divided into seven chapters. For the purpose of context, the first chapter explores the Dublin system and its development. It is important to note that the Dublin system is ever changing with the introduction of recasts and new proposals to existing regulations and directives, some of which will be highlighted in this chapter. Furthermore, the chapter explores the concepts burden-sharing, the take-back and take-charge obligations which are important for

the purpose of the research question. In addition, the chapter looks at the safe country concept as it pertains to Dublin states.

The second chapter examines Iceland as a Dublin State, in particular, its implementing of the Dublin rules, its relationship with Norway with regards to asylum issues. Furthermore, it reviews in detail SCJ *Samuel* and SCJ *Okoro.* Although this chapter is concerned with examining Iceland as a Dublin state, it is also important to review the Icelandic legislation on asylum issues to determine whether or not it provides for *individual* rebuttal of the *safe* country concept despite the "systemic deficiency" requirement.

The third chapter discusses the principle of *non-refoulement* under customary law, refugee law and human rights law and the impact of the Dublin Regulation on the principle. It is important to note that the principle will be examined in greater detail under the ECHR as it is the most relevant to Dublin cases. Therefore it looks at the refutability principle, the importance of Article 13 as well as Rule 39 of the Court.

The fourth chapter examines the concept "systemic deficiency", the standard of proof and its implications on the individual rights of the Dublin returnee not to be subject to *refoulement*. The fifth chapter examines the asylum procedures and case-laws in other Nordic countries for the purpose of a comparative analysis.

In the sixth chapter, the main findings of the research will be highlighted and in chapter seven the paper puts forward possible recommendations aimed at striking a balance between the functioning of the Dublin system and the obligation of states to respect the human rights of Dublin returnees.

IV. Limitations and Challenges

The main challenge experienced was a lack of co-operation with the asylum authorities in Iceland. This in turn placed a restriction on the author's access to the most recent statistics on asylum applications and decisions.

1. The Dublin System and State Responsibility

While Article 14 (1) of the Universal Declaration on Human Rights provides for the right of individuals fleeing persecution to international protection in other countries, a corresponding international legal instrument providing for individual state responsibility for granting such protection is non-existent.[15] This is mainly attributed to the concept *state sovereignty.*[16]

As a matter of well-established international law states have the right to control their borders and uphold discretionary admissions policies, an act which has been identified as essential components to their sovereignty.[17]

However, subject to their treaty and customary law obligation, all states accept that the principle of *non-refoulement,* (which will be examined in Chapter 3), is a peremptory norm which delimits state sovereignty.[18] Therefore, prior to the establishment of the Dublin system states would only accept responsibility to examine an asylum claim in an effort not to violate the principle of *non-refoulement, inter alia* international law.[19]

1.1. Establishing the Dublin System

The Dublin system was established in the 1980s.[20] Its territorial scope is within all the Member States of the EU as well as Norway and Iceland[21] in which an asylum application has

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15 Emma Haddad, *The Refugee in International Society: Between Sovereigns* (Cambridge University Press 2008) 79; Hersch Lauterpacht, 'The Universal Declaration of Human Rights' [1948] British Year Book of International Law 373 <http://heinonline.org/HOL/LandingPage?handle=hein.journals/byrint25&div=17&id=&page=> accessed 15 April 2014 "It is perhaps a matter for regret that in a Declaration purporting to be an instrument of moral authority an ambiguous play of words, in a matter of this description, should have been attempted. Clearly, no declaration would be necessary to give an individual the right to seek asylum without an assurance of receiving it" .

[16] Héléne Lambert, *The Position of Aliens in Relation to the European Convention on Human Rights* (Council of Europe Publishing 2008) 11.

[17] Reinhard Marx, 'Adjusting the Dublin Convention: New Approaches to Member State Responsibility for Asylum Applications' (2001) 3 European Journal of Migration & Law 7; Abdulaziz, Cabales and Balkandali v UK (1985) ECHRR Series A 94 para 67.

[18] Ibid.

[19] Marx (n 28) 8; Andreas Zimmermann, *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary. Edited by Andreas Zimmermann.* (New York: Oxford University Press 2011).

[20] Battjes (n 4) 9.

[21] Council Decision 2006/167/EC of 21 February 2006 on the conclusion of a Protocol to the Agreement between the European Community and the Republic of Iceland and the Kingdom of Norway concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Iceland or Norway [2006] OJ L 57/15.

been lodged by a third-country national.[22] Its territorial scope was also extended to Switzerland and Liechtenstein through bilateral agreements.[23]

The main objective of the system was to create a clear and workable mechanism for determining responsibility for asylum applications.[24] One which would also curtail two of the most undesirable phenomena in refugee law, the former being *asylum seekers in orbit (*a situation where the asylum seeker remains in a transit state resulting in him being sent from country to country without ever gaining access to an asylum determination procedure), and the latter being *asylum shopping (*an abuse of the asylum system where people would lodge multiple asylum applications in several states, in search of the most favourable outcome).[25]

Contrary to the intended goal of the first instrument within the system, the so-called Dublin Convention to eliminate *asylum shopping*, it was argued by some authors that it in fact strengthened the need for it due to contingent asylum policies in the Member States. Furthermore, that it creates a mechanism that was unfair and had an element of lottery to it.[26]

In spite of the numerous flaws identified within the system, it is based on *mutual trust*, i.e. the assumption that each Member State will treat asylum seekers and examine their claims in accordance with the relevant rules of national, European, and international law and therefore must be regarded as *safe* (to be discussed in sub-chapter 1.6.).[27]

Due to the strong presumption of safety, the Dublin system allowed for somewhat of a mechanical application of the Dublin rules without states having to examine thoroughly the

[22] Euopean Commission, 'Evaluation of the Dublin System' (COM 2007) 299 final <http://www.en.refugeelawreader.org/index.php?option=com_docman&task=cat_view&gid=49&limit=30&order=name&dir=ASC&limitstart=60>.

[23]Council Decision 2008/147/EC of 28 January 2008 on the conclusion on behalf of the European Community of the Agreement between the European Community and the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland [2008] OJ L 53/3; Council Decision of 7 March 2011 on the conclusion of a Protocol between the European Community, the Swiss Confederation and the Principality of Liechtenstein on the accession of the Principality of Liechtenstein to the Agreement between the European Community and the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland [2011] OJ L 160/37.

[24] Euopean Commission (n 22).

[25] Clotilde Marinho and Matti Heinonen, 'Dublin after Schengen Allocating Responsibility for Examining Asylum' [1998] EIPASCOPE 2 <http://www.docstoc.com/docs/99798743/Dublin-after-Schengen-Allocating-Responsibility-for-Examining-Asylum> accessed 13 March 2014; Christian Kaunert and Sarah Leonard, 'The European Union and Refugees:Towards More Restrictive Asylum Policies in the European Union?' (Universitat Pompeu Fabra 2011) Working Paper Volume 8 9 <http://www.upf.edu/gritim/_pdf/WP8_Kaunert_leonard.pdf> accessed 26 February 2014; Anne Keane, 'Third Pillar of the Treaty on European Union: Co-Operation in the Fields of Justice and Home Affairs' (European Parliament 1996) Working Paper W-8 57 <http://aei.pitt.edu/6080/1/003222_1.pdf> accessed 26 February 2014.

[26] Joanne Van Selm-Thorburn, *Refugee Protection in Europe: Lessons of the Yugoslav Crisis* (Martinus Nijhoff Publishers 1998) 65.

[27] Battjes (n 4) 9.

situation in other states.[28] However, this application of the Dublin rules has proven to have dire consequences for asylum seekers who find themselves in the Dublin system or the "Dublin Trap" as referred to by Amnesty International.[29]

1.2. Dublin II Regulation and its Accompanying Regulations

The DRII mentioned in the preceding sub-chapters will be expanded upon here. The DRII was adopted by the European Council on 18 February 2003, the purpose of which was to replace the failed 1990 Dublin Convention.[30] Similar to its predecessor the DRII established a hierarchy of criteria for identifying the responsible Member State and aimed at ensuring that every asylum claim within the EU was examined by one Member State and thus prevent secondary movements within the EU.[31] In accordance with Chapter III of the Regulation and by order of priority the criteria allocates responsibility to Member States. First, responsibility was allocated to the state in which the applicant has a family member who has refugee status or whose application for asylum is being examined. Second, to the state which has provided the applicant with a residence permit or a visa or the border of which has been crossed illegally by the applicant. Third, in cases where the circumstances specified above do not apply to the particular asylum seeker, if he/she enters the territory of a Member State in which the need for him/her to have a visa is waived, then that state is responsible for examination of the application. Fourth, where none of the aforementioned criteria are applicable, the first Member State with which the asylum application was lodged shall be responsible for examining it.

Like the Dublin Convention, the DRII permitted at the discretion of any given Dublin state in accordance with Article 3 (2), the so-called sovereignty clause and Article 15 the so-called humanitarian clause to examine any asylum claim, even it is not formally responsible.[32] However, owing to the strong presumption of safety based on *mutual trust* that each Dublin state is to be regarded as safe and an asylum seeker could reasonably be expected to find protection in the responsible Member State, the discretionary provisions were rarely

[28] Agnès G Hurwitz, *The Collective Responsibility of States to Protect Refugees* (Oxford University Press 2009) 89–90.
[29] Amnesty International, 'Greece: The Dublin II Trap: Transfers of Asylum-Seekers to Greece' (Amnesty International 2010) <http://www.amnesty.org/en/library/info/EUR25/001/2010> accessed 4 April 2014.
[30] Kaunert and Leonard (n 25) 9.
[31] ELENA, 'Summary Report on the Application of the Dublin II Regulation in Europe' (ELENA 2006) 5 <http://www.refworld.org/docid/4721e2802.html> accessed 13 March 2014.
[32] Kaunert and Leonard (n 25) 9.

utilized.[33] In addition, an evaluation of the Dublin system has shown that due to divergent practices by Dublin states, in the event that they did apply the sovereignty clause, it was done "for very different reasons, ranging from purely humanitarian to practical."[34]

Of utmost importance to the application of the DRII is implementing Regulation No 1560/2003, EURODAC Regulation No 2725/2000 and its implementing Regulation No 407/2002. [35]

1.2.1. Directives No 2004/83/EC, No 2005/85/EC and No 2003/9/EC

In contrast to the Dublin Convention, the DRII was accompanied by a number of EU secondary legislation aimed at harmonising the different asylum policies in all the Dublin states, in particular the Qualification Directive No 2004/83/EC[36], the Asylum Procedures Directive No 2005/85/EC[37] as well as the Reception Conditions Directive No 2003/9/EC.[38]

The preamble of the Qualifications Directive states that "the main objective of this Directive is, on the one hand, to ensure that Member States apply common criteria for the identification of persons genuinely in need of international protection, and, on the other hand, to ensure that a minimum level of benefits is available for these persons in all Dublin states."[39] Important to note is that the Qualifications Directive is considered to be the first legally binding instrument in Europe of supranational scope that imposes obligation on states to grant asylum to refugees and other persons in need of international protection.[40] However, this is similar to the practice of other regions namely the Americas and Africa.[41]

In regards to the APD, its main objective is to introduce a minimum framework in the Community on procedures for granting and withdrawing refugee status.[42] The main objective of the RCD on the other hand is to; introduce minimum standards for the reception of asylum

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[33] ELENA (n 31) 4.
[34] Report on the Evaluation of the Dublin System, COM(2007) 299 Final, 6-7.
[35] Council Regulation (EC) No 407/2002 of 28 February 2002 laying down certain rules to implement Regulation (EC) No 2725/2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention [2002] OJ L 62/1.
[36] Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] OJ L 304/12; Hereinafter: the Qualification Directive.
[37] Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status [2005] OJ L 326/13Hereinafter: APD.
[38] Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers [2003] OJ L 31/18; Hereinafter: RCD.
[39] Qualification Directive, Recital 6.
[40] Anneliese Baldaccini, Elspeth Guild and Helen Toner, *Whose Freedom, Security and Justice?: EU Immigration and Asylum Policy* (Hart Publishing 2007) 237.
[41] Ibid; Article 22 of the American Convention on Human Rights; Article 12(3) of the African Charter on Human Rights.
[42] APD, Recital 5.

seekers, which will sufficiently ensure them a dignified standard of living and comparable living conditions in all Dublin states.[43]

The Qualification Directive, the APD and the RCD act as safeguards for refugees and others in need of international protection, with the former guaranteeing access to status determination procedures and the latter protecting asylum seekers from ill-treatment and destitute situations. All Dublin states have an obligation to comply with the APD and the RCD. However, as a general rule in European Law, Member States have a wide margin of appreciation on how Directives are transposed into national laws. In consequence, there are significant disparities in the asylum laws and practices of the Dublin states.[44]

1.3. The Revised Dublin System

Since the establishment of the Dublin system, there has been a number of revisions and recasts of Directives and Regulations on the one hand with the aim of correcting serious deficiencies to the system as a result of the failed Dublin Convention and DRII and on the other hand to fulfil the EU's ultimate goal to establish a Common European asylum system[45] in accordance with the 1999 Tampere Conclusions and the 2009 Stockholm Programme.[46]

With the recent entry into force of a number of EU Regulations and Directives, the current Dublin system is comprised of the recast Dublin Regulation, the so-called Dublin III Regulation[47] and Commission Implementing Regulation (EU) No. 118/2014 which amends Regulation (EC) No. 1560/2003 laying down detailed rules for the application of the recast

[43] RCA, Recital 7.
[44] UNHCR, 'Comments on the European Commission's Amended Proposal for a Directive of the European Parliament and of the Council on Common Procedures for Granting and Withdrawing International Protection Status (Recast) 319 Final' (UNHCR 2012) 2 <http://www.refworld.org/docid/4f3281762.html> accessed 30 March 2014.
[45] Hereinafter: CEAS.
[46] Commission, '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 Person820 Final' (COM 2008) <http://www.refworld.org/docid/493e8e3a2.html> accessed 14 May 2014; UNHCR, 'Comments on the European Commission's Amended Recast Proposal for a Directive of the European Parliament and the Council Laying down Standards for the Reception of Asylum-Seekers 320 Final' (UNHCR 2012) <http://www.refworld.org/docid/500560852.html> accessed 30 March 2014; UNHCR, 'Comments on the European Commission's Amended Proposal for a Directive 319 Final' (n 44).
[47] 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 50/11. Dublin II was replaced by 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; Hereinafter: DRIII or recast Regulation.

Dublin Regulation[48] and EURODAC I[49]. With the DRIII entering into force on 19 July 2013, the new system now applies to all asylum application lodged in the EU as of 1 January 2014. Furthermore, the complementing Directives have also been revised.[50]

While the revised rules under the Dublin system are directly applicable in all EU Member States[51], the same does not apply to its associate states.

1.4. The Dublin System as a Burden-Sharing Mechanism

One of the fundamental principles underlining the Dublin mechanism is burden-sharing. However, while the criteria for determining the Member State responsible for examining asylum applications were meant to express the principle of solidarity in accordance with recital 8 of the DRII [52], it has in fact, resulted in burden-shifting to Member States located at the border of the EU's territory.[53]

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[48] 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 39/1.

[49] Council Regulation (EC) 2725/2000 of 11 December 2000 concerning the establishment of EURODAC for the comparison of fingerprints for effective application of the Dublin Convention [2000] OJ L 62/1. EURODAC I is replaced by Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 […] and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast) [2013] OJ L 180/1. EURODAC II will become applicable as from 20 July 2015.

[50] 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 180/60 replaced the APD; Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers [2003] OJ L 31/18 ; 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 [2013] OJ L 180/96 replaced the RCD; Directive 2011/95/EU of the European Parliament and 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 (recast) [2011] OJ L 337/9 replaced the Qualification Directive.

[51] Council of the European Union, 'Position of the Council at First Reading with a View to the Adoption of a Regulation of the European Parliament and 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' (2013) Inter institutional File 15605/2/12 para 41–42: The United Kingdom and Ireland participate in the adoption of the regulation. Denmark is not takingpart.<http://register.consilium.europa.eu/doc/srv?l=EN&t=PDF&gc=true&sc=false&f=ST%2015605%202012%20REV%202> accessed 9 February 2014.

[52] DRIII, Recital 25.

[53] Joanna Lenart, '"Fortress Europe": Compliance of the Dublin II Regulation with the European Convention for the Protection of Human Rights and Fundamental Freedoms' (2012) 28 Merkourios: Utrecht Journal of International and European Law 5 <http://www.utrechtjournal.org/article/view/ujiel.bd> accessed 28 March 2014.

It has been highlighted that, burden-sharing within the meaning of the Dublin System is not concerned with spreading applicants for asylum evenly around Europe, rather with moving them to that Member State which, according to the rules of the Regulation, should assess their claim.[54] Furthermore, that one objective with the Dublin system's burden-sharing arrangement is to deter asylum seekers from arriving in the European States.[55] If so, this has been a failed effort on the part of Europe as statistics show that if anything, there has been a 32 percent increase in the number of asylum claims received by Europe in 2013 compared to the previous year.[56]

According to the United Nations Commissioner for Refugees[57] 2013 Report on Asylum Levels and Trends in Industrialized Countries, newly registered asylum seekers in South Europe increased by 49 percent, a total of 89,600 applications, the highest on record. According to the Report, Turkey was the main recipient of asylum applications (44,800), followed by Italy (27,800) and Greece (8,200).[58]

The burden, in terms of asylum trends has shifted from Greece to other countries, especially Italy in comparison to previous years.[59] Additionally, the burden created as a direct result of the Dublin system has also been alleviated in terms of Greece following a recommendation from the UNHCR[60], the ECtHR ruling in *M.S.S.* and the CJEU ruling in *N.S.*

As a result of the burden shift owing to new asylum applications and non-transferable Greek Dublin returnees, there is an unduly heavy burden now placed on certain other countries making them, like Greece, more likely to infringe the ECHR or the Geneva Convention.

Since, it can be reasonably asserted that the Dublin system is a burden-shifting mechanism that places an unfair burden on the asylum capacity of border countries especially those located in East or South Europe. This in turn raise doubts as to level of *safety* within the

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[54] Joanne van Selm, 'Access to Procedures: Safe Third Countries, Safe Countries of Origin and Time Limits' (UNHCR 2001) 3 <http://www.unhcr.org/3b39a2403.html> accessed 24 February 2014.
[55] Joanne van Selm, 'Access to Procedures: Safe Third Countries, Safe Countries of Origin and Time Limits' (UNHCR 2001) 5 <http://www.unhcr.org/3b39a2403.html> accessed 24 February 2014.
[56] UNHCR, 'Asylum Levels and Trends in Industrialized Countries, 2013' (UNHCR 2013) 2 <http://www.unhcr.org/5329b15a9.html> accessed 29 March 2014.
[57] Hereinafter: UNHCR.
[58] UNHCR, 'Asylum Levels and Trends in Industrialized Countries, 2013' (n 56) 2.
[59] United Nations Commissioner for Refugees, 'Asylum Levels and Trends in Industrialized Countries 2009: Statistical Overview of Asylum Applications Lodged in Europe and Selected Non-European Countries' (UNHCR, 2009) 7 <http://www.unhcr.org/4ba7341a9.html> accessed 30 March 2014.; Amnesty International, 'Greece Report 2009' (Amnesty International 2009) <https://www.amnesty.org/en/region/greece/report-2009> accessed 30 March 2014.
[60] UNHCR, 'Observations on Greece as a Country of Asylum' (UNHCR 2009) 21 <http://www.refworld.org/pdfid/4b4b3fc82.pdf> accessed 17 April 2014.

meaning of the principle of *non-refoulement* that can be attributed to such countries, in terms of access to asylum procedures and the reception conditions.[61]

Dublin states themselves have recognised the risks involved with such unfair distribution of asylum seekers and have been pleading for a review of the burden-sharing mechanism to reflect a fairer distribution of those who seek international protection in Europe.[62] Despite the fact that the EU agrees with the concerns raised by the Dublin states in terms of the Dublin system's failure to act as burden-sharing mechanism[63], stakeholders have contended that even so the EU failed to correct the root of the problem in the DRIII.[64] Instead, the DRIII introduced a non-binding early warning system aimed at addressing crises in the event of a systemic failure caused by an overburdened system.[65]

1.5. The Dublin Returnee – The "Take-Back" and "Take-Charge" Obligation

While the DRII does not provide for a specific definition for the term "Dublin returnee/transferee", the working definition provides that it is an asylum seeker/applicant subject to a transfer decision under the DRII.[66]

Since the DRII aims to allocate responsibility for the examination of an asylum application to one particular Dublin state, the provisions of the Regulation deal mainly with the making of, and the execution of transfer decisions. Of particular importance is Article 16, the so-called take-back and take-charge provision. Under this provision, one Dublin State can request another to take-back under the conditions of Article 20; an applicant whose application is under examination and who is in the territory of another Dublin State without permission,[67] an applicant who has withdrawn the application under examination and made an

[61] Immigration Law Practioners' Association (ILPA), 'Information Sheet: Dublin III Regulation' (ILPA 2014) <http://www.ilpa.org.uk/resources.php/25755/information-sheet-dublin-iii-regulation> accessed 30 March 2014; There have been a number of suspensions to Italy, Hungary, Poland and Malta as well as Greece. In addition, on 2 January the UNCHR called for a suspension of all transfers to Bulgaria due to deteriorating situation there, as a result of mass influx of asylum seekers from Syria.

[62] German Institute for International and Security Affairs, the European Migration Network Belgium, 'European Refugee Policy Pathway to Fairer Burden-Sharing' (Expert Council 2013) <http://www.emnbelgium.be/sites/default/files/publications/european-refugee-policy_svr-fb_0.pdf> accessed 30 March 2014.

[63] European Parliament, 'Resolution Evaluation of the Dublin System' (European Parliament 2008) point m <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2008-0385+0+DOC+XML+V0//EN> accessed 30 March 2014.

[64] DRIII, Recital 21.

[65] DRIII, Recital 22; German Institute for International and Security Affairs, the European Migration Network Belgium (n 62) 5.

[66] Ngalikpima and Hennessy (n 8) 120 Annex I.

[67] DRII, Article 16(1)(c) or DRIII, Article 18(1)(b).

application in another Dublin State,[68] and relevant to *SCJ Samuel* and *SCJ Okoro,* individuals whose application it has rejected and who are in the territory of another Dublin state without permission.[69]

As for the take-charge obligation, Article 17 of the DRII requires the requesting Dublin State, to call upon the Dublin State it identifies as responsible to take-charge of an applicant who has lodged an application in requesting state. However, all take-back and take-charge transfer decisions are subject to procedural time limits as prescribed by Article 20(1)(d), which if ignored, give the applicant grounds to rebut the legality of his transfer in accordance with Article 20(1)(e) of the DRII.[70]

The treatment of a Dublin returnee subsequent to a take-back or take-charge decision varies vastly depending on which country is the receiving state due to divergences in Dublin state practices and their application of the DRII.[71] A fear of ill-treatment due to such practices was at the heart of the dispute in *SCJ Samuel* and *SCJ Okoro*, given that despite both Sweden and Italy being bound by the same obligation under the Dublin System, the Geneva Convention and the ECHR, the treatment of Dublin returnees are vastly different.

1.6. Dublin States as Presumed Safe Third Countries and the Implications

As previously noted, the Dublin System is based on the presumption that all Dublin states are *safe*, owing to their recognition of the principle of *non-refoulement* under the Geneva Convention as a binding obligation.[72] This presumption is based on *mutual trust*, an essential element, seen as the cornerstone of the relationship between EU Member States.[73] Therefore, guided by the *safe* country presumption, an asylum seeker is reasonably expected to gain protection either within the Dublin State he or she entered into the European Union territory or the first Dublin State in which he or she lodged an application. Consequently, asylum seekers who travel elsewhere to seek protection are usually transferred back to these

[68] Ibid, Article 16(1)(d) or DRIII, Article 18(1)(c).
[69] Ibid, Article 16(1)(e) or DRIII, Article 18(1)(d).
[70] Ibid, Article 26(1), (2), Article 27(1), Article 29(1), second and third subparagraphs.
[71] Ngalikpima and Hennessy (n 8) 5.
[72] Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137; Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267;Candidate 595, 'Compliance of the Dublin Regulation with the Principle of Non-Refoulement' (UiO 2013) 29 <https://www.duo.uio.no/bitstream/handle/10852/36375/178753.pdf?sequence=4> accessed 4 April 2014.
[73] Evelien Brouwer, 'Mutual Trust and the Dublin Regulation: Protection of Fundamental Rights in the EU and the Burden of Proof' (2013) 9 Utrecht Law Review 136 <https://www.utrechtlawreview.org/index.php/ulr/article/view/URN%3ANBN%3ANL%3AUI%3A10-1-112909> accessed 4 April 2014.

presumed *safe* countries as soon as the responsibility question is satisfied without any regard to the asylum capacity in the receiving.[74] Similarly, the Dublin system does not provide any safeguards against returnees being subject to inhumane treatment and degrading treatment or even access to asylum procedure.[75]

As previously determined, the Dublin system more frequently than not, shifts the responsibility to examine asylum claims to the Southern and Eastern Dublin states, usually the poorer ones.[76] As a result of their geographical location, these countries are placed at an unfair disadvantage or become over-burdened by asylum applications thus making them more susceptible to breach their human rights obligations. As illustrated by the Greek crisis, Greece was unable to provide adequate protection to those who sought it, given that the number of asylum seekers it received due to mass influx far exceeded its capacity. Furthermore, fragmentation in the implementation of the APD and the RCD results in divergent asylum procedures and reception conditions throughout the Dublin states. Therefore, a return to these countries poses significant risks for individuals to be subject to inhuman and degrading treatment or even the threat of *refoulement* to persecution is ever present.

With such significant differences between the asylum systems of the Dublin states and the unfair burden placed on some Dublin states, due to their geographical location, a presumption of safety based on *mutual trust* seems hardly warranted.[77] The judgment of the ECtHR in *M.S.S.* seems to support this reasoning, as the Court rejected the presumption of safety resulting from an automatic and mechanical application of the Dublin Regulation based on *mutual trust*.

1.7. Conclusion

Chapter one contextualized the Dublin system, by examining its establishment and objectives, as well as the legal instruments that form its basis and influence its function.

Based on the findings in chapter one, three main conclusions can be drawn. First, the Dublin system is currently in a phase of transition which aims to improve and correct past deficiencies, while striving to gradually establish a Common European asylum policy. While there have been significant steps made towards the establishment of the CEAS, it remains at

[74] Mieke Van den Broeck, 'The Dublin II-Convention and the Principle of Non-Refoulement International Protection of Refugees in the EU Failes' (Progress Lawyers Network) 5.
[75] Article 3(2) an obligation not to transfer and Article 33 (early warning mechanism) of the DRIII is expected to remedy this deficiency.
[76] German Institute for International and Security Affairs, the European Migration Network Belgium (n 62) 7.
[77] Candidate 595 (n 72) 29.

this time, a theoretical concept, for those individuals who seek protection in Europe. Second, the Dublin system is very contradictory in nature, on the one hand it strives to protect asylum seekers from *orbit* situations as well as to prevent *forum shopping*, on the other hand it continues to be the reason for the very things it strives to prevent. By allowing for there to be huge disparities both in the asylum procedures and reception systems, asylum seekers will continue to feel the need to cross borders to find protection elsewhere. Equally, by allowing States to transfer their responsibility to examine asylum applications back to presumed *safe* countries, without taking into account the capacities of the receiving state, a severe disadvantage for those Member States at the EU's external border is created, thus risking a collapse of their asylum system. Despite the significant strain placed on these countries due to mass influx of asylum seekers arriving by sea, air and the transfer of Dublin returnees, many seem to be of the opinion that the recast Regulations and Directives were insufficient in addressing this problem. Instead, it created a non-binding mechanism to react to crises caused by unfair distribution of asylum seekers. Finally, the Dublin system is very complex as it affects several different areas of law, namely EU Law, human rights and refugee law, where at times the Dublin system seems to conflict with the latter two, in particular the principle of *non-refoulement*.

2. Iceland and the Dublin System

In order to better understand the SCJ *Samuel* and SCJ *Okoro* it is important to examine Iceland as a Dublin State. This chapter will discuss Iceland's relationship with the Dublin mechanism, its cooperation with Norway and its implementation of the Dublin rules.

Although Iceland is not a member of the EU, it has always sought to coordinate its asylum laws and policies with that of its neighbours.

Iceland's initial cooperation with the Dublin mechanism was via the 1990 Dublin Convention.[78] In Accordance with Article 7 of the Convention the EC entered into a special Agreement with Norway and Iceland regarding the responsibility for the examination of asylum claims.[79] The Dublin Convention was ratified on 28 February 2001 and was transposed into the repealed Act on Control of Foreigners, No 45/1965 as Amended by Act No 13/2001.[80] After the Convention was replaced by the DRII, Iceland agreed to the terms of the DRII with a notification to the Council of the European Union on 6 May 2003.[81]

Through Iceland's membership in the Schengen Agreement and the Dublin cooperation it adopted the DRII along with its implementing Regulation (EC) No 1560/2003[82] as well as EURODAC.[83]

In terms of Iceland being a Dublin state, it is fair to assert that Iceland unlike many other Dublin states, due to its geographical location, benefits significantly from its Dublin cooperation.[84] Statistics show that during the period 2008-2013 Iceland executed 32 transfer decisions whereby most returnees were removed to Italy, but received no request to take-back

[78] Auglýsing í C-deild Stjórnartíðinda nr. 3/2001; Legal Notice No 3/2001 Section C of the Law Gazette (Translated by author); Council Decision of 15 March 2001 concerning the conclusion of an Agreement between the European Community and the Republic of Iceland and the Kingdom of Norway concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or Iceland or Norway [2001]OJ L 93/38.

[79] Alþt. 2001-2002, A-deild, þskj. 698 – 433. mál, almennar athugasemdir í kafli 5, Schengen-samstarfið; Althingi 2001-2002, section A, Parliamentary Doc no 698 item no 433, general information, chapter 5, The Schengen Cooperation (Translated by author).

[80] Ibid, Article 59 .

[81] Auglýsing í C-deild Stjórnartíðinda nr. 14/2003; Legal Notice No 14/2003 Section C of the Law Gazette (Translated by author).

[82] Auglýsing í C-deild Stjórnartíðinda nr. 10/2003; Legal Notice No 10/2003 Section C of the Law Gazette (Translated by author); Council Decision 2006/167/EC OJ L 57/15; Nefnd um meðferð hælismála, Skyrsla Nefndar um Medferð Hælisumsókna (Dóms-og kirkjumálaráðuneytið 2009) 10–11.

[83] Auglýsing í C-deild Stjórnartíðinda nr 29/2003; Legal Notice No 29/2003 Section C of the Law Gazette (Translated by author).

[84] U.S. Committee for Refugees and Immigrants, 'World Refugee Survey 2000 Iceland' (US Committee for Refugees and Immigrants 2000) <http://www.refworld.org/docid/3ae6a8e10.html> accessed 22 April 2014.

individuals during the same period.[85] In comparison, Italy which would be classified as a receiving state received in 2012 alone 12.358 take-back requests from other states.[86]

2.1. Implementing the Dublin Regulation

Iceland is a *"dualist state",* which means that, its constitutional structure and legal system prohibits direct application of international instruments.[87] Accordingly, the Icelandic domestic laws are considered as distinct and separate legal entities impermeable to Iceland's international obligations, unless enacted by parliament.[88] As a result the DRII was transposed into the Act on Foreigners No 96/2002[89] as amended by Act No 20/2004.[90] In addition, some provisions of the Qualifications Directive, the APD and the RCD were transposed into the Foreigners Act as amended by Act No 115/2010.[91] As a result, a number of safeguards were introduced into the Foreigners Act for the benefit of asylum seekers in terms of asylum procedures and reception conditions. Furthermore, the DRII, the APD, the RCD and EURODAC are reflected in the Regulation on Foreigners No 53/2003.

Despite these new changes brought about with the bill, the UNCHR has criticised Iceland for not addressing the right of asylum seekers to effective remedy before an independent and impartial second instance body.[92] This criticism is due to the fact that, the Directorate of Immigration, which is a branch under the Ministry of the Interior, acts as first instance body, while the Ministry of the Interior serves as a second instance body.[93] In contrast, the UNCHR commended Iceland for a series of good practices, for instance the right of asylum seekers in the regular process and the Dublin process to free legal aid during the appeals procedures.[94]

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[85]. EuroStat, 'Incoming Transfers by Submitting Country and Type of "Dublin" Request' (COM 2014) <http://appsso.eurostat.ec.europa.eu/nui/submitViewTableAction.do> accessed 3 May 2014; This number could be significantly higher as some information were unavailable especially for 2013.

[86] Eurostat, 'Dublin Statistics on Countries Responsible for Asylum Application' (COM 2012) <http://epp.eurostat.ec.europa.eu/statistics_explained/images/1/14/Incoming_requests_by_reporting_country_%28GEO%29_and_by_country_sending_request_%28PARTNER%29%2C_in_2012%2C_top_10_values_highlighted_new.png> accessed 3 May 2014.

[87] Davíð Þór Björgvinsson, Lögskýringar (JPV Útgáfa 2008) 253.

[88] Davíð Þór Björgvinsson, EES-Réttur og Landsréttur (Bókaútgáfan Codex 2006) 169.

[89] Hereinafter: Foreigners Act.

[90] Alþt. 2003-2004, A- deild þskj. 1120 — 749. mál; Althingi 2003-2004, section A, Parliamentary Doc No 1120 item No 749, (Translated by author).

[91] Alþt. 2009-2010, A-deild þskj. 894 — 507. mál: Althingi 2009-2010, section A, Parliamentary Doc No 894 item No 507, (Translated by author).

[92] UNHCR, 'Submission on Iceland UPR 12th Session' (UNHCR 2011) 2 <http://www.refworld.org/pdfid/4d886a092.pdf> accessed 17 April 2014.

[93] Ibid.

[94] Ibid.

As it relates to Iceland's participation in the current Dublin system due to the recast Regulation and Directives, Iceland still relies on the DRII in accordance with the Foreigners Act and the Regulation on Foreigners. However, a proposed Amendment to the Foreigners Act, aimed at implementing the DRIII was submitted to the Parliament at the 143rd Legislative Assembly.[95]

2.2. The Icelandic-Norwegian Cooperation

The Foreigners Act applies the model of the Norwegian immigration and asylum legislation.[96] The main justification for this approach by Iceland is the fact that both countries are in a similar position towards the EU within the Schengen-cooperation.[97]Taking into account the approach of both countries with regard to the Dublin cooperation, it could easily be said that in the view of Iceland, Norway is a *safe* country which upholds the *principle* of *non-refoulement* and *vice v*ersa. It goes without saying that the possibility for an individual asylum seeker to rebut the presumption of safety in Norway, from the view point of the Icelandic immigration authority would be severely challenging, if not impossible.

Not only does Iceland copy the Norwegian legislative on immigration and asylum, but it equally follows its practice in the field. For instance, following a prohibition on return to Greece from the ECtHR pending its ruling in *M.S.S.*, Norway made the decision to stop all transfers to Greece under the Dublin Regulation on 7 October 2010.[98] With reference to Norway's decision, the Icelandic Ministry of Justice and Human Rights, now Ministry of the Interior also came to the same conclusion on 14 October 2010.[99]

However, there has been at least one instance where Iceland did not follow the practice of Norway in relation to asylum matters. This deterrent practice by the Icelandic asylum authorities can be observed by a report drafted under the auspices of the Ministry of Justice and Human Rights in 2009.[100] In the report, Iceland examined the situation of asylum seekers in Greece with a view to determining whether or not a transfer of four Greek Dublin returnees would violate the *non-refoulement principle* and if Iceland should exercise its

[95] Alþt. 2013-2014, A-deild, þskj. 457 – 249. mál; Althingi 2013-2014, section A, Parliamentary Doc No 457 item No 249, (Translated by author).
[96] Nefnd um meðferð hælismála (n 82) 32.
[97] Auglýsing í C-deild Stjórnartíðinda nr. 21/2000 og 49/2000; Legal Notice No 21/2000 and 49/2000 Section C of the Law Gazette, (Translated by author).
[98] Ministry of Justice and Human Rights, 'Sendingar Hælisleitenda til Grikklands Stöðvaðar að svo Stöddu' (Ministry of the Interior, 2010) <http://www.innanrikisraduneyti.is/dmr/frettir/nr/7699> accessed 4 April 2014.
[99] Ibid.
[100] Ministry of Justice and Human Rights, 'Skýrsla um Aðstæður Hælisleitenda í Grikklandi' (Ministry of the Interior, 2009) <http://www.innanrikisraduneyti.is/utgefid-efni/skyrslur_til_radherra/nr/6760> accessed 5 April 2014.

discretionary power under Article 3(2) of the DRII to take responsibility for examining their application. In reaching its conclusion, Iceland assessed the situation by observing both the factual and legal situation in Greece as well as the position of other Nordic States, namely Sweden, Finland, Denmark[101] and Norway. It was concluded that all Nordic states still carried out transfers to Greece and so Iceland would not stray from that practice. However, in the case of Norway, it was highlighted that after the Norwegian Administrative Court in 2008 suspended a transfer to Greece, the Norwegian authorities sent a delegation team there to assess the situation of asylum seekers. Subsequently, the Norwegian authorities decided to transfer sixteen individuals back to Greece but nonetheless sought assurances from the Greek authorities that the returnees would gain access to the asylum procedures.[102] As was thoroughly discussed in the preceding chapter, the Dublin system is based on *mutual trust* that Dublin states are *safe*. Therefore, seeking assurances from another Dublin state implies a doubt. By opting to seek individual written diplomatic assurances, the Norwegian authorities decided not to rely on *blind trust* or *mutual trust* that Greece was a *safe* country.[103]

Similarly, the Icelandic authorities came to the conclusion that four individuals must be transferred back to Greece. However, unlike Norway, it did not seek individual diplomatic assurances from the Greek authorities. This deterrent practice influenced the District Court's decision in the case *E-1759/2013 Atila Askarpour v Iceland* where the Court held that Iceland violated Article 3 of the ECHR, when it returned an Iranian national to Greece under the DRII. In its assessment of an Article 3 violation the Court held that:

> "It is clear that the Icelandic authorities had neither acquired confirmation from the Greek authorities that the general situation there had improved nor a statement from them that they would ensure that the plaintiff's application would be treated."[104]

The Court's ruling implies that Iceland relied on *blind trust* when it decided to transfer the plaintiff to Greece and ignored its obligation to comply with the general rule of investigation in accordance with Article 10 of the Administrative Procedures Act No 37/1993[105] and Article 50(3) of the Foreigners Act, both will be discussed in section 2.4.5 of this chapter.[106]

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[101] Ibid 7 (n 99); The general practice in Denmark was to acquire written confirmation from the Greek authorities that they would treat the asylum application of the Dublin returnee.
[102] Ibid 8. Utlendingsnemnda, 'Pressemelding Retur Til Hellas – På Visse Vilkår - Utlendingsnemnda' (UNE, 2009) <http://www.une.no/no/Aktuelt/For-pressen/Pressemeldinger/Retur-til-Hellas--pa-visse-vilkar/> accessed 5 April 2014.
[103] Email from The Norwegian Appeals Board to Author (6 May 2014).
[104] *Atila Askarpour v Iceland* RDCJ 27 February 2014 case no E-1759/2013, Section B para 10, (Translated by author).
[105] Hereinafter: APA.
[106] Ibid.

2.3. Asylum Procedures in Iceland

All asylum claims in Iceland are handled at first instance by the Directorate of Immigration (*Útlendingastofnun*) and at second instance by the Ministry of the Interior in accordance with the Act and Regulation on Foreigners No 053/2003. However, given that Iceland is a Contracting Party to the ECHR, the compatibility of this arrangement with Article 13 in terms of the right to an effective remedy (to be expanded upon in sub-chapter 3.6) is questionable.[107]

Over the years, Iceland has seen an increase in the number of asylum applications lodged with the asylum authorities. Statistics show that there has been a steady increase in asylum applications from 2009 where 40 applications were submitted to 150 applications in 2013.[108]

The asylum procedures in Iceland can be placed into two categories, on the one hand are the Dublin procedures and on the hand are the regular or normal procedures. Both will be briefly discussed in the following sub-chapters.

Furthermore, asylum decisions are considered to be administrative decisions subject to the provisions of the APA. Therefore, all asylum decisions both taken under the normal asylum procedures as well as in accordance with the DRII must satisfy the provisions of the APA as provided by chapter V of the Foreigners Act.

2.3.1. Dublin Asylum Procedures

Under the Dublin procedure, Iceland's examination of the claim deals only with identifying the Dublin state responsible for examining the application. Statistics show that in 2012 Iceland received 117 applications for asylum 32 of which ended with a decision at first instance whereby 25 or 78% of all decisions were treated under the Dublin procedures.[109] Similarly, a total of 23 cases were treated at second instance whereby the majority were treated under the Dublin procedure with 14 or 44% Dublin removal cases confirmed [110]

The general rule under Article 3(1) of the DRII provides that a claim examined under this procedure should result in a substantive examination of the applicants claim by the responsible Dublin state. Therefore, subsequent to the identification of the responsible

[107] Auglýsing í C-deild Stjórnartíðinda nr. 11/1954; Legal Notice No 11/1954 Section C of the Law Gazette, Iceland became a Signatory Party to the ECHR on 4 November 1950, but ratified it on 19 June 1953.
[108] UNHCR, 'Asylum Levels and Trends in Industrialized Countries, 2013' (n 56) 22.
[109] Rauði kross Íslands (n 9) 4; Percentages quoted in this chapter are rounded off to the nearest 10.
[110] Ibid 7.

country, a transfer decision is made and executed. However, Article 3 (2) of the DRII allows for derogation from this rule, availing the requesting state with the discretionary power to examine an application on its merits, even though it is not responsible. Furthermore, states have the discretionary power to examine an application on its merits pursuant to Article 15 of the DRII, under the so-called humanitarian clause.

Like most countries Iceland rarely utilizes its discretionary powers under the aforementioned Articles.[111] This is mainly due to two reasons, first the strong presumption of *safety* in the receiving state and second the *principle of effectiveness* otherwise referred to as the *effet utile principle*. The principle provides that once the purpose of a provision is clearly identified, its detailed terms will be interpreted so "as to ensure that the provision retains its effectiveness."[112] Therefore, Dublin states are bound to respect the assignment of responsibilities according to the Regulation's binding criteria.[113]

Nonetheless, although the sovereignty clause and humanitarian clause are to be considered discretionary in nature, under certain circumstances they might become obligatory.[114] As must be interpreted from the ECtHR in *M.S.S.*, a sending Dublin State must apply its discretionary powers where, substantial grounds (pending discussion in sub-chapter 3.5) have been shown that the receiving Dublin State is not *safe* within the meaning of the principle of *non-refoulement*. Therefore, under those circumstances a sending Dublin State cannot be absolved of responsibility due to a fear of upsetting the *effet utile principle.*[115]

Since 2010 Iceland has not returned any asylum seeker to Greece. Therefore, all applications for supposed Greek Dublin returnees are examined on their merits by the Icelandic authorities. However, as for claims submitted to the District and Supreme Court that Iceland is obligated to apply the sovereignty clause due to a real risk of *refoulement*, in other Dublin states none have been successful thus far on those grounds.[116]

National jurisprudence shows that all claims submitted to the Courts, assert that pursuant to Article 46(a)(2), the Article implementing Article 3(2) of the DRII, Iceland

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[111] *SCJ Okoro*, Section 4, para 6.
[N]ial Fennelly, 'Legal Interpretation at the European Court of Justice' (1996) 20 Forham International Law Journal 674 <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1526&context=ilj>.
[113] Dr Christian Filzwieser, 'The Dublin Regulation vs the European Convention of Human Rights – A Non-Issue or a Precarious Legal Balancing Act' [2006] Refugee Law Reader 10 <http://www.en.refugeelawreader.org/index.php?option=com_docman&task=doc_view&=&gid=352&ml=5&mlt=system&tmpl=component> accessed 22 April 2014.
[114] Ibid; The discussion will only focus on the sovereignty clause.
[115] Ibid 11.
[116] *A v Iceland* RDCJ 5 May 2014 case no E-910/2014, where the plaintiff, an Iraqi national subject to removal to Norway was successful on the grounds that the time-limit to execute the take-back decision had expired. However, the Court did not rule on his claim of a risk of breach of Article 3 in Norway.

should use its discretion and carry out a substantive examination of the applications. However, the application of Article 46(a)(2) is conditional upon two pre-requisites being satisfied, the former being that the asylum seeker has a specific connection with Iceland and the latter, that special reasons so warrant. Both conditions will be examined in the following sub-chapters.

2.3.1.1. Specific Connection with Iceland

In terms of having a specific connection with Iceland, the commentary with the Article along with the *travaux préparatoires* does not provide any guidance in this regard.[117] However, paragraph 3 of the Article provides that the Minister shall issue a Regulation containing further provisions on the implementation of the Article. Although no such regulation has been issued, it is important to note that a similar reference to "specific connection" with Iceland can be found in Article 12(f)(1) of the Foreigners Act, that allows for residency on humanitarian grounds. In relation to the interpretation of "specific connections" with Iceland provided for by Article 12(f)(1), the Minister of the Interior has issued a set of guidelines that must be followed when the authorities assess whether or not an asylum seeker has specific connections with Iceland.[118] The guidelines provide that authorities must take into account, the individual's legal residence in the country, whether or not he/she has relatives in Iceland, has connections through employment/social/or cultural activities, means of support and the overall situation of the individual both in Iceland and the home country.[119]

In *SCJ Samuel*, the Court rejected the defendant's argument that he had specific connection with Iceland, given that he has been involved in a serious relationship with an Icelandic citizen for more than a year.[120] However, the Court denied his claim with reference to Article 5(2) of the DRII which states that, the Member State responsible in accordance with the criteria shall be determined on the basis of situation obtaining when the asylum seeker first lodged his application with a Member State.[121] Since the aforementioned guidelines were issued subsequent to the Supreme Court's ruling they did not apply in the

[117] 17 gr. í athugasemdum með frumvarpi til laga nr. 115/2010 um breytingu á lögum nr. 96/2002, með síðari breytingum (hælismál); Article 17 of the commentary accompanying Amendent No 115/2010 of the Act on Foreigners No 96/2002 (Translated by author).
[118] Ministry of the Interior, 'Leiðbeinandi Sjónarmið vegna Veitingar Dvalarleyfa á Grunni Sérstakra Tengsla við Landið' (Ministry of the Interior, 2014) <http://www.innanrikisraduneyti.is/frettir/nr/28879> accessed 19 April 2014.
[119] Ibid, Sections a-e.
[120] *SCJ Samuel*, Section IV para 1.
[121] Ibid.

defendant's case. Nonetheless, it is not with certainty that these guidelines would have applied in the appellant's case as Dublin cases are subject to the Dublin rules which define a family member in this regard as another person also benefiting from international protection.[122] Despite this, the authorities within its discretion may derogate from this strict Dublin rule.

2.3.1.2. Special Reasons so Warrant

As it relates to the second pre-condition under Article 46(a)(2), it requires that special reasons warrant the application of the sovereignty clause. According to the commentary with the Article, "special reasons" means that where there are "substantial grounds" to believe that the conditions within the receiving Dublin state with regards to asylum procedures or the reception conditions could be in contravention of Article 3 of the ECHR or Iceland's other international obligations, then the authorities may decide to utilize their discretionary powers.[123]The commentary further stipulates that this should be an individual decision to assess whether or not it is safe to return a particular asylum seeker under the DRII.[124]

The application of this Article was at the heart of the dispute in both *SCJ Samuel* and *SCJ Okoro.*

In both cases, the parties argued that Iceland was obligated to use its discretionary powers due to a risk of breach of the *non-refoulement principle* upon return to Italy and Sweden respectively. In the former case, the defendant claimed that in his particular case the asylum procedures in Sweden were incompatible with Article 3 in conjunction with Article 13 of the ECHR, which provide for the right to an effective remedy. Therefore, the defendant did not claim that there were "systemic deficiency" within the asylum procedures and reception conditions in Sweden, rather a sporadic breach of its obligation based on his own experience there. His claims were based on the fact that his only access to a lawyer was by telephone at the appeals stage as they were both situated in separate areas of the country. However, at that particular time, he was unable to communicate his protection needs effectively, since another asylum seeker from his tribe who had also taken part in persecuting him was present in the room. Furthermore, he was unable to state his protection needs as his appointed lawyer, failed to respond to phone calls and emails. Additionally, the defendant claimed that he didn't receive adequate clothing and was cold which resulted in him

[122] DRIII, Article 7(2).
[123] Act No 115/2010 amending the Foreigners Act, Article 17, para 11.
[124] Ibid.

becoming ill.[125] Moreover, that a return to Sweden would be equivalent to a return to Nigeria –indirect *refoulement*– taking into account that Sweden had already made the decision to return him to Nigeria. In his view this amounts to "substantial grounds" that if returned to Sweden he faces a real risk of treatment contrary to the non-*refoulement principle*.

The aforementioned case distinguished from the latter, in that the appellant claimed that there are "substantial grounds" for believing that a return to Italy would violate the principle of *non-refoulement* given that there are "systemic deficiency" within asylum procedures and receptions conditions there.[126] He based this claim on the general situation highlighted by a number of reports published by human rights NGOs on Italy as well as his personal circumstances there. The appellant claimed that he had no access to legal assistance and was forced to pay the cost himself.[127] He asserted that this constituted a breach of Article 3 in conjunction with Article 13 of the ECHR. Furthermore, the appellant claimed that a return to Italy would result in *indirect-refoulement* to Nigeria where he would be persecuted as the Italian authorities had already rejected his claim and would send him back there.

Despite the Court admitting that there were several shortcomings in the asylum procedures and reception conditions in Italy, the Court held that this did not warrant an application of the sovereignty clause, since the shortcomings did not amount to systemic failure.[128] Equally, the Supreme Court disagreed with the defendant that Sweden was not a *safe* country with regards to the *principle of non-refoulement* as laid down in Article 45 of the Foreigners Act. In the view of the Court, the defendant's complaints fell short of systemic deficiency in the asylum procedures and reception conditions in Sweden.[129] Consequently, Iceland was not obligated to apply the sovereignty clause and examine either of their applications for asylum on their merits.

Similarly, the District Court, relying on the precedence set by the Supreme Court in SCJ *Okoro* and SCJ *Samue*l, in its recent judgment, *Hassan Alhaj v Iceland* rejected the argument of the plaintiff, a Syrian national, that Iceland should apply the sovereignty clause, because a return to Sweden under the DRII would expose him to ill-treatment.[130] The Court held that he failed to prove "systemic deficiency" in the asylum procedures and reception conditions in Sweden.

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[125] *SCJ Samuel*, District Court pleadings para 18.
[126] *SCJ Okoro*, Section IV para 5.
[127] Ibid para 4.
[128] Ibid.
[129] Ibid Section III para 5.
[130] *Hassan Alhaj v Iceland* RDCJ 18 March 2014 case no E-274/2014.

Therefore, in the view of the Court only "systemic deficiency" in the asylum procedures and reception conditions would amount to "substantial grounds" that the applicants face a real risk of *refoulement* subsequent to a return to the responsible countries. Consequently, the criteria "special reasons" under Article 46(a)(2) were lacking in their cases. Chapter 4 examines the compatibility of "systemic deficiency" and "special reasons" within the meaning of the Icelandic asylum procedures with the principles established by the ECtHR.

2.3.2. Normal Asylum Procedures

Asylum applications submitted under the normal procedure must be examined on their merits. As noted in the preceding sub-chapter, substantive examination of a claim does not apply to Dublin returnees unless the asylum authorities utilize their discretionary powers or it becomes compulsory for them to do so. Claims examined under the normal procedure can result in the granting of refugee status in accordance with Article 44 of the Foreigners Act, subsidiary protection under Article 45, residency on the basis of humanitarian grounds pursuant to Article 12.f. of the same Act or a rejection.

In regards to applications received in 2012, statistics shows that of the 32 decisions reached at first instance, a total of 7 or 22% were treated under the normal procedures.[131] Of the total treated under this procedure, 1 or 14% were granted subsidiary protection and 6 or 86% were rejected.[132]

As for the cases reviewed in 2012 at second instance, statistics revealed that of the 23 decisions reached, 9 or 39% were treated under the normal procedure, whereby 3 were sent back to the Directorate, 5 dismissed and 1 granted refugee status.[133]

Notably, not many applications for asylum end with positive decisions and for this Iceland have been occasionally criticized.[134] However, this could be as a result of a number of factors, one of which could be explained by the fact that very few claims submitted are treated under the normal procedure. Dublin cases make up a large percentage of all

[131] Rauði kross Íslands (n 9) 4; Percentages quoted in this chapter are rounded off to the nearest ten.
[132] Ibid.
[133] Ibid 7. Including applications from the previous year, a total of three individuals were granted refugee status in 2012, and two were granted subsidiary protection. Additionally two received residence permits on humanitarian grounds pursuant to Article 12. f. of the Foreigners Act and 11 were granted refugee status on family reunification grounds.
[134] U.S. Department of State, 'Country Report on Human Rights Practices for 2013 Iceland' (USDOS 2014) section 2 <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2013&dlid=220288#wrapper> accessed 20 April 2014.

applications submitted and are therefore treated under the Dublin procedure. Another explanation could be attributed to the conflict of interest created by the first and second instance body. Appealed first instance decisions are reviewed by the Ministry of the Interior which acts as the superior body for the Directorate of Immigration. This arrangement between the two bodies could easily affect the possibility of an asylum seeker to rebut the presumption of *safe country* by an impartial body on the administrative level. However, according Article 1 of the proposed Amendment bill to the Foreigners Act a special Appeals Committee must be established whose role will be to review first instance decisions appealed to it under Article 30 of the Foreigners Act.[135]

2.4. Asylum Procedures and Article 10 of the Administrative Procedures Act

Article 10 of the APA plays an intricate role in all asylum procedures, both under the Dublin and normal asylum procedures. While the courts have only dealt with a handful of cases which involve asylum issues, it is commonplace for asylum seekers to claim a breach of Article 10 in conjunction with Article 50 of the Foreigners Act. Therefore, all successful cases before the District and Supreme Court seem to have triumphed only due to a breach of these important procedural safeguards. Also, the Court's rulings with regard to the adherence of the rule of investigation seem to indicate that only then can the authorities determine the international protection needs of an asylum seeker as well as whether or not a particular country is safe in light of the *principle of non-refoulement.*

Article 10 stipulates that the authorities shall ensure that a case is sufficiently investigated before a decision is reached. In *SCJ Iceland against Amadou Shernu Daillo,* which involved A, an asylum seeker from Mauritania, the Court held that the authorities had failed to abide by the aforementioned Articles in the handling of his case, when they neglected to adequately consult the UNCHR and acquire the necessary information as stipulated by Article 50 of the Foreigners Act.[136]

As for the District Court, it would also seem as though all successful asylum cases were as a result of an Article 10 breach. In this regard, the District Court found in SCJ *Samuel* that the authorities had violated Article 10 in conjunction with Article 50(3) of the Foreigners Act. The main reasoning of the Court was that the authorities only relied on information regarding the general situation of asylum seekers in Sweden but failed to, on its own initiative, gather the necessary and available information regarding how the plaintiff's

[135] Alþt. 2013-2014, A-deild, þskj. 457 – 249. mál.
[136] *Iceland v Amadou Shernu Daillo* SCJ 12 March 2009, case no 353/2008.

application would be handled upon return to Sweden or if there was a risk that he would be subject to *chain-refoulement* to Nigeria. However, the Supreme Court rejected this reasoning by the District Court and overturned its ruling and with reference to Article 10 in conjunction with Article 50(4) of the Foreigners Act, it held that the authorities did not violate the rule of investigation.[137]

Another example of a successful Article 10 breach would be the District Court's Judgment in *Ali Hussein Aljazem against Iceland* where the Court held that the authorities violated Article 10 by not investigating the testimony of the plaintiff as well as his circumstances in his home country.[138]

2.5. Conclusion

The findings in this chapter provide the following insights: first, that although isolated, Iceland strives to coordinate its asylum rules and practices with those of its neighbours especially Norway, which makes rebutting the presumption of safety in that Country severely difficult or impossible.

Second, that although Iceland has seen a steady increase in asylum applications over the years, it benefits significantly from the Dublin cooperation. This is mainly attributed to its geographical location and since most applications lodged with the asylum authorities are treated under the Dublin procedure many applicants are returned to other Dublin states.

Third, that the Court agrees that in the event that either of two conditions is met, namely; connection with Iceland or special reasons so warrant then an application of the sovereignty clause becomes compulsory. However, in the view of the Court, for the second condition to be satisfied, there must be "substantial grounds" for believing that there is a real risk of violation which can only be attained if there is "systemic deficiency" in the asylum procedures or reception conditions in the receiving country.

Finally, given that asylum decisions are considered as administrative decisions, the rebutting of the presumption of safety under the Icelandic asylum procedures require that

[137] It is important to note that, the Supreme Court relied on another Article than that which was relied on by the defendant before the District Court, see section 4 of the defendant's pleadings. With reference to the principle of party initiative, "Málforræðisreglan" provided for by Article 111 of the Act on Civil Procedure No 91/1991 this begs the question whether or not the Court erred in law by doing so, since its ruling was based on the new Article which introduced new arguments that exceeded the claims made by the defendant and were not in his favour. However, according to Icelandic scholar Markús Sigurbjörnsson, while the principle of party initiative provide that judges may not exceed the claims made by the parties to a dispute, it must be interpreted that judges are not bound by legal provisions and interpretations offered by the parties. Markús Sigurbjörnsson, Einkamálaréttarfar: Handrit til Kennslu við Lagadeild Háskólans í Reykjavík (2nd edn, 2003) 20–21, (Translated by author).

[138] *Ali Hussein Aljazem v Iceland* RDCJ 25 May 2011 case no E-4446/2010.

there is a breach of the rule of investigation. However, such findings do not necessarily always answer the question as to whether or not a particular state is to be considered *safe*, rather that the authorities failed to verify. Moreover, in order for the second instance body or the national courts to entertain a *safe* country rebuttal, there has to be a claim of violation of Article 10.

3. The Non-Refoulement Principle

It is widely accepted that the principle of *non-refoulement* is the cornerstone of refugee law, as it is maintained that nothing is of greater importance to a refugee than protection against persecution.[139] Broadly defined, the principle prescribes that "no refugee should be returned to any country where he or she is likely to face persecution, or other ill-treatment, or torture."[140] Although, the principle applies to all situations where there is an act of returning an individual to a place where his life or freedom is threatened[141], within the context of immigration control, an important distinction must be made between the concept *refoulement* and expulsion or deportation.[142] The former describes a situation where there is an act of driving back or repelling those who have entered a territory illegally, summary refusal or admission of those at the frontier without valid entry documents.[143] The latter situation describes a more formal process where an alien who has resided lawfully within a state's territory is required to leave or is forcibly removed.[144] In this regard, a transfer under the Dublin regulation is to be regarded as a deportation back to a *safe* country rather than a *refouler* measure proscribed by the principle. However, there has been evidence to the contrary that this is not always the case as was determined in ECtHR *M.S.S.*

In the following the discussion, emphasis will be placed on the principle of non-refoulement within the refugee law context and the human rights law context especially under the ECHR. In regards to the principle under ECHR, the discussion will highlight in turn its application in asylum matters, the establishment of the refutability principle with regard to the *safe* country concept and the standard of proof required. Third, will be a discussion on the role of Article 13 of the ECHR and finally the role of Rule 39 of the Court and the importance of "suspensive effect" of decisions in safeguarding the principle of *non-refoulement*.

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[139] Gunnel Stenberg, *Non-Expulsion and Non-Refoulement: The Prohibition against Removal of Refugees with Special References to Articles 32 and 33 of the 1951 Convention Relating to the Status of Refugees* (Iustus Förlag 1989) 171.
[140] Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford University Press, Incorporated 2007) 201.
[141] Dr Paul Weis, 'The Refugee Convention, 1951: The Travaux Preparatoires Analysed with Commentary' (UNHCR, 1951) 245 <http://www.unhcr.org/4ca34be29.pdf> accessed 23 April 2014.
[142] Goodwin-Gill and McAdam (n 140) 201.
[143] Ibid.
[144] Ibid.

3.1. Customary International Law and Non-refoulement

The principle of *non-refoulement* is regarded as a rule of customary international law binding on all states, both parties and non-parties to the Geneva Convention.[145] This is mainly owing to state practice and *opinio juris*.[146] The principle has been reiterated and added to a range of international and regional human rights and extradition treaties as well as "repeatedly endorsed in a variety of international fora, and its violation protested by UNHCR and States."[147] Furthermore, it has been stated that the principle amounts to a rule of *jus cogens* (of a kind that no treaty or state practice can set aside).[148]

3.2. Refugee Law and Non-Refoulement

As it relates to the existence of the principle under refugee law, Article 33(1) of the Geneva Convention stipulates that:

> "No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

This Article has been determined as the primary response of the international community to the need of refugees to enter and remain on the territory in which he or she seeks asylum.[149] However, the principle places no duty on States to ensure an inherent right to be granted asylum, rather prohibits states from pushing back a refugee into the hands of his or her persecutor.[150]

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[145] Sir Elihu Lauterpacht and Daniel Bethlehem, 'The Scope and Content of the Principle of Non-Refoulement: Opinion' (Refworld, 2003) 141 <http://www.refworld.org/docid/470a33af0.html> accessed 23 April 2014.; *Hirsi Jamaa and Others v. Italy* [GC] App no 27765/09 (EctHR, 23 February 2012), Concurring Opinion of Judge Pinto De Albuquerque, para 11.

[146] UNHCR, 'Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol' 7 <http://www.refworld.org/docid/45f17a1a4.html> accessed 14 May 2014.

[147] Goodwin-Gill and McAdam (n 140) 345.

[148] UNHCR ExCom, Conclusions No 25 (XXXIII) on "International Protection" (1982), para (b); UNHCR ExCom Conclusions No 79 (XLVII) on "International Protection" (1996), where the Executive Committee emphasized that the principle of non-refoulement was not subject to derogation; Cartagena Declaration on Refugees of (1984), concluded *inter alia* that the principle of non-refoulement 'is imperative in regard to refugees and in the present state of international law should be acknowledged and observed as a rule of jus cogens',section III, para5; ECtHR *Hirsi Jamaa* , Concurring Opinion of Judge Pinto De Albuquerque, "it is a rule of *jus cogens*, on account of the fact that no derogation is permitted and of its peremptory nature, since no reservations to it are admitted", para 12.

[149] James C Hathaway, *The Rights of Refugees Under International Law* (Cambridge University Press 2005) 300.

[150] Ibid 301.

3.2.1. *The Personal Scope- Ratione Personae*

At the heart of the protective scope of the principle of non-*refoulement* is the "individual" both under international refugee law and human rights law.

Under refugee law, the right to *non-refoulement* is afforded to the "refugee" in accordance with Article 1(A)(2) of the Geneva Convention. However, since the definition of the term "refugee" is conditioned, in order to qualify as a refugee, the individual must satisfy the criteria set out by the Article.[151]

Nevertheless, it has been accepted that the principle of *non-refoulement* applies both to those formally recognised as refugees and those who are in search of formal recognition. According to the UNCHR:

> "Respect for the principle of non-refoulement requires that asylum-seekers, that is, persons who claim to be refugees, be protected against return to a place where their life or freedom might be threatened until their status as refugees has been reliably ascertained. Every refugee is, initially, also an asylum-seeker; therefore, to protect refugees, asylum-seekers must be treated on the assumption that they may be refugees until their status has been determined. Otherwise, the principle of non-refoulement would not provide effective protection for refugees, because applicants might be rejected at borders or otherwise returned to persecution on the grounds that their claim had not been established."[152]

This understanding is also in keeping with the notion, that one does not become a refugee due to formal recognition, but is recognised because he or she is a refugee. [153]

While the president of the drafters of the Geneva Convention concluded that, Article 33 does not apply to mass migration,[154] the principle however, has evolved to show that not only does it protect the individual in fear of persecution but also large groups who equally do not enjoy the protection of its state.[155]

3.2.2. *Scope of Protection- Direct and Indirect Refoulement*

In terms of the interpretative scope of the principle of *non-refoulement* under Article 33(1) there seems to be contending views among authors as to the extent of protection guaranteed. On the one hand the principle has been said to provide a broader interpretation than that which is explicitly stated by the Convention, but is nonetheless supported by the Convention's humanitarian objectives and modern understanding.[156] Therefore, the term

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[151] UNCHR, 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees,' (UNHCR, redited 1992) para 28 <http://www.unhcr.org/3d58e13b4.html> accessed 28 April 2014.
[152] UNHCR ExCom Notes No 44 on "International Protection" (1994) UN Doc A/AC.96/815.
[153] Hathaway (n 149) 158.
[154] Weis (n 141) 12.
[155] Goodwin-Gill and McAdam (n 140) 205.
[156] Lauterpacht and Bethlehem (n 145) 128–132.

"persecutor" not only protects from a well-founded fear of persecution, but also a real risk of torture or cruel, inhuman or degrading treatment or punishment or faces other threats to life, physical integrity or liberty.[157] On the other hand, other authors have maintained that "evolution outside refugee law cannot be relied upon to override the linkage between the risks described in Article 33(1) and the entitlement to recognition of refugee status under Article 1."[158] Therefore, the fact that there has been an expansion of the duty not to *refouler* "under international human rights law more generally cannot be invoked to determine the meaning of Article 33(1)."[159]

In line with the strict interpretation of the principle under Article 33(1), it does raise the question as to whether or not, or, to what extent Dublin returnees may rely on the principle of *non-refoulement* with reference to Article 33(1) to rebut the presumption of *safety* in another Dublin State.

The writings of scholars as well as international and domestic case-law have not indicated that any Dublin state has been considered to be persecutors within the meaning of Article 1 in conjunction with Article 33(1) of the Geneva Convention. Therefore, it should be maintained that the principle does not apply in this regard. However, it has been interpreted as such that the principle within the meaning of the convention not only applies to direct *refoulement* but also indirect *refoulement* to persecution.[160] The words *"in any manner whatsoever"* as prescribed by Article 33(1) has been accepted to suggest an absolute prohibition on *refoulement* including *chain-refoulement* through a non-party to the Geneva Convention or any other state that cannot guarantee it will not *refouler* an individual.[161] This interpretation has also been supported by the UNCHR ExCom Conclusions 58 from 1989, which provides that states are prohibited from returning an individual to another state in which he has previously found protection, if he has a justifiable claim that he has reasons to fear persecution or threat to his physical safety or freedom in that country.[162]

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[157] Ibid 127.
[158] Hathaway (n 149) 306.
[159] Ibid.
[160] *R v Secretary of State for the Home Department, ex parte Yogathas* [2002] UKHL 36; Ibid 326.
[161] Savitri Taylor, *Nationality, Refugee Status and State Protection: Explorations of the Gap Between Man and Citizen* (Federation Press 2005) 96.
[162]UNHCR ExCom Conclusions No 58 (XL) "Problem of Refugees and Asylum-Seekers Who move in an Irregular Manner from a Country in which they had Already Found Protection" (1989) .; *R v Secretary of State for the Home Department, ex parte Bugdaycay* [1987] AC 514532D, "if a person arriving in the United Kingdom from country A sought asylum as a refugee from country B, assuming he could establish his well-founded fear of persecution there, it would, it seems to me, be as much a breach of article 33 of the Convention to return him to country A as to country B. The one course would affect indirectly, the other directly, the prohibited result, i.e. his return "to the frontiers of territories where his life or freedom would be threatened."

It was on this ground that Dublin returnees in the cases *SCJ Samuel* and *SCJ Okoro* sought to rebut the presumption of safety in Sweden and Italy. In both cases the defendant and the appellant contended that a return to the respective countries would result in indirect-*refoulement* back to Nigeria where they risk persecution, given that both countries had already rejected their applications and made arrangements to remove them from their territories.[163] They asserted that Iceland was obligated under Article 45 of the Foreigners Act, the Article implementing Article 33(1) not to send them back to an area where they risk indirect *refoulement* to persecution. However, in the former case the Supreme Court rejected the defendant's claims holding that nothing in his case had indicated that the Swedish authorities would not afford him protection from *refoulement,* back to Nigeria.[164] Therefore, it was determined that Article 45 could not prevent his transfer back to Sweden.[165]

On the contrary, in *SCJ Okoro,* the Court's ruling with regards to the principle of *non-refoulement* was not applied within refugee law context due to a fear of persecution resulting from indirect *refoulement,* rather within the human rights law context placing focus on whether or not the appellant risks torture, inhuman or degrading treatment or punishment upon return to Italy with regards to the conditions there.[166] The Court reasoned that Article 45 would not prevent a transfer back to Italy for this reason:

> "It remains unchanged, however that the facilities and the treatment of other asylum seekers in the country, including those who are sent to Italy under the Dublin Regulation are bad. Considering the materials available in the case, the Court agrees with the District Court that even though there are deficiencies in the asylum procedures and reception conditions in Italy it does not show that in Italy exists a systemic failure that will expose the appellant to a real risk of being subjected to inhuman or degrading treatment in the country, should he be removed there."[167]

Notably, the Court's assessment was with regard to feared treatment upon removal to Italy but did not address the issue of a fear of indirect *refoulement* to persecution in Nigeria.

3.2.3. Exclusion from Protection under the Non-refoulement Principle

Although beyond the scope of this research, it is important to note briefly, that even though it has been widely accepted that the principle of *non-refoulement* must not be impaired, it is however not without exceptions. This is mainly due to concerns raised by some states during the drafting of the Convention, in regards to the absoluteness of the principle.[168]

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[163] SCJ *Okoro,* District Court ruling, section II, para 1.; SCJ *Samuel,* District Court ruling, para 10.
[164] SCJ *Samuel,* Section III, para 5.
[165] Ibid.
[166] SCJ *Okoro,* Section IV, (Translated by author).
[167] Ibid.
[168] Goodwin-Gill and McAdam (n 140) 204.

Therefore, a second paragraph was added to the Article, which allows for exceptions to the prohibition on *refoulement*.[169] Therefore, Article 33(2) provides that:

> The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

Despite this, an application of this provision is subject to a number of limitations and careful interpretation taking several important factors into account.[170]

3.3. Human Rights Law and Explicit Non-Refoulement - CAT

Not only is the principle of *non-refoulement* provided for under refugee law, but also under human rights law both explicitly and implicitly. An explicit *non-refoulement* obligation is provided for by Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[171]

All Dublin states are contracting parties to the CAT, and are therefore bound by its provisions and are prohibited from returning any individual to where there is a risk of torture.[172]

3.4. Human Rights Law and Implicit Non-Refoulement - ICCPR

In addition to the *non-refoulement* obligation under the CAT, all Dublin states are parties to the International Covenant on Civil and Political Rights[173] and the ECHR. Both instruments provide for implied *non-refoulement* obligations in accordance with Article 7 and 3 respectively. This section describes briefly the *non-refoulement* obligation under the ICCPR, the protected as well as its territorial scope.

Article 2 of the ICCPR in conjunction with Article 7 places an obligation on States to "to respect and to ensure to all individuals within its territory and subject to its jurisdiction" the right to be free from torture or to cruel, inhuman or degrading treatment or punishment."

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[169] Weis (n 140) 235; Goodwin-Gill and McAdam (n 139) 204.
[170] Lauterpacht and Bethlehem (n 145) 142–192.
[171] Hereinafter: CAT
[172] Lenart (n 53) 5; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85; In regards to Iceland see, Auglýsing í C-deild Stjórnartíðinda nr. 19/1996; Legal Notice No 19/1996 Section C of the Law Gazette, (Translated by author); The principle of *non-refoulement* is also explicitly included in the Article 4 of the Charter of Fundamental Rights and Article 22(8) American Convention on Human Rights .
[173] Lenart (n 52) 5; International Covenant on Civil and Political Rights (adopted 16 December 1999, entered into force 23 March 1976) 999 UNTS 171. Hereinafter: ICCPR.

According to the Human Rights Committee General Comment 20, the prohibition of torture, other forms of inhuman and degrading treatment or punishment, contains an implicit obligation of *non-refoulement*.[174] Equally, the HRC in General Comment 20 confirmed the non-derogable nature of Article 7.[175] Furthermore, the absolute character of Article 7 is minded through Article 4(2) of the ICCPR provides that there can be no-derogation from the Article even in times of public emergency which threatens the life of the nation.

While the UNCHR has yet to deal with a complaint regarding a violation of Article 7 due to the application of the Dublin rules, it has however given its opinion for instance, it advised Germany to extend the suspension of transfers to Greece beyond 1 January 2014.[176] Also, that states allow for "suspensive effect" (to be discussed in sub-chapter 3.6.) during the review of a transfer decision under the DRII.[177]

3.5. Human Rights Law and Implicit Non-Refoulement - ECHR

Article 3 of the ECHR contains by far the most developed prohibition on *refoulement* and is the only Article under which issues relating to the Dublin Regulation have been adjudged. Therefore, this section explains in greater detail the application of the principle, its evolution and development in relation to rebutting the presumption of safety underpinning the Dublin system and especially since it has more relevance to the *SCJ Samuel* and *SCJ Okoro*.

It is well known that the starting point of every fundamental right is the human person, i.e. the individual.[178] As previously noted the right to be free from *refoulement* is an individual human right and must therefore be considered independent of collective human rights.[179] Furthermore, this right is an entitlement for the individual not the state.[180]

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[174] UNCHR, "General Comment 20" "Replaces General Comment 7 concerning Prohibition of Torture and Cruel Treatment or Punishment" (1992) UN Doc HRI/GEN/1/Rev.1 para 9; Kindler v Canada, CCPR/C/48/D/470/1991, 11 November 1993 (UNCHR),
para 6.2 "if a State party takes a decision relating to a person within its jurisdiction, and the necessary and foreseeable consequence is that that person's rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant".
[175] Ibid para 3.
[176] UNCHR, 'Follow-up to Concluding Observations and to Views' (UNCHR 2014) <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=14430&LangID=E> accessed 1 May 2014.
[177] UNCHR, Report of the 105th -107th Session of the General Assembly (New York, March 2013) UN Doc A/68/40 Volume I 56
[178] Cornelis Wolfram Wouters, *International Legal Standards for the Protection from Refoulement* (Intersentia 2009) 14–15.
[179] "H Victor Cond, *A Handbook of International Human Rights Terminology* (Nebraska Press 2004) 103; " Collective rights […] either held by the group for the individuals of the group, or held by the individual members of the group collectively for the benefit of the group […] Individual rights are held by the individual regardless of his appurtenance to a group".
[180] Wouters (n 178) 14–15.

Under Article 1 of the ECHR in conjunction with Article 3 an obligation is placed on states to "secure to everyone within their jurisdiction" protection from "torture or inhuman or degrading treatment or punishment." Therefore, the principle applies to anyone irrespective of their immigration status.[181]

By way of extension, it is accepted that the protection afforded under Article 3 of the ECHR is wider than that provided for under the Geneva Convention, and thus serves as a useful "safety net" for asylum seekers wrongly denied international protection.[182]

Consequently, any act which involves the non-admission of, deportation, expulsion, extradition, return of any individual by any State is a violation of principle of *non-refoulement*.[183] Article 3 enshrines a non-derogable right as prescribed by Article 15(2) which ensures its application even "in time of war and or other public emergency threatening the life of the nations." Article 3 has been incorporated into the Icelandic legal order under Article 45 of the Foreigners Act as well as Article 3 of Act No 62/1994, the Act implementing the ECHR and is reflected in Article 68 of the Icelandic Constitution No 33/1944.

3.5.1. The Establishment of the Non-refoulement Principle and Application to Asylum Cases

The principle of *non-refoulement* is well established under human rights law. The ECtHR is widely credited as the leader in the development of the principle as implicitly expressed under Article 3.[184] In its *Soering v United Kingdom* judgment, the Court established that:

> "... the decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3 (art. 3), and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country."[185]

Subsequent to the *Soering* judgment, the Court, confirmed the existence of the *non-refoulement* principle in relation to asylum removal cases in *Cruz Varas and Others v*

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[181] UNHCR, Regional Bureau for Europe, 'UNHCR Manual on Refugee Protection and the European Convention on Human Rights' (Refworld, 2006) para 3.1 <http://www.refworld.org/docid/3f4cd5c74.html> accessed 25 April 2014.
[182] Ibid 4.7–4.9; ECtHR *Hirsi Jamaa*, Concurring Opinion of Judge Pinto De Albuquerque.
[183] Vladislava Stoyanova, 'The Principle of Non-Refoulement and the Right of Asylum Seekers to Enter State Territory' (2008) 3 Interdisciplinary Journal of Human Rights Law 3 <http://www.americanstudents.us/IJHRL3/Articles/Stoyanova.pdf> accessed 22 April 2014.
[184] Amnesty International 'Joint Written Comments on Ramzy v Netherlands App No 25424/05 (EctHR, 22 November 2005)' (Amnesty International, HRW, ICJ, REDRESS 2005) <http://www2.ohchr.org/english/bodies/hrc/docs/ngos/RamzyBriefNov2005.pdf> accessed 15 May 2014.
[185] *Soering v UK* (1989) 11 EHRR 347, para 91; *Chahal v UK* (1996) 23 EHRR 413, para 74.

Sweden and *Vilvarajah and Others v. United Kingdom*.[186] Furthermore, the Court in its *Chahal* judgment, which involved a rejected asylum seeker, not only reaffirmed the principle of *non-refoulement* with regard to asylum removals, but made clear the absolute nature of Article 3 from which no derogation is permitted.[187]

3.5.2. Establishment of Indirect Refoulement and the Refutability Principle

Additionally, in the view of the Court, the principle is equally applicable in cases of removals to *safe* countries as was established in its *T.I.* ruling, in relation to the transfer of a Dublin returnee, Sri Lankan national back to Germany under the Dublin Convention. In this case the Court found that:

> "… The indirect removal in this case to an intermediary country, which is also a Contracting State, does not affect the responsibility of the United Kingdom to ensure that the applicant is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention. Nor can the United Kingdom rely automatically in that context on the arrangements made in the Dublin Convention concerning the attribution of responsibility between European countries for deciding asylum claims. Where States establish international organisations, or *mutatis mutandis* international agreements, to pursue co-operation in certain fields of activities, there may be implications for the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention if Contracting States were thereby absolved from their responsibility under the Convention." [188]

Not only did the Court in *T.I.* establish the prohibition of indirect *refoulement* with regards to Dublin removal cases, but it also established a new principle, which has been referred to as the principle of refutability.[189] Thus, determining that, a prohibition on indirect *refoulement* now required that states may no longer apply the Dublin rules automatically and mechanically, as well as to no longer regard the presumption of safety in another Dublin state as absolute.[190]

In its subsequent Dublin removal case *K.R.S.*, the Court reaffirmed the *T.I.* principle in relation to prohibition on indirect *refoulement*.[191] In contrast, it has been argued that while it endorsed the principle of refutability in abstract, however, in practice it had reinforced the non-refutability of safety presumption in relation to Dublin transfers.[192] The case involved a

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[186] *Cruz Varas and Others v Sweden* (1991) 14 EHRR 1paras 67-70; *Vilvarajah and Others v UK* (1991) 14 EHRR 248.
[187] ECtHR *Chahal* para 80; "The prohibition provided by Article 3 (art. 3) against ill-treatment is equally absolute in expulsion cases".
[188] *T.I. v UK* (dec) no 43844/98, 2 March 2000; ECtHR *M.S.S.*, para 342.
[189] Violeta Moreno-Lax, 'Dismantling the Dublin System: M.S.S. v. Belgium and Greece' (2012) 14 European Journal of Migration and Law 10 <http://www.academia.edu/4572563/Dismantling_the_Dublin_System_MSS_v_Belgium_and_Greece_EJML_12> accessed 25 April 2014.
[190] Ibid.
[191] Ibid.
[192] Moreno-Lax (n 189) 12.

transfer decision under the DRII made by the United Kingdom[193] to return K.R.S., an Iranian national back to Greece, the country identified as responsible for examining his application for asylum.[194] K.R.S. contested his removal where he claimed a fear of a real risk of *refoulement* there in light of the UNCHR's position on the return of asylum seekers to Greece.[195] However, the Court's reasoning indicated that, while K.R.S. had the right to rebut the presumption of safety, he bore the burden of proof,[196] and that the standard of proof (to be explained in sub-chapter 4.1) was extremely high.

Nonetheless, M.S.S. recalled the principle of refutability which was eroded by the Court's ruling in K.R.S. In its examination of the merits of the complaint under Articles 2 and 3 the Court stated that:

> "The Court must therefore now consider whether the Belgian authorities should have regarded as rebutted the presumption that the Greek authorities would respect their international obligations in asylum matters, in spite of the *K.R.S.* case-law..."[197]

Also, contrary to the ruling in K.R.S., the Court in M.S.S. also delivered a list of refutability conditions, though not an exhaustive list, to be considered in light of the circumstances of the particular case. [198]

Furthermore, the refutability principle established by the Court was also borrowed by the CJEU in the joint cases of *NS and M and Others v. Secretary of State for the Home Department*, where the Court stated that:

> "...the presumption underlying the relevant legislation, stated in paragraph 80 above, that asylum seekers will be treated in a way which complies with fundamental rights, must be regarded as rebuttable... In the light of those factors, European Union law precludes the application of a conclusive presumption that the Member State which Article 3(1) of Regulation No 343/2003 indicates as responsible observes the fundamental rights of the European Union." [199]

However, subject to further elaboration in chapter 4 it is widely accepted by Dublin states that the CJEU in its NS ruling introduced a new condition to satisfy the substantial ground criteria, the so-called "systemic deficiency" requirement. Thus, indicating that the DRII does not generally confer upon individuals the right to challenge a safety presumption.

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[193] Hereinafter: The UK
[194] *K.R.S. v UK (dec)* no 32733/08, 2 December 2008;ECtHR M.S.S. para 342.
[195] UNHCR, 'Position on the Return of Asylum-Seekers to Greece under the "Dublin Regulation"' (UNHCR 2008) <http://www.refworld.org/docid/4805bde42.html> accessed 26 April 2014.
[196] Wouters (n 178) 274.
[197] ECtHR *M.S.S.* para 345.
[198] Moreno-Lax (n 189) 28.
[199] CJEU *NS* paras 104-105.

3.5.2.1. Standard of Proof to Satisfy "Substantial Ground"

The general standard of proof adopted by the ECtHR for an Article 3 violation is the "substantial ground" criteria which is an interrelated matter of credibility and evidence.[200] The credibility of a claim for protection from *refoulement* is determined by a number of factors including; detail, comprehensiveness, consistency, and plausibility of evidence taking into account the general situation in the destination country and personal circumstances of the individual. [201] In terms of evidence, documentary evidence, including reports which consider the human rights situation in the country, have been relied upon by the Court.[202] However, the ECtHR in K.R.S. seemed to have applied a different method to satisfy the "substantial ground" criteria other than that which its well established case-law illustrates.[203] It reasoned its finding of a non-violation of Article 3 holding that:

> "The Court notes the concerns expressed by the UNCHR whose independence, reliability and objectivity is, in its view, beyond doubt. [...]The Court also observes that the UNHCR's assessment was shared by both Amnesty International and the Norwegian Organisation for Asylum Seekers and other non-governmental organisations in their reports. Despite these concerns, the Court considers that they cannot be relied upon to prevent the United Kingdom from removing the present applicant to Greece, for the following reasons. [...] Greece does not currently remove people to Iran [...] if Greece were to recommence removals to Iran, the Dublin Regulation itself would allow the United Kingdom Government to, [use its discretion] under Article 3.2. [...] asylum applicants [...] to seek interim measures [...] under Rule 39 [...], Greece, as a Contracting State, has undertaken to abide by its Convention obligations [...]. In the absence of any proof to the contrary, it must be presumed that Greece will comply with that obligation in respect of returnees including the applicant."[204]

In contrast, the Court's ruling in M.S.S. seemed to have restored the "standard of proof" usually applied in *non-refoulement* cases by relying on the similar evidentiary materials to determine "substantial grounds".[205] On those grounds, the Court concluded that Belgium violated the principle of *non-refoulement* as it knew or ought to have known the risks involved in returning the applicant to Greece.[206] Consequently, Belgium failed to acknowledge the presumption of safety in Greece as rebutted in light of the evidence presented and the circumstances of the case.

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[200] Wouters (n 178) 266.
[201] Ibid.
[202] Ibid 271–272.
[203] Ibid 272; Information from the UNHCR was for example, used in: *Andric v Sweden (dec) no 45917/99*, 23 February 1999; *Pavlovic v Sweden (dec) no 45920/99*, 23 February 1999; *Venkadajalasarma v Netherlands no 58510/00*, 17 February 2004, para 51. Reports from Amnesty International were, used in: *H.L.R. v France (dec) no 24573/93*, 29 April 1997para 42; ECtHR *T.I*; ECtHR *Venkadajalasarma* paras 46, 49.
[204] ECtHR *K.R.S*. para (emphasis added).
[205] ECtHR *M.S.S*. paras 347-351.
[206] ECtHR *M.S.S*. para 358.

Thus, confirming that the presumption of safety underpinning the Dublin system "cannot outweigh the realities on the ground as disclosed in the general information provided by reliable actors."[207]

3.5.2.2. Standard of Suffering Required to Satisfy Substantial Grounds

In terms of anticipated treatment in the receiving country, the Court has been consistent in its practice finding that only ill-treatment attaining a minimum level of severity would be sufficient to fall within the scope of Article 3.[208] This, standard of suffering has been equally applied to Dublin cases where the applicant seeks to rebut the presumption of safety.[209] The assessment of this minimum is relative and it depends on all the circumstances of the case (such as the duration of the treatment, its physical and mental effects and, in some instances, the sex, age and state of health of the individual). In this regard it is the applicant who bears the burden of proof that ill-treatment feared meets the threshold to fall within the scope of Article 3. Therefore, evidence presented in terms of the general situation in the Dublin state as well as the applicant's personal circumstance must substantiate the applicant's claim that substantial grounds for believing that, the transfer if implemented, would expose to him or her to a real risk of being subjected to treatment contrary to Article 3.

In the case *Mohammed Hussein and Others v Netherlands and Italy,* which involved the decision by the authorities in Netherlands to return *Hussein* and her children to Italy under the DRII, the principle of refutability was reaffirmed and the same standard of proof as in M.S.S was applied in determining whether or not "substantial grounds" had been shown to believe that the asylum procedure and the reception conditions in Italy were incompatible with Article 3.

The Court also made it clear by recapitulating on the *Vilvarajah test that:*

> *"*In determining whether it has been shown that the applicant runs a real risk of suffering treatment proscribed by Article 3 if transferred to Italy, the Court will examine the issue in the light of all the material placed before it or, if necessary, material obtained *proprio motu* [...] The Court's assessment must focus on the foreseeable consequences of the applicant's removal to Italy. This in turn must be considered in the light of the general situation there as well as the applicant's personal circumstances..."[210]

[207] Moreno-Lax (n 189) 28.
[208] David John Harris, Michael O'Boyle and Colin Warbrick, *Law of the European Convention on Human Rights* (2nd edn, Butterworths 2009) 75.
[209] *Mohammed Hussein v Netherlands and Italy* (dec) no 27725/10, 2 April 2013para 68; ECtHR *M.S.S*. para 219.
[210] ECtHR *Mohammed Hussein* para 69.

Therefore, in the view of the Court it is a necessary condition to focus on the foreseeability of the return, which can only be achieved through a rigorous examination of the general situation in the receiving Dublin state as well as the personal circumstances of the applicant there. This in turn must show that the ill-treatment feared reaches the minimum level of severity threshold.

In applying this test to *Mohammed Hussein*, the Court examined a number of governmental as well as non-governmental materials and assessed the general situation holding that:

> "…while the general situation and living conditions in Italy of asylum seekers, [...] may disclose some shortcomings [...] it has not been shown to disclose a systemic failure to provide support or facilities catering for asylum seekers as members of a particularly vulnerable group of people."[211]

While it is evident that the Court was assessing the general situation in Italy, thus applying part-one of a part-two test under the previously discussed *Vilvarajah test*, its reasoning however has been interpreted by Dublin states, including Iceland as an endorsement of the condition established by the CJEU in its N.S. ruling. Therefore, Dublin states accept that "systemic deficiency" is the new condition required to show substantial ground that treatment feared has reached the minimum level of severity. In consequence, individual risk can no longer support an Article 3 breach given that only treatment arising from "systemic deficiency" can amount to substantial ground that the standard of suffering for rebutting the safety presumption has been attained. This line of reasoning is also supported by the United Kingdom Court of Appeal's[212] ruling in *EM v Secretary of State for the Home Department* where the Court stated that:

> "What in the MSS case was held to be a sufficient condition of intervention has been made by the NS case into a necessary one. Without it, proof of individual risk, however grave, and whether or not arising from operational problems in the state's system, cannot prevent return under Dublin II."[213]

Subsequent to examining the general situation in Italy, the Court then applied part-two of the *Vilvarajah* test and assessed the individual circumstance of the applicant taking into account, the anticipated treatment upon return to Italy, the manner in which she was treated upon her arrival in Italy in 2008. In finding that treatment in her particular case did not attain the minimum level of severity, the Court relied on the fact that her request for protection was processed within a matter of months and she was granted subsidiary protection.[214] In addition,

[211] Ibid 78.
[212] Hereinafter: *EWCA.*
[213] EM v Secretary of State for the Home Department [2012] EWCA Civ 1336 para 47.
[214] EctHR *Mohammed Hussein* para 73.

accommodation, access to healthcare and other facilities were made available to her.[215] Consequently, the Court ruled that a return to Italy, whether taken from a material, physical or psychological perspective did not disclose a sufficiently real and imminent risk of hardship severe enough to fall within the scope of Article 3.[216]

In light of the preceding discussion it is evident that, the Court equally assessed both the general situation and the individual circumstance of the applicant in *Mohammed Hussein,* before concluding that her treatment didn't reach the minimum level of severity to trigger a *non-refoulement* obligation.

However, owing to the widely accepted new condition especially "reserved" for Dublin returnees i.e. proof of "systemic deficiency" for a rebuttal of the safety presumption; it is not unreasonable to assert that while states claim to make an individual assessment such assessment is only a theoretical one. In consequence, even if proof of individual risk is shown, it will be irrelevant to the decision of Dublin states to return an asylum seeker, as was the finding in the previously mentioned UK Appeals Court judgment.[217]

From a human rights perspective a standard which requires that suffering no matter how severe, is only lamentable if it is caused by "systemic deficiency" is undoubtedly not compatible with the ECHR especially in light of Article 3 in conjunction with Article 1. As a consequence, some individuals will be afforded protection while others will be exposed to ill-treatment in contravention of Article 3. Like the EWCA judgment, the Icelandic SCJ ruling is equally questionable given that the prevailing understanding under European human rights law is that the denial of protection without an appropriate scrutiny of the individual circumstances of the applicant would be inconsistent with the prohibition of *refoulement*.[218] Therefore, it is not astonishing that the UK Supreme Court[219] overturned the ruling by the EWCA and in its assessment, found the Court's reasoning was, to say the least, "remarkable."[220]

In the view of the UKSC, the correct approach would be to apply the *Soering* test, where the removal of a person from a member state to another country is forbidden if it is

[215] Ibid.
[216] Ibid.
[217] *EM v SSHD* [2012] EWCA, para. 47.
[218] ILPA, 'Non-Refoulement under Threat', *Non-refoulement under Threat* (ILPA and REDRESS 2006) 3 <http://www.redress.org/downloads/publications/Non-refoulementUnderThreat.pdf> accessed 1 May 2014.
[219] Hereinafter: UKSC.
[220] *EM (Eritrea) v. Secretary of State for the Home Department* [2014] UKSC 12 para 37.

shown that there is a real risk that "the person" transferred will suffer treatment contrary to article 3 of ECHR.[221]

In terms of the application of *Soering* and *Vilarajah* tests to *SCJ Okoro* and *SCJ Samuel,* in the former case, the appellant claimed that the general situation in Italy is deplorable and this places him at risk if returned there to be exposed to ill-treatment which attains a minimum level of severity. With reference to the appellant's argument regarding the correct interpretation of ECtHR ruling in *Mohammed Hussein* the Court reasoned that:

> "[…]even though there are deficiencies in the asylum procedures and reception conditions in Italy it does not show that in Italy exists a systemic failure that will expose the appellant to a real risk of being subjected to inhuman or degrading treatment in the country, should he be removed there."[222]

Therefore in the view of the Court since there was no "systemic deficiency" in the asylum procedures in Italy, then the appellant failed to show that there were substantial grounds for believing that if he were to be returned there he would be exposed to treatment proscribed by Article 3. As for his individual circumstance in terms of treatment feared, the case did not provide any information with regard to the appellant's personal circumstances in terms of his social or economic situation whilst he resided in Italy from 2008 to 2011 when his application for asylum was denied. Therefore, this was not assessed by the Court.

Nonetheless, due to the requirement of "systemic deficiency" by the Court, it cannot be seen that his individual circumstance would have had any impact on the Court's decision.

As for the latter case *SCJ Samuel,* the defendant did not assert that the general situation in Sweden was deplorable, rather that his individual experience makes him vulnerable to being exposed to ill-treatment upon return. He claimed that whilst in Sweden he was placed at a reception centre in Northern Sweden and was not provided with the appropriate winter clothing which resulted in him becoming ill. Whether or not this would satisfy the criteria that ill-treatment attains a minimum level of severity, was ignored by the Court, who made no mention of it in its assessment. Therefore, this raises the question as to whether or not the Court should have given attention to his claim in this regard in light of the Court's ruling in M.S.S. regarding Dublin States' obligation to satisfy the material reception conditions in accordance with the RCD.[223] In M.S.S. the Court determined that "the obligation to provide accommodation and decent material conditions to impoverished asylum

[221] *EM v SSHD* [2014] UKSC para 58.
[222] SCJ *Okoro* section IV, para 5 (Translated by author).
[223] *Samuel* District Court pleadings para 18 (n 124); RCD, Article 13(1)(2) in conjunction with Article 2(j) or RCD(recast), Article 17(1)(2) in conjunction with Article 2(g): where material reception conditions are considered to include; housing, food, clothing, provided in kind, or as financial allowances.

seekers has now entered into positive law and the Greek authorities are bound to comply with their own legislation, which transposes Community law."[224] Although not the deciding factor, a violation of the RCD had an impact on the ECtHR's decision that the ill-treatment had attained the minimum level of severity necessary to trigger a *non-refoulement* obligation. In addition, the Court attached weight to the "applicant's status as an asylum seeker and, as such, a member of a particularly underprivileged and vulnerable population group in need of special protection", the duration of the treatment, and the impact on his psychological and physical well-being.[225] A similar test should have been equally applied to the defendant's situation in the Samuel case and especially since the state did not refute his argument.

However in the view of the Court since there was no "systemic deficiency" in Sweden, the defendant failed to show substantial ground that treatment feared attained the minimum level of severity and thus the safety there is to be presumed non-rebuttable.

3.6. The Principle of Refutability and Article 13 of the ECHR

Equally relevant to the principle of refutability is the right to access effective remedy upon return to a Dublin state. This in turn safeguards individuals from being sent back to an area where they have an "arguable claim" that they risk ill-treatment.

In the view of the ECtHR an effective remedy within the meaning of Article 13 is comprised of four important principles. First, a remedy must be accessible in law and in practice, and that it's "exercise must not be unjustifiable hindered by the acts or omissions of authorities.[226] Second, that there are procedural safeguards in place, in particular that the applicant has access to remedy with automatic suspensive effect.[227] Third, that it allows for the appraisal of an "arguable complaint" and affords the appropriate relief.[228] Finally, that "independent and rigorous scrutiny" of a claim by the competent authority must be guaranteed.[229] These principles in turn must not be applied in vacuum, rather to the particular individual's case.

Important to note is that although the Court relied on Article 13 to test and Article 3 breach in *T.I,* it was in *K.R.S.* that it elaborated on the aforementioned procedural principles. Furthermore, it clarified that expulsion could give rise to an issue under Article 3 where

[224] ECtHR *M.S.S.* para 250.
[225] Ibid, para 251-255.
[226] Harris, O'Boyle and Warbrick (n 208) 264.
[227] Ibid.
[228] Ibid.
[229] Ibid.

substantial grounds were shown for believing that the individual concerned would face a real risk of being subjected to ill-treatment in the event of a transfer.[230] Thus, explaining that under those circumstances states are obligated, "not to deport the person in question to that country".[231]

This indicated a shift in approach, where the Court in its preliminary examination does not examine a separate issue under Article 3; instead it considers an Article 3 breach in conjunction with Article 13. However, the Court explained this new approach to an Article 3 breach in *M.S.S.* holding that:

> "This does not mean that in the present case the Court must rule on whether there would be a violation of those provisions if the applicant were returned. It is in the first place for the Greek authorities, who have responsibility for asylum matters, themselves to examine the applicant's request and the documents produced by him and assess the risks to which he would be exposed in Afghanistan. The Court's primary concern is whether effective guarantees exist in the present case to protect the applicant against arbitrary removal directly or indirectly back to his country of origin."[232]

Therefore, the Court has taken the position that, it is within the national states competence to examine a claim for asylum and the risk of persecution feared. On the contrary, it is within the Court's capacity to determine whether or not the necessary procedural safeguards are available to prevent a risk of *refoulement* in the event that the applicant has an "arguable claim" *prima facie* of a breach of Article 3 in the home country.[233]

3.6.1. Application of Article 13 to SCJ Iceland v Samuel

In *SCJ Samuel* and *SCJ Okoro* (which will be examined in sub-chapter 3.6.2.), the Court concluded that in Sweden and Italy upon return, the defendant and the appellant would have access to effective remedy within the meaning of Article 13.

In regards to the *Samuel* case, the Court in its assessment of the availability of "effective remedy" in Sweden reviewed the general situation and the defendant's experience prior to him absconding and reasoned that:

> "It is undisputed that in Sweden there are specialised institutions that deal with issues pertaining to asylum seekers in that country. This institution assessed the defendant's request for asylum there because of his circumstances in Nigeria and denied his request. Furthermore, it has been shown that it

[230] Moreno-Lax (n 189) 13.
[231] ECtHR *K.R.S.* Section A.
[232] ECtHR *M.S.S.*para 298.
[233] Ibid ; Judge Villeger in his concurring opinion argued that, in spite of the Court's reasoning that it is beyond its competence to examine a separate issue under Article 3 in terms of risk of refoulement back to Afghanistan, he disagrees, arguing that; "Indeed, […] by describing the applicant's complaint about refoulement as being "arguable" […] the Court has already undertaken precisely such an examination of the matter. Had the complaint been inadmissible as being manifestly ill-founded, the Court could not have examined it together with Article 13 of the Convention for lack of an "arguable claim"." Ibid, Concurring Opinion of Judge Villiger, Section 1, 2, 4(d).

> is possible to refer the decisions of these institutions to the domestic courts on two judicial stages. It is also undisputed that the defendant received the assistance of a lawyer during the application process for asylum in Sweden. It is clear that there were effective remedy for the defendant to seek redress, if he believes that his rights were violated by the government. Therefore, it has not been shown that within the asylum procedures in Sweden exist such systemic flaws that are inconsistent with Article 13. ECHR."[234]

In its assessment the Court took among other things into account the UNHCR's report on Sweden. Furthermore, the Court assessed the individual circumstance of the defendant with regards to access to remedy in Sweden. However, the Court's reasoning with regard to the defendant's experience, does not seem to indicate an assessment of future treatment, rather an examination of prior treatment.

Bearing in mind that, the premise of protection from *refoulement* is an evaluation of a future threat to life or freedom,[235] this does raise the question as to whether or not the Court's assessment is compatible with the case-law of the ECtHR.

Nonetheless, it should not be understood that an assessment of past experience should not also be taken into account when evaluating the likelihood of future risks.[236] However, relying only on past experiences does not seem to be compatible with the obligation to protect an individual from future risk.[237] The Court has been consistent in determining that every time a state wants to remove an individual in any manner whatsoever the State must evaluate the risk of his being subject to ill-treatment after removal, thereby taking into account all relevant information, including new or previously unrecognised facts. [238]

Hence, the importance of the duty of the domestic authorities to "first verify" that the receiving state will guarantee access to effective remedy both in law and in practice upon the transfer of the Dublin returnee.[239]

In this respect, an examination of the Swedish asylum procedures for Dublin returnees indicates that: first, access to asylum procedure upon return is conditioned. A final negative decision taken by the Migration Board can only be reviewed, where there are new circumstances in the Dublin returnee's case to justify a non-removal to his home country. Such circumstances may include: life-threatening illness, a change in conditions in country of

[234] SCJ *Samuel*, Section III para 5 (Translated by author).
[235] Marx (n 17) 8.
[236] Wouters (n 178) 543.
[237] Wouters (n 177) 543;" In general, past experiences of serious harm are a serious indication of a present or future risk, but do not by themselves establish a right to be protected from refoulement".
[238] Marx (n 17) 8; ECtHR *Soering* para 90-91 and 95 whereby the Court emphasised the need for an assessment of "future dangerousness and vileness"; ECtHR *Hirsi Jamaa* para 114-115.
[239] ECtHR *M.S.S.* para 359.

origin, family ties in Sweden or his country refused to accept him.[240] None of these however, would apply in the defendant's particular case. Second, a review of a previous decision does not allow for automatic suspensive effect.[241] Although Sweden has opted to use Article 27(2)(c) of the DRIII, this is only applicable to applications lodged after 1 January 2014. Therefore, individuals with applications prior to 1 January can be removed from Sweden back to his home country even before a final decision upon review has been reached. In light of the precedence of the ECtHR, given the irreversible nature of an Article 3 breach, a remedy without automatic suspensive effect cannot be considered an effective one.[242] Third, access to Court is limited given that legal aid for Dublin returnees is not provided free of charge except in the case of minors.[243]

Taking the aforementioned into consideration, the finding of the Court in *SCJ Samuel* is overshadowed by serious doubts as to the correct assessment of the risk of *refoulement* upon the defendant's return to Sweden in light of the four procedural principles that must be considered during an assessment of effective remedy under Article 13.

Equally, important to note in this regard is the fact that the Court seem to have relied on *inter-state trust* in relation to the Swedish authorities' assessment of whether or not the defendant had an "arguable claim" within the meaning of Article 3 and did not elaborate on it further. Establishing the existence of an "arguable claim" or lack thereof is an important element to determine whether or not Article 13 is to be considered applicable as illustrated by the Court's ruling in M.S.S.[244] This however, cannot be achieved without an "independent and rigorous scrutiny of a claim that there exist substantial grounds for fearing a real risk of treatment proscribed by Article 3."[245] Thus, requiring the sending Dublin state, in some instances to assess the general situation in the applicant's country of origin and his personal circumstances there, even though this goes against the objective of the Dublin system, i.e. to have a claim examined only in one member state. It must however be cautioned that the

[240] Swedish Migration Board, 'New Events after the Refusal of an Asylum Application' (Migrationsverket, 2013) <http://www.migrationsverket.se/English/Private-individuals/Protection-and-asylum-in-Sweden/If-you-have-sought-protection-or-asylum-/If-your-application-is-refused/New-events-after-refusal.html> accessed 1 May 2014.
[241] Email from The Swedish Migration Board (Migrationsverket) to author (23 April 2014).
[242] Harris, O'Boyle and Warbrick (n 208) 564.
[243] Email from Migrationsverket (n241).
[244] ECtHR *M.S.S.*para 288.
[245] Harris, O'Boyle and Warbrick (n 208) 564.

ECtHR Dublin case-laws provide little guidance in this regard, as the Court seem be inconsistent on how it determines whether or not the applicant has an "arguable claim".[246]

3.6.2. *Application of Article 13 to SCJ Okoro v Iceland*

Contrary to the previous case, it is reasonable to maintain that the Court in *SCJ Okoro*, took into account both the general situation and the personal circumstances of the applicant including both his past experiences as well as the anticipated future treatment in its assessment of whether or not an effective remedy would be available to him upon return to Italy. It reasoned that:

> "It is not disputed in this case that in Italy there are ten regional agencies covering material treatment of requests for asylum in that country. One such agency assessed the appellant's request for asylum because of his situation in Nigeria and denied the request. Furthermore, it is possible to refer the decisions of regional agencies to the Italian courts on three judicial levels. At the hearing before the District Court, the appellant claimed that his application for asylum in Italy has been denied at the administrative level as well as by the Court of First Instance. It is known that the appellant received the assistance of a lawyer during the application process for asylum in Italy, but for this assistance he says he paid himself. It is clear that there were effective measures available for the appellant to seek redress in his proceedings in Italy in accordance with Article 13 of the ECHR. Therefore, it has not been shown that the Italian authorities will not grant the appellant the protection required by the international obligations of Italy in the field of human rights, including the principle that individuals should not be *refouler* to a place where their lives or liberty may be at risk, should he be sent back to Italy.
>
> According to the case files the appellant has the opportunity to submit a supplementary application for asylum upon arrival in Italy, despite the fact that his application had been refused by the Italian authorities. In addition, asylum seekers transferred to Italy under the Dublin Regulation may in general, and given that certain conditions are satisfied be able to appeal to the courts after a prior refusal for asylum upon arrival in Italy, whether the refusal has been presented to them before or not."[247]

The Court's assessment in this regard is likely to satisfy the ECtHR guidance that an assessment must seek to identify future threats, taking into account the general situation there and the circumstance of the applicants case. The Court's assessment looked at the procedures prior to the appellant absconding as well as the procedures to be anticipated upon his return. Conversely, the assessment is questioned in terms of the level of scrutiny applied by the Court. In the view of the ECHR all assessment must be a rigorous one, therefore it is to be expected that examination of anticipated procedures be a thorough one. Such thorough examination does not require the national court to ensure that the remedy will secure for the

[246] ECtHR *T.I.*, where the Court assessed the alleged risk in Sri Lanka, the applicants country of origin; In ECtHR *M.S.S.*, the Court assessed the alleged risk in Afghanistan; In *Mohammed v Austria* App no 2283/12 (EctHR, 6 June 2013), the Court assessed the alleged risk in Sudan whilst in *Abubeker v Austria and Italy* (dec) no 73874/11, 18 June 2013, and *Halimi v Austria and Italy* (dec) no 53852/11, 18 June 2013, it assessed only the situation in Italy.

[247] SCJ *Okoro* Section IV, para 5, (Translated by author).

Dublin returnee a favourable outcome upon return.[248] Instead, to apply the general principles and verify that not only is the remedy available, but that it is "effective".[249]

However, in this case, it cannot be seen that the general principles necessary for the assessment of an "effective remedy" had been applied, by the Court. First, the Court did not determine, whether or not the asylum process in Italy upon return provided for automatic "suspensive effect". Second, that access to remedy will not be unjustifiable hindered by acts or omissions of the state. It is reasonable to assert that access to remedy in Italy was and is likely to be unjustifiable hindered due to acts of the State. This is mainly attributed to the fact that the appellant had to pay his own legal fees, in contradiction with Article 15 of the APD, an argument that was not refuted by the defendant. However, it seemed to have been a matter of non-importance to the Court that the appellant was forced to pay his own legal cost, despite the positive obligation placed on Italy to do so under the APD, a similar breach which in M.S.S. impacted the Court's decision in finding a violation of Article 3.[250] Equally, the Court's assessment did not take into account that the appellant had been in Iceland for almost two years, ill and unemployed which would impact greatly his chance to pay for legal assistance and ultimately limits his access to an effective remedy upon return to Italy even if he had the opportunity to submit a new application. Therefore, the Court's assessment with respect to close scrutiny and rigorousness is seriously doubted.

3.7. The Principle of Refutability and Rule 39 of the Court

The Court may, under Rule 39 of the Court, indicate interim measures to any State party to the Convention. These are urgent measures which, according to the Court's well-established practice, apply only where there is an imminent risk of irreparable harm, *fait accompli*.[251] Such measures are decided in connection with proceedings before the Court without prejudging any subsequent decisions on the admissibility or merits of the case.[252] A non-compliance with an interim measure issued by the Court may result in the violation of

[248] ECtHR *M.S.S.* para 289.
[249] Ibid.
[250] ECtHR *M.S.S.* para 250.
[251] Kimmo Sasi, 'Draft Resolution and Draft Recommendation: Urgent Need to Deal with New Failures to Cooperate with the European Court of Human Rights' (Parliamentary Assembly 2013) 1 <http://website-pace.net/documents/10643/165767/20131212-CooperationFailures-EN.pdf/74b55cdd-ee0c-48f7-8be8-6c9928fb1f4d> accessed 30 April 2014.
[252] Registrar of the Court, 'Press Release: President's Statement on Rule 39 Requests' (HUDOC, 2011) 1 <http://hudoc.echr.coe.int/sites/fra-press/pages/search.aspx?i=003-3435069-3860229#{%22itemid%22:[%22003-3435069-3860229%22]}> accessed 30 April 2014."

the principle of *non-refoulement.*[253] Although initially it was considered as a non-binding obligation on Contracting States, this has changed with the evolving jurisprudence of the Court.[254]

Rule 39 is most frequently applied in asylum related cases, not excluding Dublin related cases.[255] Over the years the Court has seen a significant increase of applications for interim measures. For instance, "between 2006 and 2010 the Court saw an increase of over 4,000 % in the number of requests received."[256]

As was illustrated by the Court's ruling in M.S.S., the refusal of an interim measure by the Court should not be used as an indication that the receiving State is to be considered *safe*.[257] This is mainly attributed to the fact that, this is a protective measure requiring an urgent decision, which does not prejudge the examination of the application under Article 34 of the Convention. Furthermore, these measures are applied even though all the facts are not available.[258]

In contrast, the non-compliance of a state with the Court's ruling on an interim measure in light of the objective of such measure might place serious doubts on the presumed safety of such countries.[259]

In relation to the SCJ *Samuel*, the government argued that in any event, Dublin returnees removed to Sweden can request interim measures under Rule 39 from the ECHR. It further noted that, this was a realistic possibility for the defendant given that in 2008 the ECHR had received a total of 1,587 applications against Sweden under Rule 39 and that 691 of those applications or 43% resulted in interim measures being granted.[260] Therefore, in this

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[253] *Ben Khemais v Italy* App no 246/07 (EctHR, 24 February 2009), where Italy expelled a Tunisian national in breach of Rule 39; Equally Italy was found to have violated Article 34 and Article 3 due to a non-compliance with the interim measure granted under Rule 39 in *Hamidovic v Italy* App no 31956/05 (EctHR, 4 December 2012), *Trabelsi v Italy* App no 50163/08 (EctHR, 13 April 2010) and *Toumi v Italy* App no 25716/09 (EctHR, 5 April 2011).

[254] ECRE, ELENA, 'Research on ECHR Rule 39 Interim Measures' (ECRE, ELENA 2012) 15 <http://www.ecre.org/component/downloads/downloads/479.html> accessed 30 April 2014.

[255] Ibid 30.

[256] Registrar of the Court (n 251) 1.

[257] ECtHR *M.S.S.* para 355; Partly Dissenting Opinion of Judge Bratza, para. 12: where, Judge Bratza in his partly dissenting opinion reasoned that Belgium was unaware or could not have been aware that Greece was not safe, given that only a few months prior the Court had rejected an application for interim measures against a return to Greece.

[258] Ibid para 355.

[259] Ibid.

[260] UNHCR, 'Asylum Levels and Trends in Industrialized Countries 2008' (UNHCR 2009) 7 <http://www.unhcr-centraleurope.org/pdf/resources/statistics/asylum-levels-and-trends-in-industrialized-countries-2008.html> accessed 30 April 2014. Where in 2007 Sweden received 36,400 applications for asylum and was ranked as the top 2 receiving country. This number declined in 2008 placing Sweden at 7th place of receiving countries with 24,400 applications.

regard, it must be considered that in Sweden there are "effective remedies" available to the defendant upon return.

However, the Court's assessment does not indicate that this argument was taken into account in its finding that there were effective remedies in Sweden. Nonetheless, it is important to note that studies have shown that whilst the number of Rule 39 applications against Sweden is relatively high, many were submitted by the asylum seekers themselves or by their relatives who are not subject to removal decisions.[261] This was especially the case with Iraqi asylum seekers.[262] Similarly, the studies have shown that reliance on Rule 39 in Sweden is severely limited "as no legal assistance is available for applicants in such procedures and there is no suspensive effect for appeals."[263] Moreover, when subsequent asylum applications are submitted because of new circumstances, the process is much faster and the applicant has no right to legal assistance and there is no suspensive effect for appeals.[264] Therefore, without legal assistance the applicants have difficulties exhausting local remedies, a necessary requirement for submitting an application to the Court.

As it relates to *SCJ Okoro*, the state also claimed that there were effective remedies in Italy and that in the event of a forced removal to his home country, the appellant may apply to the Court under Rule 39. As in the previous case the national Court's assessments do not seem to indicate that this argument had any bearing on their ruling. Notwithstanding, it must be noted that Italy has been strongly condemned for repetitive non-compliance with interim measures granted by the Court, which has in a number of cases resulted in Italy violating Article 3.[265]

Taking into consideration that an adherence to measures granted by the Court under Rule 39 plays an important role in safeguarding individuals from a risk of ill-treatment, it is reasonable to assert that the Icelandic Court's assessment of an "effective remedy" should also take this factor into account.

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[261] The European Council on Refugees (ECRE) and ELENA European Legal Network on Asylum (n 254) 22–23.
[262] Ibid.
[263] Ibid 60.
[264]Email from Migrationsverket (n 241).
[265] Rapporteur Kimmo Sasi, 'Pace Report: Draft Resolution and Draft Recommendation: Urgent Need to Deal with New Failures to Cooperate with the European Court of Human Rights' (Parliamentary Assembly, 2013) 1, 29 para. 29 <http://website-pace.net/documents/10643/165767/20131212-CooperationFailures-EN.pdf/74b55cdd-ee0c-48f7-8be8-6c9928fb1f4d> accessed 30 April 2014."Between 2009 and 2012 the Court rendered four judgments against Italy concerning extradition, in flagrant defiance of interim measures, of Tunisian nationals who, in their home country, were charged with, or convicted in absentia of, terrorist activities." Subsequently, one of the four individuals indicated to the Court that he had been tortured upon arrival in his country of origin. The whereabouts of the others are unknown.

3.8. Conclusion

The discussion in this chapter is revealing in several ways. It suggests firstly, that the personal scope of the principle of *non-refoulement* within the refugee context and the human rights context are similar in that they both strive to protect the "individual" from future risks involved with a direct or indirect removal from state territory. By contrast, the principle under human rights law is wider than under refugee law, thus acting as a safety net for those individuals who would not qualify as refugees but nonetheless are in need of international protection.

Secondly, that under human rights law, given the principle's absoluteness, even the presumption of safe country as employed by the European Union within the Dublin system is rebuttable.

Thirdly, that the principle has very little regard for *mutual or interstate trust* as it requires that all assessment must be subject to rigorous and independent scrutiny.

Fourthly, that Article 13 of the ECHR plays an intricate role in the assessment of a rebuttable presumption of safety as it requires that four main principles be regarded when domestic courts assess the safety of the receiving country in the event that the Dublin returnee has an "arguable claim" under Article 3.

Fifthly, that Rule 39 of the Court also plays a vital role in safeguarding individuals from *refoulement*. Furthermore, that compliance with Rule 39 measures is a strong indicator as to level of "safety" that can be attached to a particular country. On the contrary, the same cannot be observed where there is a refusal of a Rule 39 measure, this in no way guarantees that that particular country is to be considered safe, as was clarified by the Court in M.S.S. referring to its prior ruling in K.R.S. where a Rule 39 measure was denied. Similarly, that high numbers of Rule 39 applications alone cannot be regarded as proof that a particular country is safe or that it provides "effective remedy", as such measures are sometimes requested by the asylum seekers themselves or their relatives not subject to removal decisions.

With regards to Iceland, it can be observed that both the authorities and the national courts recognise the principle of *non-refoulement* as absolute and in the same breath recognise the refutability principle as it relates to Dublin transfers. On the other hand, some drawbacks can be observed in terms of the assessment of the risks of *refoulement*. To begin with, individual risk arising from any other source than "systemic deficiency" is disregarded given that it does not meet the substantial ground criteria. Furthermore, that an assessment of "effective remedy" by the Courts, reviewed in one case only looked at past experiences

without any regard for future risks and in the other case, both past experience and anticipated treatment were taken into account. Moreover, in both cases it would appear that both the asylum authorities and Court rely on *interstate trust* when assessing the risk involved with a Dublin removal in that the level of scrutiny and rigorousness required was lacking in both judgments.

4. The "Systemic Deficiency" Requirement

As discussed in sub-chapter 3.4., it is widely accepted by domestic courts that "systemic deficiency" in the asylum procedures and reception conditions in a Dublin state is the new condition required to establish "substantial grounds" to rebut the presumption of safety.[266]

It is evident from the ECtHR's assessment in M.S.S. that it came to a conclusion that there was "systemic deficiency" within the Greek asylum system.[267] However, it did not state that this has now become the only requirement for rebutting the presumption of safety rather that the existence of "systemic deficiency" was alone sufficient to establish "substantial grounds" and under those circumstances the applicant need not prove individual risk.[268] It should be noted however that, in this respect, M.S.S. is not the first judgment where the Court found that the general risks in a country was such that individual risk need not be established for this to trigger an Article 3 breach.[269]

In contrast, it has been argued that the CJEU in its N.S. ruling expanded upon the M.S.S. judgment requiring a proof of "systemic deficiency" to ascertain that substantial grounds have been shown for believing that there is a real risk of ill-treatment in order for a successful rebuttal of the presumption of safety.[270] Furthermore, this was reiterated by the CJEU in its subsequent *Abdullahi v Bundesasylamt* preliminary ruling where it held that:

> "the only way in which the applicant for asylum can call into question the choice of that criterion is by pleading systemic deficiency in the asylum procedure and in the conditions for the reception of applicants for asylum in that latter Member State, which provide substantial grounds for believing that the applicant for asylum would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter." [271]

In the view of the CJEU, applying any other standard of suffering than one arising from "systemic deficiency" would be incompatible with the object and purpose of the Dublin system. Furthermore, that it poses a threat to the system if the slightest infringement of the

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[266] SCJ *Samuel* ; SCJ *Okoro* ; Email from Migrationsverket (n 241); EM v SSHD [2012] EWCA, para 47.
[267] ECtHR *M.S.S.* para 321.
[268] ECtHR M.S.S. para 359.
[269] Cathryn Costello, 'Courting Access to Asylum in Europe: Recent Supranational Jurisprudence Explored' (2012) 12 Human Right Law Review 331 <http://www.deepdyve.com/lp/oxford-university-press/courting-access-to-asylum-in-europe-recent-supranational-jurisprudence-HAgNQw0kpT/45> accessed 1 May 2014; *NA v UK* App no 25904/07 (EctHR, 17 July 2008); *Sufi and Elmi v UK* App no 8319/07 (EctHR, 28 June 2011).
[270] CJEU *NS* para106.
[271] Case C-394/12 *Abdullahi v Bundesasylamt* [2013] not yet published, para 60; Case C-4/11 *Bundesrepublik Deutschland v Kaveh Puid* [2013] not yet published,para 30.

Dublin rules should prevent a transfer. [272] Moreover, the CJEU reasoned in N.S. that it would be illogical and unideal in light of the objective of the Dublin system that the mandatory consequence of a minor breach of individual rules of the Dublin system would be that those Dublin states may be exempt from obligation. In its view such a result would deprive those obligations of their substance and endanger the realisation of the objective to quickly identify the Dublin state responsible for examining an application.[273]

While the CJEU's concerns are plausible, it has been argued that "Article 3 ECHR risk is no greater or lesser for emerging from systemic or non-systemic deficiency."[274] Furthermore, that given this strict requirement, the domestic courts and Dublin states are now confronted with a very serious problem where they are now required to depart from the ECHR long-standing principles and tests in determining whether or not there is substantial grounds to believe that if the individual is removed he or she will be exposed to a real risk of ill-treatment.

What's more, "systemic deficiency" as the condition required to satisfy the substantial grounds for risk of *refoulement* has now been entered into positive EU law under the DRIII,[275] which therefore leads to the questioning of the EU's motives in regards to the protection of asylum seekers. This has been fiercely criticised by stakeholders in the field of human rights.[276]

With "systemic deficiency" as a condition for rebutting the safety presumption states are therefore able to circumvent the principle of *non-refoulement* exposing the individual concerned to irreversible treatment contrary to the objective of the principle.

In this respect, a consideration must be had with regard to the rule of interpretation under Article 31 of the Vienna Convention on the Laws of Treaties.[277] The Article places an obligation on states to interpret their treaty obligation in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. Applying this rule to the interpretation of Article 3 in conjunction with

[272] CJEU *NS* para 84.
[273] Ibid, 85.
[274] Costello (n 269) 331.
[275] DRIII (recast), Article 3(2).
[276] Amnesty International and Co., 'Joint Briefing on the Commission Proposal for a Regulation of the European Parliament and of the Council Establishing Rules for the Surveillance of the External Sea Borders in the Context of Operational Cooperation Coordinated by the European Agency' (Amnesty International, ECRE, ICJ 2013) <http://www.ecre.org/component/downloads/downloads/790.html> accessed 2 May 2014.
[277] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

Article 1 of the ECHR, a requirement of "systemic deficiency" seems hardly reasonable. By requiring such a standard the individual suffering loses its relevance.[278]

However, if an unreasonable obligation is placed on states or domestic courts as a result of a treaty obligation, Article 33 of the Vienna Convention provides for supplementary recourse where an interpretation is ambiguous or leads to an unreasonable or absurd result.

Although Iceland is not a party to the EU as was discussed in Chapter 2, it is a Dublin state and is bound by Dublin rules. However, the same cannot be said in regards to the interpretations of the CJEU although it is to be considered the chief interpretative body of the Dublin rules.

Where there are competing interpretations resulting from the jurisprudence of ECtHR and CJEU, then it is more plausible that the Icelandic Courts would apply the principles established by the ECtHR rather than those by the CJEU. To begin with, Article 46(a)(2) of the Foreigners Act, discussed in chapter 2, when read would be incompatible with the standard of "systemic deficiency". As stipulated by the commentary of the Article, where there are substantial grounds to believe that the asylum procedures or the reception conditions in the receiving state would violate Article 3 of the ECHR or Iceland's other international obligations, the state is authorized to carry out an individual assessment, aimed at determining whether or not it is safe to return "a particular asylum seeker" to that state.[279] Evidently, the focus of the Article is the real risk for that particular individual, not the failure of an entire system. Indeed, it is safe to assert that, the standards and principles to be used in such assessment are those established by the ECtHR, not the CJEU.

It is even more appropriate for the state to adhere to the ECtHR principles since the ECHR has been transposed in its entirety into the Icelandic legal system with Act 62/1994 and now forms a part of the Icelandic statutory instruments. Even more noteworthy is the fact that ECHR influenced the human rights chapter of the Icelandic Constitution with Act No 97/1995, done in an effort to further cement its position and importance in the Icelandic legal order.[280]

Even though Article 46 of the ECHR stipulates that the ruling of the Court is binding only on the parties to the dispute, it is widely accepted by contracting parties of the ECHR,

[278] Eliana Barrera, '2.2.2 - "Systemic Deficiency": Legal Standard Setting, Human Rights, and its Effect on the Individual in the Common European Asylum System' (2013) 2 SPECTRA chapter 4 <http://spectrajournal.org/2013/11/18/2-2-2-systemic-deficiency-legal-standard-setting-human-rights-and-its-effect-on-the-individual-in-the-common-european-asylum-system/> accessed 2 May 2014.
[279] Commentary with Article 46(a)(2) (n 115).
[280] Sigurður Lindal, *Um Lög Og Lögfræði: Grundvöllur Laga - Réttarheimildir* (2nd edn, Hið íslenzka bókmenntafélag 2007) 84–85.

including Iceland, that the jurisprudence of the Court is vital in the interpretation of the Convention rules. The Icelandic case-laws indicate that the national courts have been consistent in their practice of relying on the jurisprudence of the ECtHR for interpretive guidance, even prior to the ECHR's enactment as was illustrated by the Supreme Court's landmark ruling in *SCJ No 2 from 1990 (The Prosecution against Gudmundur Breifjord Aegirsson).*[281] Therefore, it is inconceivable that the Court in both *SCJ Samuel* and SCJ *Okoro* strayed from this practice and instead opted to rely on the interpretation of the CJEU requiring that the defendant and appellant in the aforementioned cases show "systemic deficiency" in the asylum system in Sweden and Italy respectively in order to rebut the presumption of safety.

4.1. Standard of Proof to Show Substantial Grounds for "Systemic Deficiency"

It has been argued that "systemic deficiency" as the only condition that can prove substantial grounds divides suffering into different categories and thereby creates a hierarchy of suffering, according to the number of incidents, the seriousness of incidents and the territorial distribution of such incidents.[282] Against this background, it is reasonable to assert that establishing and proving "systemic deficiency" in the asylum system of another Dublin state requires a stricter standard of proof than that which is required under Article 3 of the ECHR. This in turn requires evidence that goes beyond proof of individual risk of inhuman and degrading treatment, which in turn contradicts the very rationale of human rights.[283] Bearing this in mind, it is fallacious to interpret the standard in a way that would ignore the very right which it is designed to protect.[284]

As discussed in chapter 3, the principle of *non-refoulement* (a particular type of general law, *jus cogens*)[285] is non-derogable and has under international human rights law consistently applied the same standard of proof to establish substantial grounds. Such standard should therefore not be disregarded or eroded by the EU's application and interpretation of its own rules. Moreover, it has been argued that the CJEU "has no mandate to interpret Article 4 of the EUCFR in such a way that it undermines the ECHR interpretation

[281] *The Prosecution v Gudmundur Breifjord Aegirsson* SCJ, 9 January 1990 case no 120/1989.
[282] Barrera (n 277).
[283] Ibid.
[284] Barrera (n 278).
[285] ILC, 'Report Adopted by the International Law Commission at its 58th Session (2006) UN Doc A/61/10, Para 251' 4 <http://legal.un.org/ilc/texts/instruments/english/draft%20articles/1_9_2006.pdf> accessed 2 May 2014.

of Article 3"[286] Even though it could be argued that the Dublin system is a special ("self-contained") regime and *lex specialis,*[287]which under international law should take precedence over general law, this however does not apply if that general law is *jus cogens.*[288] Therefore, it would not be an unreasonable assertion that while the Dublin system could be considered as a special ("self-contained") regime, however, in accordance with the principles established by the Vienna Convention, *jus cogens* [and by extension the standards that guides it] would prevail in which case the *lex specialis* presumption may not apply.[289]

4.2.1. The Role of the UNCHR in Satisfying the Standard of Proof

As illustrated by the Court's ruling in M.S.S. while other factors played a role in the Court holding that there were in fact "systemic deficiency" in the Greek asylum system some factors outweighed the regular evidentiary standards usually relied on by the Court. This holds true with respect to the fact that the Court ascribed critical weight to a letter sent by the UNHCR to Belgium containing an unequivocal plea to stop all transfers to Greece.[290]

Considering that the UNCHR plays a vital role in refugee protection and is an authority whose objectivity and independence is never questioned,[291] a document recommending the suspension of "all transfers" to Greece speaks volumes as to the severity of the risk of ill-treatment, one that would seem not only to attain "a minimum level of severity" but instead goes beyond this threshold. Bearing this in mind, it would almost seem impossible for any individual to satisfy the standard of proof required in the absence of a recommendation for universal suspension of transfers to the particular country from the UNCHR even if it was proven that due to a sporadic breach he or she will be exposed to a real risk of ill-treatment proscribed by Article 3.

In this respect, the case of Bulgaria is a prime example. On 2 January 2014 the UNHCR made a call for the temporary suspension of transfers to that country effective until 15 April 2014, upon which time the situation will be reviewed. In light of the Court's ruling in M.S.S. it would be a feasible assertion that under these circumstances, the ECtHR would

[286] Costello (n 310) 331; Declaration Annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007 Concerning the Charter of Fundamental Rights of the European Union [2010] OJ C83/335, where it is declared that "The Charter of Fundamental Rights of the European Union ... confirms the fundamental rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms ... The Charter does not ... modify powers and tasks as defined by the Treaties".
[287] ILC (n 285).
[288] Ibid.
[289] Ibid.
[290] ECtHR M.S.S. para 349.
[291] Ibid, Partly Dissenting Opinion of Judge Bratza para 11.

consider that substantial grounds have been shown that there is "systemic deficiency" within the Bulgarian asylum system. Therefore, any state which ignores the UNCHR's call for a suspension of transfers to Bulgaria and return an individual there under the DR, that state would likely be found to have violated the principle of *non-refoulement* as it knew or ought to have known that there were substantial grounds for a risk of breach of Article 3. However, now that the suspension has been lifted it has been widely reported that Bulgaria has received a "clean bill of health" from the UNCHR, thus withdrawing proof of "systemic deficiency" and restores the presumption of *safety*, even if other human rights stakeholders disagree.[292]

This chain of thought is equally applicable in the context of the Italian asylum system which has been the subject of concern for many human rights actors for a while owing to the fact that its geographical location makes it susceptible to receiving mass influxes of illegal aliens especially by sea. [293] This poses an enormous challenge for the Italian asylum capacity and continues to do so. In consequence, Italy has been issued with a formal infringement notification by the European Commission in accordance with Article 258 of the TFEU for a violation of not one but all the Dublin rules.[294] Despite this, the presumption of safety still holds true for Italy.

Even the ECtHR deemed the infringement notification to be of little importance in its assessment in the *Halimi v Austria and Italy* ruling.[295] Nonetheless, this finding of the Court was in light of the circumstances of the particular case, where the Court found that the individual could not claim a risk of violation in Italy, since he had never lodged an application there and had continuously refused to do so.[296] However, none of the aforementioned issues have been deemed sufficient to establish systemic deficiencies in the asylum procedures in Italy.

On the contrary, taking into consideration the ECtHR's ruling in M.S.S., the aforementioned issues added to a call for suspension of returns to Italy by the UNCHR would most likely satisfy the standard of proof to show "systemic deficiency".

In light of the strict standard of proof, Italy has continuously been pardoned by other Dublin states and domestic courts including Iceland. This continues to be the reality despite

[292] Bill Frelick, 'Bulgaria's False Good News for Refugees' (Human Rights Watch, 2014) <http://www.hrw.org/news/2014/04/16/bulgarias-false-good-news-refugees> accessed 2 May 2014.
[293] The reports of Amnesty International, Human Rights Watch, Swiss Refugee Council and more.
[294] European Commission, 'Infringements of EU Home Affairs Law' (24 October 2012) <http://ec.europa.eu/dgs/home-affairs/what-is-new/eu-law-and-monitoring/infringements_by_country_italy_en.htm> accessed 13 May 2014.
[295] ECtHR *Halimi* para 73.
[296] Ibid 64-65.

the UNCHR advice that although it has not called for the suspension of all transfers to Italy, this in no way should be interpreted that there are no legal obstacles to particular transfers taking place or that it has given Italy "a clean bill of health".[297] So, unless the UNCHR calls for a suspension of all transfers to Italy, the presumption of safety will likely continue to be irrefutable.

4.5. Conclusion

The discussion in this chapter revealed a number of issues some of which raises a serious cause for concern, mainly because they pose a threat to the principle of *non-refoulemen*t. First, that the Dublin system and CJEU divides suffering into categories whereby only suffering caused from "systemic deficiency" can trigger a *non-refoulement* obligation. This however, contradicts with the object and purpose of the principle and for those whom it was designed to protect. Second, there is an obvious disregard for the tests applied by the ECtHR when assessing whether or not a *non-refoulement* obligation has been triggered, whereby a higher standard of proof is required, one which proves impossible for some individuals to achieve. In order to satisfy this standard of proof there must be evidence to show that the UNCHR has recommended a suspension of all transfers to a particular state. Without it, an individual cannot successfully rebut the presumption of safety. However, given the nature of the principle, one recognised as *jus cogens*, the legality of this approach is seriously thrown into doubt.

While the number of Icelandic case-law that has tested this new approach to assessing a *non-refoulement* obligation is limited, given that *SCJ Okoro* and *SCJ Samuel* are the first two cases, it remains unchanged that the Court's ruling has set a precedent and as shown in sub-chapter 2.3.2.2. it has thus far influenced at least one subsequent District Court judgment. It can therefore be assumed that the tone for all future judgments has been set which in turn will in some cases place the lives of Dublin returnees at risk.

[297] EM v. SSHD [2014] UKSC, para 73-75.

5. Other Nordic States and the "Systemic Deficiency" Requirement

Due to its Nordic cooperation, Iceland observes keenly the practice of other Nordic states which includes; Norway, Sweden, Denmark and Finland. It is therefore feasible to compare briefly the practice of those states with regards to the Dublin returnee's right to rebut the presumption of safety as well as whether or not the "systemic deficiency" standard has any bearing on transfer decisions. It is important to note that statistics on asylum will only show figures from 2012 as these are the latest conclusive figures available to the author in respect of Iceland. All statistics on case-laws with the exception of Norway will reflect Court rulings during the periods 2010 to present day. The reason underlying this was to examine state practice with regard to the Dublin cases prior to and following the ECtHR's ruling in *M.S.S.*

5.1. Norway

As discussed in sub-chapter 2.2 Norway and Iceland are in a similar position towards the EU and therefore, Iceland coordinates its rules on asylum and immigration with that of Norway. In Norway the Directorate of Immigration (UDI) is responsible for decisions made at first instance.[298] Those who wish to have a review of a negative decision at second instance may appeal to the Appeals Board (UNE), which is an independent quasi-judicial board.[299]

In comparison to Iceland, Norway received 10,263 applications for asylum in 2012.[300] During the same period it sent a total of 2,183 take-back requests and executed 706 transfers.[301]

As it relates to the Norwegian case-laws on asylum, like Iceland, very few cases regarding Dublin related asylum issues have been tried before the national courts in Norway. Statistics shows that during the period 2008- 2010 there have only been three Dublin related cases tried before the national Courts, two of which claimed a risk of violation of Article 3.[302] In case, *09-143086ASD-BORG/03 A v the Norwegian Appeals Board*, the Norwegian Appeals Court rejected the argument of the appellant, a Turkish national who claimed that a return to Germany, the Country Norway identified as responsible under the DRII would

[298] Email from The Norwegian Appeals Board (UNE) to author (18 February 2014).
[299] Ibid.
[300] Norwegian Appeals Board, 'Innkomne Saker Utlendingsnemnda' (UNE 2012) <http://une.no/no/Statistikk/Statistikk-artikler/UNE-statistikker-for-2011/Innkomne-saker/> accessed 3 May 2014.
[301] Eurostat (n 86).
[302] Email from UNE (n 298).

expose him to ill-treatment within the meaning of Article 3.[303] Similarly, the District Court in *Ref no 09-1162966TVI-OTIR/05 A v the Norwegian Appeals Board* rejected the argument of the plaintiff who was supposed to be returned to the Czech Republic under the DRII that a return would expose him to ill-treatment proscribed by Article 3.[304]

From 2011 until present day, no other Dublin related cases have been tried by the National Courts.[305] Therefore, the national Courts have not yet been given the opportunity to examine the compatibility of "systemic deficiency" requirement with Article 3 of the ECHR.

Nonetheless, unlike Iceland, the Norwegian immigration authorities do not require that individuals subject to Dublin removals show "systemic deficiency" in the asylum procedures and reception conditions in another Dublin state, rather that the individual circumstances and the country information warrant the suspension of a transfer.[306] While Norway considers both the rulings of the ECtHR and CJEU as important sources of law, it is not and does not consider itself bound by their rulings. Norway assesses the individual circumstances in each and every case as well as the general country information provided by the reports of international organisations such as the UNCHR.[307]

5.1.1. Dublin Returnees and "Effective Remedy"

Access to remedy for a Dublin returnee who has already received a final negative decision is conditioned whereby only those with new circumstances in their cases can request a review.[308] However, such review does not allow for automatic suspensive effect, and thus does not guarantee that the applicant will remain in Norway pending the outcome of the review.[309] In addition, legal assistance is not provided free of cost which in turn limits access to available remedy. [310]

In regards to submitting an application to the ECtHR under rule 39, this is rarely done due to practical reasons such as the lack of suspensive effect due to the 48 hour accelerated procedure, although in practice it seem not to have an impact.[311] Furthermore, lawyers often

[303] Ref no 09-143086ASD-BORG/03 A v the Norwegian Appeals Board, February 2010.
[304] Ref no 09-1162966TVI-OTIR/05 A v the Norwegian Appeals Board, May 2010.
[305] Email from UNE (n 298).
[306] Email from The Norwegian Appeals Board to author (9 May 2014).
[307] Ibid.
[308] Ibid.
[309] Ibid.
[310] Ibid.
[311] ECRE and ELENA (n 255) 60.

refrain from submitting a Rule 39 application due to legal tradition whereby it is commonplace to accept the decisions of their national organs.[312]

5.2. Sweden

All cases at first instance are handled by the Migration Board (Migrationsverket) and at second instance by specialised migration courts, the lower Migration Court and the Migration Appeals Court. In the event that the lower Migration Court confirms a negative decision by the Migrations Board, the applicant may request a review by the Migration Appeals Court if he or she is granted leave. However, the Migration Court of Appeal only gives leave to appeal in cases that are of interest for jurisprudence.

In comparison to Iceland, Sweden received 43, 887 applications for asylum in 2012.[313] During the same period it received 3,346 take-back requests and executed 1,741 transfer decisions.[314]

As for cases treated by the Migration Courts, statistics show that there were a total of 5,302 asylum cases treated during the period 2010- 2013.[315] Among those treated, were a total of 32 successful reversals of Dublin related cases during the period of 2011-2013, by the lower Court and Appeals Court.[316] However, the lower Court's ruling to reverse these decisions were not due to a risk of violation of Article 3 in the sense that the receiving state was "unsafe" rather on the basis of the individual circumstances of the asylum seeker.[317]

As it relates to the individual right to rebut the presumption of safety in another state, Sweden relies on the standard set by the CJEU in NS "systemic deficiency", which has only been the case with Greece.[318] Although both countries are Dublin states and contracting parties to the ECHR, Sweden unlike Iceland is an EU Member State. However, herein lies the problem, unlike the rulings of the ECtHR, the preliminary rulings of the CJEU in accordance with the TFEU even if questionable, are binding not only on the national court on whose

[312] Ibid 23.
[313] Swedish Migration Board, 'Statistics 2012' (Migrationsverket 2012) <http://www.migrationsverket.se/Om-Migrationsverket/Statistik/Oversikter-och-statistik-fran-tidigare-ar/2012.html> accessed 3 May 2014.
[314] Eurostat (n 86).
[315] Migrationsverket, "Statistics 2010-2014" (unpublished 24 February 2014).
[316] Ibid.
[317] Email from The Swedish Migration Board to author (23 April 2014).
[318] Ibid.

initiative the reference for a preliminary ruling was made but also on all of the national courts of the Member States.[319]

5.2.1. Dublin Returnees and "Effective Remedy"

As discussed in chapter 3.6., access to "effective remedy" for an individual who has already received a negative final decision was severely limited upon return to Sweden; this was equally applicable for persons who wish to apply the ECtHR under Rule 39. However, Sweden now relies on the DRIII, and has opted to use Article 27(3)(c) for persons returned under the Regulation, whereby a person may request directly to the Court to suspend the implementation of a transfer pending the outcome of his or her appeal or review.[320] The Court will then have to decide within a reasonable period of time whether or not it will grant the "suspensive effect". Nonetheless, it still remains, that only those with new circumstances can request a review of final decision upon return.

5.3. Denmark

Asylum procedures in Denmark are handled at first instance by the Danish Immigration Service and at second instance by the recently established quasi-judicial body, the Danish Refugee Appeals Board.[321] Important to note is that, the decisions of the Danish Refugee Board are final and cannot be reviewed by any other judicial body. Therefore, if a claim is rejected by the Board, then the asylum seeker must leave Denmark within seven days or immediately if the Board so orders.[322]

As for the requests for asylum, statistics show that in 2012, Denmark received a total of 6.184 applications for asylum.[323] During the same period it received 742 take-back requests. Regarding Dublin case-laws, statistics are unavailable as the Danish system does not record them separately.[324]

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[319] 'The Reference for a Preliminary Ruling' (*Europa*, 20 February 2013) <http://europa.eu/legislation_summaries/institutional_affairs/decisionmaking_process/l14552_en.htm> accessed 2 May 2014.
[320] Email from Migrationsverket (n 317).
[321] Email from The Danish Immigration Service (DIS) to author (5 March 2014).
[322] Danish Immigration Service, 'Avenues for Appeal' (2013) <https://www.nyidanmark.dk/en-us/coming_to_dk/asylum/application_for_asylum/appeal.htm> accessed 4 May 2014.
[323] Danish Immigration Service, 'Satistical Overview: Migration and Asylum 2012' (Nyidanmark, 2013) 1 <http://www.nyidanmark.dk/NR/rdonlyres/F7FC2906-3320-4B9B-B537-3CF5E26DBA33/0/extract_statistical_overview_migration_asylum_2012.pdf> accessed 3 May 2014.
[324] Email from DIS (n 321).

It must be noted that while Denmark is an EU Member State its relationship with the EU in terms of asylum matters is a special one. The Dublin Regulation is included in its general reservation regarding Justice and Home Affairs. [325] However, Denmark acceded to the DRII and now the DRIII through a parallel agreement.

As it relates to rebutting the presumption of safety, unlike Sweden and Iceland, Denmark does not require that there exist "systemic deficiency" within the asylum procedures and reception conditions in the receiving country, rather that the circumstances in the individual case warrants a non-removal and that there are humanitarian reasons to stop the transfer.[326]

5.3.1. Dublin Returnees and "Effective Remedy"

A Dublin returnee upon return to Denmark will be able to have access to a review to determine whether or not he or she must be transferred to another Dublin state under the DRIII. However if the responsibility of that other state has ceased, then the application lodged after a period of absence is regarded as a new application. [327] Even though legal assistance is not provided for a review, the Dublin returnee can receive it from the Danish Refugee Council, a humanitarian organisation, and must appeal within seven days of receiving a decision.

In regards to applying to the ECtHR under Rule 39, research shows that it is *de facto* very limited as lawyers attitude towards utilizing this process is that it is time consuming and complex.[328] Nonetheless it is reported that lawyers have submitted Rule 39 applications in the past for Dublin returnees, especially in regards to Greek removals prior to the M.S.S. ruling.[329] As for the "suspensive effect" of a review, unlike Sweden and Finland (to be discussed below), Denmark has opted to use Article 27(2)(a) of the DRIII whereby all appeals now have automatic "suspensive effect".[330]

[325] DRIII, Recital 42; Danish Immigration Service, 'The Dublin Regulation' (7 February 2010) <https://www.nyidanmark.dk/en-us/coming_to_dk/asylum/application_for_asylum/dublin_conventionen.htm> accessed 10 May 2014.
[326] Email from The Danish Immigration Service to author (09 May 2014).
[327] Ibid.
[328] ECRE and ELENA (n 254) 30.
[329] Ibid.
[330] Ibid.

5.4. Finland

Asylum procedures in Finland are handled at first instance by the Finnish Immigration Service and at second instance by the Helsinki Administrative Court.[331] Statistics show that in 2012 Finland received 3,129 applications for asylum.[332] During the same period it made 571 take-back requests[333] and executed no transfers.[334]

In relation to the statistics on Dublin case-laws, it is rather difficult to examine the total number treated before the Administrative Court since the statistics available also include cases considered to be manifestly ill-founded, which were 2,483 in total between the periods 2010-2013.[335]

While it is possible to appeal Dublin transfer decisions to the Supreme Administrative Court, it rarely gives leave for appeals in Dublin cases.[336] One such rare instance would be the case *Hehao 12/0890/1* from 2012, where the Court ruled that a transfer of the applicant, an Iraqi national to Sweden under the DRII would amount to a violation of Article 3. Sweden had rejected his application for asylum prior to his absconding to Finland and had refused to review his case since the prior deportation order was still in effect. This in the view of the Finnish Court amounted to substantial ground that if the applicant were to be returned to Sweden, he would be transferred to Iraq where he had an "arguable claim" that his life and freedom would be threatened.[337]

Like Sweden and Denmark, Finland is not only a Contracting Party to the ECHR but also to the EU and is therefore bound by the rulings of the CJEU, even if they contradict with their ECHR obligations. However, Finland has taken its approach with regard to the transfer of Dublin returnees a step further than the other two countries. For instance, the Finnish Administrative Court has made the decision not to return single mothers and others considered to be vulnerable back to Italy.[338]

Similarly, the Supreme Administrative Court's few case-laws relating to Dublin transfers do not indicate that to prove substantial ground for a risk of ill-treatment there has to

[331] Email from Helsinki Administrative Court to author (3 March 2014).
[332] Finnish Immigration Service, 'Annual Report on Immigration 2012' (Migri, 2012) 3 <http://www.migri.fi/download/46518_46515_Maahanmuuton_tilastokatsaus_2012_ENG_web.pdf?15f8588f92fbd088> accessed 3 May 2014.
[333] Ibid.
[334] Eurostat (n 86).
[335] Email from Helsinki Administrative Court (n 331).
[336] Ibid.
[337] *Hehao 12/0890/1* (Helsinki Supreme Administrative Court).
[338] Email from Helsinki Administrative Court (n 331); *Hehao 13/0757/1* (Helsinki Supreme Administrative Court), the Court stated that the vulnerable female applicant, subject to removal to Italy, need not prove systemic deficiency to stop the transfer.

be "systematic deficiency" in the asylum system of the receiving Dublin state. For instance, in case *KHO 2241/1/10* from 2012, the Supreme Administrative Court after assessing the general situation in Lithuania, the country Finland identified as responsible as well as the personal circumstances of the applicant, a Russian national, it arrived at the conclusion that Lithuania was safe for that particular individual.[339]

While this has been the approach taken by the Court, the authorities on the other hand have made clear that "systemic deficiency" in accordance with the DRIII is the requirement necessary to stop a transfer unless it resorts to using its discretionary powers under the sovereignty clause.[340]

5.4.1. Dublin Returnees and "Effective Remedy"

As for access to "effective remedy" upon return to Finland, in theory a person can apply for application as many times as they wish, this is submitted to the police or the Border Guard who then forwards it to the Immigration Service's Asylum Unit.[341] However, if there are no new circumstances, the application will be dealt with under the accelerated procedures in accordance with sections 102 and 103 of the Finnish Aliens Act.[342] Nonetheless, free legal assistance is provided.[343]This also aids the applicant who wishes to apply to the ECtHR under rule 39. Research shows that lawyers in Finland regularly apply to the Court and in recent years they have submitted over 200 Rule 39 applications for Dublin related removals.[344]

Pertaining to "suspensive effect" of a review, in the event that a negative decision is made, it is the general rule that a person will be removed from the country immediately after he or she is informed about that decision. However, Finland like Sweden has opted to use Article 27(3)(c) of the DRIII whereby an individual can petition to the Court to stop the transfer pending the outcome of a review or an appeal..[345] Nonetheless, such petition only applies to the Administrative Court but not the Supreme Administrative Court [346]

[339] *KHO 2241/1/10* (Helsinki Supreme Administrative Court), (Translated by author).
[340] Email from The Finnish Immigration Service to author (7 May 2014).
[341] Ibid.
[342] Ibid.
[343] Ibid.
[344] ECRE and ELENA (n 254) 24.
[345] Ibid.
[346] Ibid.

5.5. Conclusion

This chapter has compared the procedures in four other Dublin states with that of Iceland and has identified some similarities and disparities of their application of the Dublin rules both among themselves and between them and Iceland. To begin with, they allow for a review of a previous decision upon return. However such review is conditioned in that only those with new circumstances can in fact request it. It must be noted, that this factor was not examined in relation to Iceland given that, as discussed in chapter 2, Iceland is a sending Dublin state where in practice individuals are not returned under the Dublin regulation. Second, not all the states examined provide free legal assistance for a review of a previous decision. Thirdly, that with the entering into force of the DRIII, states are allowed a certain margin of appreciation as to whether or not to grant automatic "suspensive effect" or to grant "suspensive effect" upon request, the majority has opted for the latter.

One of the more significant findings to emerge from this comparison is the fact that with the exception of Iceland and Sweden "systemic deficiency" is not required to establish substantial grounds for believing that there is a risk of *refoulement*. Instead, emphasis is placed on the individual circumstances, a more compatible standard with the principle.

As it relates to Finland, while the immigration authorities require a show of "systemic deficiency", this however has not been accepted by the Courts, who instead place emphasis on the individual circumstances assessing a claim on a case by case basis.

Also important to note is that since Iceland compares itself mainly to Norway, it has not been observed that Iceland's practice in regards to rebutting the presumption of safety is compatible with that of Norway. Norway applies the same standard of proof as required by the ECtHR when assessing its *non-refoulement* obligation, taking into account the country information as well as the individual circumstances.

6. Final Remarks and Conclusion

Returning to the question posed at the beginning of this research, taking into account the preceding discussions it is now possible to state that in respect of Iceland, *in theory* an *individual*, and in this case the "Dublin returnee" can rebut the presumption of safe third country in light of the principle of *non-refoulement* supported by several reasons. To begin with it can be observed from the Icelandic legislation, the Court's rulings in *SCJ Okoro* and *SCJ Samuel* that both the Court and the authorities recognise the absoluteness of the principle in that no derogation is allowed from it. Therefore, judicial enquiry into whether or not a particular country can be presumed *safe* is not precluded.

On the other hand, while the rebuttal of the presumption of safety remains true *in theory* this has proven to be impossible *in fact,* given that the Court applies a higher standard of proof to establish a *non-refoulement* obligation, one that transcends the normal evidentiary criteria established by the ECtHR. Therefore, any claim of individual risks no matter how severe, short of "systemic deficiency" will likely be disregarded by the asylum authorities and the national Courts as illustrated by *SCJ Okoro* and *SCJ Samue*l. It is important to note that the scope of this research was limited to answering the initial question and would therefore only require an evaluation of whether or not the Court's assessment and interpretation of the principle was in line with international standards, mainly those established by ECtHR. Therefore, the paper excludes a thorough investigation into whether or not there were in fact substantial grounds to believe that if the individuals were returned to Sweden and Italy, they would be exposed to treatment proscribed by the *non-refoulement* principle.

That being said, it is reasonable to conclude that, the Icelandic Supreme Court's assessment of a risk of *refoulement* in both cases was incompatible with that of the ECtHR and Icelandic law. This is mainly attributed to two surprising findings.

First, there is a clear fragmentation of law in terms of the assessment of the principle of *non-refoulement* by the CJEU and the ECtHR whereby the former now views "systemic deficiency" as *conditio sine qua non* for the rebuttal of the safety presumption and the latter as a sufficient condition. This in turn places great strain on the domestic courts of Dublin states, Iceland included, which now has the possibility to circumvent the jurisprudential trajectory of the ECtHR in terms of assessing whether a *non-refoulement* obligation has been triggered or not. In this way, it would appear as though the CJEU has found a way to restore

the absoluteness of *mutual trus*t and presumption of *safety* which forms the basis of the Dublin system.

An implication of relying on the approach taken by the CJEU is the possibility that individual lives and freedoms will be inevitably placed at risk. This would be incompatible with Iceland's obligation under the principle of *non-refoulement*.

The second finding, shows that in spite of the "systemic deficiency" requirement Article 46(2)(a) the Foreigners Act provide for individual rebuttal of the safety presumption. Although discretionary in nature, the provision becomes obligatory where there is proof that the individual concerned faces a real risk of ill-treatment upon return to another Dublin state. Therefore in assessing whether or not Iceland should apply the Article where the presumption of safety is challenged, the focus of the assessment should be on the individual concerned and not to identify whether or not there is "systemic deficiency" in the asylum procedures in the receiving Dublin state. Therefore, the Supreme Court's rulings in both cases raise serious cause for concern in regards to the application of Article 46(2)(a) and the impact that its judgments will, and have already had on subsequent Dublin cases.

Contrary to expectations, the findings of this research also indicate that Iceland has not followed the practice of Norway when determining whether or not to consider the presumption of safety rebutted. However, this finding must be interpreted with caution given that while the approach taken by the asylum authorities in Norway reflects that of the ECtHR, the national Courts there have yet to test the compatibility of the "systemic deficiency" standard with that of the principle of *non-refoulement*.

7. Recommendations

As it relates to Iceland, it is strongly recommended that the Court, when adjudicating in future Dublin removal cases assess the risk of violation of the principle of *non-refoulement* in light of its object and purpose, which is to protect the "individual" concerned from ill-treatment and persecution.

In order to do so, it is imperative that the Court applies the pertinent test as was established in *Soering*. It is equally important that the Court applies Icelandic laws in light of their object and purpose.

Notwithstanding, it can be observed that the domestic Courts have been caught between an interpretive discord between the Strasbourg and the Luxembourg Court, which places individual fundamental rights at risk. Therefore, it is recommended that the CJEU brings its application and interpretation of the Dublin rules in line with those of the ECHR.

Furthermore, it is recommended that the ECtHR clarify some misinterpretations of its judgements in Dublin related cases which although unlikely, have nonetheless led domestic courts including Iceland to believe that it has in fact endorsed the new standard established by the CJEU.

Recapitulating on the ECtHR's own words that "given the irreversible nature of the harm that might occur if the risk of ill-treatment materialises and the importance the Court attaches to Article 3" there is absolutely no room for doubt or margin of error when assessing the risks involved with Dublin removals neither by the Court itself nor by domestic courts that observe its case-law as an important source of law.

ANNEX I- Abbreviations

APA- Administrative Procedures Act

APD- Asylum Procedures Directive

CEAS- Common European Asylum System

CJEU – Court of Justice for the European Union

CAT- Convention against Torture

DRII- Dublin Regulation II

DRIII- Dublin Regulation III (recast)

EC- European Community

ECHR- European Convention on Human Rights

ECtHR- European Court of Human Rights

EU- European Union

EUCFR- Charter of Fundamental Rights of the European Union

EWCA- England and Wales Court of Appeal

ICCPR- International Covenant on Civil and Political Rights

UKSC- United Kingdom Supreme Court

UNHCR- United Nations Commissioner for Refugees

UNCHR- United Nations Human Rights Committee

RCD- Reception Conditions Directive

SCJ- Supreme Court Judgement

ANNEX II- Definitions

- **Dublin State**: EU Member States as well as EFTA States.
- **Dublin returnees/Dublin transferees**: asylum seekers/applicants subject to a transfer decision under the Dublin Regulation.
- **Requesting/Transferring Member State**: these terms are used interchangeably in the Dublin report to signify that the Member State is sending an outgoing request and/or transferring an asylum seeker to the receiving Member State.
- **Requested/Receiving Member State**: these terms are used interchangeably in the Dublin report to signify that the Member State is receiving an incoming request and/or receiving an asylum seeker from the requesting Member State.

Annex III- Email Correspondence with Nordic States

Norway

Email from The Norwegian Appeals Board (UNE) to author (18 February 2014).

Email from The Norwegian Appeals Board to Author (6 May 2014).

Email from Norwegian Appeals Board to author (9 May 2014).

Sweden

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Denmark

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Finland

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