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# THE STANDARD OF PROOF TO REBUT MUTUAL TRUST UNDER DUBLIN REGULATION: COMPARATIVE CASE-ANALYSIS

Bachelor Thesis

Supervisor: Lehte Roots, PhD

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I hereby declare that I am the sole author
of this Bachelor Thesis and it has
not been presented to any other
university of examination.

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The Bachelor Thesis meets the established requirements

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***To my Family: for the loving support throughout these years***

***To my friend, Marlene: for being a dear friend throughout these years***

***To my cousin, Inka: for being a friend in happiness and sadness***

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## Abbreviations

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| **CJEU** | Court of Justice of the European Union |
| **ECtHR** | European Court of human rights |
| **ECHR** | European Convention of Human rights |

## Introduction

Before the landmark year of 2011, mutual trust under the Dublin Regulation had been absolute[1]. This meant that the Member States of the European Union (EU) were able to send asylum seekers back to the responsible state under the rules of the Dublin Regulation, trusting that the responsible state would follow the obligations under international treaties.[2] This had been described as "blind mutual trust".[3] However, the landmark case M.S.S. v. Belgium and Greece and N.S v. SSHD effected a change for this " blind trust"[4]. This meant that the transferring state was not allowed to send an applicant back to the Member State responsible if the fundamental rights of the applicant would be jeopardized [5]. The Dublin cases reiterated the statement that that mutual trust is not absolute as formulated in the cases M.S.S. and N.S [6]. Yet, the standard of proof to rebut such mutual trust is not clear. Thus, many authors have asked where exactly this standard of proof lies.[7]

The Court of Justice Of European Union (hereafter CJEU) has defined this standard as where the Member states: "...cannot be unaware of the systemic deficiencies in asylum procedure and in the reception conditions amounting to substantial grounds for believing that an asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter". [8] This means that not all infringement can overcome the presumption of safety

[1] see for example, European Court of Human Rights,7 March 2000 no. 43844/98 T.I v. UK Application, European Court of Human Rights 2 December2008 no. 32733/08 K.R.S v. UK Application

[2] Regulation (EU) No 604/2013 of the European Parliament and the of the Council of 26 June 2013 recital 2

[3] Brouwer, E. Mutual trust and the Dublin regulation: protection of fundamental rights in the EU and the burden of proof. Utrecht Law Review 2013, 9(1), p 135

[4] Court of Justice of the European Union 21 December 2011Joined Cases C-411/10 and C-493/10 N. S. v. Secretary of State for the Home Department and M. E. and Others v. Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform par. 94, European Court of Human Rights Strasbourg 21 January 2011(Application no. 30696/09) M.S.S. v. Belgium and Greece

[5]Supra nota 3, p 135.

[6] see for example European Court of Human rights, 4 November 2014, Application no. 29217/12, Tarakhel v. Switzerland par 33

[7] Supra nota 3 p 136. Brouwer asks for example: "When should the rebuttal of trust take place? Which procedural guarantees or safeguards are necessary in order to allow the asylum seeker to submit information against his or transferal? "

[8] Court of Justice of the European Union 21 December 2011Joined Cases C-411/10 and C-493/10 N. S. v. Secretary of State for the Home Department and M. E. and Others v. Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform par 94

under the Dublin Regulation. Indeed, only major operational problems can impede this allocation of responsibility,[9].

In contrast to the test developed by the CJEU, the European Court of Human Rights (hereafter ECtHR) has argued that the standard of proof must take into consideration not only the systemic deficiencies but also the individual circumstances of the applicant as defined by the court in the case Tarakhel v. Switzerland.(hereafter Tarakhel)[10] The CJEU's approach has been noted as possibly being too high a threshold[11] while the ECtHR approach has been questioned as creating intermediate cases.[12] These different approaches show that the issue is in flux and needs careful study. Thus, the main goal of this study is to define the standard of proof to rebut mutual trust under the Dublin Regulation.

The research questions of this study are as follows:

1) What is the standard of proof for rebutting the presumption that the receiving Member State is safe in accordance with case law?

2) When exactly can trust be considered to have been rebutted in accordance with case law?

The thesis hypothesis of this study is that the standard of proof to rebut mutual trust is the combination of the tests developed by the CJEU and the ECtHR.

The test developed by CJEU and later adopted in III Dublin convention states that the mutual trust should be rebutted where: "there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State,

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[9] Vicini, G. The Dublin Regulation between Strasbourg and Luxembourg: Reshaping Non-Refoulement in the Name of Mutual Trust. Eur. J. Legal Stud 2015. *8*, 50. p 60

[10] Supra nota 6, par 103-105.

[11] Supra nota 9, p 65.
The author of the article notes that "the high threshold established by the CJEU to rebut the mutual trust principle, which is based on Article 4 of the Charter, may affect human rights and fundamental freedoms as recognized by the Convention, in breach of Article 53 of the Charter"

[12] Zimmermann N. Strasbourg observers available at www.strasbourgobservers.com/2014/12/01/tarakhel-v-switzerland-another-step-in-a-quiet-revolution/ (24.4.2017)

resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union " [13]. Alternative legal test to rebut the mutual trust under Dublin regulation under article 3(2) is presented at the end of the thesis.

The first chapter is devoted the standard of proof to rebut mutual trust before and after the landmark case M.S.S., 2011. The second chapter studies the standard of proof to rebut the mutual trust in Tarakhel v. Switzerland, which established an alternative test to the test developed in N.S v. SSHD. The third chapter describes firstly, member states' divergences deciding rebuttal of mutual trust and secondly how the Member States should investigate the asylum seeker's application. The fourth chapter explores new approaches to the rebuttal of mutual trust.

In this thesis, the author has used comparative case-analysis as major method. The rationale of the Dublin transfer court cases has been analyzed in the light of the study questions of this thesis. Namely, what is the standard of proof to rebut mutual trust and when mutual trust is rebutted? Court cases have been compared to find common factors to rebut the mutual trust and disjunctive factors.

The two major sources of this thesis have been the so-called Dublin transfer cases and peer-reviewed legal Articles. The cases have been chosen as such that their major ground for them has been the Article 3 ECHR. The Articles that have been chosen for writing the thesis have been chosen from 2011onwards, since this is the year of when mutual trust was concluded to be rebuttable in M.S.S. v. Belgium and Greece. The Articles are chosen such that they interpret the nature of mutual trust in Dublin transfer cases and the possible standard of proof to rebut mutual trust.

The subject is interesting for contemporary research mainly because the imprecision of the correct approach: the CJEU highlights the operational problems in the asylum system while the ECtHR highlights the individual circumstances. This has divided both scholars and national courts.

[13]Supra nota 2, article 3(2)

# 1. The Dublin regulation and mutual trust: the nature of mutual trust is unclear

## 1.1 Dublin regulation and mutual trust

The Dublin Regulation is a responsibility allocation mechnanism that determines both the mechanism and criteria state responsible for the asylum application lodged in a Member state by a third-country national.[14] Thus, the main aim of the Dublin Regulation is to define the state responsible for the processing of the asylum seeker's application. Another aim of the Dublin Regulation is to prevent asylum shopping, i.e multiple asylum applications in multiple states.[15] This means that the state where the asylum seeker first lodged the application is responsible for investigating the application in accordance with national laws and international agreements[16]. Thus, under the rules of the Dublin Regulation, only one Member state is responsible for the asylum application, also known as the authorisation principle.[17]

The Dublin Regulation is based on the presumption of mutual trust that Member States may be considered as safe countries. This means that there is the presumption that the Member States are assumed not to violate the principle of non-refoulement,[18] which is the basis of both asylum and international refugee law. The principle is defined more precisely in Article 3(1) of the 1951 Convention relating to the Status of Refugees.[19] This means that the sending state cannot send the refugee to a country where he might face treatment contrary to the convention (direct refoulement). The presumption of mutual trust is justified according to two legal instruments: The Refugee convention and the European Convention of Human rights. It is stated in the preamble of the Dublin Regulation that all member states are considered as respecting the principle of non-

[14] Moreno-Lax, V. Dismantling the Dublin system: MSS v. Belgium and Greece. European Journal of Migration and Law 2012, 14(1))., 1-31. p 1
[15] Goudappel, F. A., & Raulus, H. S. (Eds.). The Future of Asylum in the European Union: Problems, proposals and human rights. Springer Science & Business Media.2011, p 3
[16] Supra nota 2, article 3(1), 3(2).
[17] Supra nota 15, p 3., Supra nota 2, recital 2
[18] Supra nota 14, p. 1., Supra nota 2, recital 3
[19] The Article states 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 because his race, religion, nationality, membership of a particular social group or political opinion."

refoulement. This passage refers to the Refugee convention to which all Member states are party, and to the Common European Asylum system.[20]

The Dublin Regulation does not define if mutual trust is absolute or rebuttable. Therefore, any definition is merely tentative. As Düsterhaus suggests, mutual trust can be described as "…the confidence that Member states should have in each other's legal system and courts in the application of EU law."[21] TThus, the question is, if mutual trust is rebuttable, how and when it should be as regarded as refuted.[22] The case law of the two courts ECtHR and CJEU has suggested two-fold criteria to rebut mutual trust. The first one is the structural deficiencies and the other one is substantial grounds for believing that the applicant, personally, would face a 'real risk' of ill-treatment contrary to Article 3.[23] Aligning with this, The N. S. v. Secretary of State for the Home Department defined mutual trust as being rebutted where "[…the State] cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of that provision." The assessment of this test is based on the case-law of Article 3 ECtHR and the Soering doctrine. The doctrine states that "…[T]he 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

Since the standard of proof to rebut mutual trust is an emerging issue in European asylum law, the starting point for defining the standard of proof rebuttal of mutual trust is the CJEU's test, since it also is codified in Dublin Regulation. Interestingly, this test developed by the CJEU's is also the

[20] Battjes H., Brouwer E., Morree P., Ouwerkerk J., The principle of mutual trust in European asylum, migration and criminal law- reconciling trust and fundamental rights, Meijers committee standing committee of experts on international immigration, refugee and criminal law, 2011, www.research.vu.nl/ws/portalfiles/portal/814834 (24.4.2017) p 10.
[21] Düsterhaus, D. Judicial Coherence in the Area of Freedom, Security and Justice–Squaring Mutual Trust with Effective Judicial Protection. Review of European Administrative Law 2015, *8*(2), 151-182. p 153
[22] Supra nota 14, p 1.
[23] Nicolosi S.Strasbourg observers available at www. strasbourgobservers.com/2015/02/20/another-episode-in-the-strasbourg-saga-on-the-dublin-system-to-determine-the-state-responsible-for-asylum-applications/ (24.4.2017)

root of the problem. Indeed, the threshold presented by the CJEU in N.S has led to debate both on the meaning and the consequences of systemic flaw.[24] There are contradicting opinions on the consequences of the systemic fault. Namely, others argue that the systemic fault cannot be a precondition for transfer obstacle: it should be sufficient, regardless of the cause, that there is a real risk for the individual to face treatment contrary Art. 4 of the Charter. Others, on the contrary argue that the real risk must be due to the systemic fault per se in order for there to be an arguable claim.[25] As can be seen, the systemic fault as such is controversial test serving as standard of proof to rebut mutual trust and it has divided the scholars in two camps: the one supports the individual approach, as defined by ECtHR while others support the strict approach as defined by CJEU. Thus, it can be argued, in the author's opinion, that the CJEU has not brought clarity to the standard of proof to rebut mutual trust and the test as such is in flux.

### 1.2 Mutual trust in case-law before 2011: T.I. v. UK [ECtHR] and K.R.S v. UK [ECtHR]

Before the landmark year of 2011, in the case M.S.S. v. Belgium and Greece, mutual trust under the Dublin Regulation had been absolute. This meant that the Member States of the European Union (EU) were able to send asylum seekers back to the responsible state under the rules of the Dublin Regulation, trusting that the responsible state would follow the obligations under international treaties[26]. This can be described as "blind mutual trust".

However, the landmark case M.S.S. v. Belgium and Greece[27] effected a change for this " blind trust", as the followed Dublin cases have shown[28]. The Dublin cases reiterated the statement in the

[24] Lubbe A., Systemic Flaws and Dublin transfers incompatible tests before the CJEU and EctHR, Int. J Refugee law 2015, 27(1) p135
[25] Ibid p 136
[26] See for example, Council of Europe: European Court of Human Rights, 7 March 2000 Appl. No. 43844/98 *T.I. v.* The United Kingdom, , and , Council of Europe: European Court of Human Rights, 2 December 2008 Application no. 32733/08 K.R.S. v. United Kingdom,
[27], Council of Europe: European Court of Human Rights, 21 January 2011 Application no. 30696/091 M.S.S. v. Belgium and Greece,
[28] European court of Human Rights, 4 November 2014 , Application no. 29217/12, Tarakhel v. Switzerland and European Court of Human Rights 21 October 2014 no. 16643/09 Sharifi and others v. Italy and Greece, Court of Justice of the European Union 21 December 2011 C-411/10 and C-493/10 N. S. v. Secretary of State for the Home Department and M. E., A. S. M., M. T., K. P., E. H. v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform par.78-86 and 104-106

case M.S.S. v. Belgium and Greece that mutual trust is not absolute[29]. Yet, the standard of proof to rebut such mutual trust is not clear.

It was in the case T.I. v. UK where the ECtHR first established the possibility to rebut the principle of safety underlying the Dublin Regulation on the basis of refutability.[30] The T.I. v. UK case concerned an asylum seeker from Sri Lanka who had come to the United Kingdom through Germany where he had applied for refugee status. The refugee status had, however, been rejected and the applicant went to the UK to lodge a new application. The UK refused to accept the application based on the Dublin Regulation in which Germany was responsible for the asylum application. However, the applicant questioned his removal to Germany based on Article 3 of the ECHR. He claimed that his removal to Germany would breach 3 ECHR since Germany did not recognize persecution by non-state agents as grounds for refugee status. Thus, there was a risk that he would be sent back to his country of origin where he would face treatment against Article 3 ECHR[31].

UK argued that that the applicant's rights under Article 3 ECHR would not be jeopardized, since there would be procedural rights in Germany to protect the applicant. In addition, although UK argued that it would be incompatible for purpose of the Dublin Regulation to UK assess if another Member State was complying with the Regulation.[32] However, the court found that the UK was not absolved of the responsibility to guarantee that the applicant would not face treatment under Art. 3 ECHR if sent back to country of origin through an intermediate state. Thus, it was in T. I v. UK that the indirect refoulement was also covered. Indeed, central to the case was the question of whether it was lawful for the UK to send the applicant to Germany in the light of its own obligations under Article 3 ECHR. The court argued that even though states establish international agreements, it was not sufficient for the UK to rely automatically on the Dublin Regulation. The court found that it would be incompatible with the purpose and object of the Convention if states could absolve their obligations by such attributions.[33]This meant that if the reference to the

[29] see for example European Court of Human Rights 4 November 2014, Application no. 29217/12, Tarakhel v. Switzerland, par 33 and European Court of Justice of the European Un ion, 21 December 2011 C 411/10, N. S. v. Secretary of State for the Home Department par 104
[30] Supra nota 14, p 8.
[31] European court of human rights, www.echr.coe.int/documents/fs_dublin_eng.pdf p 1 last access 18.4.2017
[32] European Court of Human Rights, 7 March 2000 Appl. No. 43844/98 T.I. v. The United Kingdom, p. 13.
[33]Supra nota 14, p 8.

provisions of the Dublin Regulation would have made consequences to the protection of the fundamental rights, UK was not qualified to rely on it[34].

The importance, of the case, the author concludes, lies in the fact that it established the transferring state's obligation to make sure that the freedoms and rights of the applicant are followed in the intermediary country and thus the standard of proof rebut mutual trust. Indeed, in this case the court's primary concern was whether there were enough procedural guarantees to protect the applicant from transfer to Sri Lanka from German. Since the court put weight to the intermediary country's asylum procedure, it can be argued that this obligation reaches to the individual procedural rights that the individual has as regards one's asylum application. Indeed, it can be argued that since the transferring state is responsible for the applicant's freedom and rights[35], so whenever there is chance that they might be in danger mutual trust should also be rebutted. Thus, the transferring state must pay special attention to the intermediary's country asylum procedure.[36] Namely, this is because the transferring state bears the responsibility for the asylum seeker's rights and freedoms even after the removal to the intermediary country.[37] Indeed, as Peers argues there are two major procedural rights that the applicant should be able to enjoy in order to challenge his/her trasnfer. Firstly, the rights granted in Article 3(2) should be act as a ground to resist transfer to another Member State. Secondly, any breach of substantive or procedural right in Regulation should also act as bar to challenge the transfer.[38]

Peers' argument suggests that the standard of proof to rebut mutual trust as regards procedural guarantees is set for the point in which the applicant has reasonable possibilities to challenge his/her transfer to another Member state. Yet, what is the excact standard of reasonable procedural guarantees is yet undefined. In K.R.S v UK, it was sufficient that there was possibility to challenge the possible transfer to state of origin under Rule 39. Yet, guidance on the standard of reasonable

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[34] Bodiroga-Vukobrat N., Rodin S., Sander G. New Europe -old values reform and perseverance. Springer 2016 p 44
[35] Ibid p 44.
[36]Ibid p 44.
[37] Ibid p 44.
[38] Peers, S Reconciling the Dublin system with European fundamental rights and the Charter. In *ERA Forum*. Springer Berlin Heidelberg 2014, Vol. 15, pp. 485-494 p 491 (adapted from a longer analysis of the Regulation in Garlick, Guild, Moreno Lax and
Peers, EU Immigration and Asylum Law, Vol. 3 (forthcoming: Brill, 2015)

procedural guarantees can be drawn from the K.R.S's court statement in which the court argued that the procedural guarantees must be both effective and practical.[39]

In addition, the foregoing suggests, in the author's opinion, that mutual trust is rebutted when there is not procedural guarantees for the applicant to challenge the Dublin transfer both in the sending and the intermediary country. Indeed, as argued foregoing, the sending state is responsible for the applicant's rights and freedoms in the intermediary country, thus also the procedural guarantees for the applicant should be covered. Thus, as stated above mutual trust is rebutted whenever there is possibility that those procedural rights are at stake. Thus, it can be argued that the standard of proof for rebuttal mutual trust, lies in that tranferring state which must make sure that the applicant will be treated in accordance with the international law by the responsible state.

### 1.3 Mutual trust after 2011; M.S.S. v. Belgium and Greece

The case of M.S.S. v. Belgium and Greece concerns an Afghan national who arrived in Belgium through Greece, where his fingerprints were taken. Belgium sent the applicant back to Greece under the rules of the Dublin Regulation. The court decided that there was a breach of Article 3 by Belgium on two grounds. Firstly, Belgium knew or should have known that there was no guarantee that the applicant's asylum application would be investigated seriously.[40] Indeed, as the court argued, Belgium should have verified how the Greek authorities would have applied their asylum legislation in practice. [41] Secondly, Belgium violated Article 3 ECHR by sending the applicant where he would evidently face living conditions amounting to degrading treatment.[42]

Although Belgium argued that it had assurance from the Greek authorities that the applicant would not face treatment contradicting the Convention in Greece, the court rejected this argument. The court argued that the existence of national laws is not sufficient protection against ill-treatment when reliable sources have reported that the practices tolerated by the authorities are against the principles of the Convention .[43] In addition, in M.S.S., the court argued that diplomatic assurances

[39]European Court of Human rights, 2 December 2008 Application no. 32733/08, K.R.S v UK, p 18
[40]Supra nota 27 par 358, 360
[41] Ibid par 359
[42] Ibid par 367-368.
[43] Ibid par 353

were not sufficient to guarantee the safety of the applicant.[44] Indeed, mere assumption of mutual trust based on these was not sufficient. Furthermore, the court explicitly stated that Belgium should not have just assumed that the applicant would be treated in accordance with the convention. For this, the court referred to various international reports that Belgium had disregarded.[45] It can be concluded,in the author's opinion, from the court desicions, T.I v. UK and M.S.S that neither mere existence of international treaties nor diplomatic assurances are sufficient. The court desicion raises the degree to which the sending state must work in order to ensure that the receiving state is safe. In addition, the standard to investigate the applicant's individual situation is more than a general one: the existence of international treaties and national laws in the receving state are not sufficient, as stated above . The standard to prove the applicant's situation stresses the specific individual situation and how the laws of the intermediary country would be applied to the applicant.

In conclusion, it can be argued that the case M.S.S clarifies that already stated in the previous chapter: mutual trust is rebutted whenever there is possibility that procedural rights to challenge the transfer to another Member State are at stake. The M.S.S gives guidance on the standard of proof to rebut mutual trust: whenever there is insufficient proof of the application of the asylum laws to the applicant, the mutual trust should be rebutted. Yet, as regards the procedural guarantees, the sending state's responsibility to provide sufficient procedural guarantees against the Dublin transfer should also be available in the sending state. The absence of such, can lead to a breach of Article 3 and thus rebuttal of mutual trust as seen in M.S.S. Namely, in M.S.S the procedure of Belgium did not leave any possibility to the applicant to challenge his transfer to another Dublin country: there was no such section in the form that the Alliens office filled in. In addition, even though the applicant tried to fill the application with that information challenging his transfer, the Aliens Appeal Board did not take into account that material. Thus, as a result the applicant was prevented to establish his case under Article 3 ECHR.[46] Thus, the standard of proof to rebut the mutual trust should be the absence of procedural guarantees to challenge his/her

[44] Ibid par 354.
[45] Ibid par 359, 348-349.
[46] Supra nota 3, pp 144-145.

transfer both in the transferring state, against the Dublin transfer, and in the intermediary state, against the transfer to the state of origin.

### 1.4 The CJEU: the test N. S. (C-411/10) v Secretary of State for the Home Department

After the M.S.S, CJEU had a case similar to M.S.S. The case was about an asylum seeker who had entered Britain through Greece. Under the Dublin Regulation it would have been Greece that should have investigated this asylum application. However, the asylum seeker challenged this on the grounds that his human rights would be breached since Greece would be unable to investigate his application properly.[47]

The legal test rebutting mutual trust, developed by CJEU in N.S has the systemic fault[48] as precondition for founding a breach of Art. 4 of the Charter.[49] This forms the first part of the test and maybe the most controversial part, since it has led debate on the exact meaning and consequences of the systemic fault.[50] Indeed, as argued by Costello, this threshold is flawed. Namely, it has been argued by C. Costello that this threshold is not compatible with the interpretation of Art. 3 ECHR by the Strasbourg court.[51]

The test developed in N.S. v. SSHD entails several elements, which are analyzed in turn to reveal the malfunctions of the test. According to Mellon, the elements are following: (i) a Member State 'cannot be unaware' of (ii) systemic deficiencies (iii) amounting to substantial grounds for believing iv) there is a real risk of violation of Article 4.[52]

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[47] Murphy C., The EC] on Asylum, Greece & the UK Protocol on the EU Charter www.humanrights.ie/index.php/2011/12/28/nsjudgment/(118.4.2017.)

[48] The author uses the term "systemic fault" since it has codified in Dublin III regulation

[49]Court of Justice of the European Union 21December 2011.C-411/10 and C-493/10 N.S v. SSHDM. E. v. Refugee Applications Commissioner ja Minister for Justice, Equality and Law Reform**.** par.94 the first part of the legal test developed and later codified in Dublin III regulation states that mutual trust is rebutted where: "they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State –"

[50] Supra nota 24, p 135.

[51] Costello, C. Courting access to asylum in Europe: recent supranational jurisprudence explored. Human Rights Law Review 2012, 12(2), 287-339. p 331

[52] Mellon G., The Charter of Fundamental Rights and the Dublin Convention: An Analysis of N.S. v. Secretary of State for the Home Department C-411/10, The.Eur. Pub. L.,18, 655. p 661

However, interestingly, a recent CJEU case C.K. and others suggests that there can be a halt in the transfer of the asylum seeker to another Member state regardless of the absence of systemic deficiencies. In other words, the court put more weigh on the individual situation of the applicant than the existence of asylum system conditions as the determinant factor for finding the breach of Article 3 ECHR.[53] Thus, this case puts the decision in N.S. in controversy. In this case, the applicants argued against their transfer from Slovenia to Croatia based on the individual condition of the applicants – a new-born baby and mental health issues of the mother. The Slovenian court decided that weight should be given to the individual circumstances of the applicants in order to give protection the absolute nature of the non-refoulement. The case was referred to preliminary reference to CJEU. The most important question on regards this thesis, was the second question where the Slovenian court asked whether the circumstances of the case as presented were sufficient from article 3(2) to meet the requirements of the Article 4 and Article 19(2) of The Charter of Fundamental Rights of the European Union in conjunction with Article 3 of the European Convention on Human Rights and Fundamental Freedoms and Article 33 of the Geneva Convention?[54]

What makes the court case interesting is that the CJEU decided the case against the opinion of the Advocate General who opined that the case should have solved accordance with the Dublin Regulation of the Article 3(2).[55] Thus, it can be argued that the systemic flaws, as a major precondition for prevent transfer of the applicant to another Member state, cannot be seen as a determinant factor to finding breach of Art. 3 ECHR or Art. 4 of the Charter as developed by the N.S.

[53] Rizcallah C EU Law Analysis Expert insight into EU law development www.eulawanalysis.blogspot.fi/2017/02/the-dublin-system-ecj-squares-circle.html last access 18.4.2017
[54] EDAL European database of asylum law www.asylumlawdatabase.eu/en/case-law/slovenia-constitutional-court-republic-slovenia-judgment-61316-28-september-2016#content last access 18.4.2017
[55]. Supra nota 53

## 2. The alternative approach developed by Tarakhel V Switzerland

### 2.1 Mutual trust and individual circumstances approach developed by Tarakhel V. Switzerland

Although the ECtHR had been endorsing the "systemic flaw"- test [56]developed by CJEU in N.S, the year 2014 brought a change for this in Tarakhel v. Switzerland[57].

The court argued that the threshold for rebuttal of mutual trust is a real risk and individual assessment of the applicant. Thus, the court set aside the systemic fail test as developed by the CJEU[58]. The court argued that the breach of Article 3 ECHR amounted in particular categories of asylum seekers. Thus, a more individualised approach was adopted.[59] In this landmark case, a family of eight argued that reception conditions in Italy were such that they would lead to inhuman and degrading treatment of the family.[60] Although the reception conditions were not collapsed to such a degree as formulated in M.S. S.[61], the court put weigh on the individual situation of the applicants as vulnerable and needing protection, given that there were children in the family,[62] and thus the court decided that Switzerland could not send the applicants to Italy without obtaining individual guarantees[63].

Indeed, interestingly, despite the fact that the overall situation a such did not warrant the general prohibition of Dublin transfers, the court argued that the reception conditions might still amount to a breach of Article 3 ECHR. Indeed, in Tarakhel, by contrast the case in M.S.S was that Italy's asylum system was not effectively collapsed as was in the case in Greece. In addition, there were no allegations relating to flaws in Italy's asylum procedure. Indeed, the whole argument was only

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[56] E.g. European court of Human Rights 2April 2013, No. 27725/10 Mohammed Hussein a.o. v. the Netherlands and Italy,
, para 78; European Court of Human rights 18 June 2013 Application no. 53852/11 Halimi v. Austria and Italy, para. 68
[57]Supra nota 6
[58] Battjes, H., Brouwer, E. The Dublin Regulation and Mutual Trust: Judicial Coherence in EU Asylum Law? Review of European Administrative Law 2015, 8(2), 183-214
p 191
[59] Ibid p 191
[60] Supra nota 6, par 100
[61] Ibid par. 114
[62] Ibid par. 118-120
[63] Ibid par. 122

about living conditions in Italian detention centers. In addition, central to the court's argument was that the asylum seekers were an underprivileged and vulnerable group.

About the substantial grounds, the court referred to the case NS and the systemic deficiencies test but made no reference on Abdullahi[64] where CJEU had argued that the systemic deficiencies were the "only" feature to rebut mutual trust. Instead, the court referred to the EM judgment of the UK supreme court which had argued that a systemic deficiency is not the only grounds for such a challenge. It is not clear how the court's assessment should be interpreted. There are two possible interpretations of possibility: either that it means that the ECtHR meant to abandon the CJEU's assumption that "only systemic deficiencies" in the asylum system can challenge the Dublin transfer or the ECtHR meant to lower the threshold of the CJEU's test. For the former interpretation, this would mean that the systemic deficiencies were just one example of a situation that could lead to rebuttal. For the latter interpretation, this would mean that the systemic deficiencies would exist not only where the whole system had been collapsed but also particular parts.[65]

In the author's opinion, the former interpretation seems more correct. Namely, this kind of approach would give more room to the interpretation in which the individual circumstances would matter over the possible systemic deficiencies. Namely for example the UK Supreme court argued, in particular that the breach of the Article 3 ECHR cannot be dependent on the systemic shortcomings. Holding otherwise, it would deprive possibly applicants from their Art. 3EHCR rights, if the breach would result from other than systemic faults in the procedure and reception conditions. [66] In addition, the English Supreme Court argued that holding the systemic breach as requisite for breach of article 3 ECHR, would be arbitrary. As the court noted: "There is nothing intrinsically significant about a systemic failure which marks it out as one where the violation of fundamental rights is more grievous or more deserving of protection"[67] Most remarkably, the court observed that the gross breach of article 3 ECHR can be occur without the systemic breach.[68] Most

[64] Judgment of the Court (Grand Chamber), 10December 2013, C-394/12, Shamso Abdullahi v Bundesasylamt
[65] Peers S.EU Law Analysis Expert insight into EU law developments, www.http://eulawanalysis.blogspot.fi/2014/11/tarakhel-v-switzerland-another-nail-in.html ( 25.2.2017)
[66] United Kingdom: Supreme Court, 21 March 2012, R(Eritrea) v. Secretary of the State for the Home Department paras 42
[67] Ibid paras 48
[68] Ibid paras 48

importantly, the court argued that in its view, the CJEU did not meant to stipulate that the only way tor resist the Dublin transfer was to show breach of article 3 ECHR stemming from either the asylum procedure of reception conditions of the receiving country. Indeed,as the court argued: "-- the infringement of fundamental rights provided evidence of the systemic deficiency rather than that a systemic deficiency had to be demonstrated before violation of a fundamental right could operate to prevent the transfer".[69]

Although the CJEU has been holding on the interpretation developed in N.S, there has been a change for this. Namely, in C.K and others, the CJEU adopted the approach developed in Tarakhel and possibly overruling the decision in N.S. This kind of ruling is very welcomed. Namely, although both courts agreed the relative character of mutual trust, both jurisprudence differ the conditions that might rebut mutual trust.[70] The ECtHR gave relevance to the individual situation of asylum seeker while the CJEU gave relevance to the general situation of national reception systems [71] Indeed, although the CJEU agreed with the ECtHR that the presumption of mutual trust must be relative[72], the test established by the CJEU was criticized as being too high threshold to rebut mutual trust.[73] Indeed, in Abdullahi[74] the CJEU established that the applicant can rebut the mutual trust only "by pleading systemic deficiencies in the asylum procedure and in the conditions for the reception of applicants for asylum in that Member State."[75] Thus, according this test the individual risk is neither sufficient or necessary to rebut mutual trust.[76] However as stated, C.K and other brought a change for this. Thus, in the light of the foregoing, it shows that, although the court referred to the test developed by N. S[77] in Tarakhel, and yet did not follow it shows, in the author's opinion, that the court wanted to divorce at least some extent from the N.S' systemic fault test. Namely, on the contrary, the court adopted the approach formulated by the English Supreme

[69] Ibid par 55
[70] compare Court of Justice of the European Union, 21 December 2011, Case C-411/10 and 493/10 *N.S. v.* Secretary of State for the Home Department and European Court of Human rights, European court of Human rights, 4 November 2014, Application no. 29217/12, Tarakhel v. Switzerland
[71] Vicini G., The Dublin regulation between Strasbourg and Luxembourg: Reshaping the non-refoulement in the name of mutual trust? European Journal of Legal Studies, 2015, 8 (2), p 57.
[72] Ibid pp 51-52
[73]Supra nota 58, p 191.
[74]Grand Chamber of the CJEU10 December 2013 C-394/12 Shamso Abdullahi v. Bundesasylam
[75] Vicini G., The Dublin regulation between Strasbourg and Luxembourg: Reshaping the non-refoulement in the name of mutual trust? European Journal of Legal Studies, 2015, 8(2), p 60
[76] Ibid p 60
[77] Supra nota 6, par 33.

court. The English Supreme court had argued that the test developed by CJEU in N.S was flawed and should be rejected.[78] Namely, the English court argued that the assessment of the risk of the article 3 ECHR, should be done on a case-by-case basis irrespective of whether systemic deficiencies exist in a State's reception system for asylum seekers[79].

Yet, in the author's opinion this test seems to contradict the Soering to some extent. Namely, in Soering , the court first established the existence of the source of the risk and then continued to the individual assessment. The individual assessment was taken into consideration only if there was the existence of the source of risk. In the author's opinion, the English Supreme court and Tarakhel, by contrast to Soering, suggest that the right assessment would see the source of the risk and the individual risk as equal. This would mean that the mutual trust could be rebutted regardless of the existence of the systemic deficiency in a State's reception system for asylum seekers. If this approach were taken, it would mean overruling CJEU's legal test. Thus, the systemic deficiency would merely be an example of the source of risk that could lead to the rebuttal of mutual trust. Indeed, in addition, in Tarakhel the court argued that the source of the risk is irrelevant to the level of protection guaranteed by the Convention.[80] Similarly, in Sufi and Elmi v. UK the court argued that what is essential is that the risk of an Art. 3 ECHR breach exists. As argued in Sufi and Elmi the court argued that if the risk as such is established, applicants' removal would breach to article 3 ECHR regardless of the source of the risk[81]. Although this case is not, a Dublin transfer case as such, it gives guidance on the alternative interpretation of the article 3 ECHR and as such also the rebuttal of mutual trust.

Indeed, in the author's opinion, what the court argued was that the systemic fault as such cannot be hold to be precondition to find a breach of Article 3 ECHR, since as argued in the English Supreme court, there is nothing in essence such that would mark out the systemic fault as needing more protection[82]. In addition, as the Tarakhel case suggests, regardless of the fact that the situation

[78]Supra nota 6 par 52 and supra nota 66, par. 42,48,58
[79]Supra nota 6, par 52
[80] Taylor A European database of asylum cases, http://www.asylumlawdatabase.eu/en/journal/tarakhel-v-switzerland-where-does-dublin-system-stand-now (5.2.2017)
[81]European Court of Human Rights 28-11-2011 8319/07 and 11449/07 Sufi andElmi v. United Kingdom par 218
[82]Supra nota 66, paras 48.

would not be the same as in M.S.S., it does not mean that there cannot a be halt on the transfer, if there exists both the possibility of breach of article 3 ECHR and the vulnerable situation of the individual[83]. This also gives guidance, in the author's opinion, on the standard of proof to rebut mutual trust: where the situation is not comparable to M.S.S., alternative approach should be adopted. In addition, the author of this thesis argues that this means that when there is both the mere possibility on the breach of Article 3 ECHR regardless of the source of the risk and that risk, given vulnerable situation of the individual, would lead to a breach of Article 3 ECHR, then mutual trust should be rebutted.

### 2.2 "Serious doubts" of the capacity of the system and mutual trust

In the Dublin transfers cases the most common argument has been that the applicant would be exposed to inhuman and degrading treatment because of the asylum or detention conditions, in other words, the source of the risk to be assessed was the condition of asylum procedure and reception conditions. Yet, what the case-law seems to have left open is the exact legal test for the severity of the source of the risk. Although the CJEU has formed a test in which it states that both asylum procedures and the reception conditions must be almost collapsed, the ECtHR, on the other hand, adopted in Tarakhel an approach that seemed to lower the threshold of the severity of the risk.

When compared to the two cases of ECtHR with similar facts, Mohammed Hussein v. The Netherlands and Italy and Tarakhel v. Switzerland, this issue is unclear. In Hussein, in which the court still followed the CJEU's approach, the court concluded that although there were some shortcomings in the Italian general situations and living conditions, there was no systemic failure of the facilities. Thus, the argument in Hussein was rejected as a ill-founded[84] . In Tarakhel, with almost the same arguments compared to Hussein, the court obviously lowered the threshold of the failure of the capacity of the system risk by stating that: " [t]he possibility that a significant number of asylum seekers . . . may be left without accommodation or accommodated in overcrowded

[83] Supra nota 6, par 114-115, 117-119
[84] European Court of Human Rights, 2 April 2013, Application no. 27725/10 Mohammed Hussein v. The Netherlands par 79

facilities without any privacy . . . is not unfounded".[85] So, while in Hussein the court had required systemic failure of the facilities, in Tarakahel on the other hand, the possibility that the privacy of the applicants may be reduced was desicive to require that Swiss authorities demand individual guarantees from Italian authtorities. In addition, although the court found that the overall situation could not be compared to the case in M.S.S, the court still concluded that: "the data and information set out above nevertheless raise serious doubts as to the current capacities of the system." Thus, it can be argued that the court lowered the threshold in Tarakhel of a total collapse of reception conditions found in M.S.S to "serious doubts" of the capacity of the system, which would lead to the breach of the fundamental rights of the individual[86] and therefore, the mutual trust should be rebutted.

In the author's opinion, the ECtHR, indeed, departed from the legal test formulated in N.S. Namely, in Tarakhel, the applicants did not argue that both the asylum procedure and reception conditions were collapsed. They argued only that reception conditions had been flawed. In the author's opinion, since the court decided to give protection to the applicants regardless that the legal test in N.S was not fully filled, shows the deportation from the N.S. Indeed, when compared to C.K and others it is seen that there can be halt on the Dublin transfer despite that the asylum conditions are flawless[87]. However, in the author's opinion it is still early to say whether the case means that the CJEU has overruled the legal test in the Dublin Regulation or does this just mean that the legal test in regards the systemic deficiencies is lowered only in cases when the asylum seekers are in especially vulnerable situation.

It can be argued that if the systemic flaw test is kept as an alternative test for rebut mutual trust, the threshold in terms of the severity of the detention conditions and asylum procedure should not be a total collapse but rather severe doubt of the functionality of the asylum procedure and detention system.

[85]Supra nota 6, par 115
[86]Ibid paras 115.
[87]Court of Justice of the European Union, 16 February 2017, C-578/16 PPU C.K and others v Republika Slovenija par 96

## 2.3 The interpretation of real risk: the right legal test to rebut mutual trust should be the Soering

The central feature of the rationale of the court's decision in Tarakhel was the reference to the English Supreme court in which the court argued that the legal test in N.S. was flawed.

The English Supreme court of England in R v. SSHD suggested that the right test to put a halt on the transfer of the applicant should be the Soering one: "The removal of a person from a member state of the Council of Europe to another country is forbidden if it is shown that there is a real risk that the person transferred will suffer treatment contrary to article 3 of ECHR. "[88] Thus, although the court in Tarakhel referred to the legal test formulated by CJEU, it adopted different approach to the N.S. and highlighted the comparison of the overall situation and the individual situation.[89]The court followed the Soering tests on the real risk by acknowledging that even small risks of breach of article 3 may halt the transfer of the applicant.[90]

Namely, in the Soering case the probability of the situation of the applicant put on death row was not certain or even probable, the court saw that there was a real risk of breach of Article 3 ECHR. Thus, it can be argued that the court sees even the small risks to be relevant in regards of article 3.[91] Similarly, the possibility to real risk of treatment against Article 3 ECHR, even a small one, was central to the argument in Tarakhel. Namely, although the situation as such was neither in the individual level or procedural level same as in M.S.S. the court concluded that the possibility that asylum seekers would be left overcrowded in conditions or left without any accommodations was not totally unfounded[92]. Thus, it can be argued that, although the risk of breach of article 3 ECHR in Tarakhel was not in the the same level as in M.S.S., the court decided to put weigh on the possibility of breach of article 3 ECHR. Yet, the interpretation for real risk requires that there must

[88] Supra nota 66, par 58.
[89] Supra nota 6, par 101
[90] Ibid par 115,120
[91] Alleweld R. Protection Against Expulsion Under Article 3 of the European Convention on Human Rights, European Journal of international law (1993) available at www.ejil.org/pdfs/4/1/1208.pdf pp 365-366
[92] Supra nota 6, par 117 and 120

be more than a " mere possibility " of ill-treatment which is not sufficient.[93] Indeed, the real risk test is “foreseeable risk”[94]

So, in the author’s opinion, even though the systemic breach is enough to bar the transfer, it cannot be argued that there has to be systemic breach every time per se to bar the transfer to state responsible. As argued, the systemic fault as such is imprecise: systemic faults are not requisite to find violation of Article 3 ECHR and to demand such, will reject the relevant individual situation of the applicant. Indeed, three important points here are major importance drawn from N.S. as an example. Firstly, the systemic deficiency was well established in the facts of the case N.S. v UK. Although the court referred to the breach, the focus was not the sort of the breach that had to be established. Indeed, secondly, the court argued that the focus of the CJEU was really the awareness of the breach that had to established, not the specific sort of breach that was allegedly to be established.[95] Thirdly, the court argued that violation of article 3 ECHR is enough bar to transfer asylum seeker, so it is not necessary to demonstrate the systemic breach in the facilities of the system.[96]

Yet, N.S. is especially important here since it was in this case that the court specified the scope of infringement of fundamental rights and its consequences. Namely, the court concluded that not every infringement has an effect on rebuttal of mutual trust. Indeed, in N.S the court specified the scope of infringment of fundamental right and its consequences. Namely, the court concluded that not every infringment has the effect on rebuttal of mutual trust. Indeed, the court noted that “it would not be compatible with the aims of Regulation No 343/2003 were the slightest infringement of Directives 2003/9, 2004/83 or 2005/85 to be sufficient to prevent the transfer of an asylum seeker.*”* [97] If the systemic flaw in the asylum or reception conditions in the responsible Member State will result in inhuman or degrading treatment , then the there is consequence for rebuttal of

[93] European court of Human Rights .30 October 1991, Application no. 13163/87; 13164/87; 13165/87; 13447/87; 13448/87 Vilvarajah and others v. UK par.111
[94] Costello C, 2015, The human rights of migrants and refugees in European law, Oxford, Oxford Studies In European law p 193-194
[95] Morano-Foadi S., Vickers L. Fundamental rights in the Eu: a matter of two courts, Hart 2015, p 131
[96]Ibid p 131
[97] Buckley J Eutopia law. www. eutopialaw.com/2012/01/25/case-comment-n-s-v-secretary-of-state-for-the-home-department-c-41110(24.4.2017)

mutual trust[98]. However, as Düsterhaus argues that the general failure of the Member state's asylum system is not a necessarily a requirement for finding systemic deficiencies: it is sufficient that there is a possibility that systemic deficiency will result in individual fundamental rights violation.[99] The Düsterhaus' statement indicates, the author's opinion, that the test formulated by the CJEU in N.S. is to some extent flawed: the requirement of substantial grounds for systemic fault is somewhat too rigid – it is sufficient that there is the possibility for individual fundamental rights violation. This same approach was also adopted in Tarakhel, in which the court had argued that it was sufficient that there was possibility for an individual rights violation to put a halt on Dublin transfer[100]. Thus, in conclusions, it can be argued that standard of proof for rebuttal of mutual trust is whenever there is possibility for individual rights violation.

### 2.4 Dissenting opinion Tarakhel v. Switzerland

However, the desicion in Tarakhel has been critized by Rubin A. in "Shifting standard and Dublin Regulation and Italy", by destroying the whole mutual trust holding the treaty by requiring subjective additional standards.[101] This argument is supported by the dissenting opinion in Tarakhel where the dissenting judges noted that the court in Tarakhel had departed from its previous case-law and most notably from the Hussein case only months after the desicion even though the court had in previous cases unanimously found that no systemic failings existed in Italy.[102] Indeed , in many cases the ECtHR had adopted the CJEU approach to the Dublin cases, by also requiring the approach taken by CJEU[103]. However, as noticed henceforth , the ECtHR rejected its approach and adopted a more individualised test.[104]

In the dissenting opinion the judges Casadevall , Berro-Lefevre and Jäderblom adopted an approach similar to Vilvarajah. They argued that it was not sufficient that there would have been

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[98] S. Lieven Case Report on C-411/10, *N.S.* and C-493110, ME. and Others, 21 December 2011, European journal of Migration and Law (2012) 14 223-238, p 234

[99] Düsterhaus D., Judicial Coherence in the Area of Freedom, Security and Justice – Squaring Mutual Trust with Effective Judicial Protection, Review of European Administrative Law, December 2015, Volume 8, Number 2, , pp 151-182(32) p 179

[100] Supra nota 6, par. 115

[101] Supra nota 101, p 151.

[102] Ibid pp 148-149

[103] See for example European Court of Human Rights 7 March 2000Application no. 43844/98 T.I v UK, European Court of Human Rights, 2 December 2008 Application no.32733/08 K.R.S v UK

[104] Supra nota 58, p 191.

prove that people in the same situation would be most likely be left without accommodation or accommodated in facilities without sufficient privacy. By contrast, they argued that the situation must be proved in individual level. Thus, the standard of proof in this case, would have been as argued: "-- concrete risk of treatment contrary to Article 3 in their individual situation. " [105]

Furthermore, they argued that approach in Tarakhel concerning the mere possibility of the source of the risk was against the approach adopted in Soering. Namely, in Tarakhel the majority had concluded that the possibility that the family would face treatment against Art. 3 was not unfounded. [106] By contrast, the dissenting judges noted that if followed by the Soering judgment, the liability would arise under the Convention only when the breach would have actually occurred. The dissenting judges noted that in M.S.S the breaches in the asylum conditions had actually already certain, while by contrast in Tarakhel they were uncertain.

The dissenting opinion in Tarakhel raises two important questions. Firstly, must the applicant prove that he/she is somehow singled out from the risk of refoulement? This question has been under academic discourse[107] and the prevailing opinion has been that the applicant does not have to prove that he/she is somehow individualized from the majority.[108] Secondly, does the source of the risk, i.e the collapse of asylum conditions, necessarily been occurred or is it enough that there is the possibility of a breach of Art. 3 ECHR? Interestingly, the dissenting judges pointed out an exception formulated in Soering, yet did not comment more specifically, that the principle that the source of the risk must have occurred, can be departed, when:"…in view of the serious and irreparable nature of the alleged suffering risked…".[109]

It can be concluded that the dissenting judges were wrong in their conclusions. As regards the standard of proof to rebut mutual trust, the applicant does not need to show that he/she is individualized from the majority. In addition, the collapse of the asylum conditions does not have

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[105] Supra nota 6, Dissenting opinion p 54
[106] Ibid par 120
[107] Vedsted-Hansen, J. European non-Refoulement revisited. International and Comparative Law Quarterly, 1999, 515-44. p 275
[108] Velluti, S. Reforming the Common European Asylum System—Legislative developments and judicial activism of the European Courts. Springer Science & Business Media.2013, p 84, see also ECtHR judgment of, 11 January 2007Application no. 1948/04 Salah Sheekh v. Netherlands, paras 148
109 Supra nota 6, Dissenting opinion p 53.

to be collapsed if there is sufficient possibility that the rights under Art.3 ECHR are jeopardized. Therefore, as argued above to rebut mutual trust is sufficient that there is sufficient possibility of breach of Article 3 ECHR.

### 2.5 The consequences of Tarakhel's later jurisdiction on regards the mutual trust

In the author's opinion of this thesis, it is controversial whether the requirement of the additional requirement of subjective individual standards would lead to the destruction of whole mutual trust. [110]Namely, even though the court rejected the "systemic breaches" as a necessary aspect for breach of Article 3 ECHR, there is still a need of comparison of the receiving state general situation in order to assess the risk to the individual[111]. This shows that the individual assessment at least not yet has not ruled over the mutual trust. Therefore, it can be argued that the mutual trust is rebutted only in case of the comparison of the general circumstances and the individual situation of the applicant.

In addition, it has been argued that the Tarakhel case has created "intermediary" category for Dublin transfers where the transfer can take place but only after specific guarantees have obtained. This has left the question as to which cases fall within this "intermediary category". Namely, the use of vulnerability as assessing the severity of the case, has created the question of different degrees of vulnerability assessing the individual circumstances. Yet, this aspect still remains unclear and unexplored.[112]

Furthermore, it has been argued that the Tarakhel case develops the case-law in the direction which weakens the mutual trust. Namely, after Tarakhel the Member States must investigate whether the receiving state actually fulfils the obligation regarding the fundamental human rights. [113]Although, it can be argued that this requirement puts heavy workload on the transferring state, it, on the other hand protects human rights more broadly, since there is no "blind mutual trust ". Yet, it is still left unclear whether the scope of Tarakhel reaches only cases concerning families with minor children.

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110 Supra nota 101, p 151.
111 Supra nota 12
112 Ibid.
113 Davatz M., Winkler S., Zvinklyté K, Eu constitutional law, The university of Örebro www.eulaworebro.wordpress.com/2015/05/05/tarakhel-v-switzerland-ecthr-appl-no-2921712-of-4-nov-2014/ (16.4.2017)

In NA (Sudan) v. Secretary of State for the Home Department it was argued that the reasoning does not go further from Tarakhel as it was decided, namely the families with minor children.[114] In addition, the court argued that the case was not to extended vulnerable person generally[115]. Thus, it can be argued that the individual assessment is vitally important in cases of particularly vulnerable asylum seekers, such as children, yet, this does not mean that all asylum seekers per se would be vulnerable. Therefore, it can be argued that individual insurances and the rebuttal of mutual trust is extended only in cases where vulnerability is defined by Reception Condition

[114] EDAL European Database of Asylum law www.asylumlawdatabase.eu/en/case-law/uk-nasudan-v-secretary-state-home-department-01-november-2016#content (18.4.2017)
[115] Chambers R. Immigration Barrister's Blog,www.immigrationbarrister.co.uk/Blog/Immigration-appeals/asylum-applicants-can-be-returned-to-italy-under-dublin-regime-says-court-of-appeal.html (18.4.2017)

# 3. National courts of the Member states and mutual trust

## 3.1 The divergence in national courts deciding the mutual trust

The divergence of the two courts ECtHR and CJEU have left the national courts uncertain how to interpret and apply the "systemic deficiencies". The national courts have been uncertain whether the mutual trust should be rebutted in cases of human rights violation that amount to systemic deficiencies or should individual causes be taken into consideration. In addition, the issue of whether the violations of absolute human rights should be considered as well as whether the relative human rights such as the right to family life and right to effective remedies should be considered as well.[116]

Indeed, the uncertainty has led to divergence between the national courts; other courts have embraced the CJEU strict approach on mutual trust while the others have given recognition to the legal test developed in ECtHR in Tarakhel.[117] The most important example is the case of EM (Eritrea) v SSHD from United Kingdom. In this case, the Court of Appeal in UK decided to follow the CJEU's interpretation of the systemic deficiencies while the UK Supreme court decided to follow ECtHR's approach in Soering and quashed the decision of the Appeal court. [118]

Other national courts have also decided to follow the ECtHR's approach and have thus been given recognition also to other relative human rights. For example, the Prague Regional court gave protection to an applicant's procedural rights. In this case, the court found that the applicants were not subject to personal interviews which violated their right to fair trial. The court argued that the applicants were not informed that police interrogations can be seen as personal interview in their Dublin transfer proceedings.[119] This argument was executed without arguing that this violation would have amounted to a systemic deficiency in the receiving state.[120]

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[116] Brouwer E. and Gerard D, Mapping mutual trust: Understanding and Framing the role of mutual trust in Eu law www. cadmus.eui.eu/bitstream/handle/1814/41486/MWP_2016_13.pdf? sequence=1 p 49
[117] Ibid p 48
[118] Supra nota 66, par 58.
[119] European Database of Asylum law, www.asylumlawdatabase.eu/en/case-law/czech-republic-prague-regional-court-1-july-2015-k-s-k-k-e-and-k-b-v-ministry-interior-49az (14.4.2017)
[120] Supra nota 116, p 49.

In another case from Sweden, the Migration Court of Appeal argued that even though there was no sufficient evidence on systemic deficiencies in the asylum procedure and detention conditions in the receiving country in Hungary at that time, Sweden was held responsible for the application since some of the applicants were children and there was a danger that if transferred to Hungary, they would have been held in custody for a long time which would have been harmful to their wellbeing.[121]

It can be argued that the national courts are leaning towards the less strict legal test developed by ECtHR and giving recognition to other relative right as well such as the procedural rights, the right to fair trial. Therefore, it can be argued that the legal test to rebut mutual trust should also entail other relative rights as stated.

### 3.2 The State's responsibility to be aware of the foreseeable consequences and mutual trust

As regards rebuttal of mutual trust, the relevant question here is how far the inquiry should go to determine whether mutual trust is rebutted or not. The recent case, C.K and others shows that even though the circumstances in the receiving state would not be breaching the Article 4 of the Charter, the transfer of the applicant itself could be as such that it would breach the Article 4 of the Charter by affecting the applicant's health.[122] Therefore, it can be argued that the inquiry must include also the foreseeable consequences to the applicant.

The legal test in N.S. it refers only one possible situation that the member states must be aware of. Namely, the systemic flaws in the asylum procedure and reception conditions that cause a breach of Article 4 of the Charter[123]. According to the legal test developed by the CJEU systemic flaws both in the asylum procedure and in the reception conditions of asylum seekers must be such a degree that they expose the applicant face treatment contrary to the Art. 3 ECHR. In addition, the degree that the applicant is affected by the systemic flaws, must be sufficient probability and severity[124] Yet, as can be seen from the C.K. and others the legal test in N.S. does not take into

[121] European Asylum Database EDAL www.asylumlawdatabase.eu/en/case-law/sweden-migration-court-appeal-1-july-2016-um-1859-16-mig-201616 (14.4.2017)
[122] Court of Justice of the European Union, 16 February 2017 C-578/16 PPU C.K and others v. Slovenia par 37, 96
[123] Court of Justice of the European union, 21 December 2011 C-411/10 and C-493/10 N.S v. SSHD. par 86
[124] Supra nota 24, p 139

account situations in which the circumstances of the receiving country can be meet the requirements of the Charter, but the applicant's individual situation can be such that the transfer can meet the threshold of Article 3 ECHR and thus be against human rights, in the author's opinion of this thesis . Therefore, it can be argued that the legal test of the formulated in N.S. is flawed and should be rejected as standard of proof to rebut mutual trust. The correct legal test to rebut mutual trust would take into account also the individual situation of the applicant.

Indeed, in the author's opinion, Tarakhel and C.K and others show that the foreseeable consequences to the applicant is much wider than in N.S. Namely, the C.K and others showed that the even the transfer itself belongs to the scope of Article 4 of the Charter. This means that the Member states must be aware also the effects of the transfer to the applicant situation in the meaning of Article 4 of the Charter. Thus, in author's opinion the foreseeable consequences should be extended not only to the situation of the receiving State that may breach Article 4 of the Charter but also to the transfer that may affect the individual in such a way that the threshold of Article 4 is filled. It follows that the mutual trust should be rebutted in these situations.

### 3.2.1 State's examination of procedural guarantees and mutual trust

As can be seen from the case T.I. v. UK., the court's primary concern was whether there were enough procedural guarantees to protect the applicant from transfer to Sri Lanka from Germany. Since the court put weight to the intermediary country's asylum procedure, it can be argued that this obligation extends to the individual procedural rights that the individual has as regards one's asylum application. Indeed, it can be argued that since the transferring state is responsible for the applicant's freedom and rights[125], so whenever there is a risk that they might be in danger, mutual trust should also be rebutted. Thus, the transferring state must pay special attention to the intermediary country's asylum procedure.[126] Namely, this is because the transferring state bears the responsibility for the asylum seeker's rights and freedoms even after removal to the intermediary country.[127] The foregoing suggests that the state responsibility from mere awareness of the consequences to the applicant outside the sending state's jurisdiction, as formulated in

[125] Supra nota 34, p 44
[126]Ibid, p 44.
[127] Ibid, p 44.

Soering, is widened to the point where the state must also make an individual examination on the procedural guarantees that the applicant has in his hands in the intermediary country against possible expulsion to the country of origin. This assessment is rather strict as M.S.S. suggests: the evaluation must be done withouth assessment of the risk that the individual may face in regards the Art.3.[128]

Moreover, as regards the procedural guarantees, the sending state's responsibility to provide sufficient procedural guarantees against the Dublin transfer should also be available in the sending state. The absence of such can lead to a breach of Article 3 and thus rebuttal of mutual trust as seen in M.S.S. Namely, in M.S.S the procedure of Belgium did not leave any possibility to the applicant to challenge his transfer to another Dublin country: there was no such section in the form that the Alien's' office filled in. In addition, even though the applicant tried to complete the application with the information challenging his transfer, the Aliens' Appeal Board did not take into account that material. Thus, the applicant was prevented from establishing his case under Article 3 ECHR.[129]

There has been a change for the grounds on which the applicant can challenge the grounds which the transferring state is sending the applicant to the receiving country. In Abdullahi, the court argued that only way that the applicant can challenge the transfer was to apply to deficiencies in the reception conditions and asylum procedure in the receiving country[130]. The desicion in Abdullahi was changed in C-155/15 – George Karim v. Migrationsverket and C- 63/15 - Mehrdad Ghezelbash v. Staatssecretaris van Veiligheid en Justitie. The issue in these cases was the scope of the effective remedy under Dublin regulation.[131] It was decided in Karim that the applicant can

[128] Supra nota 27, par. 342 states that member states must: 'make sure that the intermediary country's asylum procedure affords sufficient guarantees to avoid an asylum seeker being removed, directly or indirectly, to his country of origin without any evaluation of the risks he faces from the standpoint of Article 3 of the Convention'.
[129]Supra nota 3, pp 144-145.
[130] Court of Justice of the European Union, 10 December 2013, Case C-394/12, Shamso Abdullahi v. Bundesasylamt par 60
[131] European Union: Court of Justice of the European Union, 7 June 2016 C-155/15 George Karim v Migrationsverket par 19, Court of Justice of the European Union, 7 June 2016 C-63/15 Mehrdad Ghezelbash v Staatssecretaris van Veiligheid en Justitie par 28

challenge the transfer if there has been a violation accordance with the Article 19(2) of the Dublin Regulation.[132]

The following shows that the sufficient procedural guarantees to challenge the transfer to the receiving state cannot be limited only to the detention conditions and asylum procedure in the receiving country. This would seriously jeopardize applicant's procedural rights. The sufficient procedudral rights in the transferring state must be such that they allow effectively to challenge the grounds on which the transfer is to happen. Furthermore, the sufficient procedural rights demand the sending state to check the asylum procedure in the receiving state. Thus, it can be argued that if there are not sufficient procedural rights to challenge the transfer, there should be a halt on the transfer.

### 3.3 The inquiry to rebut mutual trust by the transferring state

The burden of proof is for the asylum seeker to prove that, when expelled, there would be substantial grounds for believing that he would face treatment against Article 3 ECHR and it is for the government to dispel doubts on it. However, M.S.S suggests that in particular circumstances, the role of the state could be more active in its inquiry of studying the grounds for rebuttal of mutual trust.[133]

Two grounds can trigger this more active role. Firstly, general information on the receiving country: for example, in M.S.S. the court rejected Belgium's argument that the applicant had not provided sufficient amount of proof to prevent his transfer[134]. In M.S.S. the court argued that: Belgium knew or should have known that there was no guarantee that the applicant's asylum applicaton would be investigated seriously.[135] Indeed, as the court argued, Belgium should have verified how the Greek authorities would have applied their asylum legislation in practice. [136] Secondly, the possibility, as explained above, to provide evidence for challenging the transfer

[132] European Union: Court of Justice of the European Union,7 June 2016 C-155/15 George Karim v Migrationsverket par 27
[133]Supra nota 58, pp 187-188.
[134]Ibid. pp 187-188
[135] Supra nota 27 par.358,360
[136]Ibid par. 359

should be made available to the applicant.[137] Yet, as formulated by the N.S., the threshold to trigger non-return has been set high: mere non-implementation of EU Asylum law is not sufficient - the systemic deficiencies in the national system must reach such a degree that they lead to a real risk of breach of fundamental rights of the individual.[138] As stated in this thesis, since the transferring state is repsonsible for the rights and freedoms of the applicant, it is obvious that the sending state must be active it is role to extent, that this responsibility is fullfilled. Therefore, it can be argued that in its this role the state must take an active role to ensure that an applicant's individual rights are being respected. Thus, the sending state cannot neclect the fact that if there is a possibility that the rights of the applicant are not being respected in the receiving state, then also the mutual trust should be rebutted.

In M.S.S. the court argued that diplomatic assurances were not sufficient to guarantee the safety of the applicant.[139] Indeed, mere assumption of mutual trust based on these was not sufficient. The court explicitly stated that Belgium should not have just assumed that the applicant would be treated in accordance with the convention. For this, the court referred to various international reports that Belgium had disregarded.[140] The court desicion raises the degree to which the sending state must work in order to ensure that the receiving state is safe. In addition, the standard to investigate the applicant's individual situation is more than a general one: the existence of international treaties and national laws in the receiving state is not sufficient . The standard to prove the applicant's situation stresses the specific individual situation and how the laws of the intermediary country would be applied to the applicant.

In addition, indeed, Mitsilegas argues that the authorities are now on a duty to investigate each case in, regards both the individual situation and the human rights implication in Dublin transfer cases[141].

[137]Supra nota 58, pp 187–188.
[138] Mitsilegas V., The limits of Mutual Trust in Europe's area of freedom security and Justice: from automatic inter-state cooperation to the slow emergence of the individual, Yearbook of European law 2012, 31(1) p 362
[139]Supra nota 27, Greece par.354
[140]supra nota 27, Greece par. 359, 348-349
[141] Supra nota 138, p 358-359.

This assessment should be done regardless of the existence of the source of the risk. In Tarakhel the court argued that the source of the risk does not exempt the state from carrying out throughout an individualised investigation of the applicant's situation. The court referred to the UK Supreme court desicion of R v. SSHD in which the court had adopted a similar approach.[142] The court in Tarakhel argued that the issue to be ascertained was that the "overall situation with regard to the reception arrangements for asylum seekers in Italy and the applicants' specific situation.." In the author's opinion, this seems to suggest that the court wanted to see the assessment of the asylum condition and individual situation as equal, not conditional each other. Indeed, the court continued: "…substantial grounds have been shown for believing that the applicants would be at risk of treatment contrary to Article 3 if they were returned to Italy."[143] Therefore, since the court did not put weight on the fact that the asylum condition had not been collapsed as in M.S.S. but still concluded that there was breach of Article 3 , suggests in the author's opinion that the court wanted to decide the case on grounds of the individual situation, not giving weight on the source of the risk, namely the asylum conditions.

[142] Supra nota 6, par104
[143]Ibid, par105

# 4. New emerging standard of proof to rebut mutual trust

## 4.1 Vulnerability as an emerging standard to rebut mutual trust?

The designation of asylum seekers as vulnerable group has been one major point in two landmark case, namely M.S.S. and Tarakhel. Indeed, it can be seen from the two landmark cases M.S.S and Tarakhel, that ECtHR has taken the vulnerability of the asylum seekers as one major argumentative tool to argue for rebutting mutual trust.

Indeed, for example, in M.S.S. the court argued the status of an applicant as an asylum seeker attaches to the applicant a special vulnerable position needing special protection. The court referred to the Geneva Convention, "the remit and activities of UNCHR" and the standards set out in Reception Conditions to argue that the applicant as such is indeed, need for special protection. [144] Similarly, in Tarakhel the court argued that the applicants were unprivileged and in need of special protection and cited M.S.S. The court argued that the applicants were especially vulnerable given the fact they were children though accompanied their parents[145]. The court's approach in M.S.S. reveals that it sees the asylum seekers as a group in whole as vulnerable. For example, the court argues that: "[T]he applicant's distress was accentuated by the vulnerability inherent in his situation as an asylum seeker." This shows that the court sees the vulnerability as if inherent to the entire class of asylum seekers.[146] Yet, the analysis of these two cases raises relevant questions on the scope of the vulnerability as a ground to rebut mutual trust. For example, does the cases mean that all asylum seekers are vulnerable? And if the answer is negative, what degree of vulnerability[147] will awake the protection and thus the rebuttal of mutual trust under Dublin Regulation? These issues are particularly essential when expelling ill-asylum seekers. Indeed, these issues were the very essence for example in C.K and others. In this case, the applicant argued that the Dublin transfer would negatively affect the applicant's health[148]. The court concluded that if the transfer would cause: "…significant and permanent deterioration in the state of health of the

[144] Supra nota 27, par. 251
[145] Supra nota 6, par 118-119
[146] Peroni, L., & Timmer, A. Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law. International Journal of Constitutional Law, 2013, 11(4), 1056-1085, p 1068
[147]Strasbourgobservers.com www. strasbourgobservers.com/2014/12/01/tarakhel-v-switzerland-another-step-in-a-quiet-revolution/#more-2706, (2.3.2017)
[148]Court of Justice of the European Union 16 February 2017 C-578/16 PPU C.K and others v. Slovenia par 37

person concerned, that transfer would constitute inhuman and degrading treatment, within the meaning of that Article.", then the transfer should be prevented[149].

Furthermore, the vulnerability intertwines with other human rights such as the right to family life provided in Article 8 ECHR. For example, in the case A.S v. Switzerland the applicant, who suffered PTSD, argued that his dependence on his sister's support fell within the scope of the right to a private life since their support for his mental health was crucial and thus would prevent the Dublin transfer to Italy[150] . Although the court rejected this argument, in the author's opinion this shows that the vulnerability as such is connected to other human rights as well and makes the standard of proof to rebut mutual trust more complex.

Even though the two cases, Tarakhel and M.S.S have been constructed the individuality in accordance with the asylum status, there are dissenting opinions as well. Following the dissenting opinion in the case M.S.S, it was argued that asylum seekers as such should not be treated as homogenous group since they are not socially classified. Although some of the asylum seekers may be classified as vulnerable, this does not amount to presumption of a "class". [151]

The two cases Tarakhel and C.K and others have reiterated the responsibility codified in Reception conditions ad Asylum Procedure's Directive that the Member state must conduct an individual assessment especially in case of vulnerable asylum seekers. Yet, the issue here is what does the individual assessment entail?[152]. It has been argued by Costello that the individual requirement, the one defined in Tarakhel, would vary in accordance with the needs of the asylum seeker[153]. Yet, if this were the case, would that lead to the situation in which there, indeed, would not be mutual trust but rather individual assessment of each particular case? Therefore, the essential question is are all asylum seekers vulnerable, or just those mentioned in Reception Conditions Directive. It would follow then that those not mentioned in Reception Conditions, yet ill would be required to

[149] Ibid par 96
[150] European Court of Human Rights, 30 June 2015, Application no. 39350/13, A.S. v. SWITZERLAND par 41
[151] Supra nota 27, par 100.
[152]European Asylum Database www.asylumlawdatabase.eu/sites/www.asylumlawdatabase.eu/files/aldfiles/Dublin%20transfers%20post-Tarakhel-%20Update%20on%20European%20case%20law%20and%20practice%20(3).pdf (10.4.2017)
[153] Costello, C. and Mouzourakis, M., Reflections on Reading Tarakhel (December 12, 2014). (2014) Asiel&Migrantenrecht Nr 10 404-411. Available at SSRN: www.https://ssrn.com/abstract=2548542 p 410

show exceptional circumstances accordance with the D v UK. Therefore, it would follow that there would be “more” vulnerable and “less ” vulnerable classes.

It has been argued that the vulnerability should not be limited only to the health status when expelling ill asylum seekers. Since the status of asylum seekers as such may expose the applicant to the risk of ill-treatment that could worsen the health status too[154]. Therefore, it would follow that the scope of the vulnerability would be more extensive.

Thus, questions are raised on the scope of the vulnerability. This is because vulnerability as definition as such is wide and rather vague. Most importantly, vulnerability is also subjective and not easily standardized. Thus, the question is raised: are all asylum seekers vulnerable? Thus, it follows that, if the systemic fault test is rejected as standard of proof to rebut mutual trust, as argued in chapter 2 in this thesis, does that only muddy the waters as regards the real test of standard of proof to rebut mutual trust? Do we go from where the definition on standard of proof is unclear to the end where it is even more unclear?

[154] Nicolosi S. and Delbaere R Strasbourg observers. www.strasbourgobservers.com/2015/07/16/a-s-v-switzerland-missed-opportunity-to-explain-different-degrees-of-vulnerability-in-asylum-cases/ (13.4.2017)

## CONCLUSIONS

This thesis has shown that the test developed by N.S. is flawed. Namely, C.K and others and Tarakhel shows that the applicant can challenge the Dublin transfer despite the absence of the systemic fault in asylum procedures or reception conditions. Thus, as a standard of proof to rebut mutual trust, what is decisive is that there is possibility of breach of individual fundamental rights. Indeed, as argued by the author in this thesis, when there is the mere possibility on the breach of Article 3 ECHR regardless the source of the risk and that risk, given vulnerable situation of the individual, would lead to breach of Article 3 ECHR, then mutual trust should be rebutted. As argued in this thesis there is nothing in such that would mark out the systemic fault as needing more protection. Therefore, requiring the systemic fault as a condition for the breach of the Article 3 ECHR would be too rigid a legal test.

It was concluded in this thesis that if the systemic flaw test is kept as alternative method to rebut mutual trust, the legal test for this should not be a total collapse of the system but rather serious doubt for the functionality of the system. Namely, it has been shown in this thesis that the total collapse of detention conditions and asylum procedure is not a requisite for the breach of Article 3 ECHR or Article 4 of the Charter. What is needed is that there is possibility of the Article 3 ECHR to breached in order the mutual trust to be rebutted. Yet, this test should not be without restraints. Namely, this thesis has raised the issue in the second chapter that if followed by the legal test in Soering, the requirement of the source of the risk which must have occurred can be departed if the risk suffered is by nature serious and irreparable. Therefore, mutual trust can be rebutted if there is possibility of breach of Article 3 ECHR but only if the possibility amounts to a risk that is by nature serious and irreparable. This is because it is obvious that the Dublin Regulation tries to make a balance between the efficiency of the transfers of the asylum seekers and also the human rights of the asylum seekers. Therefore, fair balance needs to be made whatever legal test is established between the efficiency of the transfers of the asylum seekers, yet without jeopardizing the human rights of the asylum seekers.

Indeed, what this thesis has also argued is that the general failure of the Member state's asylum system is not a necessarily a requirement for finding systemic deficiencies: it is sufficient that there is a possibility that systemic deficiency will result an individual fundamental rights violation. Following this interpretation, it would give more recognition to asylum seekers' both procedural

and other relative right as well. Therefore, it can be argued that rebuttal of mutual trust should take into account also the possibility that systemic deficiency will result an individual fundamental rights violation. Thus, whenever there is this possibility, mutual trust should be rebutted.

This thesis has raised important questions regarding the vulnerability and the rebuttal of mutual trust. Although, especially as vulnerable asylum seekers are defined in the Reception Directive Article 17 and 20, the case-law of ECtHR has indicated that all asylum seekers, given their situation would be vulnerable. Thus, the question arises do the cases mean that all asylum seekers are vulnerable? And if the answer is negative, what degree of vulnerability[155] will awake the protection and thus the rebuttal of mutual trust under Dublin regulation? The question is are all asylum seekers vulnerable, or just those mentioned in Reception Conditions Directive is essential. It would follow then that those not mentioned in Reception Conditions, yet ill would be required to show exceptional circumstances in accordance with the D v. UK to rebut the mutual trust. It would follow then that those not mentioned in Reception Conditions, yet ill would be required to show exceptional circumstances in accordance with the D v. UK. Therefore, it would follow that there would be "more" vulnerable and "less" vulnerable classes.

These issues are particularly essential when expelling ill-asylum seekers. Due to the scope of this thesis, these issues could not be fully analyzed in detail, but remain relevant questions for future study. Furthermore, it was shown in the fourth chapter that the vulnerability is connected also to other human rights such as the right to family life. This again make the determination of standard of proof of mutual trust more complex and raises more questions for further study. However, what is certain is that the vulnerability is an emerging standard to rebut mutual trust and of this the courts should take notice.

It can be seen from the following that the approach to rebut mutual trust is to be chosen to be either the individual assessment or the formal approach to mutual trust. Indeed, this thesis has shown that the subject matter divides both scholars and the national courts. What has been mutual is that usually the approach adopted to rebut mutual trust has been either the individual assessment or the legal test developed by N.S. Therefore, the standard of proof to rebut mutual trust boils down to

[155]Supra nota 12

the right approach. Namely there are two main alternative approaches according to Noll. The first is a formal approach that endorses the fact that all Member States are bound by the 1951 Refugee Convention, the 1967 Protocol and the ECHR. The second is an empirical approach that requires to take into account that the applicant is treated in accordance with international law in the responsible Member State[156]. As can be seen from the case- law T.I v. UK, Tarakhel and C.K and others, the approach of the two courts have come closer to each other, namely the empirical approach. Therefore, even though the hypothesis of this study was that the legal test for rebut the mutual trust would be the combination of the two courts, the right approach seems to be either one of them. Thus, the right approach is, in the author's opinion, the approach adopted in Tarakhel and C.K and others. In this approach, the "systemic fault" means conditions of the Member State that can affect the applicant's individual situation[157]. Thus, mutual trust should be rebutted whenever there is situation that amounts to systemic fault, that is condition of the Member State that affect the applicant's individual situation.

In annex 3 of this thesis, the author of this thesis has defined the systemic fault as a situation in which there are flaws in the asylum system such that it would affect the individual situation so that there would be a breach of Article 4 of the charter. This would mean that there would have to be an individual assessment in comparison of the general circumstances of the receiving state, and whenever the general circumstances of the receiving state would lead to the breach of the Article 4 of the Charter, then also mutual trust should be rebutted. In this test, therefore, the breach of Article 4 of the charter would not be dependent on the systemic deficiencies in the asylum system, but rather the individual situation would be taken into consideration. This is needed for the author's opinion of this thesis, because the vulnerability of the asylum seekers as a standard to rebut mutual trust is emerging and the legal test needs to meet this demand as well. Indeed, it has been argued that the application of mutual trust within the Dublin system has not been a successful as achieving the asylum seeker's basic rights and thus the prevention of refoulement. Furthermore, in order to

[156] Noll, G. Formalism v. Empiricism: some reflections on the Dublin Convention on the occasion of recent European case law. Nordic Journal of International Law 2001, 70(1), 161-182. pp 1-2.
[157] see the author's suggestion for the definition for the systemic fault: Annex 3 Suggestion for new Article 2(d): definition of systemic fault

fully protect the individual rights and the risk of refoulement, mutual trust must be rebutted whenever there is the possibility of it.[158]

Although the hypothesis of this thesis was that the legal test should be the combination of the legal test of the CJEU and ECtHR, this hypothesis must be rejected. This thesis has shown, as stated, that the legal test developed in N.S. is flawed and does not take into account vulnerability of the applicants. In addition, this argument is supported also by the recent case, C.K and others, in which the CJEU rejected the approach developed in N.S. This indicates that the legal test developed by ECtHR considers more broadly the individual situation of the applicant and seems more correct in terms of the rights set out in the preamble of the Dublin regulation in section 39.

In the second chapter, it was concluded that the systemic flaws are just one example of a situation that could lead to rebuttal of mutual trust. Indeed, holding otherwise, it would possibly deprive applicants from their Art. 3EHCR rights, if the breach would result from other than systemic faults in the procedure and reception condition. Indeed, Tarakhel argued that the source of the risk is irrelevant to the level of protection guaranteed by the Convention. Yet, in the author's opinion this rises the essential question: if the systemic fault is defined as flaws in the asylum system that affect the individual's situation, how far-reaching will this test be? Does it jeopardize the effectiveness of the Dublin Regulation? Namely, in the fifth recital of the Dublin regulation[159] it is stated that the method to determine the Member state responsible should be based on "objective and fair criteria both for the Member states and the persons concerned. "In addition, this method should be able the determination of the responsible Member State "rapidly". Yet, this is in author's opinion problematic. Namely, if the effectiveness of the Dublin Regulation is seen as the determinant factor over the individual's fundamental rights, the result is can be rather strikingly gross result[160].

As regards Tarakhel and its consequences to later jurisprudence it was concluded in this thesis that the individual situation of the asylum seeker and the general situation of the receiving state must be compared to see what kind of consequences it would cause to the asylum seeker's individual

[158] Supra nota 95, p 157.
[159]Supra nota 2, recital 5
[160] Opinion of Advocate General Tanchev 9 February 2017 Case C-578/16 PPU see in this context par. 58 where the Advocate general stated: " it is not impossible to transfer the applicant to the member state responsible where the transfer itself gives rise to a risk of inhuman or degrading treatment within the meaning of article 4 of the Charter"

situation, especially if the asylum seekers is vulnerable as defined by the Reception Directive. In Annex 1 it is suggested by the author of this thesis that an alternative legal test to rebut mutual test is used. It gives recognition to the individual situation of the asylum seeker, yet requires also the assessment of the general situation of the receiving country compared to the individual situation's outcome.

In this thesis, it was concluded that the applicant's procedural rights for challenging the transfer decision is linked with rebuttal of mutual trust. Namely, this thesis has shown that since the transferring state is responsible for the applicant's freedom and rights, so whenever they are in danger, mutual trust should also be rebutted. Indeed, this thesis has shown that the Member State must be aware of not only the foreseeable consequences to the applicant but also the fact that procedural rights are given full recognition to the applicant. This thesis has shown that as regards the foreseeable consequences to the applicant, the systemic deficiencies as a legal test as developed in N.S., is flawed since it does not take into account the applicant's individual situation. Namely, as it has concluded in this thesis, C.K. and others has shown that the threshold of Article 3 may be breached although there is not flaw in the reception conditions. Therefore, it can be argued that the legal test of the formulated in N.S. is flawed and should be rejected as standard of proof to rebut mutual trust. The correct legal test to rebut mutual trust would take into account also the individual situation of the applicant.

This thesis has raised many questions on vulnerability and mutual trust that show that the mutual trust is linked to several aspects that affect the effectiveness of Dublin regulation. Indeed, this thesis has showed that mutual trust as such is linked to various aspects and therefore the legal test to rebut mutual trust should reflect this finding. Therefore, it can be argued that the legal test for rebut mutual trust should be more flexible in order to the procedural rights of asylum seekers.

In conclusion, it can be argued that the implementation of asylum legislation in terms of the Dublin regulation, especially when there are fundamental questions about the functionality of the asylum system, is relatively difficult. This is also true especially when the question has been the

functionality of the asylum system in terms of fundamental rights.[161] Indeed, the application of mutual trust in terms of the Dublin system is especially problematic. Mutual trust is based on the efficiency of the system, the efficient transfer of the asylum seekers, yet, the individual assessment that this thesis has concluded necessary, can diminish this efficiency.

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## Annex 1: The suggested legal test Dublin regulation 604/2013 Article 3(2)

| **The original Article 3(2) Dublin regulation** | **Suggested legal test for Dublin regulation Article 3(2)** |
|---|---|
| Where it is impossible to transfer an applicant to the Member State primarily designated as responsible because there are ~~substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants~~ in that Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union, the determining Member State shall continue to examine the criteria set out in Chapter III in order to establish whether another Member State can be designated as responsible. | Where it is impossible to transfer an applicant to the Member State primarily designated as responsible because there are **systemic flaws in the capacity of the asylum system** in that Member State which would lead to the breach resulting in a **real** risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union, **given the comparison between the individual situation of the applicant and the asylum system. Thus**, the determining Member State shall continue to examine the criteria set out in Chapter III in order to establish whether another Member State can be designated as responsible. |

## Annex 2 Suggestion for the recital 3 of the Regulation 604/2013

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| The European Council, at its special meeting in Tampere on 15 and 16 October 1999, agreed to work towards establishing the CEAS, based on the full and inclusive application of the Geneva Convention Relating to the Status of Refugees of 28 July 1951, as supplemented by the New York Protocol of 31 January 1967 ('the Geneva Convention'), thus ensuring that nobody is sent back to persecution, i.e. maintaining the principle of non- refoulement. In this respect, and without the responsibility criteria laid down in this Regulation being affected, Member States, all respecting the principle of non- refoulement, are considered as safe countries for third- country nationals. | The European Council, at its special meeting in Tampere on 15 and 16 October 1999, agreed to work towards establishing the CEAS, based on the full and inclusive application of the Geneva Convention Relating to the Status of Refugees of 28 July 1951, as supplemented by the New York Protocol of 31 January 1967 ('the Geneva Convention'), thus ensuring that nobody is sent back to persecution, i.e. maintaining the principle of non- refoulement. In this respect, and without the responsibility criteria laid down in this Regulation being affected, Member States, all respecting the principle of non- refoulement, are considered as safe countries for third- country nationals. **However, this does not mean that the mutual trust under this regulation is absolute.** |

## Annex 3 Suggestion for new article 2(d): definition of systemic fault

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| **new article 2(d)** | "systemic flaws" means that there are flaws in the circumstances of the asylum system so that it affects the applicant's individual situation so that there will be breach of individual's right in the meaning of article 4 of the Charter. |