



The Dublin Regulation, mutual trust and fundamental rights: No exceptionality for children?

Title	The Dublin Regulation, mutual trust and fundamental rights: No exceptionality for children?
Author(s)	Smyth, Ciara
Publication Date	2023-08-30
Publisher	Wiley
Repository DOI	https://doi.org/10.1111/eulj.12469

The Dublin Regulation, mutual trust and fundamental rights: No exceptionality for children?

Ciara Smyth* 

Abstract

Mutual trust in the Dublin III Regulation is justified by the assumption that all Member States respect the fundamental rights of asylum seekers and that it is therefore immaterial which Member State processes any given claim. This justification has been questioned in light of the treatment of asylum seekers in some Member States. Nonetheless, in order to circumvent a Dublin transfer on fundamental rights grounds, the Court of Justice of the EU has held that the risk of violation must meet the threshold for inhuman or degrading treatment in Article 4 of the Charter. Recently, the Court rejected the proposition that another Charter right—the principle of the best interests of the child—could block Dublin transfers of families with children. Through a child-rights analysis of the jurisprudence, this article explores the idea of exceptionality for children, concluding that there is potential for the best interests principle to trump mutual trust.

1 | INTRODUCTION

The Dublin III Regulation establishes a hierarchy of criteria for allocating responsibility for a given asylum claim to a single EU Member State, usually the one that allowed the applicant to enter the territory of the Union.¹ If a third

* Assistant Professor, School of Law and Irish Centre for Human Rights, University of Galway. Email: ciara.m.smyth@nuigalway.ie.

¹Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), OJ L 180/31. There are effectively nine criteria of which five allocate responsibility to the Member State where family members are located (Articles 8–11 and 16) and four to the Member State at fault for allowing the applicant to enter the territory of the EU (Articles 12–15). According to Eurostat, in 2021 11% of incoming ‘take charge’ requests (i.e., requests received by the Member State considered responsible under the criteria from the Member State in which the application for international protection was lodged) and 12.9% of outgoing ‘take charge’ requests (i.e., requests from the Member State in which the application for international protection was lodged to the Member State considered responsible under the criteria) were made on the basis of family reasons. Adjusting for requests on the basis of humanitarian reasons (3.9% and 7.5%, respectively), this means that approximately 80% of requests were made on the basis of the fault criteria. Statistics available at https://ec.europa.eu/eurostat/statistics-explained/index.php?oldid=473443#Dublin_requests.

This is an open access article under the terms of the [Creative Commons Attribution](https://creativecommons.org/licenses/by/4.0/) License, which permits use, distribution and reproduction in any medium, provided the original work is properly cited.

© 2023 The Author. *European Law Journal* published by John Wiley & Sons Ltd.

country national moves on irregularly and makes an asylum application in another Member State, s/he will be returned to the responsible State. The Regulation aims to tackle the twin phenomena of ‘refugees in orbit’ and ‘forum shopping’ and to allow for the expeditious processing of asylum claims, even if it is officially acknowledged that these aims are not being realised.² Dublin III is premised on mutual trust: the assumption that since all EU Member States are bound by the Common European Asylum System (CEAS), which comprises standards on reception, qualification and procedures; the 1951 Convention relating to the Status of Refugees³; and the Charter of Fundamental Rights of the EU,⁴ the transferring Member State is entitled to presume that an asylum seeker will be properly treated in the responsible Member State. According to the regulation and the jurisprudence of the Court of Justice of the EU (CJEU), this presumption can be rebutted if the asylum seeker can make out that the Dublin transfer would result in a real risk of inhuman or degrading treatment contrary to Article 4 of the Charter.⁵ Put differently, there is a conclusive presumption of safety as regards fundamental rights violations that do not meet this threshold. The propriety of this presumption of safety has long been challenged in the case-law (albeit unsuccessfully so far)⁶ and in the literature.⁷ The key issues are that the presumption flies in the face of definitively established facts about disparate (and sometimes desperate) reception and processing conditions in different Member States—the CEAS and Charter commitments notwithstanding—and that fundamental rights, including the right to asylum in Article 18 of the Charter, are sacrificed on the altar of mutual trust.

This contribution takes up this discussion but from a novel—and underexplored—perspective. It examines whether another Charter right, the principle of the best interests of the child in Article 24(2), is subject to the same conclusive presumption. That provision, which is derived from Article 3(1) of the UN Convention on the Rights of the Child (CRC),⁸ provides that ‘In all actions relating to children, whether taken by public authorities or private institutions, the child’s best interests must be a primary consideration.’⁹ In the Dublin context, the principle is perhaps best known for having been integrated into the criteria that apply to unaccompanied minors.¹⁰ However, it is also stated in Article 6, a horizontal provision of the Dublin III Regulation which requires the best interests of the child to be considered in ‘all procedures provided for in this Regulation’, and is referred to in Article 20(3), the specific provision of the regulation dealing with accompanied minors.¹¹ In broad terms, the best interests principle obliges decision-makers to interrogate how decisions involving a child affect him or her and to prioritise the option that best protects relevant rights of the child. As a rights-based concept, it includes but is significantly broader in scope than

²See Explanatory Memorandum, Proposal for a Regulation of the European Parliament and of the Council on Asylum and Migration Management and Amending Council Directive (EC) 2003/109 and the Proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund], COM(2020) 610 final.

³Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137.

⁴OJ C 326, 391–407.

⁵It should be noted that it is possible to challenge a Dublin transfer on the grounds that an incorrect criterion (or associated provision) has been applied to the applicant. See Case C-63/15, *Ghezelbash* [2016] ECLI:EU:C:2016:409 and Case C-155/15, *Karim* [2016] ECLI:EU:C:2016:410. Indeed, technical grounds for contesting a Dublin transfer may hold out more promise than fundamental rights in challenging Dublin transfers. See D. Thym, ‘Judicial Maintenance of the Sputtering Dublin System on Asylum Jurisdiction: *Jafari*, A.S., *Mengesteab* and *Shiri*’, (2018) 55 *Common Market Law Review*, 549; and M. Den Heijer, ‘Remedies in the Dublin Regulation: *Ghezelbash* and *Karim*’, (2017) 54 *Common Market Law Review*, 859.

⁶For example, Joined Cases C-411/10 and C-493/10, *N.S. and M.E.* [2011] ECLI:EU:C:2011:865; Case C-394/12, *Abdullahi* [2013] ECLI:EU:C:2013:813; Joined Cases C-297/17, C-318/17, C-319/17 and C-438/17, *Ibrahim* [2019] ECLI:EU:C:2019:219; Case C-490/16, A.S. [2017] ECLI:EU:C:2017:585 and Case C-646/16, *Jafari* [2017] ECLI:EU:C:2017:586; and Case C-483/20, XXXX [2022] ECLI:EU:C:2022:103.

⁷For a cross-section of the literature, see V. Moreno-Lax, ‘Mutual (Dis-)trust in EU Migration and Asylum Law’, in S. Iglesias Sánchez and M. González Pascual (eds.), *Fundamental Rights in the EU Area of Freedom, Security and Justice* (Cambridge University Press, 2021), at 77; G. Anagnostaras, ‘The Common European Asylum System: Balancing Mutual Trust against Fundamental Rights Protection’, (2020) 21 *German Law Journal*, 1180; Silvia Morgades-Gil, ‘The “Internal” Dimension of the Safe Country Concept: The Interpretation of the Safe Third Country Concept in the Dublin System by International and Internal Courts’, (2020) 22 *European Journal of Migration and Law*, 82; Ermioni Xanthopoulou, ‘Mutual Trust and Rights in EU Criminal and Asylum Law: Three Phases of Evolution and the Uncharted Territory beyond Blind Trust’, (2018) 55 *Common Market Law Review*, 489; M. Den Heijer, J. Rijpma and T. Spikerboer, ‘Coercion, Prohibition and Great Expectations: The Continuing Failure of the Common European Asylum System’, (2016) 53 *Common Market Law Review*, 607.

⁸Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC).

⁹Explanations Relating to the Charter of Fundamental Rights, 2007/C 303/02.

¹⁰Article 8 establishes that the Member State responsible for the application of an unaccompanied minor is that where a family member, sibling or relative is legally present, provided that it is in the best interests of the minor.

¹¹Emphasis added. Furthermore, Recital 13 of the Dublin Regulation provides that ‘[i]n accordance with the 1989 United Nations Convention on the Rights of the Child and with the Charter of Fundamental Rights of the European Union, the best interests of the child should be a primary consideration of Member States when applying this Regulation.’

the prohibition of torture and inhuman or degrading treatment. If the Dublin criteria are subject to a best interests assessment, this casts doubt on the established position that deficiencies in the human rights situation in the responsible Member State, other than risks to Article 4, are no impediment to transfer. In theory, then, the best interests principle holds out significant promise—and not just for the child, but for his/her accompanying family members.

However, a trio of recent judgments of the CJEU seem to vitiate that promise: *M.A., S.A. and A.Z.* in 2019,¹² *XXXX* in 2022¹³ and *L.G.* in 2023.¹⁴ In different ways these judgments subjugate the principle of the best interests of the child to the principle of mutual trust as if the former were just any other non-absolute human right. Yet it is questionable whether the judgments fully capture the intricacies of the best interests principle as *lex specialis*. To be sure, the principle is a creature of EU law, as reflected in the Charter and the text of the Dublin Regulation, and interpreted by the CJEU. However, the principle derives from international child rights law and cannot be divorced from that wider context. This article conducts a critical analysis, based on EU and international law, of the three judgments, exposing problems in the Court's reasoning and suggesting alternative approaches. This is an important endeavour since the Dublin case-law on mutual trust is fast evolving and it is to be hoped that the Court will take a different view of the best interests principle in the future.¹⁵ This would be in line with the Court's role as Guardian of the Treaties and, specifically, of Article 2 TEU, which recognises respect for human rights as a foundational value of the Union.¹⁶ Section 2 sets the scene by describing the state of the general jurisprudence and scholarship on the friction between fundamental rights and mutual trust. Section 3 analyses the three emblematic cases in light of the statutory and Charter requirements relating to the best interests of the child, as shaped by international child rights law. Section 4 concludes with some final remarks about judicial review of the balancing of mutual trust and the best interests of the child.

2 | FUNDAMENTAL RIGHTS VERSUS MUTUAL TRUST: THE STORY SO FAR

2.1 | From a conclusive to a (highly circumscribed) rebuttable presumption of safety

A series of jurisprudential and legislative developments have established that the presumption of safety in the Dublin Regulation is rebuttable in the context of a real risk of an Article 4 Charter violation. As a preliminary point, it is worth noting that the current Dublin Regulation (so-called 'Dublin III') was preceded by the Dublin II Regulation,¹⁷ which, in turn, was preceded by the intergovernmental Dublin Convention (from which the regulations get their name)¹⁸ and, before that, a provision of the Schengen Convention.¹⁹ Notably, the Dublin and Schengen Conventions established the principle of mutual trust at a time when the EU Charter of Fundamental Rights was still a mere idea,²⁰ and well before the emergence of a European non-refoulement jurisprudence in the asylum context or the

¹²Case C-661/17, *M.A., S.A. and A.Z.* [2019] ECLI:EU:C:2019:53.

¹³*XXXX*, above, n. 6.

¹⁴Case C-745/21, *L.G.* [2023] ECLI:EU:C:2023:113.

¹⁵It should be noted that the Dublin cases involving minors are steadily increasing, giving the Court more opportunity to pronounce on the best interests principle. See, in addition to the cases discussed in this article, Case C-720/20, *R.O.* [2022] ECLI:EU:C:2022:603 and Case C-19/21, *I and S* [2022] ECLI:EU:C:2022:605. For commentary, see E. Frasca and J.Y. Carlier, 'The Best Interests of the Child in ECJ Asylum and Migration Case Law: Towards a Safeguard Principle for the Genuine Enjoyment of the Substance of Children's Rights?' (2023) 60 *Common Market Law Review*, 345.

¹⁶Consolidated Version of the Treaty on European Union, OJ C 326/13.

¹⁷Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ L50/1.

¹⁸Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities – Dublin Convention, 1990 (97/C 254/01) OJ C 254, 0001.

¹⁹Article 30, Convention Implementing the Schengen Agreement of 14 June 1985, OJ L 239, 0019.

²⁰See, in particular, the adoption by the European Parliament of a non-binding Declaration of Fundamental Rights and Freedoms in 1989, at the initiative of the European federalist Altiero Spinelli, OJ C 120 of 16.5.1989, 51. In this regard, see, e.g., O. De Schutter, 'The Charter of Fundamental Rights as a Social Rights Charter', *CRIDHO Working Paper 2018/4*, 6–8.

'communitarisation' of asylum.²¹ Accordingly, at its genesis, the Dublin concept was indifferent to fundamental rights concerns. This explains why, up to and including the Dublin II Regulation, there was no provision by which an applicant could challenge a Dublin transfer on the grounds of a threat to fundamental rights in the responsible State. Thus, from the outset there was a clear imbalance between, on the one hand, the principle of mutual trust, a cornerstone in the EU law galaxy, and, on the other hand, fundamental rights considerations.²²

However, as is well known, a judgment apiece by the European Courts—*M.S.S. v. Belgium and Greece* by the Grand Chamber of the European Court of Human Rights (ECtHR) and *N.S. and M.E.* by the Grand Chamber of the CJEU—modified this situation, resulting in legislative change.²³ The Dublin III Regulation now acknowledges in Article 3(2) that it is 'impossible' to send an applicant to the responsible State when 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'. However, that provision must be interpreted in light of the judicial dialogue that has continued between the two European Courts since the adoption of the recast Regulation.

In the 2014 case of *Tarakhel v. Switzerland*, the Grand Chamber of the ECtHR decoupled the risk of inhuman or degrading treatment from any requirement that the risk emanate from 'systemic flaws', noting that '[t]he source of the risk does nothing to alter the level of protection guaranteed by the Convention' and that the standard Article 3 European Convention of Human Rights (ECHR)²⁴ requirement of a 'thorough and individualised examination' of a real 'risk of inhuman or degrading treatment' subsisted.²⁵ This caused the CJEU to revise its position on the requirement of systemic flaws, overriding the explicit wording of Dublin III. Thus, in the 2017 case of *C.K., H.F. and A.S.*, the CJEU removed the need to demonstrate systematic flaws or indeed any flaws in the asylum procedure or reception conditions in the responsible State if the transfer itself would exacerbate an extremely serious health condition leading to a violation of Article 4 of the Charter.²⁶ A year later, in *Jawo*, the Grand Chamber confirmed that, although Article 3(2) Dublin III refers only to systemic flaws, 'the transfer of an applicant is ruled out in *any situation* in which there are substantial grounds for believing that the applicant runs such a risk during his transfer or thereafter.'²⁷

It is interesting to note that these last two cases concerned a risk to socio-economic rights because such rights have traditionally been problematic in the Article 3 ECHR/Article 4 Charter context—potential violations only meeting the threshold of inhuman or degrading treatment in a situation of 'extreme material poverty'. This threshold was first articulated in the Dublin context in *M.S.S.*, where the ECtHR held that the fact that the applicant was abandoned by the State to homelessness and destitution constituted a violation of Article 3 ECHR.²⁸ This implied that situations short of homelessness and destitution could fall shy of the threshold. This was the interpretation in *Jawo*, where the CJEU held that 'situations characterised even by a high degree of insecurity or a significant degradation of the living conditions of the person concerned' did not constitute extreme material poverty and were thus not a violation of Article 4 of the Charter.²⁹ This was confirmed by the Grand Chamber in *Ibrahim*, discussed below.³⁰

Therefore, despite the jettisoning of the systemic flaws requirement, the Article 4 Charter threshold remains elusive, especially in cases where the transfer is resisted because of reception conditions in the responsible State. It also follows that risks to fundamental rights short of the Article 4 Charter threshold are no impediment to transfer. In *N.*

²¹The emergence of a European non-refoulement jurisprudence in the asylum context can be traced to the early 1990s. See, e.g., *Vilvarajah v. UK*, App nos 13,163/87; 13,164/87; 13,165/87; 13,447/87; 13,448/87 (ECtHR, 30 October 1991). As for EU law, the original treaty basis for the CEAS was inserted into the Treaty Establishing the European Community by the Treaty of Amsterdam in 1997, which 'communitarised' asylum by moving it from the intergovernmental third pillar to the Community first pillar.

²²To understand the origin of this imbalance, it is worth exploring the genesis of the principle of mutual trust. See, in particular, N. Cambien, 'Mutual Recognition and Mutual Trust in the Internal Market', (2017) *European Papers*, 93.

²³*M.S.S. v. Belgium and Greece*, App no 30696/09 (ECtHR, 21 January 2011); *N.S. and M.E.*, above n. 6.

²⁴European Convention for Human Rights and Fundamental Freedoms 1950, ETS 5.

²⁵*Tarakhel v. Switzerland*, App no 29217/12 (ECtHR, 4 November 2014), para. 104.

²⁶Case C-578/16 PPU, *C.K., H.F. and A.S.* [2017] ECLI:EU:C:2017:127.

²⁷Case C-163/17, *Jawo* [2019] ECLI:EU:C:2019:218, para. 87 (emphasis added).

²⁸*M.S.S.*, above, n. 23, para. 253.

²⁹*Jawo*, above, n. 27, para. 93.

³⁰*Ibrahim*, above, n. 6.

S. and M.E. the Court seemed to leave open the door to such risks. The Court denied that ‘any infringement of a fundamental right’ or the ‘slightest infringement’ of the CEAS directives by the Member State responsible could interfere with the operation of the Dublin Regulation, noting that:

At issue here is the *raison d'être* of the European Union and the creation of an area of freedom, security and justice and, in particular, the Common European Asylum System, based on mutual confidence and a presumption of compliance, by other Member States, with European Union law and, in particular, fundamental rights.³¹

Nonetheless, this left open the possibility that a threatened fundamental rights violation greater than ‘any infringement’ but less than the Article 4 threshold could impede a Dublin transfer. Options include: risks of serious violations of the very essence of rights in the Charter (akin to the ECtHR’s ‘flagrant breach’ line of jurisprudence)³² and risks to certain subjective rights in the Charter, notably Article 18 on the right to asylum. Indeed, it has long been argued that Article 18 potentially encompasses a medley of rights such as the right to *non-refoulement*, to seek asylum, to have one’s claim processed and to be granted asylum if eligible under EU rules (i.e., pursuant to the standards enumerated in the CEAS directives).³³ Various Advocates General have opined that the right to asylum, thus understood, should circumscribe the operation of the Dublin Regulation.³⁴ However, such arguments have either been ignored (as superfluous to the Article 4 argument) or rejected (as not displacing mutual trust) by the Court. Accordingly, the current position is that risks to ‘ordinary’ fundamental rights are non-justiciable in Dublin proceedings, although the jurisprudence on this point is by no means definitively settled.³⁵

Scholars have roundly condemned the prioritisation of mutual trust over fundamental rights in the legislation and case-law.³⁶ Apart from the perverse chronology discussed earlier (whereby, among other things, mutual trust predated the creation of a CEAS), the CEAS, now in existence for nearly 20 years, remains deeply problematic. The various directives and regulations fail to establish clear standards that are unambiguously aligned to fundamental rights; there is a lack of harmony in implementation at the national level; and there is an institutional reluctance to enforce the legislation.³⁷ The net effect is that the fundamental rights of asylum seekers are routinely violated in some Member States. In this context, the elevation of mutual trust over fundamental rights ‘comes close to asserting that because we believe it, it must be true’,³⁸ a triumph of formalism over empirical evidence.³⁹ Mutual trust has

³¹N.S. and M.E., above, n. 6, para. 83. For an interesting analysis of the relationship between mutual trust and fundamental rights in the neighbouring Area of Criminal Justice, also part of the Area of Freedom, Security and Justice, see V. Mitsilegas, ‘The Symbiotic Relationship between Mutual Trust and Fundamental Rights in Europe’s Area of Criminal Justice’, (2015) 6(4) *New Journal of European Criminal Law*, 457.

³²See, e.g., *Othman (Abu Qatada) v. UK*, App no 8139/09 (ECtHR, 17 January 2012). For a fuller discussion of the ‘flagrant breach’ case-law, see C. Costello, *The Human Rights of Migrants and Refugees in European Law* (Oxford University Press, 2016).

³³For a cross-section of the literature, see M. Moraru, ‘The EU Fundamental Right to Asylum: In Search of its Legal Meaning and Effects’, in S. Iglesias Sánchez and M. González Pascual (eds.), *Fundamental Rights in the EU Area of Freedom, Security and Justice* (Cambridge University Press, 2021), at 139; S. Fabio Nicolosi, ‘Going Unnoticed? Diagnosing the Right to Asylum in the Charter of Fundamental Rights of the European Union’, (2017) 23 *European Law Journal*, 94; F. Ippolito, ‘Migration and Asylum Cases before the Court of Justice of the European Union: Putting the EU Charter of Fundamental Rights to Test?’, (2015) 17 *European Journal of Migration and Law*, 1; V. Moreno Lax, ‘Dismantling the Dublin System: M.S.S. v Belgium and Greece’, (2012) 14 *European Journal of Migration and Law*, 1; M. Gil-Bazo, ‘The Charter of Fundamental Rights of the European Union and the Right to be Granted Asylum in the Union’s Law’, (2008) 27 *Refugee Survey Quarterly*, 33.

³⁴See, e.g., the opinion of Advocate (AG) General Trstenjak in *N.S. and M.E.*, above, n. 6, ECLI:EU:C:2011:611; AG Cruz Villalon in *Abdullahi*, above, n. 6, ECLI:EU:C:2013:473; AG Wathelet in *Ibrahim*, above, n. 6, ECLI:EU:C:2018:617; the joint opinion of AG Sharpston in *A.S. and Jafari*, above, n. 6, ECLI:EU:C:2017:443; and AG Pikamäe in *XXXX*, above, n. 6, ECLI:EU:C:2021:780.

³⁵See Anagnostaras, above, n. 7.

³⁶See the literature cited at n. 7 above.

³⁷See, in particular, Den Heijer et al., above, n. 7.

³⁸C. Costello, ‘The Ruling of the Court of Justice in NS/ME on the Fundamental Rights of Asylum Seekers under the Dublin Regulation: Finally, an End to Blind Trust across the EU?’, (2012) 2 *Asiel- en Migrantenrecht* 83, 90.

³⁹Gregor Noll, ‘Formalism v. Empiricism: Some Reflections on the Dublin Convention on the Occasion of Recent European Case Law’, (2001) 70 *Nordic Journal of International Law*, 161. For a similar analysis in the field of judicial cooperation in criminal matters, see P. Popelier, G. Gentile and E. van Zimären, ‘Bridging the Gap between Facts and Norms: Mutual Trust, the European Arrest Warrant and the Rule of Law in an Interdisciplinary Context’, (2022) 27(1–3) *European Law Journal*, Special Issue: Between Ought and Is: European Integration through the Rule of Law, 167.

become an end in itself, as is evident from the Court's characterisation of the concept in *N.S. and M.E.* as 'the *raison d'être* of the European Union'.⁴⁰

The enduring supremacy of mutual trust in European asylum law is somewhat surprising when one considers that the pre-eminence of the principle is being called into question in other fields of EU law, such as European criminal law⁴¹ or European constitutional law with regard to rule of law backsliding and judicial independence.⁴² In a landmark case in June 2023, the Court of Justice recalled that:

the European Union is composed of States which have freely and voluntarily committed themselves to the common values referred to in Article 2 TEU, which respect those values and which undertake to promote them. In that regard, mutual trust between the Member States and, in particular, their courts and tribunals is based on the fundamental premise that Member States share a set of common values on which the European Union is founded.

Consequently, Article 2 TEU is not merely a statement of policy guidelines or intentions, but contains values which are an integral part of the very identity of the European Union as a common legal order, values which are given concrete expression in principles containing legally binding obligations for the Member States.⁴³

If, in its previous case-law, the CJEU has categorised mutual trust as the 'raison d'être of the European Union', it makes clear in this judgment that the values enshrined in Article 2 TEU—among which respect for human rights—are the *raison d'être* of the EU and the 'premise' for mutual trust. After all, mutual trust is nowhere to be found in the treaties, while respect for human rights is enshrined in both Article 2 TEU and in the EU Charter of Fundamental Rights and is thus of constitutional status. And yet this reassertion of the proper hierarchy of EU norms sits uneasily with the status given by the Court to mutual trust in the Dublin context.

Nonetheless, some scholars argue it is not for the Court to remedy what is essentially a legislative and enforcement problem, without falling foul of rule of law constraints on judicial activism.⁴⁴ Accordingly, it is a problem for the other institutions to fix and, in the meantime, the Court can only tackle the most egregious violations of fundamental rights. Unfortunately, the other institutions seem incapable of making the fix: at the Member State level there is no political capital in improving conditions for asylum seekers, at the intra-State level asylum is perceived as a zero-sum game, and at the EU level real harmonisation constitutes a threat to integration.⁴⁵ The torpor can be seen in the third phase of the CEAS which is currently being (fractiously) negotiated as part of the New Pact on Migration and Asylum.⁴⁶ This includes a proposed Regulation on Asylum and Migration Management to replace Dublin III, which 'seeks

⁴⁰F. Maiani and S. Migliorini, 'One Principle to Rule them All? Anatomy of Mutual Trust in the Law of the Area of Freedom, Security and Justice', (2020) 57 *Common Market Law Review*, 7.

⁴¹For a discussion, see Popelier et al., above, n. 39; K. Caunes, 'Editorial: The Paradoxes of the Rule of Law in EU Context—With Special Emphasis on the Polish RRP and EAW Sagas', (2022) 27(1–3) *European Law Journal*, Special Issue: Between Ought and Is: European Integration through the rule of law, 2; L. Mancano, 'A Theory of Justice? Securing the Normative Foundations of EU Criminal Law through an Integrated Approach to Independence', (2023) 27(4–6) *European Law Journal*, Special issue: The Normative Foundations of European Criminal Law, 477. See Joined Cases C-562/21 PPU and C-563/21 PPU, *X and Y* [2022] ECLI:EU:C:2022:100.

⁴²See, e.g., P. Bard, 'In Courts We Trust, or Should We? Judicial Independence as the Precondition for the Effectiveness of EU Law', (2022) 27(1–3) *European Law Journal*, Special issue: Between Ought and Is: European Integration through the Rule of Law, 185.

⁴³Case C-204/21, *Commission/Poland* [2023] ECLI:EU:C:2023:442, paras. 66–67, translated from French based on formulation in previous case-law available in English.

⁴⁴See, e.g., K. Lenaerts, 'La vie après l'avis: Exploring the Principle of Mutual (not yet Blind) Trust', (2017) 54 *Common Market Law Review*, 805; I. Goldner Lang, 'No Solidarity without Loyalty: Why do Member States Violate EU Migration and Asylum Law and What Can Be Done?', (2020) 22 *European Journal of Migration and Law*, 39; and D. Thym, above, n. 5, 549.

⁴⁵See, e.g., M. Mouzourakis, 'More Laws, Less Law: The European Union's New Pact on Migration and Asylum and the Fragmentation of "Asylum Seeker" Status', (2021) 26(3–4) *European Law Journal*, 171.

⁴⁶Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum, Com/2020/609 final.

to *promote* mutual trust'.⁴⁷ However, the proposal explicitly limits the scope of any fundamental rights judicial review to an assessment of whether the transfer would result in a real risk of an Article 4 Charter violation.⁴⁸ Even on the Article 4 issue the proposal is out of date, reproducing the wording of Article 3(2) Dublin III which links the risk of an Article 4 violation to 'systemic flaws', despite the jurisprudential abandonment of this link.⁴⁹ The proposal does include a new solidarity mechanism to assist Member States which are facing particular migratory pressures—these being the States which are presumably the most likely to violate fundamental rights. However, the workability of the proposed solidarity mechanism, which is based as much on solidarity in affecting returns of unsuccessful applicants as it is on sharing responsibility for processing such applications, is highly questionable. Furthermore, the other proposals in the package, which could tackle the fundamental rights issues at the heart of the CEAS, are orientated towards control rather than protection.⁵⁰ Accordingly, it is submitted that a fuller fundamental rights judicial review of Dublin transfers is, and will continue to be, warranted if the constitutional status of Article 2 TEU and the Charter of Fundamental Rights are to be upheld. This is, after all, the role of the CJEU as Guardian of the Treaties.

2.2 | Special considerations for families with children?

As described above, the current legislative and CJEU position is that a Dublin transfer can only be successfully challenged on fundamental rights grounds in cases where there is a real risk of inhuman or degrading treatment contrary to Article 4 of the Charter. However, as is well known, the threshold for inhuman or degrading treatment is *relative*. This sub-section examines the position of the European courts on whether that threshold should be lowered in cases involving children, thus potentially expanding the one established exception to mutual trust.

In the *Tarakhel* case, the ECtHR suggested that special considerations apply when it comes to families with children.⁵¹ *Tarakhel* concerned a family of asylum seekers comprising parents and six minor children who challenged their Dublin transfer from Switzerland to Italy on the basis of flaws in the Italian reception system that could lead to an Article 3 ECHR violation. On the evidence, there were serious capacity issues with the Italian reception system, including 'the possibility that a significant number of asylum seekers may be left without accommodation or accommodated in overcrowded facilities without any privacy, or even in insalubrious or violent conditions'.⁵² However, these flaws did not meet the 'extreme material poverty' threshold established in *M.S.S.* Nonetheless, the Court observed that the UN Convention on the Rights of the Child 'encourages States to take the appropriate measures to ensure that a child who is seeking to obtain refugee status enjoys protection and humanitarian assistance, whether the child is alone or accompanied by his or her parents'.⁵³ It noted the 'extreme vulnerability' and 'specific needs' of the children as minors and asylum seekers and used this vulnerability designation effectively to lower the threshold for a violation, holding that:

the reception conditions for children seeking asylum must be adapted to their age, to ensure that those conditions do not 'create ... for them a situation of stress and anxiety, with particularly traumatic consequences'. Otherwise, the conditions in question would attain the threshold of severity required to come within the scope of the prohibition under Article 3 of the Convention.⁵⁴

⁴⁷Proposal for a Regulation on Asylum and Migration Management, above, n. 2, at 2 (emphasis added).

⁴⁸*Ibid.*, Article 33(1)(a). Furthermore, Article 33(1)(b) confines technical challenges to the Dublin criteria to those relating to the family grounds, excluding the possibility of challenging the fault grounds.

⁴⁹*Ibid.*, Article 8(3).

⁵⁰For commentary on the various proposals for reform of the CEAS, see the policy notes of the European Council on Refugees and Exiles, available at <https://ecre.org/ecre-publications/policy-notes/>.

⁵¹*Tarakhel*, above, n. 25.

⁵²*Ibid.*, para. 115.

⁵³*Ibid.*, para. 99.

⁵⁴*Ibid.*, para. 119.

In this context, the Swiss authorities were required, as a pre-condition to transfer, to obtain ‘detailed and reliable information concerning the specific facility, the physical reception conditions and the preservation of the family unit’.⁵⁵ However, the requirement that families with minor children only be sent back to specially adapted reception conditions has yet to permeate CJEU case-law and, indeed, appears to have been disregarded in at least one significant case.

In *Ibrahim*—a Grand Chamber judgment on four joined cases, each involving children—the CJEU reiterated the threshold in *Jawo* (which, recall, reflects *M.S.S.*, not *Tarakhel*).⁵⁶ The Court was asked whether pursuant to the recast Asylum Procedures Directive (APD), a Member State was precluded from rejecting an asylum application as inadmissible on the grounds that the applicant had already been granted subsidiary protection by another Member State, because in that Member State beneficiaries of subsidiary protection did not receive any subsistence allowance or a markedly inferior allowance compared with other Member States, in violation of the provisions of the recast Qualification Directive (QD) and, possibly, Article 4 of the Charter.⁵⁷ The Court held that infringements of the QD that did not amount to a violation of Article 4 of the Charter could not impede a Member State’s finding of inadmissibility. Furthermore, infringements of the QD would reach the Article 4 Charter threshold ‘only if the consequence is that the applicant is, because of his or her particular vulnerability, irrespective of his or her wishes and personal choices, in a situation of extreme material poverty’.⁵⁸ Notwithstanding the reference to vulnerability, the Court gave no consideration to the children and made no mention of the principle of the best interests of the child, possibly because no child-specific questions were asked by the referring court.⁵⁹ However, in a recent case—XXXX—the Court did consider the *Ibrahim* precedent in the light of the principle of the best interests of the child.⁶⁰ This case is extensively analysed in Section 3. Suffice is to conclude at this stage that the CJEU is not always alive to the fact that the threshold for inhuman and degrading treatment should be adjusted in cases involving children.

2.3 | A ring-fenced option: activating the sovereignty clause

If transfer to the responsible State is precluded in situations in which Article 4 of the Charter is engaged, then which State becomes responsible for the applicant? A logical and expeditious solution would be for the determining Member State to take responsibility via the so-called ‘sovereignty clause’ (17(1) of Dublin III, formerly Article 3(2) of Dublin II), which allows any Member State to assume responsibility for any application. However, in *N.S. and M.E.* the CJEU came to a different conclusion. On the one hand, the Court rejected the argument advanced by several States that Article 3(2) Dublin II could not be considered as implementing EU law within the meaning of Article 51(1) of the Charter, and hence that the Charter had no impact on a Member State’s decision about whether to exercise Article 3 (2). Rather the Court found that Article 3(2) ‘grants Member States a discretionary power which forms an integral part of the Common European Asylum System’, which ‘must be exercised in accordance with the other provisions of that regulation’ and hence that ‘a Member State which exercises that discretionary power must be considered as implementing European Union law within the meaning of Article 51(1) of the Charter’.⁶¹ On the other hand,

⁵⁵*Ibid.*, para. 121. The Court has subsequently upheld generic letters of guarantee by the Italian authorities as being *Tarakhel*-compliant. See *M.T. v. the Netherlands*, App no 46595/19 (ECtHR, 18 May 2021), para. 50.

⁵⁶*Ibrahim*, above, n. 6.

⁵⁷Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, OJ L 180; Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), OJ L 337.

⁵⁸*Ibrahim*, above, n. 6, para. 93.

⁵⁹*Jafari*, above, n. 6 is another judgment in which the Court was seemingly oblivious to the fact that the applicants were two single women with three minor children. Although the Court reiterated that Article 4 of the Charter precludes transfer where there is a genuine risk that the person concerned may suffer inhuman or degrading treatment, including one caused by a mass influx situation which overwhelms the reception capacity of the responsible Member State, it gave no consideration to the threshold issue. ECLI:EU:C:2017:586.

⁶⁰XXXX, above, n. 6.

⁶¹*M.S.S.*, above, n. 23, paras. 65, 66 and 68, respectively.

however, it rejected the notion that a discretionary clause could impose an automatic obligation on Member States. Rather, the determining State had to continue to examine the other Dublin criteria in the search for a responsible State, only assuming responsibility itself under Article 3(2) if that process would 'worsen a situation where the fundamental rights of that applicant have been infringed by using a procedure for determining the Member State responsible which takes an unreasonable length of time.'⁶² In *Puid*, two years later, the Court reiterated the principle of continued examination of the other Dublin criteria but omitted to mention the exception.⁶³ The *Puid* precedent won out and is reflected in Article 3(2) of the Dublin III Regulation.

The 'ringfencing' of the sovereignty clause was confirmed in *C.K., H.F. and A.S.* where the Court observed that Member States could choose to activate Article 17(1) Dublin III but could not be compelled to do so.⁶⁴ However, on the specific, health-related facts of that case, a textual solution was available entailing a graduated response: the responsible State should take mitigating actions prior to, during and after the transfer to accommodate the applicant's poor state of health; if these actions did not offset the risk of an Article 4 Charter violation, the transfer should be suspended; if there was no improvement in the state of health of the person within six months, then the determining State would assume responsibility pursuant to Article 29(2)—the default provision governing situations where the transfer does not take place within six months.

One way or another, there is no *clear* obligation to trigger the Article 17(1) sovereignty clause. It is generally acknowledged that questions about the scope of the Charter are not black and white but depend on the nexus between a given provision and EU law.⁶⁵ Where the connection is tenuous, the case for strict Charter compliance is weakened. It may well be that the weakness of the connection between Article 17(1) and EU law will remain, for the time being, an impediment to *any* Charter right transforming the sovereignty clause from a right of the Member State to a duty of the Member State. However, it should be noted that in the case-law just discussed, not only was there a weak connection between the sovereignty clause and EU law, there was no clear Charter right governing the situation. In this regard, the prohibition on torture and inhuman and degrading treatment in Article 4 of the Charter entails a negative duty (not to send) but does not clearly imply a positive obligation (to regularise stay). As observed earlier, the Court has steadfastly declined to work through the ramifications of Article 18 of the Charter in the Dublin context. Nonetheless, there is the possibility that the principle of the best interests of the child in Article 24(2) of the Charter could yield a different outcome. The Court explored this possibility in *M.A., S.A. and A.Z.*, analysed below.⁶⁶

To summarise, the primacy of mutual trust in the Dublin context has so far constituted an impediment to taking fundamental rights seriously, despite their constitutional status. However, in as much as the CJEU has acknowledged that respect for the values enshrined in Article 2 TEU, including respect for fundamental rights, is the premise for mutual trust in its case-law addressing rule of law backsliding and judicial independence, it is to be hoped that its case-law in the field of European asylum law will evolve in the same direction. Section 3 now explores the role that the principle of the best interests of the child might play in such an evolution.

3 | NO EXCEPTIONALITY FOR CHILDREN?

The current position is that risked violations of fundamental rights that fall short of the Article 4 Charter threshold cannot displace the primacy of mutual trust in the Dublin context. However, there are several features of the best interests principle which suggest that some modification of this status quo is required in the case of Dublin transfers of accompanied children. This section draws out these features through a critical child-rights analysis of three recent

⁶²Ibid., para. 98.

⁶³Case C-4/11, *Puid* [2013] ECLI:EU:C:2013:740.

⁶⁴*C.K., H.F. and A.S.*, above, n. 26, para. 88.

⁶⁵See, generally, S. Iglesias Sánchez and M. González Pascual (eds) *Fundamental Rights in the EU Area of Freedom, Security and Justice* (Cambridge University Press, 2021).

⁶⁶*M.A., S.A. and A.Z.*, above, n. 12.

cases which spoke to the issue for the first time.⁶⁷ The first sub-section discusses whether the best interests of the child can be met in the Dublin context by simply keeping the family together and proceeding with the transfer. The second sub-section explores whether the best interests of the child can impel a State to activate the sovereignty clause and itself take responsibility for the claim. The third sub-section interrogates whether the best interests of the child can ever displace mutual trust.

3.1 | Family unity and then business as usual?

In *M.A., S.A. and A. Z* the Court held that as long as family unity is maintained in a Dublin transfer, it can be presumed that the best interests of the child are met.⁶⁸ The case involved a family comprising mother, father and child who claimed asylum in Ireland after the parents' visas in the UK had expired. In essence, the applicants argued that they should not be transferred to the UK pursuant to the Dublin III Regulation because that country was poised to leave the EU, making the fundamental rights situation there uncertain. Reference was also made to the fact that the mother had a health problem and the child was under assessment by the health service, but these issues did not appear to form a significant part of the argument. As such, the argument was not grounded in allegations that specific fundamental rights were at risk but was rather based on an inchoate threat. Two of the questions referred pertained to the best interests of the child. The first related to the indissociable clause in Article 20(3) of the Regulation, which provides, *inter alia*:

For the purposes of this Regulation, the situation of a minor who is accompanying the applicant and meets the definition of family member shall be indissociable from that of his or her family member and shall be a matter for the Member State responsible for examining the application for international protection of that family member, even if the minor is not individually an applicant, provided that it is in the minor's best interests.

The Court was asked whether, in the absence of evidence to the contrary, it could be presumed that it is in the best interests of a child to treat his or her situation as indissociable from that of the parents, thus obviating the need to consider the best interests separately from the parents 'as a discrete issue or as a starting point for consideration of whether the transfer should ... take place'.⁶⁹ Disposing of the issue in four terse paragraphs, the Court held 'it is clear from the wording of Article 20(3) of the Dublin III Regulation that that is the case.'⁷⁰ It supported this finding by referring to various recitals and statutory provisions relating to the family, noting that 'respect for family life and, more specifically, preserving the unity of the family group is, as a general rule, in the best interests of the child'.⁷¹ Accordingly, in the absence of evidence to the contrary, Article 20(3) 'establishes a presumption that it is in the best interests of the child to treat that child's situation as indissociable from that of its parents'.⁷² However, this gives rise to a number of questions. First, can the best interests of the child in the Dublin context be reduced to family unity? Secondly, if not, how to assess whether the transfer is in the best interests of the child? Thirdly, can it be *presumed* that transfer is in the best interests of the child?

⁶⁷*M.A., S.A. and A.Z.*, above n. 12; *L.G.*, above, n. 14; *XXXX*, above, n. 6.

⁶⁸*Ibid.*

⁶⁹*Ibid.*, para. 43.

⁷⁰*Ibid.*, para. 88.

⁷¹*Ibid.*, para. 89.

⁷²*Ibid.*, para. 90.

3.1.1 | Can the best interests of the child be reduced to family unity?

One can hardly take issue with the above reasoning of the Court relating to family unity. Indeed, the Court can be commended for interpreting the best interests concept through the lens of a relevant right of the child, namely the right to family unity, which is protected in Article 24(3) of the Charter. In this regard, the Court followed a number of judgments relating to the *Zambrano* test and the Family Reunification Directive, which linked Article 24(2) of the Charter with Article 24(3) and/or Article 7 relating to the right to family life.⁷³ As for the Court's presumption that family unity is in the best interests of the child, this is also reasonable in light of Article 9(1) CRC which provides that 'States Parties shall ensure that a child *shall not be separated* from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is *necessary* for the best interests of the child'.⁷⁴

However, Article 20(3) of the Dublin Regulation is not just about indissociability (and family unity) but also about transfer. In this regard, the Court applied the best interests principle in an asymmetric manner, best revealed by simplifying Article 20(3) as follows:

The child's situation must be governed by X (indissociability) *plus* Y (a matter for the Member State responsible according to the Dublin criterion that pertains to the family member) *if* Z (it is in the best interests of the child).

In focusing on the rights-based logic and presumption behind X, the Court overlooked the question of whether Y is also in the best interests of the child. But X and Y might reveal different interests: to remain with the family member and not to be transferred. This explains why the Committee on the Rights of the Child has insisted, in the Dublin context, that the determination of the best interests of the child requires the child's situation to be assessed *separately* from his/her parents.⁷⁵ Moreover, the case for a separate evaluation of Y follows from a schematic statutory and Charter-based interpretation of the Regulation.

As for the first of these, the reference to the best interests of the child in Article 20(3) on the situation of the accompanied minor indicates that this provision should be interpreted in light of the horizontal best interests provision in Article 6 of the Regulation, which requires the best interests of the child to be considered in '*all procedures provided for in this Regulation*'.⁷⁶ Notably, Article 6(3) sets out four factors which Member States must take 'due account' of when assessing the best interests of the child: family reunification (or unity); the minor's well-being and social development; safety and security considerations; and the views of the minor, in accordance with his or her age and maturity. These factors are reiterated by the European Asylum Support Office (EASO), which also notes that '[t]he best interests assessment for the Dublin III Regulation should include all relevant elements of the child's best interests, the weight attributed to each element being dependent on its relation to the others.'⁷⁷ Therefore, the best interests assessment in Article 20(3) cannot be reduced to family unity.

As for a Charter-based interpretation of Article 20(3) of the Regulation, the Charter provides that the best interests of the child must be a primary consideration in '*all actions relating to children*'.⁷⁸ This suggests that both the

⁷³Cases C-356/11 and C-357/11, *O, S and L* [2012] ECLI:EU:C:2012:776; Case C-304/14, *CS* [2016] ECLI:EU:C:2016:674; Case C-165/14, *Rendón Marín* [2016] ECLI:EU:C:2016:675; Case C-133/15, *Chavez Vilchez and Others* [2017] ECLI:EU:C:2017:354; Case C 82/16, *K.A. and Others* [2018] ECLI:EU:C:2018:308; and Case C 635/17, *E* [2019] ECLI:EU:C:2019:192. Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, L 251/12, 12. See also Case C-91/20, *L.W.* [2021] ECLI:EU:C:2021:89, in which a provision of the recast Qualification Directive was interpreted in the light of Articles 7 and 24(2) of the Charter.

⁷⁴Emphasis added.

⁷⁵See, most recently, *M.K.A.H. v. Switzerland*, CRC/C/88/D/95/2019, Views of 6 October 2021. See also *V.A. v. Switzerland*, CRC/C/85/D/56/2018, Views of 30 October 2020.

⁷⁶Article 6(1). In *Haqbin*, the CJEU interpreted a reference to the best interests principle in a substantive provision of the recast Reception Conditions Directive in light of the horizontal best interests provision in the directive. Case C-233/18, *Haqbin* [2019] ECLI:EU:C:2019:956.

⁷⁷EASO, Practical Guide on the best interests of the child in asylum procedures, 2019, <https://euaa.europa.eu/sites/default/files/Practical-Guide-Best-Interests-Child-EN.pdf>, 30.

⁷⁸Emphasis added.

issue of indissociability and the issue of transfer fall within its broad scope. The expansive scope of the best interests principle was recognised in an early Dublin judgment concerning unaccompanied minors. In *M.A., B.T. and D.A.* the Court circumvented a narrow statutory iteration of the best interests principle in the Dublin II Regulation by relying on Article 24(2) of the Charter.⁷⁹ The unaccompanied minors in the case, who had no family members in the EU, had lodged applications in various Member States before lodging applications in the UK, where they sought to remain. The situation was governed by Article 6 of the Dublin II Regulation, which comprised two paragraphs, only the first of which mentioned the best interests principle. The paragraph that was most relevant to the case was the second one, which established that, in the absence of a family member in a Member State, the responsible Member State was that where the minor lodged the asylum application. However, it was silent on the situation where an application for asylum had been lodged in more than one Member State. The lack of reference to the best interests principle meant that there was no discernible rationale for designating one Member State over another as responsible. Moreover, unlike Dublin III, there was no horizontal best interests provision in Dublin II. The Court considered that, in view of the vulnerability of unaccompanied minors, it was important not to prolong the Dublin procedure and thus ‘as a rule, unaccompanied minors should not be transferred to another Member State’.⁸⁰ This was supported by the need for the Regulation to adhere to the Charter and in particular Article 24(2) relating to the best interests of the child. The second paragraph of Article 6 could not be interpreted in such a way as to disregard this right:

Consequently, although express mention of the best interest of the minor is made only in the first paragraph of Article 6 of Regulation No 343/2003, the effect of Article 24(2) of the Charter, in conjunction with Article 51(1) thereof, is that the child’s best interests must also be a primary consideration in all decisions adopted by the Member States on the basis of the second paragraph of Article 6 of Regulation No 343/2003.⁸¹

Hence, the best interests principle was not limited to the provision that explicitly mentioned the principle but extended to a provision—presumably all provisions—that were silent on the principle. A fortiori, when a provision—like Article 20(3) of Dublin III—does explicitly mention the principle and envisages two consequences, a best interests assessment should be conducted in relation to both.

In any event, the best interests of the child must be considered when the determining State is applying, via Article 20(3), whatever criterion applies to the family member. Although that criterion is ostensibly directed to the adult, it also falls within the broad scope of the best interests principle. This was confirmed in a recent judgment of the CJEU in the context of the Return Directive—another legislative instrument of the Area of Freedom, Security and Justice premised on mutual trust.⁸² In *M.A.* the question referred to the Court essentially related to the scope of Article 5(a) of the directive, which provides: ‘When implementing this Directive, Member States shall take due account of [...] the best interests of the child’.⁸³ Specifically, the Court was asked whether Belgium, before adopting a return decision in respect of an adult, had to take due account of the best interests of his child, who was a Belgian national. Interpreting Article 5 in light of Article 24(2) of the Charter, and the latter in the light of Article 3(1) CRC, the Court answered in the affirmative, noting that:

According to Article 3(1), the best interests of the child are to be taken into account in *all decisions* concerning children. Therefore, such a provision covers, in general terms, all decisions and actions

⁷⁹Case C-648/11, *M.A., B.T. and D.A.* [2013] ECLI:EU:C:2013:367.

⁸⁰*Ibid.*, para. 55.

⁸¹*Ibid.*, para. 59.

⁸²Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348, 98.

⁸³Case C-112/20, *M.A.* [2021] ECLI:EU:C:2021:197.

directly or indirectly affecting children, as was pointed out by the UN Committee on the Rights of the Child [in] General Comment No. 14 [...].⁸⁴

One way or another, consideration must be given to whether the transfer is in the best interests of the child. If it transpires that the transfer is not in the best interests of the child, and relying on the presumption that family unity is in the best interests of the child, one cannot rule out the prospect that neither the child nor his/her family member(s) can be transferred to the responsible State. This is similar to the reasoning used by the ECtHR in respect of immigration detention of families, whereby the best interests of the child renders the detention of the child contrary to Article 5(1)(f) ECHR (in circumstances where the detention of adults is consistent with that article) while the right of the child to family unity pursuant to Article 8 ECHR means that the whole family must be released.⁸⁵

3.1.2 | How to assess whether transfer is in the best interests of the child?

Since it is argued here that the Court ought to have reviewed the transfer in light of the best interests of the child, this subsection considers how this should be done. A clue to the appropriate method lies in the Court's approach to indissociability, whereby it evaluated that requirement in light of a relevant right of the child, namely, family unity. This is an example of the 'rights-based approach' to the best interests of the child: the use of substantive rights of the child as objective signposts for what is in the best interests of the child (and the corollary—the use of child-rights violations to circumscribe what is in the best interests of the child).⁸⁶ The rights-based approach to the best interests principle is a necessary precaution against arbitrariness and subjectivity, whereby *anything* can be said to be in the best interests of the child.⁸⁷ This risk is particularly acute in the immigration/asylum field where the State perceives its own sovereign interests to be keenly at stake *and* has to take decisions in the best interests of the child. Absent a rights-based approach, the State could readily present the best interests of the child as coinciding with its own interests.⁸⁸ This is acknowledged by EASO, which calls for '[a] child-rights approach as opposed to a state-centred approach' to the best interests of the child in the asylum context.⁸⁹

In terms of where to source the rights, an obvious starting point is Article 24 of the Charter. However, this provision contains only four child rights, which were apparently randomly selected from the CRC, and so reliance on it would lead to an unduly restrictive understanding of the best interests principle.⁹⁰ A more robust approach would be to rely on the 'parent' document itself, the CRC, as interpreted by the UN Committee on the Rights of the Child.

⁸⁴Ibid., para. 38 (emphasis added).

⁸⁵See *Popov v. France*, App no 39472/07 and 39,474/07 (ECtHR, 19 January 2012).

⁸⁶For the rights-based approach to the best interests of the child, see Committee on the Rights of the Child, General Comment no 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3 para. 1) CRC/C/GC/14. For a forceful rejection of the proposition that violating a right of the child could be in the best interests of the child, see Committee on the Rights of the Child, General Comment no 8 (2006) on the right of the child to protection from corporal punishment and other cruel or degrading forms of punishment, CRC/C/GC/8, para. 26, reiterated in General Comment no 13 (2011) on Article 19: the right of the child to freedom from all forms of violence, CRC/C/GC/13, para. 61.

⁸⁷For a cross section of the literature on the potential indeterminacy of the best interests principle, see R. Mnookin, 'Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy', (1975) 39 *Law and Contemporary Problems*, 226; S. Parker, 'The Best Interests of the Child—Principles and Problems', (1994) 8 *International Journal of Law and the Family*, 26; J. Dolgin, 'Why Has the Best Interests Standard Survived? The Historic and Social Context', (1996) 16 *Child Legal Rights Journal*, 2; and Michael Freeman, *A Commentary on the United Nations Convention on the Rights of the Child, Article 3 The Best Interests of the Child* (Martinus Nijhoff Publishers, 2007).

⁸⁸This accounts for why the Committee on the Rights of the Child has issued a general comment on the full applicability and implications of the best interests principle in the immigration context: Joint General Comment no 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and no 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration, CMW/C/GC/3-CRC/C/GC/22.

⁸⁹EASO, above, n. 77, 14.

⁹⁰The rights in Article 24 are: the right to such protection and care as is necessary for well-being; the right to express views freely; the best interests of the child; and the right to maintain a personal relationship and direct contact with both parents. During the drafting of the Charter, the European Children's Network in its very first submission urged the drafting convention to make a clear and explicit cross-reference to the CRC: CHARTE 4127/00 CONTRIB 22 of 9 February 2000.

Admittedly, there is no strict legal obligation to do so as the EU is not party to the CRC and there is no Charter requirement to interpret Article 24 in light of the CRC or the jurisprudence of its committee. This contrasts with the situation that pertains to Charter provisions that correspond to ECHR rights, which must be interpreted with reference to the meaning and scope given to those rights by the ECtHR (although here it should be noted that the ECtHR does interpret ECHR rights in light of the CRC in cases involving children, as is evident from *Tarakhel*).⁹¹ Moreover, in the Dublin context, the principle of mutual trust means that Member States may ‘not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law’.⁹² However, it is not being argued that the CRC supplies a higher level of protection than the Charter, but rather that it supplies useful and specialist guidance on the appropriate level of protection. Indeed, the Court expressly relied on such guidance in *M.A.* by referring to General Comment no. 14 of the Committee on the Rights of the Child.⁹³ Furthermore, it is practically impossible to divorce the best interests principle from the substantive rights in the CRC since it is a ‘general principle’ of the Convention, meaning that it has a symbiotic relationship with the rights therein.⁹⁴ An integrated approach is also suggested by Recital 13 of Dublin III, which provides that ‘[i]n accordance with the 1989 United Nations Convention on the Rights of the Child and with the Charter of Fundamental Rights of the European Union, the best interests of the child should be a primary consideration of Member States when applying this Regulation.’ Finally, even if the EU has not acceded to the CRC, all Member States are States parties to the Convention—a fact that led the Court to conclude (well before the Charter became legally binding) that the rights in the CRC are general principles of Community law (as it was then).⁹⁵ In this context, creating interpretative discrepancies that run counter to Member States’ obligations under the CRC is surely to be avoided. In sum, there are compelling arguments for using the full panoply of rights in the CRC as barometers of the best interests of the child.

Of course, not all the rights in the CRC will be relevant to any given assessment of the best interests of the child. Of likely relevance to the Dublin context are the rights of the child that are implicated by the status determination procedure and those that are relevant to reception conditions. In terms of the former, examples are the right of the asylum-seeking and refugee child to receive *appropriate* protection (as acknowledged by the Court in *Tarakhel*) and the right of the child to be heard in any judicial and administrative proceedings affecting the child.⁹⁶ In terms of the latter, examples are the right of the child to health, to social security, to an adequate standard of living and to education.⁹⁷ Also of potential relevance, given reception conditions in some Member States, is the right of the child not to be arbitrarily detained,⁹⁸ and various rights which, directly or indirectly, protect the child from coercion and violence.⁹⁹ The CEAS directives supply some guidance on how these rights should be given effect to, even if the directives are not in perfect alignment with international child rights law.¹⁰⁰

3.1.3 | Can transfer be presumed to be in the best interests of the child?

Can transfer, like indissociability, be *presumed* to be in the best interests of the child? Several nuances of the best interests principle would suggest not. First, while an action taken in furtherance of a right of the child can be presumed to be in the child’s best interest (notwithstanding the need to resolve any possible conflict between the child’s

⁹¹Article 52(3) of the Charter and Explanations Relating to the Charter of Fundamental Rights, above, n. 9.

⁹²Opinion 2/13 [2014] EU:C:2014:2454, para. 192.

⁹³*M.A.*, above, n. 83.

⁹⁴Committee on the Rights of the Child, General guidelines regarding the form and content of initial reports to be submitted by states parties under art 44, para 1(a) of the Convention’, CRC/C/5 (1991). This is also recognised by EASO, above, n. 77.

⁹⁵Case C-540/03, *European Parliament v. Council* [2006] ECLI:EU:C:2006:429.

⁹⁶Articles 22(1) and 12(2) CRC, respectively.

⁹⁷Articles 24, 26, 27 and 28 CRC, respectively.

⁹⁸Article 37(b) CRC.

⁹⁹Examples are the right of the child not to be forcibly separated from his/her parents in Article 9 CRC and the right of the child to protection from all forms of violence in Article 19 CRC.

¹⁰⁰For a critical assessment of the compatibility of the CEAS with the CRC, see C. Smyth, *European Asylum Law and the Rights of the Child* (Routledge, 2014). The EASO Guide, above, n. 77, also supplies useful guidance on how the rights of the child should be given effect to in the asylum procedure.

rights), an action that potentially jeopardises a right of the child must be scrutinised to ensure that the child's best interests are indeed a primary consideration. In light of what is commonly known about the failings of the CEAS, it is reasonable to contend that a Dublin transfer is an action that potentially jeopardises a range of child rights. For example, although the CJEU has held that the requirement in the recast Qualification Directive of an individual assessment means that even when a child's application for international protection is based on that of his/her parent(s) '[t]hose applications cannot therefore be subject to a single assessment',¹⁰¹ nonetheless a separate assessment of the child's situation does not routinely occur in all Member States.¹⁰² Another example relates to the deplorable reception conditions for families in certain Member States, including widespread immigration detention, which are well documented.¹⁰³ Therefore, it is hard to defend a general presumption that transfer to any Member State is in the best interests of the child.

In this regard, it should be pointed out that the rationale for a rebuttable presumption in respect of Article 4 Charter (Article 3 ECHR) situations does not neatly translate to the best interests context. In Article 4 cases, there is a high threshold below which human rights violations are tolerated, even if in *Tarakhel*-type situations the threshold is lowered. The high threshold allows for a presumption (even if strongly contested in the literature and by the evidence) that EU Member States operate on the right side of the threshold when it comes to their reception conditions and protection procedure. By contrast, in the best interests context, there is no threshold below which human rights violations are tolerated. Therefore, it cannot readily be presumed that transfer to any given State is consistent with the child's rights. This is not to suggest that the converse should be presumed—that transfer to any given State is inconsistent with the rights of the child. But it does favour an inquiry in each case.

Secondly, since a presumption operates to displace the burden of proof onto the claimant, it effectively places the obligation on the child (and/or his/her representatives) to conduct his/her own best interests assessment. This is inconsistent with the fact that the duty-bearer in the best interests context is the State, as is evident from the wording of Article 24(2) of the Charter. Admittedly, the Committee on the Rights of the Child has emphasised that the views of the child are significant in determining what is in the best interests of the child, depending on the age and maturity of the child.¹⁰⁴ This is also reflected in Article 24(1) of the Charter. However, this in no way implies that the child is responsible for ascertaining what is in his/her own best interests. Furthermore, the best interests principle operates *ex ante*, requiring the decision-maker to canvass all available options, identify which is best and *then* give primacy in decision-making to the best interests of the child.¹⁰⁵ This is hardly compatible with a requirement that the child mount an *ex post* challenge to a decision that has already been taken.

Thirdly, to establish a presumption that transfer is in the best interests of the child based on Dublin criteria that generally (with the exception of the family criteria, which are rarely applied) reflect the interest of the State in

¹⁰¹Case C-652/16, *Ahmedbekova* [2018] ECLI:EU:C:2018:801.

¹⁰²For a cross-section of the views of the Committee on the Rights of the Child on the failure of the State to separately assess the child's international protection needs, see: *A.B. v. Finland*, CRC/C/86/D/51/2018, Views of 12 March 2021, in which 'the Committee observe[d] that the formal and general reference to the best interests of the child by the Finnish Immigration Service, without having considered the author's views, reflects a failure to consider the specific circumstances surrounding the author's case and to assess the existence of a risk of a serious violation of the Convention against his specific circumstances', at para. 12.4; *W.M.C. v. Denmark*, CRC/C/85/D/31/2017, Views of 3 November 2020, in which the Committee found that Denmark had failed to properly consider the best interests of the child in the *non-refoulement* context by failing to adequately verify how the children would be treated on return; *I.A.M. v. Denmark*, CRC/C/77/D/3/2016, Views of 8 March 2018, in which the Committee held that the right of the child not to undergo female genital mutilation could not be made dependent on the mother's ability to resist family and social pressures.

¹⁰³See, e.g., European Council for Refugees and Exiles (ECRE) and Asylum Information Database (AIDA), *Housing Out of Reach? The Reception of Refugees and Asylum Seekers in Europe* [2019], available at https://asylumineurope.org/wpcontent/uploads/2020/11/aida_housing_out_of_reach.pdf. Of the last 10 Concluding Observations of the Committee on the Rights of the Child to EU Member States or non-EU Member State participants in the Dublin III Regulation, the issue of the detention of children in families seeking international protection has been raised in 7: Poland (CRC/C/POL/CO/5–6), Switzerland (CRC/C/CHE/CO/5–6), Czech Republic (CRC/C/CZE/CO/5–6), Luxembourg (CRC/C/LUX/CO/5–6), Hungary (CRC/C/HUN/CO/6), Portugal (CRC/C/PRT/CO/5–6) and Malta (CRC/C/MLT/CO/3–6).

¹⁰⁴General Comment no 12 (2009) on the right of the child to be heard, CRC/C/GC/12, para. 74.

¹⁰⁵In this regard, the Committee on the Rights of the Child distinguishes between the best interests assessment, which 'consists in evaluating and balancing all the elements necessary to make a decision in a specific situation for a specific individual child' and the best interest determination, which is the final decision itself. General Comment no 14, above, n. 86, para. 47.

immigration control is highly dubious.¹⁰⁶ It marks a retreat from the rights-based approach, previously discussed, with all the risks that that entails.

In contrast to these significant principled reasons against a rebuttable presumption that Dublin transfers are in the best interests of the child, there is one compelling argument for a rebuttable presumption. This is the argument from expediency. In practically all the Dublin cases discussed in Section 2, the Court has emphasised the aims of the Dublin Regulation, namely, avoiding ‘refugees in orbit’ and ‘forum shopping’ and ensuring a speedy designation of the Member State responsible. If there was a duty on every determining State to assess the human rights situation in the responsible State prior to transfer, then this would fly in the face of those aims and, as the Court put it in *N.S. and M.E.*, ‘add to the criteria for determining the Member State [...] another exclusionary criterion’.¹⁰⁷ The Court generally shores up the argument by noting (the fiction) that CEAS was conceived in a context making it possible to assume that all Member States observe fundamental rights. Against this backdrop, the Court is most unlikely to suggest (or Member States to tolerate a suggestion) that in cases involving children a completely novel approach is required.

In this context, a rebuttable presumption may just have to be accepted. Indeed, if the purpose of the best interests principle in the Dublin context is to pre-empt potential human rights violations that the child might face in the responsible State, and in human rights law the burden of proof lies on the person asserting the claim, then a rebuttable presumption is defensible on that ground. In other words, it is not enough to make generalised claims about the human rights situation in the responsible State; the claimant must make out an arguable case that, owing to his/her personal circumstances and/or the specific reception or status determination situation in the responsible State, transfer poses a foreseeable risk to one or more identified human rights. Indeed, this is required by the Committee on the Rights of the Child as an admissibility criterion in non-refoulement communications.¹⁰⁸ This was undoubtedly a problem in *M.A., S.A. and A.Z.*, where generalised predictions were made about the fundamental rights situation in the UK post-Brexit, along with a vague reference to the child’s health situation. The particular facts in that case may account for the Court’s rather abrupt findings on the best interests of the child. Hence, a rebuttable presumption constitutes a pragmatic middle ground.

3.2 | The sovereignty clause: impervious to the best interests of the child?

We saw previously that when a Dublin transfer cannot proceed on fundamental rights grounds, the determining State is not necessarily required to activate the sovereignty clause and itself take responsibility for the application. An interesting question is whether, if it is in the best interest of the accompanied child to remain in that State, the State could indeed be required to activate the sovereignty clause. This question was also considered by the Court in *M.A., S.A. and A.Z.*

Before analysing the Court’s response, it is necessary to address how it dealt with a prior question. The Court was asked whether the fact that the responsible State has notified its intention to withdraw from the EU obliges the determining State to itself examine the application under the sovereignty clause in Article 17(1). The Court underscored the discretionary nature of the article, noting that the option to trigger the article was ‘not subject to any particular condition’ since it was ‘intended to allow each Member State to decide, in its absolute discretion, on the basis of political, humanitarian or practical considerations, to agree to examine an asylum application even if it is not responsible under the criteria laid down in that regulation’.¹⁰⁹ This is more or less of a piece with the Court’s

¹⁰⁶See the discussion of the statistics relating to the Dublin criteria at n. 1 above.

¹⁰⁷*N.S. and M.E.*, above, n. 6, para. 85.

¹⁰⁸A number of non-refoulement communications to the Committee on the Rights of the Child have been deemed inadmissible under art 7(f) of the Optional Protocol to the CRC because of a failure to substantiate the claim. For example, in *AS v. Denmark*, the Committee noted ‘the author’s claims based on articles 2, 6, 7 and 8 of the Convention [...] are general in nature and do not provide any information or arguments to justify how his rights under the invoked provisions would be violated in the event of his deportation to Pakistan’. CRC/C/82/D/36/2017, Views of 8 November 2019, para. 9.3.

¹⁰⁹*M.A., S.A. and A.Z.*, above, n. 12, para. 58.

established jurisprudence although the emphasis on the State's absolute discretion follows the *Puid* rather than the *N.S. and M.E.* line, discussed earlier.

However, in a subsequent question, the Court was asked whether Article 6(1) must be interpreted as meaning that it requires the determining State, which is not responsible under the criteria, to take into account the best interests of the child and to itself examine the application under Article 17(1) of the Regulation. The Court responded, not by exploring the implications of Article 6(1) (or indeed the Charter) for Article 17(1), but by inferring from its earlier finding on Article 17(1) that the best interests had no traction. It stated that '[g]iven that it is already apparent' that Article 17(1) is optional, 'it must be held that considerations relating to the best interests of the child can also not oblige a Member State to use that option and itself examine an application for which it is not responsible'.¹¹⁰ In other words, the Court deduced from its general proposition about Article 17(1), made in a context in which there were no Charter rights at issue, that the best interests of the child cannot oblige a Member State to trigger the sovereignty clause. I contend that this is an invalid deduction when assessed from the point of view of the best interests principle in its statutory and Charter form.

The Court made no attempt to interpret Article 17(1) schematically, in light of the horizontal best interests clause in Article 6(1), which requires the best interests of the child to be a primary consideration in 'all procedures provided for in this Regulation'. Perhaps the Court considered that Article 17(1) is a domestic procedure acknowledged but not provided for in the Regulation and thus outside the scope of Article 6(1). However, such an interpretation seems at odds with the Court's finding in *N.S. and M.E.* that the sovereignty clause 'forms an integral part of the Common European Asylum System', that it 'must be exercised in accordance with the other provisions of that regulation'.¹¹¹ Moreover, such an interpretation is at variance with the scope of the Charter principle of the best interests of the child, as previously discussed.

Indeed, the key passages from the judgment quoted above signal a confusion, not just about the scope, but also about the legal status and weight of the best interests principle. The Court's inference that 'considerations relating to the best interests of the child can also [along with political, humanitarian or practical considerations] not oblige a Member State to use [the Article 17(1)] option' suggests, not only that the best interests principle is akin to these other matters, but that the principle has no particular weight in the scheme of competing interests. On the contrary, as well as being a rule of procedure and an interpretative legal principle, the Committee on the Rights of the Child has identified that the best interests principle is a substantive right (and hence, in co-relative terms, an obligation).¹¹² Moreover, the best interests of the child is 'a primary consideration', meaning that 'the child's interests have high priority and are not just one of several considerations. Therefore, a larger weight must be attached to what serves the child best'.¹¹³ Accordingly, the principle cannot be equated with non-binding 'political, humanitarian or practical considerations'.

As discussed in the next section, there are certainly some circumstances in which the best interests of the child outweigh the competing value of mutual trust. In such circumstances, activating Article 17(1) is one option available to the transferring State among the several options identified to date by the European courts, namely:

1. No transfer, determining the Member State elects to take responsibility for the applicant (*N.S. and M.E.* and subsequent cases);
2. No transfer, continued examination of the other Dublin criteria to find the Member State responsible, determining State assumes responsibility via sovereignty clause if undue delay (*N.S. and M.E.*);
3. Transfer but subject to individualised and specific assurances (*Tarakhel*);
4. Mitigating actions prior to, during and after transfer; suspension of transfer; assumption of responsibility by default if the delay extends to six months (*C.K.*).

¹¹⁰*Ibid.*, para. 71.

¹¹¹*N.S. and M.E.*, above, n. 6, paras. 65 and 66.

¹¹²General Comment no 14, above, n. 86, para. 6.

¹¹³*Ibid.*, para. 39.

Some of the above options may not be appropriate on the facts. For example, the child's situation may not fall within the C.K. factual matrix. Others may have a negative impact on the child. For example, the options involving delay are unlikely to be in the best interests of the child.¹¹⁴ It may therefore come down to a choice between individualised assurances or triggering Article 17(1). It is not possible to say in the abstract which option is in the best interests of the child.¹¹⁵ But it is certainly not in the best interests of the child to exclude one of them (including from judicial review) and thereby narrow the range of potential options.

In summary, the rather crude position adopted by the Court in *M.A., S.A. and A.Z.* that the best interests of the child can never cause a State to activate the sovereignty clause offends the scope, legal status and weight of the best interests principle. A more refined understanding of the principle—and one that gives due regard to its constitutional status in EU law—leads to a different conclusion. Unfortunately, in the 2023 case of *L.G.*, the Court confirmed its position in *M.A., S.A. and A.Z.*¹¹⁶ Although the Court in *L.G.* found that Article 17(1) does not *preclude* the legislation of a Member State from requiring the competent national authorities to take responsibility for an application on the sole ground of the best interests of the child, nor does Article 6(1) *oblige* the legislation of a Member State to do so:

Article 6(1) of the Dublin III Regulation does not require a Member State which is not responsible, under the criteria laid down in Chapter III of that regulation, for examining an application for international protection to take into account the best interests of the child and to examine that application itself, pursuant to Article 17(1) of that regulation.

The next section returns to the question of the weight of the best interests principle and whether it can ever outweigh mutual trust in the Dublin context.

3.3 | Mutual trust: always a trump card?

Let us begin by recalling that the statutory and Charter (and CRC) iterations of the best interests principle require it to be 'a primary consideration' in all actions concerning children. The use of the indefinite article ('a'), as opposed to 'the') and the term 'primary' (as opposed to 'paramount') indicates that the best interests of the child may have to be weighed against other primary considerations, such as mutual trust, to evaluate which of the competing interests should prevail. However, in its 2022 judgment of *XXXX*, the Court appeared to reject the possibility that the best interests of the child might prevail.¹¹⁷

The applicant in this case had been granted refugee status in Austria and then moved irregularly to Belgium to join his two daughters, one of whom was a minor and both of whom were subsequently granted subsidiary protection. He then applied for international protection in Belgium, which was refused pursuant to Article 33(2)(a) of the recast Asylum Procedures Directive (APD), a discretionary provision that allows Member States to consider an application inadmissible if another Member State has already granted international protection. The question referred to the Court was whether, in circumstances where the applicant has sole parental responsibility for and lives with a minor child, Articles 7 (family unity) and 24(2) (best interests of the child) of the Charter preclude reliance on the admissibility provision.

¹¹⁴In *M.A., B.T. and D.A.*, above, n. 79, the Court observed that it was in the best interests of unaccompanied minors 'not to prolong unnecessarily the procedure for determining the Member State responsible', at para. 61. The same holds true for accompanied minors.

¹¹⁵In General Comment no 14, above, n. 86, the Committee on the Rights of the Child notes that the best interests of the child 'should be adjusted and defined on an individual basis, according to the specific situation of the child or children concerned, taking into consideration their personal context, situation and needs', para. 32.

¹¹⁶*L.G.*, above, n. 14.

¹¹⁷*XXXX*, above, n. 6.

The Court began by emphasising the importance of the principle of mutual trust in the Area of Freedom, Security and Justice, characterising Article 33(2)(a) of the recast APD as ‘an expression of the principle of mutual trust’.¹¹⁸ Following *Ibrahim*, it noted the Article 4 Charter exception to mutual trust and reiterated the ‘extreme material poverty’ threshold to which living conditions must fall before Article 4 is engaged. It then observed that the case did not seem to be about the relative merits of international protection in Austria and Belgium but rather the applicant’s ‘wish to ensure family unity in Belgium’.¹¹⁹ In the central passage of the judgment it held:

Infringement of a provision of EU law conferring a substantive right on beneficiaries of international protection which does not result in an infringement of Article 4 of the Charter, even if established, does not prevent the Member States from exercising the option available to them under Article 33(2) (a) of [the recast APD ...]. In that regard, unlike protection against any inhuman or degrading treatment enshrined in Article 4 of the Charter, the rights guaranteed by Articles 7 and 24 of the Charter are not absolute in nature and may therefore be subject to restrictions under the conditions set out in Article 52(1) of the Charter.¹²⁰

This finding was in direct contrast to AG Pikamäe’s opinion that the exception to the use of the inadmissibility provision foreseen in *Ibrahim* extended in principle to all fundamental rights and hence that:

[...] if an applicant for international protection will be exposed, in the event of his or her return to the Member State which initially granted him or her refugee status or subsidiary protection, to a serious risk of being subjected to treatment contrary to Article 7 of the Charter, read in conjunction with Articles 18 and 24 thereof, the Member State with which the new application has been lodged should not be able to declare that application inadmissible.¹²¹

Whereas AG Pikamäe considered that such a risk existed, in part because he considered that the applicant had no right of residence in Belgium as a derived right under the recast Qualification Directive (QD), the Court found the opposite: that the applicant was entitled to reside in Belgium as a derived right under the recast QD. Thus, despite finding that a risk of a violation of Articles 7 and 24 of the Charter ‘even if established’ does not displace mutual trust, the Court went on to negate that risk. This allowed the Court to uphold its established position on mutual trust while avoiding a blatant violation of the right to family unity and the principle of the best interests of the child. Whether the Court or the AG was correct in their respective interpretations of the recast QD—a discussion for another day—it is questionable whether the Court’s bipolar analysis of rights as absolute or limitable accurately captures the complexities of the best interests principle.

Certainly, as acknowledged at the outset, the principle of the best interests of the child is not absolute; but nor is it equivalent to all other competing interests. As the CJEU itself has previously observed and as was reiterated by AG Pikamäe, ‘whilst alone they cannot be decisive, such interests certainly must be afforded significant weight’.¹²² Indeed, the principle of the best interests of the child fits poorly within the typical ranking of human rights into absolute and non-absolute rights. This can be appreciated by recalling the rights-based approach to the best interests of the child, whereby the best interests assessment draws attention to the rights of the child implicated by the decision at hand. In this regard, it is noteworthy that the fullest and most authoritative source of the rights of the child, the CRC, contains no derogation provision and draws no distinction between ‘ordinary’ human rights and ‘absolute’ ones. To the contrary, the Committee on the Rights of the Child refers to ‘the absolute nature of the obligations

¹¹⁸*Ibid.*, para. 29.

¹¹⁹*Ibid.*, para. 33.

¹²⁰*Ibid.*, para. 36.

¹²¹*Ibid.*, ECLI:EU:C:2021:780, para. 33.

¹²²*Ibid.*, para. 55.

deriving from the Convention and their *lex specialis* character',¹²³ insisting that 'there is no hierarchy of rights in the Convention'.¹²⁴

Furthermore, just as the ECtHR non-refoulement jurisprudence encompasses a broader range of rights than the CJEU case-law does in the Dublin context (namely, violations which cause irreparable harm including 'flagrant breaches' of 'ordinary rights'), so the Committee on the Rights of the Child has provided:

States shall not reject a child at a border or return him or her to a country where there are substantial grounds for believing that he or she is at real risk of irreparable harm, such as, *but by no means limited to*, those contemplated under articles 6 (1) and 37 of the Convention on the Rights of the Child, either in the country to which removal is to be effected or in any country to which the child may subsequently be removed.¹²⁵

Article 6(1) CRC relates to the right to life. It must be read schematically in light of Article 6(2) which provides that 'States Parties shall ensure to the maximum extent possible the survival and development of the child.' Indeed, like the principle of the best interests of the child, the Committee on the Rights of the Child considers that the right to life, survival and development constitutes a 'general principle' of the Convention.¹²⁶ The right to survival and development underscores the positive dimension of the right to life and its close association with various socio-economic rights, such as the right to health and the right to an adequate standard of living. Accordingly, Article 6 (1) CRC is broader in scope than the right to life in general human rights law. The same is true for Article 37 CRC, which relates to the prohibition of torture or other cruel, inhuman or degrading treatment or punishment *and* the prohibition of unlawful or arbitrary deprivation of liberty. As this provision encompasses two discrete rights and, bearing in mind that the threshold level of harm for the purposes of the prohibition of inhuman or degrading treatment is relative and likely to be lower in the case of children (as per the ECtHR in *Tarakhel*), it follows that the scope of Article 37 CRC is broader than its counterpart in general human rights law. Hence, the rights explicitly mentioned by the Committee on the Rights of the Child as engaging the non-refoulement guarantee are more expansive than their counterparts in general human rights law.

Moreover, they are just *examples* of irreparable harm, from which others could be extrapolated. I have argued elsewhere, for example, that violation of any of the rights in the Convention which aim to protect the child against coercion and violence always entails irreparable harm.¹²⁷ On this analysis, whether or not the principle of the best interests of the child is limitable and thus amenable to being trumped by mutual trust depends on which rights are implicated by the action under consideration. One could go further and argue that, since the best interests principle 'is aimed at ensuring both the full and effective enjoyment of all the rights recognised in the [CRC] and the holistic development of the child', any serious violation of any of the rights in the CRC potentially entails irreparable harm.¹²⁸ Indeed, in the international refugee law context, this is the position advanced by leading commentators.¹²⁹ On this analysis, whether or not the principle of the best interests of the child is limitable and thus amenable to being trumped by mutual trust depends on the gravity of the violation. Either way, and *pace* the judgment of the Court in XXXX, mutual trust cannot automatically trump the best interests of the child.

¹²³Committee on the Rights of the Child, General Comment no 6 (2005), Treatment of unaccompanied and separated children outside their country of origin, CRC/GC/2005/6, para. 16.

¹²⁴Committee on the Rights of the Child, General Comment no 14, above, n. 86, para. 4.

¹²⁵Committee on the Rights of the Child, General Comment no 6, above, n. 123, para. 27, reiterated in the Committee's joint General Comment with the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, above, n. 88, para. 46.

¹²⁶Committee on the Rights of the Child, General Guidelines, above, n. 94.

¹²⁷C. Smyth, 'The Human Rights Approach to Persecution and its Child-Rights Discontents', (2021) 20 *International Journal of Refugee Law*, 1.

¹²⁸Committee on the Rights of the Child, General Comment no 14, above, n. 86, para. 82.

¹²⁹See, e.g., G. Goodwin Gill, 'Unaccompanied Refugee Minors: The Role and Place of International Law in the Pursuit of Durable Solutions', (1995) 3 *International Journal of Children's Rights*, 405; J. McAdam, *Complementary Protection in International Refugee Law* (Oxford University Press, 2007); J. Hathaway and M. Foster, *The Law of Refugee Status* (Cambridge University Press, 2nd edn, 2014); J. Pobjoy, *The Child in International Refugee Law* (Cambridge University Press, 2017).

4 | CONCLUSION

The case-law of the CJEU operates like a pincer movement to minimise the disruptive potential of the best interests principle in the context of mutual trust in the Dublin III Regulation. The Court so far has established that the best interests of the child can be reduced to family unity, that family unity can be trumped by mutual trust and that a Member State does not have to take responsibility for an application even if it is clearly in the best interests of the child to do so. One wonders, then, what is the point of the statutory references to the best interests of the child in the Dublin Regulation (and all CEAS legislation), not to mention the Charter iteration of the principle and its progenitor, the CRC. However, the case-law relating to mutual trust in the asylum field is highly contested and evolving and it is likely that the Court will continue to revisit, not only its general jurisprudence on the relationship between fundamental rights and mutual trust, but its specific jurisprudence on the relationship between the best interests of the child and mutual trust. Through a critical child-rights analysis of the cases, this contribution has teased out the implications of the scope, legal status, weight and *lex specialis* nature of the best interests principle for Dublin transfers. In so doing, it has signalled how the key issues could be dealt with differently.

It is to be regretted that the Proposal for a Regulation on Asylum and Migration Management fails to grapple with any of these matters.¹³⁰ Indeed, the sovereignty clause is reproduced *verbatim* and the indissociable clause is amended only to reflect the rebuttable presumption established by the Court in *M.A., S.A. and A.Z.*¹³¹ Moreover, in the current negotiating environment the Commission's proposal is likely to be negotiated down and not up, from a fundamental rights perspective. In this context, it falls to the Court to be less tolerant of the fundamental rights fall-out from mutual trust and more willing to review whether the transfer of families with children and associated issues are *really* in the best interests of the child. Otherwise, the best interests principle risks becoming redundant, or worse, 'a vehicle for the furtherance of the interests or ideologies of others, not of the interests of children'.¹³² As Guardian of the Treaties (and hence of the best interests of the child), could the Court really stand over such a situation?

ACKNOWLEDGEMENTS

Open access funding provided by IReL.

ORCID

Ciara Smyth  <https://orcid.org/0000-0002-2973-2534>

How to cite this article: Smyth C. The Dublin Regulation, mutual trust and fundamental rights: No exceptionality for children? *Eur Law J.* 2022;28(4-6):242-262. doi:[10.1111/eulj.12469](https://doi.org/10.1111/eulj.12469)

¹³⁰Commission proposal, above, n. 2.

¹³¹*Ibid.*, Articles 25(1) and 26(2) respectively. The latter establishes that indissociability prevails 'unless it is demonstrated that this is not in the best interests of the child'.

¹³²J. Eekelaar, 'The Interests of the Child and the Child's Wishes: The Role of Dynamic Self-determinism', (1994) 8 *International Journal of Law and the Family*, 42, 58.