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The Legality of Detention of Asylum Seekers under the Dublin III Regulation

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Introduction*

The human right to liberty faces a particularly difficult test when confronted with the exercise of state power in the area of migration control. States regularly detain foreign nationals entering their territory or residing there without authorisation, either with a view to deporting them or pending the examination of an asylum application. In the European Union (EU), Member States' powers to deprive individuals of their liberty for reasons related to their status as irregular migrants or asylum seekers stem from and are confined by EU law adopted in the area of freedom, security and justice. More particularly, the EU asylum *acquis* sets out the scope and limits of lawful detention of foreigners entering Member States' territory to seek international protection.

In this regard, the very basis of detention throughout the various stages of the asylum process remains a contentious issue, both from an EU law and international human rights law perspective. The right to liberty defines not only the modalities of detention, but also the lawful basis, if any, of states' detention powers vis-à-vis applicants for international protection.

This briefing discusses the new Article 28 of the Dublin III Regulation¹ on detention, which only expressly permits detention for the purpose of securing transfer procedures when there is a "significant risk of absconding" and subject to necessity, proportionality and insofar as less coercive alternative measures cannot be applied effectively. It also sketches out the applicable safeguards and conditions of detention under the Dublin III Regulation. The briefing then analyses the legality of detention in Dublin procedures under Article 5 ECHR, to submit that asylum seekers subject to a Dublin procedure/transfer may not be detained either as persons effecting an unauthorised entry or for the purpose of removal under the ECHR.

For the purpose of examining the legality of Dublin detention, this briefing will not cover all possible scenarios where the Dublin Regulation would be applicable. As it refers to the "detention of asylum seekers", its analysis will cover cases where a Member State bound by the EU asylum *acquis* and the EU Charter would detain a person who has applied for international protection on its territory for the purpose of transferring him or her to another Member State.²

The Dublin Regulation and its interaction with human rights standards

In the EU context, the right to liberty as established in international human rights law raises specific questions as regards the legality of the detention of asylum seekers in the context of the Dublin III

* ECRE thanks Professor Cathryn Costello for sharing drafts and Lilian Tsourdi for insightful comments. All errors remain ECRE's own.

¹ Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or stateless person (recast), *OJ* L180/31.

² This would exclude 2 different cases: (a) scenarios where a person who has *not* applied for international protection is detained pending a Dublin transfer; and (b) scenarios involving Denmark, Ireland and Dublin Associated States as sending countries, as they are not bound by the EU asylum *acquis*. It should be noted that the United Kingdom and Ireland have opted out of the recast asylum legislation except for the recast Dublin Regulation and the recast EUODAC Regulation, while Denmark is only bound by the recast Dublin III Regulation and the recast EUODAC Regulation through an international agreement. The United Kingdom remains bound by Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, *OJ* 2003 L 31/8, Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, *OJ* 2005 L 326/13 and Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, *OJ* 2004 L 304/12. Ireland is only bound by Council Directives 2004/83/EC and 2005/85/EC. However, according to Article 28(4) of the Dublin III Regulation, Articles 9, 10 and 11 of Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), *OJ* 2013 L180/96 which lay down the guarantees with regard to procedural guarantees, detention conditions and detention of vulnerable persons and of applicants for international protection with special reception needs shall apply "as regards the detention conditions and the guarantees applicable to persons detained, in order to secure the transfer procedures to the Member State responsible".

Regulation. The Regulation, which repeals the Dublin II Regulation³ and is applied as of 1 January 2014, sets out the criteria and mechanisms for determining the Member State responsible for examining an application for international protection in the EU. These rules, also known as the “Dublin system”, apply to all 28 EU countries and four Schengen Associated States: Switzerland, Liechtenstein, Iceland and Norway (hereinafter ‘Member States’). Under the Dublin system, a single Member State in the EU is determined as responsible for an asylum seeker under defined criteria and has an obligation to receive that asylum seeker and examine his or her application for international protection, if the Member State in which she is present requests so.⁴ This responsibility-allocation mechanism carves an important nuance into the way states’ legal obligations towards asylum seekers are understood, as it legally dissociates the state where the asylum seeker is physically present from the ‘responsible state’, where her claim is to be processed according to the criteria laid down in the Dublin III Regulation.

During the process of determination of the Member State responsible and/or for the purposes of the applicant’s removal thereto, asylum seekers are in many cases detained in the Member State where they are present.⁵ The legality of such detention must be assessed in light of Member States’ obligations under other provisions of the EU asylum *acquis* and the EU Charter of Fundamental Rights, as well as under international human rights law on the right to liberty.

It is crucial to bear in mind the interaction between the Dublin system and human rights standards at two levels. Firstly, the development of fundamental rights protection in EU law is built on the European Convention on Human Rights (ECHR) and its interpretation by the European Court of Human Rights (ECtHR), general principles of EU law as developed by the Court of Justice of the European Union (CJEU) based on the ECHR and the common constitutional traditions of the EU Member States and the EU Charter of Fundamental Rights.⁶ In this respect it is important to emphasise that the rights contained in the Charter of Fundamental Rights of the European Union are given the same “meaning and scope” to their corresponding ECHR rights, subject to the possibility for EU law to confer higher levels of protection.⁷

Secondly, the Lisbon Treaty has elevated the constitutional value of the EU Charter in EU law by conferring upon it equal status to that of the Treaties.⁸ As EU primary law, the Charter takes priority over EU secondary legislation such as the Dublin Regulation, as well as national law.⁹ By virtue of that primacy, any conflicting provision in secondary EU legislation or national law must be set aside.¹⁰ Through this guarantee, the Treaty on European Union (TEU) requires effective scrutiny of its legislative instruments by ECHR and EU Charter standards.

As mentioned, standards laid down in the EU asylum *acquis* may not be read in a vacuum and must be interpreted in light of Member States’ general obligations to observe international law and fundamental rights. These obligations may qualify or even contradict the letter of legislative provisions, not least in the Dublin system, which often appears to distort human rights guarantees through its own standards by attempting to create a state of exceptionality for the persons falling within its scope. A clear example is the Dublin II Regulation’s presumption of compliance with human rights standards across all Member States, one of the key principles underpinning the Dublin system. Both the ECtHR and the CJEU found that such a presumption must necessarily be rebuttable and imposed unequivocal constraints on the legality of transfers of asylum seekers to Member States

³ Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ 2003 L50/1.

⁴ Article 18 Dublin III Regulation details the different “take charge” and “take back” requests a Member State may issue to order the transfer of an asylum seeker.

⁵ For an overview, see AIDA, *Mind the Gap: An NGO perspective on challenges to accessing protection in the Common European Asylum System, Annual Report 2013/2014*, available at: <http://bit.ly/1GxadWk>, 68.

⁶ CJEU, Case 29/69 *Stauder*, Judgment of 12 November 1969; Case C-279/09 *DEB*, Judgment of 22 December 2010, para 35.

⁷ Article 52(3) EU Charter.

⁸ Article 6(1) Treaty on European Union (TEU).

⁹ CJEU, Case 6/64, *Costa v ENEL*, Judgment of 15 July 1964.

¹⁰ CJEU, Case C-221/89, *Factortame II*, Judgment of 25 July 1991.

where they face real risks of serious violations of Article 3 ECHR or Article 4 of the EU Charter respectively.¹¹

Yet, while the legal questions with regard to Dublin transfers so far have mainly revolved around their compatibility with the prohibition of *refoulement* in human rights law, other elements of the Dublin system need be placed under careful fundamental rights scrutiny as well. The permissibility of detention of asylum seekers for the purpose of transfer under the Dublin Regulation, which is common practice in the majority of Member States, is a highly contentious legal point to date in that regard.¹²

Grounds for detention under the Dublin Regulation

Prior to the entry into force of the Dublin III Regulation, detention was widespread in the absence of express provisions in EU law providing grounds for detention of asylum seekers subject to a Dublin procedure. For instance, Austria, Bulgaria, France, Germany, Hungary, Slovakia and the Netherlands made standard use of detention for the purposes of carrying out transfers under the Dublin II Regulation.¹³ The recast Regulation lays down the significant risk of absconding as the only ground for the detention of applicants in Dublin procedures, which constitutes one of the six permissible reasons for detaining asylum seekers in general under the recast Reception Conditions Directive.¹⁴

The Dublin III Regulation clarifies that Member States may not detain an applicant for the sole reason that he or she is subject to a Dublin procedure,¹⁵ mirroring the general prohibition on detaining an applicant for making an application for international protection.¹⁶ The only permissible ground for detention under Article 28(2) of the Regulation is securing transfer to the responsible Member State where there is a “significant risk of absconding”. Such detention may only be ordered following an individual assessment and subject to conditions of proportionality and necessity and insofar as alternatives to detention cannot be applied effectively. Moreover, detention must be in line with Article 31 of the 1951 Refugee Convention,¹⁷ which prohibits penalisation of refugees for illegal entry where they come directly from a territory in which they have a well-founded fear of persecution and present themselves directly to the authorities showing good cause for illegal entry. Evidently in the Dublin context, the applicability of Article 31 of the 1951 Refugee Convention is severely limited, given the onerous condition of coming “directly” from a place where refugees’ life or freedom was threatened.

The concept of “significant risk of absconding” merits closer consideration. Article 2(n) of the Dublin III Regulation defines “risk of absconding” as:

“[T]he existence of reasons in an individual case, which are based on objective criteria defined by law, to believe that an applicant or a third-country national or a stateless person who is subject to a transfer procedure may abscond.”¹⁸

However, the deliberate inclusion of the term “*significant*” introduces a difference of degree between this ground and the “risk of absconding” ground laid down in Article 8(3)(b) of the recast Reception Conditions Directive in respect of detention of asylum seekers in general.

¹¹ ECtHR, *MSS v Belgium & Greece* Application no. 30696/09, Judgment of 21 January 2011; *Tarakhel v Switzerland*, Application no. 29217/12, Judgment of 4 November 2014; CJEU, Joined Cases C-411/10 and C-493/10, *NS v Secretary of State for the Home Department*; *ME v Minister for Justice, Equality and Law Reform*, Judgment of 21 December 2011, para 94.

¹² For examples, see Belgium: EMN, *Alternatives to Detention*, December 2014, 27; Sweden: *AIDA Country Report Sweden: Second Update*, April 2015, available at: <http://bit.ly/1AAceVn>, 44; Austria: *AIDA Country Report Austria: Third Update*, December 2014, available at: <http://bit.ly/1HPdOm8>, 72.

¹³ C Costello, ‘Human Rights and the Elusive Universal Subject: Immigration Detention under International Human Rights and EU Law’ (2012) 19 Ind. J GLS 257, 286; ECRE, *Dublin II Regulation: Lives on Hold* (February 2013) available at: <http://bit.ly/1dzN27F>, 82-83.

¹⁴ Article 8(3)(f) recast Reception Conditions Directive.

¹⁵ Article 28(1) Dublin III Regulation.

¹⁶ Article 8(1) recast Reception Conditions Directive; Article 26(1) recast Asylum Procedures Directive.

¹⁷ Recital 20 Dublin III Regulation.

¹⁸ Article 2(n) Dublin III Regulation.

The identification of relevant objective criteria for the definition of a risk of absconding is problematic in practice. Examples may be drawn from criteria shared in the context of a comparative study carried out in 2014 by the Odysseus Network in Austria, Belgium, Lithuania, Sweden and the UK.¹⁹ Research revealed that Member States determine such a “risk of absconding” in return procedures with reference *inter alia* to the following factors: non-cooperative behaviour regarding obligations to leave the territory; previous criminal convictions; lack of documents; insufficient means of subsistence; insufficient ties to the country of residence. If some of these criteria seem dubious factors for evaluating the probability of the applicant’s absconding, the following is even more alarming: the UK deems failure to give satisfactory or reliable answers to immigration officers as conducive to absconding, while Austria considers that a risk exists where another Member State is responsible for the claim under the Dublin Regulation.²⁰

The criteria determining “risk of absconding” therefore tend to be overly broad,²¹ unclear and in some cases tenuously connected to factors conducive to determining the applicant’s future conduct. The risk of arbitrary detention of asylum seekers stemming from such uncertainty cannot be overstated. Yet the burden of proof of a significant risk of absconding lies with the state and requires an individualised and rigorous assessment.²² To that effect, the German Federal Court held in July 2014 that a “well-founded suspicion that the person intends to evade deportation” as provided in section 62(3) of the German Residence Act does not satisfy the threshold of such a significant risk of absconding.²³

Attempts to implement the “significant risk of absconding” criterion of Article 28(2) of the Dublin III Regulation in national law seem problematic. In Switzerland, for example, the draft Article 76a of the Foreign Nationals Act would allow detention under the Dublin Regulation where an applicant: (a) does not disclose his or her identity, lodges multiple applications under different identities, does not appear for interview on multiple occasions without good reasons, or does not respect other obligations towards the authorities; (b) has left the designated area; (c) has entered Switzerland in violation of an entry ban; (d) lodges an application after being expelled; (e) lodges an application with the purpose of delaying or frustrating return proceedings; (f) poses a threat to public order; (g) has been convicted of a crime; or (h) denies the possession of a residence permit or visa from another Dublin State or having applied for asylum in another Dublin State.²⁴ This definition of the “significant risk of absconding” seems overly broad and leaves significant room for detention, contrary to the restrictive wording of the Regulation.²⁵

Nevertheless, practice reveals that the absence of Dublin-specific criteria to define a significant risk of absconding in national legislation has not prevented Member States from detaining asylum seekers under the Dublin III Regulation. As of December 2014, at least 10 countries participating in the Dublin system had adopted no Dublin-specific criteria relating to the risk of absconding and continued to apply the general grounds for detention of asylum seekers, even though the Dublin III Regulation had been in force since the beginning of the year.²⁶ However, this approach has been sanctioned by national courts in Germany and Austria as incompatible with the Dublin Regulation.²⁷

In this regard, it is crucial to recall that the burden of proof is on Member States to establish not only the existence of a “significant risk of absconding” of the individual asylum seeker subject to a transfer procedure under the Dublin Regulation as the sole reason for detaining, but also the necessity and

¹⁹ Odysseus Network, *Alternatives to Immigration and Asylum Detention in the EU: Time for Implementation*, January 2015, available at: <http://bit.ly/1JX4hMm>, 72-74.

²⁰ *Ibid*, 72-73.

²¹ *Ibid*, 74.

²² See ECRE, *Amicus Curiae before the Czech Constitutional Court in Case 4 Azs 115/2014-40 Greka v Police of the Czech Republic*, February 2015, para 5.1. See also ECtHR, *Popov v France*, Applications nos. 39472/07 and 39474/07, Judgment of 19 April 2012.

²³ Bundesgerichtshof, V ZB 31/14, veröffentlicht am 23. Juli 2014, available at: <http://bit.ly/1GRGyMx>.

²⁴ Draft Federal Decree on the application of Regulation (EU) No 604/2013 [...], available in French at: <http://bit.ly/1lxQPiH>, Article 76a.

²⁵ See *AIDA Country Report: Switzerland*, April 2015, available at: <http://bit.ly/1eXYiev>, 28-29.

²⁶ European Migration Network, *The use of detention and alternatives to detention in the context of immigration policies: Synthesis Report for the EMN Focussed Study 2014*, available at: <http://bit.ly/1Ksa36I>, 17.

²⁷ See e.g. German Federal Court, V ZB 31/14, veröffentlicht am 23. Juli 2014, available at: <http://bit.ly/1GRGyMx>; Austrian Administrative High Court, VwGH 2014/21/00755, 19 February 2015.

proportionality of detention, as well as the ineffectiveness of less coercive measures. In particular, Recital 24 of the Dublin Regulation requires Member States to promote voluntary transfers. Despite its interpretative difficulties, an appropriate reading of Article 28 of the Dublin III Regulation should therefore leave very narrow scope for applying detention in Dublin procedures.

Guarantees and conditions of Dublin detention

Article 28(3) of the Dublin III Regulation details guarantees relating to the duration of detention in Dublin procedures. The provision states that detention may be applied “for as short a period as possible” and for “no longer than the time reasonably necessary to fulfil the required administrative procedures with due diligence until the transfer”.

More specific time-limits are laid down in the provision. The Member State detaining the applicant must submit a “take charge” or “take back” request within one month, which must be replied to by the requested Member State within two weeks; upon the expiry of which the request may be deemed as implicitly accepted. The transfer need be carried out within a maximum of six weeks from the date of acceptance of the request. Accordingly, under Article 28(3), detention of an asylum seeker subject to a Dublin procedure may never exceed a maximum period of three months.²⁸ Such a maximum duration of detention, however, seems to fit uneasily with the duty to detain applicants for “as short a period as possible” in the same provision of the Regulation, although it would undoubtedly serve to constrain Member States which currently detain applicants for periods exceeding three months.²⁹ Moreover, the length of detention should always be reviewed under Article 5 ECHR, which prohibits detention for a longer period than that required for the purpose pursued.³⁰ On that ground, the ECtHR has condemned countries such as Belgium for imposing unduly lengthy periods of detention under Dublin.³¹

Furthermore, the recast Regulation binds Member States to the detention standards set out in the recast Reception Conditions Directive for Dublin detention.³² These entail a number of procedural guarantees, ranging from notifying the applicant of the reasons for detention, providing for the possibility of judicial review and reviewing the legality of detention at reasonable intervals of time, as well as affording some form of access to free legal assistance.³³ Member States need also abide by the recast Reception Conditions Directive conditions by detaining asylum seekers subject to Dublin procedures in specialised facilities for the detention of asylum seekers insofar as possible and by allowing them contact with family members, legal advisors, non-governmental organisations and UNHCR.³⁴ Finally, the Regulation holds that detention must take account of special reception needs of vulnerable applicants and the best interests of children in order to be lawful.³⁵ These guarantees are expected to bring about welcome, albeit often limited, constraints on Member States’ powers to detain asylum seekers subject to Dublin procedures as well as asylum seekers in general.³⁶

The basis for detention of asylum seekers subject to a Dublin procedure in human rights law

Under Article 5(1)(f) ECHR, detention of a person in the broader immigration context is permissible:

- (a) “to prevent his effecting an unauthorised entry into the country”;
- (b) where “action is taken with a view to deportation or extradition.”

²⁸ Which may be prolonged with the duration of a suspensive appeal or review. See Article 28(3) Dublin III Regulation.

²⁹ For example, Austria has detained applicants in Dublin procedures for periods reaching up to six months. See *AIDA Country Report Austria: Third Update*, December 2014, available at: <http://bit.ly/1HPdOm8>, 72.

³⁰ ECtHR, *Saadi v United Kingdom*, Application no. 13229/03, Judgment of 29 January 2008, para 74. This is recalled in Article 28(3) Dublin III Regulation.

³¹ ECtHR, *Firoz Muneer v Belgium* Application no. 56005/10, Judgment of 11 April 2013; *MD v Belgium* Application no. 56028/10, Judgment of 10 November 2013.

³² Article 28(4) Dublin III Regulation, cross-referring to Articles 9, 10 and 11 recast Reception Conditions Directive.

³³ Article 9 recast Reception Conditions Directive.

³⁴ Article 10 recast Reception Conditions Directive.

³⁵ Article 11 recast Reception Conditions Directive.

³⁶ For a detailed discussion, see ECRE, *Information Note on Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*, June 2015, Forthcoming.

Prevailing ECtHR jurisprudence has grounded the permissibility of detention of asylum seekers in the first limb of Article 5(1)(f) ECHR, on the basis that their entry in the state's territory has not yet been authorised when they apply for international protection.³⁷ However, this legal fiction developed in the case of *Saadi v United Kingdom* is the subject of complex interactions between the ECHR and EU law, given that the EU asylum *acquis* unequivocally clarifies the issue of asylum seekers' authorisation of entry and stay. Both the recast Reception Conditions Directive and the recast Asylum Procedures Directive³⁸ require Member States to establish in their national law that applicants have a right to remain on their territory until a decision has been taken on their claim.³⁹ This clarification in the EU asylum *acquis* has cast considerable doubt upon the validity of the *Saadi* approach to asylum seekers' entry as "unauthorised", leaving Strasbourg's position in relative uncertainty. In the case of *Suso Musa v Malta*, the Court nuanced its conclusion in *Saadi* by finding "some merit" in the argument that asylum seekers cannot be effecting an "unauthorised entry" in a Member State that has enacted legislation conferring them a right to remain pending a decision on their application.⁴⁰ It held that:

"[W]here a State which has gone beyond its obligations in creating further rights or a more favourable position – a possibility open to it under Article 53 of the Convention – enacts legislation (of its own motion or pursuant to European Union law) explicitly authorising the entry or stay of immigrants pending an asylum application (see for example, *Kanagaratnam*, cited above, § 35 *in fine*, in relation to Belgian law), an ensuing detention for the purpose of preventing an unauthorised entry may raise an issue as to the lawfulness of detention under Article 5 § 1 (f)" [and that in such circumstances it would be] "hard to consider the measure as being closely connected to the purpose of the detention and to regard the situation as being in accordance with domestic law".⁴¹

Beyond *Suso Musa v Malta*, the relevance of EU law standards in the assessment of ECHR obligations has been consistently stressed by the ECtHR.⁴²

The Court's careful wording in *Suso Musa v Malta* has nevertheless made clear that the lawfulness of the detention of asylum seekers under Article 5 ECHR in an EU context is determined by EU asylum and immigration law granting applicants for international protection an authorisation to stay. In the context where a country has formally authorised entry and stay during the examination of an asylum claim, detention under this limb of Article 5(1)(f) ECHR would therefore be arbitrary.⁴³

Conversely, the ECtHR has much more firmly declared that the pre-deportation limb of Article 5(1)(f) ECHR may *not* be applied to asylum seekers, since the 1951 Refugee Convention precludes the expulsion of an asylum seeker before a final decision has been taken on their application.⁴⁴ Therefore, on the basis of the ECHR, applicants for international protection may in some cases be considered as persons trying to effect unauthorised entry but can never be viewed as persons who can be removed from the territory.

³⁷ ECtHR, *Saadi v United Kingdom*, para 65. For a critique, see C Costello, *The Human Rights of Migrants in European Law* (OUP 2015, Forthcoming), Chapter 7.

³⁸ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), *OJ* 2013 L180/60.

³⁹ Article 7(1) recast Reception Conditions Directive; Article 9(1) recast Asylum Procedures Directive. See also Recital 9 of the Return Directive, clarifying that asylum seekers are not illegally staying on the territory of Member States.

⁴⁰ ECtHR, *Suso Musa v Malta* Application no. 42337/12, Judgment of 23 July 2013, para 97.

⁴¹ *Ibid.*

⁴² See e.g. ECtHR, *MSS v Belgium and Greece*, paras 57-86 and 250; *Sufi and Elmi v United Kingdom* Applications nos. 8319/07 and 11449/07, Judgment of 28 June 2011, paras 30-32 and 219-226.

⁴³ Odysseus Network, Network, *Alternatives to Immigration and Asylum Detention in the EU: Time for Implementation*, 48-49. It should be noted that *Suso Musa v Malta* referred to a legal context whereby EU law had not yet defined the grounds for detention of asylum seekers. In any event, however, the existence of specific grounds to detain asylum seekers in the recast Reception Conditions Directive does not affect their right to remain on the territory of the Member State and therefore to be safeguarded from removal until a final decision has been taken on their application for international protection.

⁴⁴ ECtHR, *SD v Greece*, Application no. 53541/07, Judgment of 11 June 2009, para 62; *RU v Greece* Application no. 2237/08, Judgment of 7 September 2011, para 94, citing Articles 31 and 33 of the 1951 Refugee Convention.

Yet the coming into play of EU law creates even greater tensions with the ECHR than those already existing within Strasbourg case-law. The legal framework establishing the CEAS has been crafted with such complexity so as to create a peculiar category of asylum seekers that seems paradoxical under the ECHR: that of asylum seekers who may be expelled to another Member State bound by the Dublin Regulation before a substantive assessment of their claim has taken place (provided that such a transfer is compatible with international human rights standards).⁴⁵ In that light, the Dublin Regulation seems to create a specific group of applicants for international protection falling outside the scope of Article 5(1)(f) ECHR, which is not permissible under the ECHR. Article 28(2) of the Dublin Regulation permits detention for the purpose of securing transfer procedures from one EU Member State to another – which amounts to removal from the territory in all but name – even though the individual to be removed from the territory is still an asylum seeker with a right to reside in the Member State detaining him or her.⁴⁶

In the case of *Cimade and GISTI*, the CJEU interpreted Articles 2 and 3 of the 2003 Reception Conditions Directive as providing for “only one category of asylum seekers, comprising all third-country nationals or stateless persons who make an application for asylum” and found that:

“[N]o provision can be found in the directive such as to suggest that an application for asylum can be regarded as having been lodged only if it is submitted to the authorities of the Member State responsible for the examination of that application”.⁴⁷

Furthermore, the Court emphasised that the process of determining the responsible Member State under the Dublin Regulation starts as soon as an application is first lodged with a Member State, which means that an application for asylum is made “before the process of determining the Member State responsible begins”.⁴⁸ Interestingly, this right to remain on the territory of the sending Member State does not cease until the very moment when the asylum seeker has reached the territory of the responsible Member State, as the standards set out in the recast Reception Conditions Directive apply throughout the entirety of Dublin procedures.⁴⁹

In that respect, caution should be paid to interpretations of *Cimade and GISTI* by Belgian courts, finding that an asylum seeker who fails to comply, without good reason, with the necessary steps to effect his or her transfer to the responsible Member State can be deprived of material reception conditions.⁵⁰ The CJEU’s reading of the Reception Conditions Directive in no way introduces such a condition on treating the person subject to a transfer as an asylum seeker. Rather, *Cimade and GISTI* unequivocally recognises that asylum seekers are to be treated as such by the sending Member State until they have effectively reached the territory of the receiving country.

The Dublin system therefore appears to distort the categorical approach of Article 5(1)(f) ECHR as it legitimates pre-removal detention of a non-removable category of foreign nationals, i.e. asylum seekers who have not received a final decision on their asylum application. As practice reveals, several Member States tend to treat asylum seekers subject to a Dublin procedure as removable as soon as they determine that responsibility for examining their claim lies with another Member State, thereby contravening the right to remain guaranteed in the recast Reception Conditions Directive and Asylum Procedures Directive.⁵¹ This objectionable reading of the recast Reception Conditions Directive and Asylum Procedures Directive results in systematic detention of applicants subject to Dublin procedures, even in countries which normally refrain from detaining asylum seekers.⁵²

⁴⁵ C Costello, *The Human Rights of Migrants in European Law*, Chapter 7.

⁴⁶ Odysseus Network, *Alternatives to Immigration and Asylum Detention in the EU: Time for Implementation*, 55-56.

⁴⁷ CJEU, Case C-179/11 *Cimade & GISTI v Ministre de l’Intérieur*, Judgment of 27 September 2012, para 40.

⁴⁸ CJEU, *Cimade & GISTI v Ministre de l’Intérieur*, para 41.

⁴⁹ CJEU, *Cimade & GISTI v Ministre de l’Intérieur*, para 46. See also Recital 9 Dublin III Regulation.

⁵⁰ Labour Court of Liege, Judgment No 2013/CN/2 of 28 May 2013. This was then nuanced to suggest that material reception conditions cannot be withdrawn if the applicant lawfully ‘resists’ the transfer through an appeal: Labour Court of Brussels, Judgment 13/62/C of 17 September 2013.

⁵¹ Odysseus Network, *Alternatives to Immigration and Asylum Detention in the EU: Time for Implementation*, 69.

⁵² *Ibid.* By way of example, in 2013, Sweden detained a total 248 asylum seekers under the regular and accelerated procedures, and 1,239 persons under Dublin procedures: Caritas Sweden, *AIDA Sweden: Second Update*, 44.

On the other hand, the incoherence surrounding the legality of Dublin detention has not fully evaded judicial scrutiny from national courts. In Germany, the Administrative High Court of Saarbrücken and the German Federal Court found in 2014 that the criteria for pre-deportation detention cannot be used for the purpose of Dublin detention, in absence of objective criteria laid down in national law defining the significant risk of absconding as required by the Dublin III Regulation.⁵³

As the CJEU has held that a person is an applicant for international protection from the moment an application is made, regardless of whether it is made in the responsible Member State, and the ECtHR has held that no asylum seeker can be removed from the territory before a final decision has been taken, this leaves the most critical question unanswered: if Dublin detention is not pre-removal detention, then what?

The answer lies outside of Article 5(1)(f) ECHR, one might suggest. As the peculiar context of the EU asylum *acquis* precludes consideration of asylum seekers as “persons trying to effect unauthorised entry”, as argued by the applicants in the case of *Suso Musa v Malta*, it has been contended that detention of applicants lawfully residing on the territory of an EU Member State may only be envisaged under Article 5(1)(b) ECHR.⁵⁴ This provision permits “the lawful arrest or detention of a person for non-compliance with the lawful order of a court or *in order to secure the fulfilment of any obligation prescribed by law.*”

Yet in the Dublin context, the purpose of detention is to “secure transfer procedures” to return or send the applicant to the responsible Member State.⁵⁵ This objective of transferring an applicant is not tantamount to discharging an “obligation prescribed by law”. Member States are not under a duty to transfer asylum seekers to the country determined as responsible for their claim, given that the Dublin Regulation affords them a discretionary power to undertake responsibility for processing the application under its “discretionary clauses”.⁵⁶ The non-mandatory nature of Dublin transfers has been acknowledged by both ECtHR and CJEU.⁵⁷ This clarification is crucial in reminding that transferring an asylum seeker is not an obligation *per se* under Dublin. It is only a means towards the rapid and efficient processing of his or her application in the responsible Member State, rather than an end in itself.⁵⁸ Accordingly, securing the transfer of an applicant under the Regulation cannot be considered an “obligation prescribed by law” for the purposes of legitimising her detention under Article 5(1)(b) ECHR.

Where does Article 5 ECHR leave Dublin detention then? Insofar as it falls outside of the scope of both Article 5(1)(f) and Article 5(1)(b), Dublin detention should not be permissible under a correct reading of the right to liberty. The boundaries of lawful detention under the ECHR are of paramount importance, as they determine the legality of the provisions laid down in EU secondary legislation. The detailed provision in Article 28 of the Dublin III Regulation has restricted the grounds and clarified conditions of detention of asylum seekers subject to Dublin procedures. However, if such detention is not permitted by the ECHR, the Dublin III Regulation also contravenes Article 6 of the EU Charter, which has primacy over any Regulation or national law.

Concluding remarks

Detention in Dublin procedures is a stark illustration of the dangers attached to the EU’s often introspective approach to protection standards in the CEAS. At first glance, the newly introduced Article 28 of the Dublin III Regulation seems to raise red flags around vague detention grounds which create significant risks of abuse in implementation, and which will require lengthy processes of

⁵³ BGH, Beschluss vom 26. 6. 2014 - V ZB 31/14; LG Saarbrücken; Bundesgerichtshof, V ZB 31/14, veröffentlicht am 23. Juli 2014, available at: <http://bit.ly/1GRGyMx>.

⁵⁴ C Costello, ‘Immigration Detention: The Grounds Beneath our Feet’ in R Chambers, J King & V Mantouvalou (eds), *Current Legal Problems* (OUP 2015, Forthcoming).

⁵⁵ Article 28(2) Dublin III Regulation.

⁵⁶ Article 17 Dublin III Regulation. These were previously divided into “sovereignty clause” in Article 3(2) Dublin II Regulation and “humanitarian clause” in Article 15 Dublin II Regulation.

⁵⁷ ECtHR, *MSS v Belgium & Greece*, paras 338-340; CJEU, *NS/ME*, para 65.

⁵⁸ C Costello, ‘Courting Access to Asylum in Europe: Recent Supranational Jurisprudence Explored’ (2012) 12:2 HRLR 287, 314; M Mouzourakis, “We Need to Talk about Dublin”: Responsibility under the Dublin System as a Blockage to Asylum Burden-Sharing in the European Union’ (2014) RSC Working Paper Series No 105, 26.

clarification through legislation and litigation before national courts and the CJEU. Further clarification is needed with regard to the threshold of “significant risk of absconding” and its requisite degree of difference from a mere “risk of absconding”. A significant risk should be corroborated by evidence conducive to an applicant’s intention to abscond. It should also be recalled that, in addition, Member States would need to prove that detention is necessary and proportionate and that less coercive measures may not effectively be applied in such a case.

Yet clarification should not be equated with legitimization. The complexity surrounding the provisions of the Dublin Regulation, as any other measure of the EU asylum *acquis*, may tempt one to read the instrument as a detailed, comprehensive body of rules that may sufficiently regulate the allocation of responsibility for asylum applications in its own terms. Restricting Dublin’s permeability to international standards should be resisted, however, especially when those standards form the bedrock of the EU’s own constitutional order. Under an appropriate reading of Article 6 of the EU Charter, the legality of detaining asylum seekers subjected to a Dublin procedure has not been established in accordance with the right to liberty, as laid down in Article 5 ECHR and interpreted by the ECtHR.⁵⁹

⁵⁹ Strikingly, Recital 39 Dublin III Regulation, stating that the “Regulation respects the fundamental rights [...] acknowledged, in particular, in the Charter of Fundamental Rights”, makes no reference to Article 6 of the EU Charter.