



**COMMENTS FROM THE EUROPEAN COUNCIL ON
REFUGEES AND EXILES**

on the

**European Commission Proposal to recast the Dublin
Regulation**

April 2009

1. Introduction

On 3 December 2008, the European Commission released its proposed recast¹ of the Dublin Regulation,² cornerstone of the Dublin system.³ This recast will undergo considerable scrutiny during the codecision procedure, during which a range of further amendments will be considered. To be adopted, a duly revised text must receive joint approval from the Parliament and the Council.

The Dublin Regulation aims to “*determine rapidly the Member State responsible [for an asylum claim]*”⁴ and provides for the transfer of an asylum seeker to that Member State.

While the Commission’s proposal would introduce significant humanitarian reforms, it fails to address the system’s underlying flaws. The Dublin system remains an impediment to an efficient, harmonised and humane Common European Asylum System (‘CEAS’).⁵ This paper reviews the state of the Dublin system, examines the proposed recast and makes further recommendations within the context of the Regulation.

1.1 Unsuitability of the Dublin System

The Dublin system is an automated intra-European application of the concept of ‘protection elsewhere,’⁶ based on the assumption that all Member States provide adequate protection to those who need it. Responsibility for examining asylum claims is allocated to the Member State that “*played the most important part in the entry or residence of the person concerned.*”⁷ This arbitrary

¹ Commission (EC), *Proposal for a Regulation of the European Parliament and of the Council establishing an application for international protection lodged in one of the Member States by a third-country national or a stateless person (Recast)*, COM (2008) 0243 final, 3 December 2008 (‘Dublin Regulation recast or recast’).

² Council Regulation (EC) 343/2003 of 18 February 2003 establishing the criteria and mechanism for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national [2003] OJ L 50/1 (‘Dublin Regulation’ or ‘Regulation’, elsewhere ‘Dublin II Regulation’).

³ The Dublin system consists of the Dublin Regulation, Council Regulation (EC) 2725/2000 of 11 December 2000 concerning the establishment of “EURODAC” for the comparison of fingerprints for the effective application of the Dublin Convention [2000] OJ L 316, Commission Regulation (EC) 1560/2003 of 2 September 2003 laying down detailed rules for the application of Council Regulation (EC) 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national [2003] OJ L 222, 3, and Council Regulation (EC) 407/2002 of 28 February 2002 laying down certain rules to implement Regulation (EC) 2725/2000 concerning the establishment of “EURODAC” for the comparison of fingerprints for the effective application of the Dublin Convention [2002] OJ L 62/1.

⁴ Dublin Regulation 343/2003, recital 4.

⁵ See ECRE, *Sharing Responsibility for Refugee Protection in Europe: Dublin Reconsidered*, March 2008 <http://www.ecre.org/files/Sharing%20Responsibility%20Dublin%20Reconsidered.pdf> (‘Sharing Responsibility’).

⁶ See Rosemary Byrne, Gregor Noll & Jens Vedsted-Hansen (eds), *New Asylum Countries? Migration Control and Refugee Protection in an Enlarged European Union* (Kluwer Law International, The Hague) 2002, p 10; Eva Kjaergaard, ‘The Concept of Safe Third Country in Contemporary European Refugee Law’ (1994) 6 *IJRL* 4; Nina Lassen & Jane Hughes (eds) *Safe Third Country Policies in European Countries* (Copenhagen) 1997; Rosemary Byrne & Andrew Shacknove, ‘The Safe Third Country Notion in European Asylum Law’ (1996) 9 *HHRJ* 185; Michigan Guidelines on Protection Elsewhere, Guideline no. 3 (2007).

⁷ Commission (EC), *Evaluation of the Dublin Convention’ (Staff Working Paper)*, COM (2001) 756, 13 June 2001 (‘2001 Evaluation’); Commission (EC), *The future Common European Asylum System (Green Paper)*, COM (2007) 301 final, 06 June 2007 (‘Green Paper’), p 10. International law, however, does not require asylum seekers to apply for protection from the first country able to provide it: “[A]sylum should not be refused solely on the ground that it could be sought from another state.” UNHCR Executive Committee, 30th sess, *Refugees Without an Asylum Country*, Conclusion on International Protection No 15 (XXX), UN Doc A/AC.96/572 (16 October 1979), (h)(iii)-(iv). ECRE has repeatedly expressed concern that the mechanical application of safe third country agreements risks abrogating a State’s protection obligations: ECRE, *Safe Third Countries: Myths and Realities*, February 1995 <http://www.ecre.org/files/s3c.pdf>; ECRE, *Comments on the amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing Refugee Status*, March 2005 http://www.ecre.org/files/ECRE_comments_minimum_standards_directive.pdf. The European Court of Human Rights has stated that States must evaluate the risk of ‘chain refoulement’ when contemplating a Dublin transfer: *T.I. v U.K.*, Application No. 43844/98, 7 March 2000.

administrative focus disregards fundamental rights of asylum seekers and the need to base the CEAS on solidarity and integration. The consequences are serious for asylum seekers and Member States alike.

The Dublin Regulation's responsibility determination rules seem logical, but in practice can have severe impact on human rights. During determination procedures under the Regulation, asylum seekers wait in limbo, too often in detention, with their protection needs unassessed. The system lengthens and complicates the already difficult experience of flight to Europe. Emphasis on criteria that ignore substantial connections between asylum seekers and Member States impedes the integration of refugees and tends to encourage irregular secondary movement. This system has particularly harsh effects on families and on asylum seekers with special needs due, for example, to age, health or trauma. Finally, the underlying presumption of Europe-wide common protection standards is demonstrably inaccurate.⁸ As a result, the Dublin system locks asylum seekers into a dangerous 'asylum lottery,' where the outcomes of their claims, and therefore their lives, depend on the route of their flight.

The impact of the Dublin system on Member States is difficult to measure, as complete and reliable statistics on its application have not been compiled. The available information suggests the system is expensive,⁹ inefficient¹⁰ and places disproportionate pressures on Member States that make up the EU's external southern and eastern borders.¹¹

1.2 Replacing the Dublin System

Fair and efficient operation of the Dublin system depends on a harmonised CEAS that reliably meets all international and regional protection obligations. As the European Parliament noted, in the absence of such harmonisation, "*the Dublin system will continue to be unfair both to asylum seekers and to certain Member States.*"¹² The Commission's proposed amendments can reduce many of the system's harmful effects, but they cannot fully address the system's fundamental flaws.

While acknowledging that any responsibility determination mechanism will be imperfect in the absence of common protection standards throughout the States to which it applies, ECRE holds that the Dublin system's harmful effects go beyond those caused by the currently imperfect CEAS. It must be dismantled and replaced by a system based on integration and solidarity. Such a system is not only a strong, principled and humane application of international law; it would arguably also better achieve current European policy objectives.

It has been contended that restrictive asylum policy is counterproductive. While its goal is to limit access to asylum seekers with viable protection pretensions, it has altogether discouraged participation in formal migratory channels.¹³ As then UNHCR High Commissioner stated, "[A] policy built on exclusion is not only morally reprehensible, it is also impractical: it will simply push all forms of

⁸ See ECRE, *Five years on Europe is still ignoring its responsibilities towards Iraqi refugees*, March 2008 http://www.ecre.org/files/ECRE_Survey_Iraq_2008.pdf, p 2; ECRE, *Report on the application of the Dublin II Regulation in Europe*, March 2006 <http://www.ecre.org/files/ECRE%20Dublin%20Report%2007.03.06%20-%20final.pdf> ('Dublin Report'); UNHCR, *Asylum in the European Union*, November 2007.

⁹ See Commission (EC), *2001 Evaluation*, p 18; *Letter from the Lord Grenfell to Liam Byrne, MP*, 26 July 2007, <http://www.parliament.uk/documents/upload/LetGrenMinDublinsystem260707.pdf>.

¹⁰ Commission (EC), *Annex to the evaluation of the Dublin system (Working Document)*, COM (2007) 299 final, 6 June 2007 ('Annex to 2007 Evaluation'), p 47.

¹¹ See ECRE, *Sharing Responsibility*, p 12-14; Madeline Garlick, 'The EU Discussions on Extraterritorial Processing: Solution or Conundrum?' (2006) 18 *IJRL* 608; UNHCR, *The Dublin II Regulation: A UNHCR Discussion Paper*, April 2006, p 1; Rosemary Byrne, 'Harmonization and Burden Redistribution in the Two Europe's' (2003) 16 *JRS* 336, p 350-51.

¹² Parliament (EC), *Evaluation of the Dublin system (Own Initiative Report)*, INI (2008) 2262, 2 July 2008, Para 2 ('Own Initiative Report').

¹³ This issue permeates all aspects of the asylum process, including the Dublin system. Notably, the Commission cited "*low rate of transfers*" as a key deficiency of the Dublin system: Commission (EC), *Annex to 2007 Evaluation*, p 17.

migration, including refugees, further underground.”¹⁴ Mistrust of formal migratory channels promotes dangerous smuggling practices,¹⁵ and favours the creation of a statusless, destitute underclass within receiving communities.¹⁶ Humane and fair policies¹⁷ encourage participation in the asylum process, while providing the tools to monitor the residence, health and welfare of a population that is currently invisible to host governments. Recent studies have also suggested that humane policies also tend to favour efficient, cost-effective and sustainable asylum systems.¹⁸ As former Director-General of Justice and Home Affairs of the European Commission observed, “*The real answer to illegal immigration (and, incidentally, to the alleged abuse of the asylum system) lies in properly and lucidly managed legal migration.*”¹⁹

ECRE has previously outlined two alternatives to the Dublin system’s reliance on arbitrary criteria for responsibility determination: (1) connection to a Member State and (2) free choice.²⁰ A system based on an applicant’s familial, linguistic, cultural and educational connections to a Member State would favour integration (thereby promoting productive contributions to the host community), reduce dependence on the State, and would discourage irregular onward movement.²¹ In essence, this system is based on the factors that would be likely to inform the applicant’s preference, if given the choice. A plausible alternative is, therefore, to simply allow the applicant to choose the Member State that will examine their application.²² This would eliminate the need for complex and expensive determination procedures, with the EURODAC database remaining in place to ensure that only one Member State would examine each claim.

A system that assigns responsibility for applications for international protection between States cannot operate fairly in the absence of mutual support and cooperative measures.²³ International protection is acknowledged as being the “*collective responsibility of the international community.*”²⁴ The Treaty of Nice required the Council to adopt measures “*promoting a balance of effort between Member States in receiving and bearing the consequences of receiving refugees and displaced persons*”²⁵ by 1 May 2004. Five years past this deadline, no significant European responsibility-sharing instrument

¹⁴ Ruud Lubbers, *EU should share asylum responsibilities, not shift them*, UNHCR Analysis/Editorials, 5 November 2004.

¹⁵ Adrian Fortescue, *Combating Illegal Immigration: From Tampere Via Seville*, Paper presented at the Greek Presidency Conference on Managing Migration, Greece, 15-17 May 2003), p 1.

¹⁶ See Jesuit Refugee Service Europe, *Report on Destitute Forced Migrants*, September 2007, p 131-140.

¹⁷ ECRE, *Towards Fair and Efficient Asylum Systems in Europe*, September 2005 (‘The Way Forward’) <http://www.ecre.org/files/ECRE%20WF%20Systems%20Sept05.pdf>.

¹⁸ Jane Aspden for UKBA and LSC, *Evaluation of the Solihull Pilot*, October 2008; Irene Bruegel & Eva Natamba, *Maintaining Contact: What happens after detained asylum seekers get bail?*, June 2002.

¹⁹ Adrian Fortescue, *Combating Illegal Immigration: From Tampere Via Seville*, Paper presented at the Greek Presidency Conference on Managing Migration, Greece, 15-17 May 2003, p 2. See also James Hathaway, ‘Why Refugee Law Still Matters’ (2007) 8 *MJIL* 89, p 99 (“For states, the real value of refugee law is that it accommodates the claims of those whose arrival cannot be dependably stopped, even as it vindicates the exclusionary norm in relation to other would-be entrants.”).

²⁰ ECRE, *Sharing Responsibility*, p 27-30.

²¹ *Ibid.*, p 26-29.

²² This position is supported in soft law: “The intentions of the asylum-seeker as regards the country in which he wishes to request asylum should as far as possible be taken into account,” UNHCR Executive Committee, 30th sess, *Refugees Without an Asylum Country*, Conclusion on International Protection No 15 (XXX), UN Doc A/AC.96/572 (16 October 1979), (h)(iii).

²³ As the Commission noted, “*The Dublin system... was not devised as a burden sharing instrument.*” Commission (EC), *Green Paper*, p 10.

²⁴ UNHCR, *The application of the “safe third country” notion and its impact on the management of flows and on the protection of refugees*, Background paper No. 2, May 2001. The preamble to the Refugee Convention sets out: “[T]he grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation.”

²⁵ Treaty on European Union (Maastricht Treaty), art 63(2)(b).

has yet been enacted.²⁶ EU responsibility-sharing should encompass more than financial redistribution. A cohesive CEAS requires free movement of beneficiaries of protection, well-resourced integration and return funds, and significant administrative cooperation to ensure consistent, high quality decision making across Europe.²⁷ As the second phase of the CEAS begins, the EU is poised to address solidarity and responsibility-sharing.²⁸ Significant and concrete responsibility-sharing measures are essential to ensure the equitable application of the Dublin system or its replacement.²⁹

2. Proposals for amendments

2.1 Scope of the Dublin Regulation and consistency with asylum acquis

The Commission proposes to bring the Regulation into line with the other instruments that make up the European asylum *acquis* by including applicants for all forms of international protection and stateless people within its scope. It would also be explicitly stated that the Regulation applies in transit zones, a move that ECRE welcomes.

2.2 Efficiency of the system

The Commission proposes a mandatory **personal interview** to ensure proper application of the Regulation.³⁰ ECRE welcomes this safeguard, but is concerned about the potential prejudice that inappropriate use of information gathered at the interview could cause.

A Dublin assessment and an examination of a claim for international protection examine the substance of an applicant's case in significantly different contexts. The Regulation should ensure that an applicant's substantive protection claim is not undermined by directly providing the authority deciding that claim with all information gathered pursuant to the Dublin Regulation.³¹

ECRE recognises the value of information sharing for purposes such as identifying asylum applicants, ensuring their ongoing care and tracing relatives in Member States. However, safeguards are required when the information relates to the substance of a protection claim. ECRE also believes certain provisions should be reinforced to ensure applicants are aware of all information concerning them that is communicated between Member States, with the opportunity to correct it where appropriate.

ECRE recommendations for further amendments:

Access to and use of information

1. Ensure the integrity of information transferred for a take back request by introducing a paragraph (6) into article 23 that reads, "*The rules laid down in Article 32(8) to (12) shall apply to the exchange of information pursuant to this Article.*"

²⁶ While the European Refugee Fund's was earmarked as a burden sharing instrument, its redistribute mechanism does not sufficiently take account of relative development of and pressures on Member States' asylum systems; it compensates States according to absolute numbers rather than relative burdens. See Eiko Thielemann, *Towards Refugee Burden-Sharing in the European Union State Interests and Policy Options*, 2005, p 15-17.

²⁷ See ECRE, *The Way Forward*.

²⁸ See, for example, 'Asylum added to list of priority issues of the Czech EU Presidency', 16 January 2009, <http://soderkoping.org.ua/page22458.html>; Parliament (EC), *Own Initiative Report*, art 5; Presentation by the Cyprus, Greece, Italian and Maltese Delegations at the informal meeting of the Justice and Home Affairs Ministers held in Prague on 15 January 2009, *Combating illegal immigration in the Mediterranean*, <http://www.apm.org.mt/documents/pdfs/Migration%20doc%20-%20Cyprus%20Greece%20Italy%20Malta%20to%20EU%20delgs.pdf>, p 6.

²⁹ See ECRE, *Sharing Responsibility*.

³⁰ Dublin Regulation recast, art 5.

³¹ While agreeing that "Obviously the applicant has the duty to tell the truth," UNHCR, *Note on Burden and Standard of Proof in Refugee Claims* (1998), p 3, ECRE believes that, like any person asserting a legal right, an asylum seeker is entitled to present each case in its most favourable light.

2. Require Member States to specify the purpose for which shared information would be used and limit its use to that purpose. This should be done by amending article 32:
 - a. Paragraph (1) to require a requesting Member State to specify by which authority and for what purpose the requested information will be used.
 - b. Paragraph (7) to read, "*The information exchanged pursuant to paragraph 1 shall only be used by the specified authority for the specified purpose. Any decision made on the basis of improperly used information shall be annulled and a hearing de novo shall be commenced.*"
3. Amend article 32, paragraph (3) to ensure that an applicant's decision to allow the communication of information relating to previous decisions concerning the applicant to be properly informed consent. Applicants must be provided the information in writing in a language they understand and have the opportunity to consult a legal representative prior to giving their approval.
4. Amend article 32, paragraph (9) to require information processed under the Regulation to be provided to the applicant automatically, rather than on request. The information should be communicated in a language the applicant understands.

2.3 Legal safeguards for persons falling under the Dublin procedure

The Commission addressed the applicant's **right to information**.³² Under the proposal, a common information pamphlet would be produced in a variety of languages. ECRE has long advocated the creation of this kind of pamphlet and welcomes its introduction.³³

Under the amendments, applicants would gain access to a '**more effective**' remedy.³⁴ They would have the right to judicial review of a transfer decision, but lodging an appeal would not have an automatically suspensive effect. Rather, the competent judicial authority would need to decide within seven days whether or not the appellant has the right to stay pending the outcome of the appeal against transfer.³⁵ ECRE has previously recommended reinforcing the right to judicial review,³⁶ and welcomes these provisions, but regrets the Commission did not go further.

It is not clear that this 'more effective' remedy sufficiently holds Member States to their international obligations to provide effective remedies.³⁷ The European Court of Human Rights concluded that a court must independently and rigorously scrutinise an appeal asserting that return to a country of origin would risk a violation of Convention rights; such an appeal must have suspensive effect unless the national court finds that this risk is unfounded.³⁸

ECRE maintains that appeals against transfer decisions should have a full and automatic suspensive effect. Essentially, in its examination whether an appeal would have suspensive effect, the judicial authority would begin examining the merits of the appeal, but would only later complete the examination and rule on the appeal itself. In effect, this process creates double scrutiny of the same material, burdening the already stretched judicial systems.

In deciding whether to grant suspensive effect, the recast proposal would require the judicial authority to consider: (1) whether the receiving Member State provides adequate international protection and, if

³² Dublin Regulation recast, art 4.

³³ ECRE, *Dublin Report*, p 161.

³⁴ Dublin Regulation recast, art 26.

³⁵ Prior to this initial decision, the appellant could not be transferred.

³⁶ ECRE, *Sharing Responsibility*, p 19.

³⁷ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) ('ECHR'), art 13; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 ('ICCPR'), art 2.

³⁸ *Jabari v. Turkey*, Application No. 40035/98, judgement of 11 July 2000, paragraph 50. It should be noted that this case dealt with the appellant's direct return to Iran, whereas Dublin appeals deal with transfers to another EU Member State. However, ECRE believes the principle laid down in *Jabari* should apply to appeals of Dublin transfer decisions until all Member States are able to provide adequate examination of claims for international protection.

not, (2) whether the appellant would be at substantial risk if returned to the country of origin. This amounts in substance to a preliminary assessment whether or not the grounds for appeal are well founded.

ECRE believes this approach risks prejudice against an appeal that is denied suspensive effect; the claim could be disadvantaged on the basis of a rapid, incomplete assessment of the case.³⁹ Granting automatic suspensive effect and conducting a full examination of each appeal in a single hearing would speed the final assessment of the protection claim, reduce overall judicial burdens, and decrease costs to Member States, which are required to provide legal representation for both sides.⁴⁰

Automatic suspensive effect of appeal

5. Remove the discretion to grant suspensive effect to an appeal, thereby rendering all appeals fully and automatically suspensive.

The Commission proposes to limit the use of **detention**. A new article would recall the principle in the Procedures Directive that people should not be detained solely because they seek international protection,⁴¹ setting out the following tests based on an individual assessment:

- A decision to transfer has been made,
- Less coercive measures cannot be applied effectively, and
- There is a significant risk of the person absconding.

The less coercive measures a Member State must consider include regular reporting, deposit of a financial guarantee and requiring the applicant to stay at a designated place. However, the definition of “*risk of absconding*”⁴² does not specify objective criteria to guide Member States in establishing such a risk; this would be left to each Member State.

Generally, only judicial authorities could order detention. A detained person would need to be immediately informed of the reasons for the detention, its intended duration, and all relevant procedures. Judicial authorities would have to review continued detention “*at reasonable intervals*.” The article would also ensure access to legal assistance. While welcoming the adoption of many of its previous recommendations,⁴³ ECRE remains concerned that Member States may nonetheless continue to routinely detain transferees.

ECRE is concerned that risk criteria might be defined broadly, or that low rates of execution of transfer decisions under the current Regulation might be cited to assert a risk of absconding. The recast would only require Member States to *consider* alternatives to detention, not necessarily to actually employ them. ECRE is concerned that previous secondary movements might be cited as *proof* such measures would be ineffective.

Relatively little research data is available to assist in assessing an individualized risk of absconding.⁴⁴ In one study, over ninety per cent of ‘high absconding risk’ detained asylum seekers did not attempt to

³⁹ The common law rules against bias prohibit this kind of premature judgment: *The King v. Sussex Justices; ex parte McCarthy* [1924] 1 KB 356.

⁴⁰ Dublin Regulation recast, art 26(5).

⁴¹ *Ibid.*, art 27. This aspirational reminder also recalls international obligations precluding arbitrary detention: ECHR, art 5; ICCPR, art 9.

⁴² Dublin Regulation recast, art 2(l).

⁴³ ECRE, *Sharing Responsibility*, p 19.

⁴⁴ Refugee Legal Centre, *The Evolution of Immigration Detention in the UK*, September 2005, p 7; Detention Health Advisory Group, *Submission to the Joint Standing Committee on Migration Inquiry into Immigration Detention in Australia*, 4 August 2008, p 2.

abscond after release on bail.⁴⁵ In *A v Australia*, the UN Human Rights Committee clarified that assertions about a general risk of absconding cannot legitimise detention:

*[T]he burden of proof for the justification of detention lies with the State authority in the particular circumstances of each case; the burden of proof is not met on the basis of generalized claims that the individual may abscond if released.*⁴⁶

While welcoming the Commission's proposed safeguards, ECRE is concerned that a risk of arbitrary detention nonetheless remains. Given that arbitrary or category-based detention is unacceptable, and the apparent effectiveness of non-custodial measures, 'risk of absconding' should be defined narrow, and less coercive measures required before detention may be enforced.⁴⁷

Detention

6. In article 2(l), set out narrowly and exhaustively the objective criteria upon which a risk for absconding should be assessed by the Member State.
7. Require Member States to apply non-custodial measures to an individual before that person could be detained by amending article 27, paragraph (2) to read, "...if other less coercive measures have demonstrably failed..."

Technical clarifications seek to ensure that asylum seekers who fall under the Dublin Regulation have effective access to determination procedures.⁴⁸ In the past, transferees' applications have been prejudiced or simply not addressed.⁴⁹ This is a serious concern and ECRE questions whether the new measures will be sufficient.

2.4 Family unity, sovereignty clause and humanitarian clause

The Commission has proposed to include family unity in the **hierarchy of criteria** by moving part of the current humanitarian clause to the hierarchy. Currently, Member States are not required to reunite unaccompanied minors or dependant relatives with other relatives present in Member States. This amendment makes it a compulsory criterion to consider when determining the responsible Member State. ECRE welcomes this amendment, as it significantly enhances respect for the principle of family unity.

The recast merges the remainder of the humanitarian clause with the sovereignty clause, as **discretionary clauses**.⁵⁰ Provisions have been introduced specifying that the clauses should be used for humanitarian reasons. As with the Dublin Convention, an applicant would need to give consent before the clauses could be applied. The proposal also clarifies that the clauses can be exercised at any time. Nonetheless, the execution of a transfer under the discretionary clauses would continue to depend on the willingness of the receiving Member State.

⁴⁵ Irene Bruegel & Eva Natamba, *Maintaining Contact: What happens after detained asylum seekers get bail?*, June 2002.

⁴⁶ *A v. Australia*, UN Doc CCPR/C/59/D/560/1993 (30 April 1997), Para 8.7.

⁴⁷ ECRE notes *Petrosian & Ors* [2009] EUECJ C-19/08 (29 January 2009), which establishes that the time limit extended to a Member State to execute a transfer begins from the final appellate decision, if such an appeal had suspensive effect. By implication, an appellant could also be detained for the duration of the appeal process. These processes tend to be protracted, which could lead to equally protracted detentions. The initial decision to transfer the Petrosian family was made on 1 August 2006. A final judicial decision on the merits is still pending. Had it been deemed that they presented a serious risk of absconding, the day that the ECJ handed down its decision would have marked the 913th day of their detention.

⁴⁸ Dublin Regulation recast, art 18(2), 19(2)-(3).

⁴⁹ See Panayiotis N. Papadimitriou & Ioannis F. Papageorgiou, 'The New "Dubliners": Implementation of European Council Regulation 343/2003 (Dublin-II) by the Greek Authorities', 18 *JRS* (2005), p 299-318. See also Commission (EC), *2007 Evaluation*, p 6; ECRE, *Dublin Report*, p 150-153.

⁵⁰ Dublin Regulation recast, art 17.

The amendments propose to expand the **definition of ‘family members.’**⁵¹ While welcoming this move, ECRE believes the definition of ‘family members’ in the Dublin Regulation is unduly limited. The current definition only encompasses family ties that existed in the country of origin. This fails to accommodate the wide-ranging displacement experiences of asylum seekers. References to ‘family members’ in the Regulation offset this limitation by accompanying the reference with “*or any other relative,*” and article 9 includes family members “*regardless of whether the family was previously formed in the country of origin.*” The definition should be brought into line with these principles throughout the Regulation.

Family members

8. Amend the definition of family member in article 2, paragraph (i) to read, “...regardless of whether the family was formed in the country of origin...”

2.5 Unaccompanied minors and other vulnerable groups

In addition to prioritising the unification of **unaccompanied minors** with relatives in the responsibility criteria, the recast introduces an article providing general safeguards for children.⁵² The amendments specify that the best interests of the child are a primary consideration, set out matters that Member States must consider in assessing best interests, and require Member States to trace all relatives of an unaccompanied minor in any Member State. The national authorities concerned would be required to receive training concerning the specific needs of minors. ECRE welcomes the wide-ranging protection (or forms of protection) the amendments propose to extend to unaccompanied minors.

Provisions are introduced requiring Member States to consider the ‘**special needs**’ of applicants.⁵³ Where an applicant has particular needs, the transferring Member State would be required to inform the receiving Member State, so that it can provide adequate assistance. The recast identified the following groups as likely to have special needs:

- Disabled people,
- Elderly people,
- Pregnant women,
- Minors,
- Victims of torture, rape or other serious psychological, physical or sexual violence.

Member States could transfer an applicant with special needs, but would have to attest to the applicant’s fitness for transfer. According to ECRE, the protection mechanism provided in the proposal is an improvement, but is however not sufficiently rigorous. ECRE has grave concerns about subjecting people with particular needs to unnecessary transfer. Therefore, ECRE believes that a properly trained medical professional should conduct the assessment of an applicant’s fitness for transfer. Such an assessment should take place under the proper ethical safeguards.

Asylum seekers with special needs

9. Amend article 30, paragraph 1, to require a declaration that an asylum seeker is fit for transfer to be made on the basis of an assessment by an independent, registered medical practitioner trained to recognise the special needs of asylum seekers and subject to strict rules of confidentiality and ethical guidelines.

2.6 Particular pressure or inadequate level of protection

ECRE has repeatedly expressed concern over the highly divergent standards of protection afforded by Member States. In 2008, ECRE proposed empowering the Commission to suspend transfers to a

⁵¹ *Ibid.*, art 2(i).

⁵² *Ibid.*, art 6.

⁵³ *Ibid.*, art 30.

Member State in which full and fair determination is not assured.⁵⁴ The recast sets out amendments to this effect.

The Commission has proposed to introduce a mechanism for the temporary suspension of transfers to particular Member States.⁵⁵ Suspensions could be ordered: (1) where a Member State's asylum system faces particular pressures or (2) based on concerns that a Member State provides a level of protection that falls below Community standards. Only the affected Member State could request suspension on the grounds of particular pressure. Where concerns arise regarding the level of protection, another Member State could make a request, or the Commission could consider suspending transfers on its own initiative. In the event of a request by a Member State on either ground, the Commission would decide whether to enforce a suspension.

The Commission would notify the Council and Member States of a decision to suspend transfers. Any Member State could then request the Council to review the decision. The Council could overrule a suspension decision by qualified majority, and the Commission would review suspensions at least every six months. Each Member State would become responsible for examining applications of asylum seekers on its territory who could no longer be transferred due to the suspension.

ECRE regrets the Commission did not take up ECRE's previous recommendation that such a proceeding should be accompanied by measures to help raise standards in the Member State concerned.⁵⁶ A mechanism to suspend transfers is a tool for exceptional situations. Collateral solidarity and responsibility-sharing measures should be developed to reduce the need for its use over the longer term. ECRE believes that in the interim, the Commission's proposed temporary suspension of transfers is an appropriate tool to improve protection.

As far as is possible within the framework of the Dublin Regulation, ECRE believes that the proposal must be strengthened on three grounds: (1) to encourage the enactment of further solidarity measures, (2) to encourage remedial efforts, and (3) to extend the bases upon which a suspension could be ordered.

2.6.1 Encouraging enactment of further solidarity measures

It has been suggested that "*requesting Member States to take up their responsibility for a burden sharing solution*" would be more appropriate than empowering the Commission to suspend the responsibility determination mechanism.⁵⁷ While ECRE agrees that Member States should engage in responsibility-sharing, the temporary suspension of transfers is an important remedial mechanism to reduce the consequences of operating the Dublin system in the face of diverging protection standards. Longer term, maintaining the suspension mechanism available for emergency use, it is essential to establish tangible responsibility-sharing mechanisms.

Without transgressing the scope of the Dublin Regulation, ECRE believes the recast could mandate concrete advancement of the debate over how to increase harmonisation and solidarity, by requiring the Commission to report to the Council and the Parliament on the effectiveness of the suspension mechanism, and to recommend further responsibility-sharing measures. In addition to this express requirement, ECRE believes the recitals to the Regulation should be updated to clarify the relationship between the suspension mechanism and solidarity, and the advisory role of the Commission.

2.6.2 Encouraging remedial efforts

Suspensions of transfers under the Commission's proposal are intended to be temporary. ECRE believes that suspension should also initiate a procedure to rectify the underlying situation. Proposed article 31 should provide for: (1) identification of the specific issues to be addressed, (2) monitoring of

⁵⁴ ECRE, *Sharing Responsibility*, p 19.

⁵⁵ Dublin Regulation recast, art 31.

⁵⁶ ECRE, *Sharing Responsibility*, p 19.

⁵⁷ Kay Hailbronner, *Briefing Note PE 410.676*, February 2009, <http://www.europarl.europa.eu/activities/committees/studies/download.do?language=en&file=24683>, p 12.

progressive improvements in relation to the issues, and (3) consequences for failure to act to remedy the issues.

Under the recast, the Commission would base a decision to suspend transfers on “*an examination of all the relevant circumstances prevailing in the Member State,*”⁵⁸ state the reasons for the decision, and specify *inter alia* “*any particular conditions attached to such suspension.*”⁵⁹ The principle underlying this provision should be enhanced, to require Member States to act to remedy the situation that gave rise to the suspension of transfers. ECRE believes the Commission should explicitly identify particular issues the Member State must address.⁶⁰

The resulting obligation could be enforced by making a benefit conditional on redressing the situation, and by attaching consequences for ongoing failure to act. First, if financial assistance has been granted, the Commission should have the power to suspend the Member State’s access to these funds. This power should be used cautiously. Asylum seekers are the ultimate intended beneficiaries of these funds and assistance should not be suspended to their detriment. Second, failure to act to rectify the issues identified by the Commission must have consequences, to ensure that suspensions are not unduly prolonged, and to avoid any risk that suspension might appear to encourage neglect of protection obligations. If a Member State does not act to remedy the issues identified, the Commission should initiate infringement proceedings.⁶¹

Under the current proposal, the Commission must determine whether the grounds for the suspension persist after a six-month period.⁶² ECRE believes this should be accompanied by a process to enhance monitoring and accountability over remedial efforts, and to encourage open dialogue between the Commission and a Member State in order to promptly rectify protection deficiencies. The Commission should indicate benchmarks to assess progress in regard to the issues that led to the suspension, requiring the Member State to report progress against those benchmarks within six months. The European Asylum Support Office could play a key supporting role in this process.

2.6.3 Extending the bases of suspension

ECRE finds it unacceptable that suspensions could be ordered on the basis of a failure to provide protection which is not in conformity with the Reception Directive and the Procedures Directive, but not the Qualification Directive. Respect of the Qualification Directive is integral to the Common European Asylum System

Temporary suspension of transfers

10. Encourage the enactment of further solidarity measures by:

- a. Amending recital (21) to read, “*...The temporary suspension of Dublin transfers can thus contribute in the short term to achieving a higher degree of solidarity...*”
- b. Introducing a recital 22(a) that would read, “*This mechanism of suspension of transfers is an exceptional measure to address issues of particular pressure or ongoing protection concerns.*”
- c. Introducing a recital 22(b) that would read, “*The Commission should periodically review progress toward improving the long-term development and harmonisation of the Common European Asylum System, and the degree to which solidarity measures and the availability of a suspension mechanism are facilitating that progress, and report that progress to the Council so that the Council may consider the need to provide for further solidarity measures.*

⁵⁸ Dublin Regulation recast, art 31(4)(a).

⁵⁹ *Ibid.*, art 31(4)(d).

⁶⁰ These should be appropriately communicated to the Member State concerned. Dublin Regulation recast, art 31(5).

⁶¹ In considering whether to suspend transfers pursuant to paragraph 2 or 3, the Commission must inquire whether the circumstances prevailing in the Member State concerned may lead to a level of protection which is not in conformity with Community law. This question is essentially the same it would ask in an infringement proceeding: Treaty on European Union (Maastricht Treaty), art 226.

⁶² Dublin Regulation recast, art 31(8).

consisting in particular of rules to facilitate the secondment of officials from other Member States and to introduce means to reallocate asylum seekers from Member States experiencing particular pressures, and means to extend financial support to assist Member States in rectifying situations leading to the suspension of transfers based on protection concerns.

- d. Introducing a paragraph (10) into article 31 that would read, “The Commission shall, within 18 months of the enactment of this Regulation, report to the Council and Parliament on the implementation and effectiveness of the measures described in this Article, and propose such further instruments as are necessary to advance the objectives of harmonisation and solidarity regarding asylum.”

11. Encourage remedial efforts by:

- a. Amending article 31, paragraph (4) to read,

“... The decision to suspend transfers shall state the reasons on which it is based and shall in particular include:

(a) an examination of all the relevant circumstances prevailing in the Member State toward which transfers could be suspended and a list of the specific issues that led to the decision to suspend transfers;...

(e) indicia of measures and benchmarks to be established in order to assess progress toward resolution of the issues identified pursuant to subparagraph (a) of this paragraph.”

- b. Introducing a paragraph (8a) into article 31 that would read, “A Member State to which transfers are suspended shall report to the Commission within six months the measures that it has undertaken in order to address the issues that led to the suspension of transfers, and to comply with any conditions specified pursuant to subparagraph (4)(d) of this Article.”

- c. Introducing a paragraph (8b) into article 31 that would read, “The Commission shall have authority to require information from the Member States, in particular in relation to any perceived lack of progress in remedying the situation that led to the suspension of transfers to a particular Member State. Following such a suspension of transfers, the Commission shall periodically report to that Member State and the Council:

(a) actions undertaken to address the issues that led to the suspension;

(b) progress toward resolution of those issues; and

(c) whether to order a suspension of financial assistance or take further action in response to a failure to act to remedy the issues that led to the suspension.”

12. Extend the bases of suspension by making appropriate references to the Qualification Directive in recital (22) and article 31, paragraphs (2) and (3).

2.7 Ombudsman

The current conciliation mechanism offered by the Regulation deals exclusively with disputes between Member States. It provides no recourse for individuals who believe that the Regulation has been incorrectly applied to them: failure to reunify family members or return to a Member State where medical care is not available, for example. ECRE proposes the establishment of an ombudsman with the power to receive complaints from individuals, and to seek resolution of the complaint.

13. Introduce an article after article 35 establishing an ombudsman in each Member State. The ombudsman would be granted power to:

- a. Receive complaints from individuals,
- b. Seek explanations from Member States,
- c. Determine whether the Regulation was correctly applied,
- d. Order a remedial procedure,
- e. Intervene in procedures.

3. Conclusion

ECRE welcomes the Commission's recognition that the Dublin system must be improved. The proposed recast could make significant improvements to the system as it currently operates. Even so, the proposed amendments should go further in certain areas to better achieve their intended effects. However, ECRE greatly regrets that the Commission was unwilling to undertake a fundamental reconsideration of the Dublin system. As the Parliament notes, "*Whatever the political obstacles to change, such a single-minded preference for the status quo could only be defensible on the premise that the Dublin system worked by and large satisfactorily.*"⁶³ ECRE contends that this premise is not defensible: the system has extensive detrimental effects to Member States and asylum seekers. An alternate system based on integration accompanied by substantial solidarity measures is the only way to ensure a fair, efficient and humane CEAS. ECRE hopes that Europe will be willing to commit to finding durable solutions to these issues in the near future.

For further information contact:

European Council on Refugees and Exiles (ECRE)
www.ecre.org

Anne Peeters (Advocacy Officer)
Tel.: + 32 2 212 0 820
Email: apeeters@ecre.org

⁶³ Parliament (EC), *Evaluation of the Dublin system and on the Dublin III proposal (Reflection Note)*, PE 410.690, March 2009, p 1.