

The Dublin Regulation: Ten Recommendations for Reform



AD1/3/2007/Ext/CN

The European Council on Refugees and Exiles (ECRE)¹ welcomes the opportunity to reiterate its key recommendations for reform of the Dublin Regulation in anticipation of the imminent release of the European Commission's evaluation, required under Article 28 of the Regulation but now delayed for over a year. ECRE has additionally gathered a collection of case studies demonstrating the human cost of the Dublin system for individual refugees and asylum seekers across Europe.²

In March 2006, ECRE through its legal network, ELENA, produced a report on the application of Dublin II in twenty states.³ The report concluded that:

- Some states are denying access to an asylum procedure to individuals transferred under the Dublin system, thereby placing them at risk of refoulement;
- Some states are increasingly using detention to enforce Dublin transfers;
- The Dublin system is having a particularly harsh impact on separated children and on families by preventing people from joining their relatives;
- Vulnerable applicants such as torture survivors are especially badly affected because of the widely differing reception conditions in EU states, including in relation to the provision of health care and psychiatric treatment;
- Many states are not opting to use the sovereignty and humanitarian clauses to alleviate these problems, or are doing so in an inconsistent manner;
- Applicants are often not being informed about the workings of the Dublin system where it might help with the identification of the responsible state, for example where they have family members present in another state;
- States are failing to share information with each other which can also frustrate the quick and correct identification of the responsible state;
- Most states do not guarantee a suspensive appeal right enabling individuals to challenge transfer under Dublin where mistakes have been made or where it would breach states' obligations under international law.

ECRE calls for all of these concerns to be addressed rather than a narrow focus on technical and operational problems with the application of the Regulation. A more improved and uniform application of existing provisions under the Regulation, while helpful, would not in itself rectify all of the problems identified above. Serious flaws in the Regulation and its relationship to other asylum instruments must be addressed in the forthcoming review by the European Commission, and in any subsequent changes to the Regulation. Ultimately, the solution lies in replacing the Dublin II Regulation with an alternative system that ensures genuine responsibility-sharing and fully respects the protection needs of refugees. This recommendation on the future of the Dublin system represents one element of a package of proposals by ECRE for the future development of a Common European asylum system.⁴ In the short term urgent reform is required in relation to the following.

¹ ECRE is an umbrella organisation of 76 refugee-assisting organisations in 30 countries working towards fair and humane policies for the treatment of asylum-seekers and refugees.

² The Dublin Regulation: Twenty Voices – Twenty Reasons for Change, ECRE, March 2007

³ ECRE/ELENA, Summary Report on the Application of the Dublin II Regulation in Europe, March 2006.

⁴ For further information see ECRE, The Way Forward, Europe's role in the global refugee protection system. Towards Fair and Efficient Asylum Systems in Europe, September 2005. Section 3 pp 29–36.

To guarantee access to a full and fair procedure for all asylum seekers 'taken back' under Article 16

The Dublin II Regulation is premised on the assumption that a single Member State will take responsibility for a full substantive examination of an asylum claim,⁵ and ECRE reminds Member States of their commitment, reaffirmed at Tampere in 1999, to ensure that any system of allocating responsibility should guarantee effective access to a procedure for determining refugee status in a single Member State, and ensure absolute respect of the right to seek asylum.⁶

However, ECRE's research discovered that some states are failing to provide a full determination procedure to applicants transferred under the Regulation. This typically occurs where applicants have their asylum claims closed after leaving the first Dublin state but are not permitted to re-open them or submit new claims when subsequently transferred back to that state under Article 16. In several states the ability to submit a subsequent application is dependent on the applicant being able to demonstrate new facts or circumstances since leaving the first Dublin state, which in practice may well not be possible, even where the individual in question has a well-founded fear of persecution. In one such case, a Somali national was killed in Mogadishu following his expulsion from the Netherlands.⁷

ECRE believes that when asylum seekers are transferred under the Dublin procedure, the receiving state must ensure that they receive a substantive examination of their asylum claim. It is dangerous and unacceptable that some states treat the claim as having been abandoned, and refuse to re-open the asylum file when the individual is returned. Applicants who left before a final decision on their asylum claim should be re-admitted to the procedure at the stage they left and must be given the opportunity to have their case examined substantively, taking into account any new facts or circumstances. Where applicants have received an initial refusal decision then the time limits for lodging an appeal should be extended to ensure that the case is fully and fairly considered. If states do not do so, they may fail to meet their obligations not to return a person to a situation where they face persecution, torture, inhuman or degrading treatment or punishment.

Recommendation:

1. Amend Article 16 to explicitly oblige the responsible Dublin state not to remove an asylum seeker until a full and fair examination of the individual asylum claim has taken place.

To guarantee the suspensive effect of appeal against transfer

The above problems may be compounded by the fact that currently articles 19 (2) and 20 (1) (e) of the Dublin Regulation do not explicitly guarantee a suspensive right of appeal against transfer from one Member State to another. Thus individuals are put at risk of chain refoulement to their countries of origin. Chain refoulement is prohibited by Article 33 of the Geneva Convention and Article 3 ECHR. In the TI case the ECtHR held that indirect removal to an intermediary country, which is also a Contracting State, [did] not affect the responsibility of the State to ensure that the applicant is not, as a result of the decision to expel, exposed to treatment contrary to Article 3.⁸ An appeal which cannot have suspensive effect is contrary to Article 3 in conjunction with Article 13 ECHR.⁹

Recommendation:

2. Amend Articles 19 and 20 to provide all applicants with an automatic suspensive right of appeal against the decision to transfer responsibility to another Dublin state.

⁵ Paras 2, 3, 4 and 15 of the Preamble to the Regulation.

⁶ European Council, Tampere Presidency Conclusions, 15/16 October 1999, paras 13/14.

⁷ This case was highlighted in a letter from the Meijers Committee to the European Commission dated 12 July 2006. The case purportedly concerned a Somali asylum seeker, Mr Abdilatif Ali, who absconded from the Netherlands to lodge an asylum claim in the UK. His asylum application was subsequently declared unfounded by authorities in the Netherlands for having left with an 'unknown destination' even though at the moment of this decision a request had already been received from the UK authorities that Mr Ali be transferred back under the Dublin Regulation. Following transfer back to the Netherlands, Mr Ali's new asylum claim was rejected because it was found that there were no new facts or circumstances which justified examination of the claim. Thus the merits of the claim were never considered. In October 2003 Mr Ali was returned to Somalia and in June 2004 he was killed in unclear circumstances in Mogadishu (Frans-Willem Verbaas, *Er is thans geen grond ... Het Nederlandse asielbeleid van binnenuit*, Uitgeverij De Arbeiderspers, 2005, pp. 89-90).

⁸ TI v UK, ECHR, application no. 43844/98, 7 March 2000.

⁹ Conka v Belgium, application no. 51564/99, 5 February 2002.

Family unity is a fundamental principle of refugee protection. ECRE regrets that the definition of a family member under the Regulation is limited to a spouse (or unmarried partners where national practice permits this), minor children, and parents/guardians where the applicant is a minor and unmarried. This restrictive definition results in families remaining separated. The definition should be extended, as is already the case in some states. Furthermore, the test of family relationships should be based on a reasonable standard of proof, allowing alternative means of proof where documentary evidence is unavailable, and should not be subject to unreasonable delay.

Family separation can also occur due to the fact that Article 7 currently does not require unification with family members with subsidiary protection status or other settled members of the family. Article 8 of the Regulation, which restricts reunification to with those family members still awaiting a first instance decision, is problematic because many states now operate accelerated first instance procedures which mean that in practice there is no realistic prospect of family unification under this Article. The right to family life should prevail over administrative and procedural considerations. A broader and more inclusive approach to family unity would not only be fairer for individuals, but also help enhance efficient decision-making and help prevent unauthorised secondary movement.

Recommendation:

3. Extend the definition of 'family member' in Article 2 (i) (i) to include unmarried couples in a genuine and stable relationship as well as dependents, including close relatives who have no other family support and adult children unable to care for themselves, for example due to a medical condition.
4. Amend Article 7 to require unification with family members granted subsidiary protection or otherwise legally resident in another Dublin state.
5. Amend Article 8 to require unification with a family member at any stage of the asylum procedure.

To achieve a more uniform application of the humanitarian clause under Article 15

Article 15 of the Regulation is an important provision which allows Member States to bring together family members on humanitarian grounds, and ECRE therefore urges states to adopt a more generous and consistent approach to its application. In particular, Member States should note that Article 15 (2) requires them to bring family members together, provided the ties existed in the country of origin, where the person concerned is dependent on the assistance of the other family member on account of pregnancy or a newborn child, serious illness, severe handicap or old age. ECRE therefore urges states to respect the obligatory nature of this provision. ECRE also calls on states to respond quickly to requests from other states under the humanitarian clause so as to avoid undue hardship.

Recommendation:

6. The humanitarian clause (Article 15) should be used widely and consistently to ensure its intended impact in avoiding undue hardship to families as a result of separation.

To exempt separated children from transfer under the Dublin Regulation

While Article 6 of the Regulation stipulates that a separated child's application for asylum should be examined in the Member State where a member of his/her family is present, if the child does not have a family member in another Dublin state the Regulation requires that his/her application should be considered in the Member State where it was first lodged. Member States are technically complying with this provision transferring a child, in the absence of family members, to the Member State where he/she first applied for asylum. However, this formulation does not properly reflect the UN Convention on the Rights of the Child which requires that the best interests of the child should be a primary consideration in all actions concerning children. The best interests of children will rarely be served by being uprooted and transferred back to a state where they have no ties or family members. ECRE's research suggests that the current application of Article 6 is in practice causing hardship to children and failing to protect the best interests of the child.

Recommendation:

7. Amend Article 6 to require that the Member State responsible for examining the application of a separated child shall be that where a member of his or her extended family is present, provided that this is in the best interests of the child. In the absence of a family member, the Member State responsible for examining the application shall be that where the child has currently lodged his/her application for asylum.

To avoid the disproportionate use of detention during Dublin procedures

Though there is no specific provision for detention in the Dublin II Regulation, several Member States are increasingly detaining asylum seekers in order to effect Dublin transfers, while some states also detain returnees. Other states have recently announced legislative proposals for an increase in the detention of Dublin II applicants. This is of grave concern. Asylum seekers may have already suffered imprisonment and torture in the country from which they have fled. Therefore, the consequences of detention may be particularly serious, causing severe emotional and psychological stress and may amount to inhuman and degrading treatment. Asylum seekers should only be detained in exceptional cases, and full procedural safeguards should always be ensured.¹⁰ Alternative, non-custodial measures such as reporting requirements should always be considered before resorting to detention and unaccompanied minors should never be detained under any circumstances.

Recommendation:

8. Add a provision restricting the detention of Dublin claimants to a measure of last resort where non-custodial measures have been demonstrated not to work on an individual basis. Detention must be subject to procedural safeguards, and limited to the minimum time required to meet its lawful purpose.

To ensure the consistent application of adequate reception facilities to Dublin applicants

The Dublin II Regulation does not explicitly refer to the reception conditions that should be afforded to those who are transferred under its provisions. However, ECRE's research has revealed that in some states Dublin transferees are afforded lesser, or no, access to reception conditions. An additional problem is the huge disparity in reception conditions from one Dublin state to another in relation to accommodation, material benefits and access to health care.¹¹ This problem is particularly acute in relation to the provision of psychiatric care and treatment for traumatised asylum seekers. In some Dublin states there are currently no or extremely limited psychiatric facilities.

Recommendation:

9. Add a provision requiring that Dublin II claimants receive the same reception conditions as other asylum seekers in line with the EC Reception Standards Directive.

10. Member States should apply Article 3 (2) of the Regulation to take responsibility for cases where there is evidence that adequate medical or trauma treatment facilities would not be available in the responsible Dublin state.

¹⁰ For further information see ECRE's position paper on the Detention of Asylum Seekers, 1996.

¹¹ See ECRE, The EC Directive on the Reception of Asylum Seekers: Are asylum seekers in Europe receiving material support and access to employment in accordance with European legislation, November 2005.

ECRE's Ten Recommendations for Reform

1. Amend Article 16 to explicitly oblige the responsible Dublin state not to remove an asylum seeker until a full and fair examination of the individual claim has taken place.
2. Amend Articles 19 and 20 to provide all applicants with an automatic suspensive right of appeal against the decision to transfer responsibility to another Dublin state.
3. Extend the definition of 'family member' in Article 2 (i) (i) to include unmarried couples in a genuine and stable relationship as well as dependants, including close relatives who have no other family support and adult children unable to care for themselves, for example due to a medical condition.
4. Amend Article 7 to require reunification with family members granted subsidiary protection or otherwise legally resident in another Dublin state.
5. Amend Article 8 to require unification with a family member at any stage of the asylum procedure.
6. The humanitarian clause (Article 15) should be used widely and consistently to ensure its intended impact in avoiding undue hardship to families as a result of separation.
7. Amend Article 6 to require that the Member State responsible for examining the application of a separated child shall be that where a member of his or her extended family is present, provided that this is in the best interests of the child. In the absence of a family member, the Member State responsible for examining the application shall be that where the child has currently lodged his/her application for asylum.
8. Add a provision restricting the detention of Dublin claimants to a measure of last resort where non-custodial measures have been demonstrated not to work on an individual basis. Detention must be subject to procedural safeguards and limited to the minimum time necessary to meet its lawful purpose.
9. Add a provision explicitly requiring that Dublin II claimants receive the same reception conditions as other asylum seekers in line with the EC Reception Standards Directive.
10. Member States should apply Article 3 (2) to take responsibility for cases where there is evidence that adequate medical or trauma treatment facilities would not be available in the responsible Dublin state.

For further information contact the European Council on Refugees and Exiles (ECRE) at:

ECRE Brussels
Richard Williams, EU Representative
Rue Belliard, 205 - Box 14
B- 1040 Brussels
Tel: +32 (0) 2.514.59.39
Fax: +32 (0) 2.514.59.22
E-mail: rwilliams@ecre.org

ECRE London
Chris Nash, Senior Legal Officer
103 Worship Street
London EC2A 2DF, UK
Tel: +44 (0) 20 7377 7556
Fax: +44 (0) 20 7377 7586
E-mail: cnash@ecre.org

Web : <http://www.ecre.org>

