

BEYOND SOLIDARITY: RIGHTS AND REFORM OF DUBLIN

**ECRE'S CALL ON STATES TO ENSURE FUNDAMENTAL RIGHTS
PROTECTION IN THE REFORM OF THE DUBLIN SYSTEM**

I. INTRODUCTION

The reform of the Dublin Regulation is the central and most contentious part of the European Commission's comprehensive asylum reform package. Council negotiations have resumed under the Bulgarian Presidency and ECRE remains concerned that the revised proposals under discussion continue to represent a deterioration in the rights of refugees and asylum-seekers, while failing to address the fundamental dysfunctions of the Dublin system.

ECRE published its full analysis of the Commission proposal for a recast of the Dublin Regulation (the Dublin IV proposal) in October 2016.¹ In this legal note ECRE provides an update on key provisions in light of the latest available information on Presidency proposals for the Council position,² the European Parliament's negotiating mandate adopted on 19 October 2017,³ and recent case law. The Council's position is subject to ongoing negotiations and constantly evolving. For the purpose of this note, ECRE relies on the latest available Presidency drafts relating to Chapters I to VI of the Commission proposal, the overall framework provided by the Estonian Presidency paper on solidarity and responsibility, and information on the main debates among the EU Member States.

While most attention has focused on "solidarity" and specifically the corrective allocation mechanism proposed in Chapter III, ECRE maintains its position that it is inherently paradoxical to rely on annexing a mechanism to correct a fundamentally flawed system; a deeper overhaul is required. More attention also needs to be paid to other parts of the Dublin proposal, given the risks of human rights violations and inefficiencies arising. It is increasingly likely that a revised proposal incorporating damaging revisions moves forward either with or without the solidarity piece. For these reasons, the legal note focusses on:

- » implications of the pre-Dublin check for the fundamental rights of asylum seekers under the Dublin system;
- » sanctions imposed on applicants to prevent secondary movement;
- » bolstering provisions on the rights of the child;
- » limitations on the right to an effective remedy;
- » risk of increased use of detention.

II. ANALYSIS

PRE-DUBLIN PROCEDURES - ARTICLE 3.3

The Presidency proposal includes new text which aligns Article 3(3) covering pre-Dublin procedures with the three stages model set out in the earlier Estonian Presidency paper. The stages are:

- » *Normal circumstances*, where the number of applicants in a MS is equal to or below that MS's fair share. Support measures would exclusively aim at ensuring the effective implementation of the regular Dublin rules.
- » *Challenging circumstances*, where the number of asylum seekers reaches 90% of a MS's fair share and exceeds the *de minimis* threshold. This could trigger a voluntary relocation pledging exercise or, when the 150% share is reached, a Council Implementing Decision, both subject to a cap of 200,000 people over a two-year period.
- » *Severe crisis circumstances* when there is "extreme pressure" and the overall EU ceiling for relocation has been reached. It would trigger an intervention by the European Council and the need for exceptional measures.

1. See ECRE, [Comments on the Commission Proposal for a Dublin IV Regulation COM\(2016\) 270](#), October 2016.

2. Council of the European Union, *Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)*, LIMITE 15991/17, Brussels, 9 January 2017 and LIMITE 5571/18, Brussels, 24 January 2018.

3. European Parliament, *Report on Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)*, A8-0345/2017, 6 November 2017.

While endorsing the pre-Dublin check in the Member State of first entry into EU territory,⁴ the proposed Council text softens its possible implications. In “normal circumstances”, it would be *optional* for the Member State in which the claim is lodged to run the pre-Dublin checks before applying the Dublin criteria, i.e. it would be optional to decide on admissibility of the claim on the basis of the safe third country or first country of asylum concepts or to accelerate its examination on safe country of origin or public order grounds. In challenging circumstances, on the other hand, it would still be mandatory for the MS to use the pre-Dublin procedures.

Making the pre-Dublin check optional in normal circumstances is an improvement compared to the Commission proposal, which provides for a mandatory pre-Dublin check in all circumstances. However, its mandatory application in challenging circumstances warrants a reiteration of concerns.

First, serious human rights violations are likely to result from the mandatory application of safe country concepts aiming at deflecting protection obligations to third countries.⁵

Second, the proposed Council position still disregards protection obligations relating to asylum seekers’ right to family life. As stated in Recital 16, the right to be reunited with family members is enshrined in Article 7 of the Charter, mirroring the content and meaning of Article 8 ECHR. However, to require the first Member State in which an application for international protection is lodged to use an inadmissibility or accelerated procedure before applying the responsibility criteria in accordance with Chapters III and IV, which include the family provisions, would render impossible the exercise of this right for a potentially large group of asylum seekers.

Third, by creating complex procedural layers before applying responsibility-allocation criteria, the pre-Dublin procedure would seriously undermine the Regulation’s objective of efficient procedures ensuring rapid access to asylum procedures.

Fourth, it will make the system more unequal:⁶ Member States located at the EU’s external borders will be responsible for processing all asylum applications falling under “first country of asylum”, “safe third country”, “safe country of origin” and security grounds. Member States of first entry are more likely to be affected by “challenging circumstances” and thus obliged to carry out the mandatory checks. Solidarity remains a *quid pro quo*, with measures introduced only when they increase their responsibilities by carrying out the pre-Dublin checks and assuming responsibility for more claims. Regardless of the solidarity measures that may be triggered, it is counter-intuitive to require Member States to assume responsibility for more cases under challenging circumstances than they would under “normal” circumstances.

Finally, containing more applicants in Member States of first entry will encourage the use of coercive measures, including detention, and risks subjecting applicants to substandard reception conditions, given continued significant problems at points of arrival.

ECRE does not consider introducing a pre-Dublin procedure in Member States of first arrival to be a viable option. The proposed optional character of the pre-Dublin check in normal circumstances is a cosmetic change and will not avoid disproportionate pressure on Member States of first arrival, particularly as solidarity measures will likely include only selective relocation based on unduly high EU average recognition rates and thus not serve as a corrective mechanism.

OBLIGATIONS AND SANCTIONS ON THE APPLICANT - ARTICLES 4 AND 5

The obligation on the applicant to make and lodge an application in the first Member State of entry and to remain on the territory of the Member State conducting the Dublin examination and/or the Member State

4. The Council text maintains the reinforced obligation on the applicant to make and lodge an asylum application in the first Member State of entry as proposed by the Commission. As a result, in practice Article 3(3) concerns in the vast majority of cases the Member State of first entry.

5. For an in-depth analysis and critique on the role safe country concepts in the proposed reform of the CEAS see ECRE, [Comments on the Commission proposal for an Asylum Procedures Regulation COM\(2016\) 467](#), November 2016 and ECRE, [Debunking the “safe third country” myth](#), Policy Note 8, October 2017.

6. The scale of such inequalities would obviously depend on the exact nature and scope of the corrective relocation mechanism in the Council position, which was not known at the time of writing. Moreover, it is unclear from the definition in the Council text whether normal or challenging circumstances are to be assessed with respect to individual Member States or the entire EU. This obviously would have an important impact on the application of the proposed Article 3(3) in practice.

responsible is further strengthened in the Presidency proposal. Non-compliance with these obligations triggers different procedural sanctions depending on the type of obligation that has been breached, including the application of an accelerated examination procedure to applicants who have engaged in secondary movements or the rejection of their application as implicitly withdrawn.

The first sanction seems to presume a connection between secondary movement and the well-foundedness of an asylum seeker's claim, since the accelerated procedure is designed to facilitate the processing of manifestly unfounded claims. However, an applicant's secondary movement to another Member State is unrelated to that person's well-founded fear of persecution or real risk of serious harm in his or her country or origin or habitual residence. Therefore, it should under no circumstances affect the assessment of a person's international protection needs nor the type of procedural safeguards to be provided.

Rejection on the second ground, that the application is considered implicitly withdrawn, would result in effectively denying the applicant access to the asylum procedure, contrary to the stated aim of the Dublin Regulation itself and Article 18 of the EU Charter guaranteeing the right to asylum.

Beyond procedural sanctions, entitlement to reception conditions would be limited to emergency assistance providing a "minimum standard of living", as per the Council position on the RCD proposal.

The Council's position on the recast RCD proposal⁷ has significantly improved the Commission's text, as it reduces the scope of Article 17a of the said proposal to applicants still present on the territory of a non-responsible Member State after notification of the transfer decision. However, such an approach would still remain incompatible with the fundamental right to dignity as affirmed by the CJEU's ruling in the case of *Gisti and Cimade*, according to which a Member State's obligation to give access to reception conditions under EU law only ceases where the applicant is "actually transferred by the requesting Member State."⁸ The European Parliament's position is a much more promising avenue: it rejects the punitive approach to secondary movement, combined with provision of better information to applicants and inclusion of connection factors among the criteria for allocation of responsibility.

Threatening asylum seekers with punishment for failing to subscribe to an unfair system or to systematic violation of their human rights is likely to trigger more contestation, more irregularity and more creative avoidance strategies and undermine the objective of asserting state control over migration flows. Thus, ECRE maintains its recommendations that procedural sanctions and exclusion from material reception conditions – as foreseen in Articles 3(3), (4) (5) of the Commission proposal and maintained by the Council – must be deleted in order to ensure the human dignity of applicants subjected to Dublin procedures in line with CJEU jurisprudence.

GUARANTEES FOR MINORS - ARTICLE 8 AND ARTICLE 19.2(A)

Recent evaluations of the application of the Dublin III Regulation reveal serious problems in the implementation of the principle of family unity and the effective protection of children.⁹

The insertion of a new paragraph under Article 19(2)(a) which provides flexibility for unifying family relations when the applicant was not in a position to submit evidentiary elements within a two-month deadline is an improvement. Nonetheless, current practice shows that discretionary clauses are hardly ever used so the additional flexibility may have limited impact.¹⁰ During the first half of 2017, the humanitarian clause concerned under 0.1% of almost 30,000 outgoing Dublin requests issued by Germany and 5.4% of requests by Switzerland.¹¹

Worryingly, the current draft does not properly address the best interests assessment and it deletes the requirement in Article 8(4) of the Commission proposal for such assessment to be carried out by sufficiently qualified and expert staff. Inspiration should rather be found in the European Parliament's position which includes a number of positive amendments to the Commission proposal relating to *inter alia*, the role of

7. Council of the European Union, 11318/1/16/REV 1, Brussels, 30 November 2017.

8. CJEU, Case C- 179/11, *Cimade, Groupe d'information et de soutien des immigrés (GISTI) v Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration*, Judgment of 27 September 2012.

9. See, UN High Commissioner for Refugees (UNHCR), *Left in Limbo: UNHCR Study on the Implementation of the Dublin III Regulation*, August 2017, available at <https://goo.gl/1Qh4uL> and European Commission, *Evaluation of the Implementation of the Dublin III Regulation- Final Report*, 18 March 2016, available at <https://goo.gl/7vdTXC>.

10. See UNHCR, *Left in Limbo*,

11. AIDA, *The concept of vulnerability in European asylum procedures*, September 2017, 49,

the guardian, the requirement of a multidisciplinary best interests assessment prior to any decision on the transfer of an unaccompanied child, and training requirements for staff of competent authorities.¹²

Domestic case law shows a relatively coherent approach to the assessment of the best interests of the child principle and most courts have established positive duties¹³ on Member States to, *inter alia*, investigate and communicate with one another on family links,¹⁴ to ensure that the child is actually heard,¹⁵ and to take into consideration the child's schooling and education as part of the best interests assessment.¹⁶ National courts have consistently required States to ensure that at the forefront of decision makers' minds is whether the transfer is in that child's best interests and to prevent a transfer where that is not the case.¹⁷

Here too, the European Parliament's position includes a number of positive amendments to the Commission proposal relating to *inter alia* the role of the guardian, the requirement of a multidisciplinary best interests assessment prior to any decision on the transfer of an unaccompanied child, and training requirements for staff of competent authorities. ECRE strongly supports the latter approach.

EFFECTIVE REMEDY – ARTICLE 28

While the Council retains an article containing restrictions on the material scope of the right to an effective remedy, it potentially softens its impact by removing reference to article 3(2), on the need for systemic flaws. The proposed restrictions limit the remedy to certain grounds of the Dublin Regulation – a risk of inhumane and degrading treatment and an infringement of Articles 10-13 and 18.

These restrictions are in breach of recent case law.¹⁸ The CJEU ruled that the right to an effective remedy should be interpreted as meaning that an asylum seeker is entitled to plead, in an appeal against a decision to transfer, the incorrect application of any of the criteria for determining responsibility laid down in Chapter III of the Dublin Regulation. This has been echoed by domestic courts,¹⁹ as well as by the European Parliament in its negotiating mandate.

The suggested deletion of the reference to Article 3(2) in Article 28(4) is welcome as this more accurately reflects current jurisprudence of the CJEU and the ECtHR as regards the required threshold of human rights violations triggering a Member State's obligation not to carry out a Dublin transfer for such reason. In the case of *C.K. and Others*, and following the ECtHR judgment in *Tarakhel v. Switzerland*, the CJEU found that even in the absence of systemic flaws in the asylum system of the Member State responsible, the transfer of an asylum seeker "can take place only in conditions which exclude the possibility that that transfer might result in a real and proven risk of the person concerned suffering inhuman or degrading treatment".²⁰ Logically, this also requires amending Article 3(2), which continues to incorrectly refer to the existence of systemic flaws in a Member State's asylum system.

Another impediment to the exercise of the right to an effective remedy is linked to the limitation of free legal assistance "where the appeal or review is considered to have no tangible prospect of success", which is maintained by the Council. The use of merits testing leaves extensive scope for Member States to deprive applicants of the right to free legal assistance through an unduly broad interpretation. It notably risks entrenching less protective treatment of asylum seekers in the Dublin procedure compared to those

12. See European Parliament report, AM 91-99.

13. Austrian Federal Administrative Court, W144 2160624-1, 12 June 2017, accessible at: <http://bit.ly/2vQ2vcR>; UK Upper Tribunal, *The Queen on the application of MK, IK (a child by his litigation friend MK) and HK (a child by her litigation friend MK) v Secretary of State for the Home Department*, JR/2471/2016, 29 April 2016, summary accessible at: <http://bit.ly/1OImDWB>. The Hague Court, NL17.9820, 17 October 2017.

14. Austrian Federal Administrative Court, W153 2166337-1, 18 August 2017, <http://bit.ly/2jiAk4A>.

15. This is required by national courts not only in cases where children risk being sent back to another country but also being sent to a country where a family member is. See, for instance, The Hague Court, NL17.9820, 17 October 2017.

16. Luxembourg Administrative Tribunal, application no. 39131, 21 April 2017.

17. For an overview of recent trends in national jurisprudence on the topic of family reunion within the Dublin Regulation, see ELENA/ ECRE, [Case law note on the application of the Dublin Regulation to family reunion cases](#), February 2018.

18. CJEU, Case C-63/15 *Ghezelbash v Staatssecretaris van Veiligheid en Justitie*, Judgment of 7 June 2016 and C-55/15 *Karim v Migrationsverket*, Judgment of 7 June 2016; Case C-490/16, *A.S. v Republika Slovenija*, Judgment of 26 July 2017 and Case C-646/16, *Jafari*, Judgment of 26 July 2017.

19. See e.g. Swiss Federal Administrative Court, Decision E-1998/2016, 21 December 2017; Portuguese Central Administrative Tribunal of Lisbon, Decision 2183/15.6BESLB, 25 November 2015;

20. CJEU, Case C- 57/16 PPU, *C.K., H.F., A.S. v. Republika Slovenija*, Judgment of 16 February 2017.

in the regular procedure on the ostensible basis that their claims have no tangible prospect of success, as already done for first-instance legal assistance in some countries.²¹ Given the fundamental rights engaged by Dublin transfers and the indispensable role of legal assistance in safeguarding the rights of applicants for international protection during both the responsibility allocation and the asylum procedure, as a rule, the applicant's entitlement to such legal assistance and representation should only be excluded where he or she has sufficient financial resources.

Finally, the Council draft maintains the seven day deadline for appealing a Dublin decision. This is too short a time limit to enable asylum seekers to prepare an appeal and gather the necessary evidence. National courts have struck down shorter deadlines as unconstitutional where they discriminate against asylum seekers on the sole ground that they are in a different procedure.²² In this regard, the position taken by the European Parliament, requiring a "reasonable period, of no less than 15 days" to challenge a Dublin decision is in line with current practice in a number of countries (e.g. Austria, Poland, France, Greece, the UK, Sweden, Cyprus, Spain and Italy).

ECRE recommends that the proposal be amended in line with the CJEU's rulings in *Ghezelbash and Karim*: limitation on the scope of the right to appeal a transfer decision is incompatible with the right to be heard and the right to an effective remedy under the EU Charter of Fundamental Rights. Article 3(2), which continues to refer to the existence of systemic flaws in a Member State's asylum system should be amended accordingly. A reasonable time limit for lodging an appeal against a transfer decision should be in place, with the option of making access to free legal assistance and representation contingent on merits testing removed.

DETENTION – ARTICLE 29

The latest available Council draft includes amendments to Article 29 broadening the possibility for Member States to detain asylum seekers in Dublin procedures, as it no longer requires a "significant risk of absconding" but merely a "risk of absconding". This amendment raises particular concerns. The CJEU recalled in *Al Chodor* that the Dublin Regulation provides for a "limitation on the exercise of the fundamental right to liberty enshrined in Article 6 of the Charter"²³ but that any limitation on this right must be restrictively read and be necessary and proportionate to a legitimate objective. The Council offers no justification for reducing the threshold of risk for depriving asylum seekers of their liberty.

Furthermore, the Council draft introduces a presumption of such a risk "in particular where a take back notification has been sent". This is not in line with current jurisprudential standards, where the Court of Justice has clearly held in *Al Chodor* that objective criteria to define a "risk of absconding" must be clear, predictable, accessible and non-arbitrary. To protect asylum seekers against arbitrary deprivation of liberty, the determination of a "risk of absconding" should be based on strict standards and criteria related to an individual applicant's conduct. The mere submission of a "take back" notification to another Member State in no way demonstrates that an asylum seeker is likely to abscond from the process. The European Parliament position on this paragraph refers to a "proven significant risk of absconding", demonstrating a more proportionate approach.

Finally, in the Council draft the maximum time limit for carrying out the transfer in case of detention is set at 30 days from the final transfer decision, a welcome reduction from the time limit of six weeks in the Commission proposal.

In order to ensure compliance with the right to liberty under Article 5 ECHR and Article 6 EU Charter of Fundamental Rights and that detention is only used as a matter of last resort, ECRE strongly recommends maintaining the requirement of a "significant" risk of absconding in Article 29. Moreover, the possibility to detain an applicant under the Dublin Regulation should be limited to where a final transfer decision has been taken and notified to the applicant and all effective remedies have been exhausted. This would also be consistent with the Council position to limit the scope of Article 17a recast Reception Conditions Directive to applicants present on the territory of another than the responsible Member State after notification of the transfer decision.

21. See AIDA, Country Report Netherlands, 2017 Update (forthcoming); AIDA, Country Report Sweden, 2017 Update (forthcoming).

22. See e.g. Austrian Constitutional Court, Decision G 134/2017, 9 October 2017.

23. CJEU, Case C-528/15 *Al Chodor*, Judgment of 15 March 2017, para 36 et seq.

III. RECOMMENDATIONS

As Member States are negotiating the Council's position on the Commission proposal for a Dublin IV Regulation, the fundamental rights of applicants subject to Dublin procedures must be fully ensured in line with their obligations under international human rights law and jurisprudence and the EU Charter of Fundamental Rights. Therefore, ECRE makes or reiterates the following recommendations:

- » Pre-Dublin checks (Article 3.3) – Refrain from introducing a pre-Dublin procedure in Member States of first arrival as it will generate risks of violations of asylum seekers' fundamental rights, create unnecessary procedural complexity, and undermine solidarity.
- » Punitive measures (Article 4 and 5) – Reject the introduction of procedural sanctions and exclusion from material reception conditions as foreseen in Articles 3(3), (4) (5) of the Commission proposal and ensure access to material reception conditions until actual transfer to the Member State responsible in line with the CJEU ruling in *Cimade and Gisti*.
- » Rights of refugee children (Article 8 and 19,2a) – Ensure that the best interests of the child are assessed using a multidisciplinary approach and by staff with the requisite qualifications and expertise.
- » Effective remedy (Article 28) – In line with the CJEU's rulings in *Ghezelbash and Karim*, reject any limitation on the scope of the right to appeal a transfer decision. Amend Article 3(2), which continues to refer to the existence of systemic flaws in a Member State's asylum system, contrary to the ECtHR ruling in *Tarakhel v Switzerland* and the CJEU ruling in *C.K and others*.
- » Effective remedy – Maintain a reasonable time limit for lodging an appeal against a transfer decision and delete the possibility of making access to free legal assistance and representation contingent on merits testing.
- » Detention (Article 29) – Uphold the current threshold of a "significant" risk of absconding and exclude the possibility to detain an applicant under the Dublin Regulation before a final transfer decision has been taken and notified to the applicant and all effective remedies have been exhausted.

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