

TO DUBLIN OR NOT TO DUBLIN?

ECRE'S ASSESSMENT OF THE POLICY CHOICES UNDERMINING THE FUNCTIONING OF THE DUBLIN REGULATION, WITH RECOMMENDATIONS FOR RIGHTS-BASED COMPLIANCE

I. INTRODUCTION

The implementation of the Dublin III Regulation, the “cornerstone” of the Common European Asylum System (CEAS), has become fraught with problems following rising tensions between Member States over responsibility for refugee protection and due to blockages in the negotiations on the Dublin IV proposal tabled by the European Commission in 2016.

ECRE has consistently voiced criticism of the structure and logic of the Dublin system for perpetuating inefficient and unworkable mechanisms for allocation of responsibility. The system is unfair to both asylum seekers and EU Member States, and ECRE has proposed alternatives based on fairer responsibility sharing. Ultimately, deeper reform is needed. In the meantime, the Regulation currently in force needs to be applied in accordance with EU and international legal standards and in a manner that respects individual rights and states’ administrative resources.

Member States, however, remain trapped in a futile and costly cycle in their implementation of the Dublin system. Obstacles to Dublin transfers stem from deliberate policy choices, partly deriving from the perceived unfairness of the system. Choices can involve lack of compliance with other parts of the CEAS, including rules on reception and refugee status determination, as well as creating a generalised hostile political environment on migration. Member States try to enforce transfers without understanding and addressing these obstacles, which in turn leads courts to block transfers for legal reasons arising from these deficiencies. Courts can prevent individual transfers but cannot themselves effect policy changes to break the cycle.

In this policy note, ECRE analyses the obstacles to the application of Dublin created by policy choices, focusing in particular on divergent decision-making outcomes and hostile political discourse and measures on migration. ECRE then explores the role of states and EU enforcement mechanisms in overcoming these obstacles, and makes recommendations on how to do so through compliance with the *acquis* and support to functioning asylum systems in all Member States.

II. ANALYSIS

The legal constraints on states' interpretation and application of the Dublin system have been shaped dramatically by the landmark rulings of European Courts in 2011: *M.S.S. v. Belgium and Greece* by the European Court of Human Rights (ECtHR) and *N.S./M.E.* by the Court of Justice of the European Union (CJEU). Following the ECtHR's judgment, legal challenges to forcible transfers of asylum seekers under the Dublin system have been most commonly associated with human rights risks arising from substandard reception conditions. Domestic and European courts regularly accept that an asylum seeker shall not be sent to a Member State where he or she would face destitution, arbitrary detention, deprivation of health care or other necessary forms of support. The CJEU ruling in *C.K.* has also provided much needed convergence with ECtHR case law and clarity on the human rights claims of applicants faced with individual risks upon transfer, regardless of whether deficiencies in the destination country are "systemic" or not.

Policymakers generally tend to perceive barriers to Dublin transfers as a reception problem. When it recommended Member States to reinstate transfers to Greece in its Recommendation C(2016) 8525 of 8 December 2016, the European Commission urged Dublin Units to ensure "in particular that the applicant will be received in a reception facility meeting the standards set out in EU law... and that he or she will be treated in line with EU legislation in every other relevant aspect." The Commission's focus on reception frames Dublin transfers to Greece as a question primarily related to living conditions. The problem may lie elsewhere, however. Adequate reception capacity is a crucial component, yet only one of many legal measures, policies and practice that make up an asylum system. Asylum systems require *inter alia* fair refugee status determination in compliance with international law standards, as well as an overall humane approach to those fleeing persecution or serious harm.

Member States make a range of policy choices when it comes to the implementation of the CEAS, shaped by governments and based on different factors, including (perception of) public opinion, perception of and relations with fellow Member States, and political and legal considerations vis-à-vis countries of origin. These choices also affect the prioritisation of enforcement of different parts of the Dublin Regulation, where financial and human resources are deployed, and the way cases are treated.

"ASYLUM LOTTERY" AND INDIRECT REFOULEMENT

One area where policy choices on the application of Dublin come into tension with human rights law relates to onward deportation. Since 2017, a fresh body of case law has emerged on the suspension of Dublin transfers to Member States where an asylum seeker would unfairly be denied international protection and would face removal to his or her country of origin. Such suspensions on account of indirect *refoulement* have been most prominent vis-à-vis applicants from Afghanistan: domestic courts have ruled against transfers of individuals to Germany,¹ Austria,² Belgium,³ Sweden,⁴ Finland⁵ and Norway,⁶ due to human rights risks stemming from their unduly strict policy on granting protection to Afghan claims. Some courts have taken a similar line towards asylum seekers at risk of onward return to Sudan upon transfer to Italy.⁷

Here, the deficiencies identified by courts in the receiving Member States are not capacity-related: these countries have generally well-resourced asylum systems and reception arrangements to cater for applicants' subsistence needs. The suspension of Dublin transfers results rather from the persisting discrepancies in national decision-making outcomes, due to which Afghan asylum seekers – like many others – continue to face an "asylum lottery" in Europe.

As of October 2018, first-instance protection rates for nationals of Afghanistan ranged from 98% in Italy and 71% in Greece, to 51% in Germany, 32% in Sweden and 7% in Bulgaria according to latest statistics. Similarly, Iraqi nationals have a 95% chance of getting protection at first instance in Italy but no more than 26% in Sweden and 8% in Bulgaria. As there is no evidence to indicate variations in the profiles of applicants from these countries, the conclusion has to be that the extreme disparities in recognition rates are to a large extent a product of conscious policy choices. For example, in some countries authorities are instructed

1. (France) Administrative Court of Bordeaux, 180412, 15 June 2018.
2. (France) Administrative Court of Rouen, 1801386, 31 May 2018.
3. (France) Administrative Court of Appeal of Nantes, 17NT03167, 8 June 2018.
4. (Germany) Administrative Court of Saarland, 5 L 140/18, 27 February 2018.
5. (France) Administrative Court of Appeal of Lyon, 17LY02181, 13 March 2018.
6. (France) Administrative Court of Lyon, 1702564, 3 April 2017; (Italy) Civil Court of Rome, 58068/2017, 25 May 2018.
7. (France) Administrative Court of Melun, 1708232, 6 November 2017.

to refuse protection based on the “internal protection alternative” or even on a presumption of “manifest unfoundedness” for claims lodged by applicants from countries such as Afghanistan or Iraq, while others do not systematically apply such concepts.

Successful appeals against Dublin transfers therefore shatter the illusion that asylum claims are treated alike across the continent. Over a decade into the implementation of Asylum Directives and multiple forms of practical cooperation and knowledge exchange, persons who clearly qualify for international protection by one Member State’s standards may face the prospect of unfair rejection in the “responsible Member State” and subsequent removal to a place where they risk persecution or serious harm.

HOSTILE ENVIRONMENT AND DISCOURSE ON MIGRATION

Another type of policy choice which has recently warranted suspension of Dublin transfers is the political context within which asylum systems operate. In their assessment of the situation prevailing in destination countries, courts have incorporated the policy decisions and rhetoric of receiving countries’ governments in their reasoning. The case of Hungary is a vivid example of deliberate dismantling of protection standards through a crackdown and successive legislative reforms. Most Member States’ judicial authorities oppose Dublin transfers to Hungary to protect asylum seekers from arbitrary detention in substandard conditions, unfair denial of protection, and hostility in the country.

Recently, some transfers to Italy have been halted on account of the government’s decisions to forbid search and rescue boats from disembarking in Italian ports, its plans to slash funding for asylum seekers, its hostile discourse on migrants, and the increase in incidents of racist violence.⁸ Transfers have also been halted following the recent dismantling of the country’s standards through legislative reform.⁹ Alongside official policy and discourse on asylum seekers, the acquiescence in police violence by Bulgaria has also been deemed a ground for suspending Dublin transfers.¹⁰

The impact of hostile political statements and anti-migration positions on the implementation of the Dublin system should not be underestimated. The presumption of equivalent asylum standards underpinning the Dublin Regulation is clearly dispelled when the “responsible” Member State overtly flouts its legal obligations and invests political capital in creating a climate where refugees feel threatened and unwelcome.

THE COSTS OF NON-COMPLIANCE

The adverse political climate on migration and the inability of the EU to reach an agreement on responsibility-sharing, reflected yet again in European Council stalemate, has severely undermined longstanding efforts to develop functioning asylum systems. Rather than understanding and addressing the obstacles to Dublin transfers, Member States push their Dublin Units to secure more transfers, despite unnecessary human and financial costs, and even in the face of blatant disregard for protection standards and harmful policies on the part of their counterparts.

Hungary is the “elephant in the room”. Despite pending infringement proceedings launched by the European Commission, and UNHCR and ECRE advice against transfers, its Immigration and Asylum Office received 1,848 incoming requests during the first half of 2018. These were mostly “take back” requests relating to persons having previously applied there, including 698 from France and 543 from Germany. Bulgaria, potentially facing an infringement procedure following recent Commission action, received 1,986 requests during the same period, including 634 from Germany and 559 from France, most of them “take back” requests. Italy remains the main recipient of Dublin procedures, with 10,748 incoming requests from Germany, 1,582 from Switzerland, 1,248 from Austria and 1,150 from the Netherlands.

Even if transfers are not actually carried out in such cases, the insistence on “business as usual” in Dublin procedures is worrying. Member States spend considerable time and resources on initiating procedures which at best leave people in limbo and delay their access to protection, only to end up with no transfer, and at worst expose them to severe violations of basic human rights. These cases are not inevitable – Article 17(1) of the Dublin Regulation permits states to take responsibility for an asylum application at any time, while

8. (France) Administrative Court of Paris, 1807362/8, 25 June 2018; Administrative Court of Paris, 1810819/8, 3 August 2018; Administrative Court of Bordeaux, 1803602, 29 August 2018; Administrative Court of Melun, 1807266 and 1807354, 18 September 2018; Administrative Court of Versailles, 1807048, 11 October 2018; Administrative Court of Pau, 1802323, 15 October 2018; Administrative Court of Toulouse, 1805185, 9 November 2018.

9. (Netherlands) Regional Court Amsterdam, NL18.17748, 18 October 2018.

10. (France) Administrative Court of Paris, 1811611/9, 6 July 2018; (Romania) Regional Court Galați, 5362/2017, 4 December 2017.

Article 3(2) prohibits transfers to countries where a risk of inhuman or degrading treatment would ensue.

Courts are usually prepared to scrutinise Dublin procedures and halt dangerous transfers, provided that asylum seekers are able to effectively access a remedy. Yet, litigation is a reactive or remedial measure. It is not an adequate substitute for sound and rights-compliant policy from the start. States participating in the Dublin system, and the EU institutions and agencies tasked with overseeing its implementation, have a responsibility to thoroughly assess the safety of Member States as countries of asylum, based on realities on the ground rather than assumed compliance and “mutual trust”. However, the readiness of policymakers to blame individuals for “absconding” or engaging in “secondary movements”, or external border countries for failing to contain people at points of arrival, is contrasted with striking complacency about states’ deliberate violations of CEAS standards.

Shying away from official positions on the legality of some Dublin transfers may be driven by denial, excessive focus on reception, or efforts to constructively engage with fellow governments or to maintain (the appearance of) “a normal functioning of the rules of the Dublin system”, in the Commission’s words. However, “soft” diplomatic measures to promote compliance with the asylum *acquis* have proven as ineffective in Hungary as they have elsewhere. In the meantime, national authorities have continued to conduct unnecessary Dublin procedures, to the detriment of individuals’ rights and the efficiency of their own administrations. Policy choices on Dublin must be revisited to avoid perpetuating futile strategies.

EU institutions have also been regrettably passive in the face of violations of asylum standards. The Commission and the European Asylum Support Office (EASO) have a role in monitoring and responding to deficiencies under the “early warning and preparedness” mechanism, set out in Article 33 of the Dublin Regulation, which remains a dead letter. Over the past three years the Commission has single-handedly led a policy process to reinstate Dublin transfers to Greece and remained silent on the numerous Member State policies aiming at unlawful Dublin transfers to other countries which carry high risks of human rights violations and have been considered unlawful by national courts.

Monitoring and enforcement bodies have duties to ensure that the CEAS is implemented and complied with, and remain accountable for this. The recent formal notice of a possible infringement procedure against Bulgaria is a welcome reminder of the Commission’s role in the enforcement of asylum standards, but should be followed by concrete action on non-compliance there and elsewhere.

III. RECOMMENDATIONS

To break out of the cycle of futile and unlawful Dublin procedures, ECRE makes the following recommendations:

- » **Member States:** Dublin Units should adopt clear instructions precluding the transfer of asylum seekers to Member States in which they would be at risk of direct or indirect *refoulement*, on the basis of objective evidence. Instructions should include an assessment of the socio-political context for asylum seekers and refugees in the transfer country, insofar as they relate to ECHR Article 3 considerations. These instructions should be clearly communicated to all authorities applying the Dublin Regulation across the national territory.
- » **Member States:** Where a Member State is deemed to raise risks of *refoulement*, Dublin Units should refrain from initiating Dublin procedures on entry or “take back” grounds altogether, and should promptly make use of the “sovereignty clause” under Article 17(1).

To tackle the obstacles to a human rights-compliant and effective implementation of the Dublin system, pending discussions on deeper reform, ECRE makes the following recommendations:

- » **European Commission:** The Directorate-General for Migration and Home Affairs (DG HOME) Asylum Unit should thoroughly assess states’ compliance with fundamental rights in Dublin implementation as part of their country monitoring of overall the implementation of the CEAS. This assessment must be based on the full range of available and credible sources, including reputable international and non-governmental organisations, and case law on suspension of Dublin transfers. Where violations of the *acquis* are identified and systems are not brought in line with legal standards, the Commission should initiate infringement proceedings.
- » **European Parliament:** MEPs, in particular members of the Civil Liberties, Justice and Home Affairs (LIBE) Committee, should contribute to the effective monitoring of the implementation of the CEAS by making use of parliamentary accountability mechanisms. In addition to oral and written questions to the European Commission, hearings on thematic or country-specific aspects of Dublin could be held in the LIBE Committee to promote in-depth debate.