

## DRC'S RECOMMENDATIONS ON

# the Regulation on Asylum and Migration Management

The Danish Refugee Council (DRC) has since 2014 provided free legal assistance and representation to all asylum seekers in the Dublin procedure in Denmark. In addition to this, DRC has an operational presence in Greece and Italy, where we also provide legal assistance to asylum seekers, including asylum seekers in the Dublin procedure.

This document outlines DRC's concerns and key recommendations regarding the proposed Regulation on Asylum and Migration Management (RAMM)<sup>1</sup> that is meant to replace the current Dublin III Regulation<sup>2</sup>, under the European Commission's proposed New Pact on Migration and Asylum<sup>3</sup>.

Based on DRC's practical experience with thousands of asylum seekers in the Dublin procedure, we focus on selected articles of the RAMM which will affect the rights of asylum seekers.

DRC's analysis of how the RAMM will impact asylum seekers and our four key recommendations are presented in detail below, followed by a table with a brief overview of the selected articles and the corresponding proposed amendments to the RAMM.



## **DRC's key recommendations on the Regulation on Asylum and Migration Management**

- **Family should be kept together:** To ensure the right to family life, the definition of asylum seekers' family members should be expanded to be based on actual family ties and include members of households in the home country, such as parents and their adult children, as well as all unmarried couples in stable relationships, including same sex partners.
- **No sanctions for onward movement:** Rather than sanctioning asylum seekers for onward movement identified drivers, such as the wish to reunite with family or undignified living conditions, should be addressed.
- **Primacy to the best interests of the child:** Unless unaccompanied minor asylum seekers have family in the Member States with whom they want to reunite, the children's asylum applications should be examined the Member State, where they are present.
- **Access to effective remedies:** Asylum seekers have the right to effective remedies and should thus have access to appeal all parts of the Dublin decision.

## Family should be kept together

Next to achieving international protection, reuniting with family is one of the most important issues to the asylum seekers, DRC represents in the Dublin procedure.

Many asylum seekers are forced to flee separately from their family members or become separated during the flight to Europe, thus ending up applying for asylum in different Member States. In such situations, the asylum seekers depend on the Dublin procedure to ensure that they are reunited with their families.

In the experience of DRC, some asylum seekers, who are prevented from reuniting with their family members in the Dublin procedure, see no other option than moving between Member States. The separation of families is thus one of the main drivers of onward movement.<sup>4</sup> Additionally, successful integration can be supported by reunification of separated families.<sup>5</sup>

### Family reunification in the Dublin procedure

The Dublin III Regulation includes a hierarchical list of criteria that can determine which Member State should be responsible for examining an asylum application. When applying the Dublin III Regulation, the right to respect for private and family life<sup>6</sup> should be a primary consideration for the Member States<sup>7</sup>.

The so-called family provisions<sup>8</sup> as well as the dependency and discretionary clauses<sup>9</sup> allow for asylum seekers to be reunited with family members already present in the Member States.

The Dublin III Regulation<sup>10</sup> states that family ties should have existed in the home country and defines asylum seekers' 'family members' as:

- The spouse,
- The unmarried partner in a stable relationship, if the law or practice of a Member States treats unmarried couples in a way comparable to married couples,
- The minor children, and
- The parents of a minor and unmarried asylum seeker.

1 European Commission, [Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management \(RAMM\)](#), COM(2020) 610.

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

3 [Migration and Asylum Package: New Pact on Migration and Asylum documents adopted on 23 September 2020](#)

4 The European Parliamentary Research Service (EPRS), [Dublin Regulation on international protection applications European Implementation Assessment](#), February 2020, pages 1 and 21.

5 CEPS paper, [When mobility is not a choice – problematizing asylum seekers' secondary movements and their criminalization in the EU](#), December 2019, pages 1-6, and [The European Parliamentary Research Service \(EPRS\), The European Commission's New Pact on Migration and Asylum – Horizontal substitute impact assessment](#), August 2021, page 125.

6 The [Charter of Fundamental Rights of the European Union](#) (the Charter) Article 7 and the [European Convention on Human Rights](#) Article 8.

7 The Dublin III Regulation preamble (14) refers to respecting family life in accordance with the European Convention for the Protection of Human Rights and Fundamental Freedoms and with the Charter of Fundamental Rights of the European Union.

8 The Dublin III Regulation Articles 9-11 and RAMM Articles 16, 17 and 18.

9 The Dublin III Regulation Articles 16 and 17(1).

10 The Dublin III Regulation Article 2(g).

Although family reunification should have priority to lower ranking criteria in the Dublin III Regulation, varying interpretations of the definition of ‘family members’ and different evidential requirements across the Member States result in less use of the family provisions compared to the arguments related to documentation and entry reasons<sup>11</sup>.

The DRC policy brief on families in the Dublin procedure, [When the Dublin system keeps families apart](#)<sup>12</sup>, provides concrete examples of the many challenges asylum seekers face in reuniting with their family members due to burdensome and restrictive Dublin rules and procedures in the Member States.

The policy brief also includes examples on how the best interests of the child are not always being taken sufficiently into consideration by the Member States in the Dublin procedure.

### **The RAMM’s impact on asylum seekers**

DRC welcomes that the RAMM expands the definition of ‘family members’ listed in the Dublin III Regulation<sup>13</sup> by including families created in transit and siblings. However, to fully capture the various compositions of families arriving in Europe and to respect the right to private and family life, the definition of ‘family members’ should be further expanded.<sup>14</sup>

DRC thus calls for the definition of ‘family members’ to focus on the actual ties between asylum seekers and their family members by clearly including members of a household that existed in the home country e.g., parents, who used to live with their adult child and vice versa, and all unmarried couples in a stable relationship, including same sex couples, regardless of national law and practice in the Member States.

As an alternative to the family provisions, the dependency<sup>16</sup> and discretionary<sup>17</sup> clauses can be utilized to reunite family:

- The dependency clause provides the possibility to unite dependent family members based on pregnancy, having a new-born child, serious illness, severe disability, severe trauma or old age.
- The discretionary clause enables a Member State to take responsibility for an asylum seeker regardless of the situation.

However, in DRC’s experience the Member States interpret these clauses restrictively and rarely apply them in practice<sup>18</sup>, thereby reducing the impact of the much-needed safeguards.<sup>19</sup>

11 Asylum Information Database: [The implementation of the Dublin III Regulation in 2019 and during COVID-19, AIDA Dublin Update, August 2020](#), pages 13-16, European Parliamentary Research Service, [Dublin Regulation on international protection applications European Implementation Assessment](#), February 2020, pages 1 and 10-11, and [ECRE Comments on RAMM, February 2021](#) page 30.

12 DRC Policy brief, [When the Dublin System keeps families apart](#), May 2018.

13 The RAMM Article 2(g) and the Dublin III Regulation Article 2(g).

14 The European Parliamentary Research Service (EPRS), [The European Commission’s New Pact on Migration and Asylum – Horizontal substitute impact assessment](#), August 2021, page 125.

15 The European Parliamentary Research Service (EPRS), [The European Commission’s New Pact on Migration and Asylum – Horizontal substitute impact assessment](#), August 2021, page 156.

16 The Dublin III Regulation Article 16 and RAMM Article 24 with proposed changes.

17 The Dublin III Regulation Article 17(1) and RAMM Article 25(1).

18 ECRE, [ECRE Comments on the Commission proposal for a Regulation on Asylum and Migration Management](#), February 2021, page 33.

19 ECRE, [ECRE Comments on the Commission proposal for a Regulation on Asylum and Migration Management](#), February 2021, page 32.

Additionally, the proposed dependency clause in the RAMM limits the eligible family members by removing siblings and only allowing for children and parents to be reunited.

The limitation of the scope of the dependency clause can cause a negative impact on the possibility for family reunification that is not coherent with the objective of ensuring the protection of the right to family life.<sup>20</sup> Furthermore, the restriction can risk keeping asylum seekers from the family members, who provide the most support to the asylum seekers.<sup>21</sup>

Separation of families in the Dublin procedure has severe consequences for the individuals involved and should be avoided. To ensure that the right to family life is protected and families are reunited, DRC calls for a more frequent and less restrictive use of the family provisions as well as the dependency and discretionary clauses by the Member States.

### **Children and parents who used to live together in the home country**

The Dublin III Regulation requires that children must be minor and unmarried to be included as ‘family members’ of their parents.

When representing asylum seekers in the Dublin procedure, DRC often encounters the separation of families with children above the age of 18 years. Such families often consist of parents with several children, where the eldest children are young adults in the age 18-22, who always have lived with their families in the home country.

Legally, the children are considered adults when they turn 18, which entails that they no longer fulfil the definition of ‘family members’ of their parents in the Dublin III Regulation.

Consequently, families with young adult children, who are forced to flee in separate groups and thus get registered in different Member States, are often separated or kept apart by the application of the Dublin III Regulation, in spite of the inevitably close family ties that exists e.g., between a father and mother and their 18-year-old daughter.

Similarly, (often elderly) parents, who used to share a household with their children and grandchildren in their home country, are not covered by the definition of ‘family members’ and thus risk being separated at high human costs.

The parents may be dependent on their children, both emotionally and physically, but very few meet the very narrow definition and application of the notion of dependency clause.

By changing the wording of the RAMM Article 2(g) to include all children regardless of age and marital status, parents living with their adult child or vice versa will no longer be at risk of being separated.

### **All unmarried couples in a stable relationship**

For a couple to be reunited under the Dublin III Regulation and the RAMM, they should either have been married in the home country or be in a “*stable relationship, where the law or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to third-country nationals.*”<sup>22</sup>

20 The European Parliamentary Research Service (EPRS), [The European Commission’s New Pact on Migration and Asylum – Horizontal substitute impact assessment, August 2021](#), page 125.

21 The European Parliamentary Research Service (EPRS), [The European Commission’s New Pact on Migration and Asylum – Horizontal substitute impact assessment, August 2021](#), page 156.

22 The Dublin III Regulation Article 2(g) is copied in RAMM Article 2(g)(i).

Based on the experiences of DRC, many Member States have restrictive legal practices and interpretations of whether unmarried couples can have equal status as a married couple and thereby be recognized as 'family members' under the Dublin III Regulation.

National marriage and family reunification rules often require documentation of a shared household for unmarried couples to receive equal status as married couples. The Family Reunification Directive applies to most Member States, but still leave some discretion in the implementation to the Member States.<sup>23</sup>

For many unmarried couples it is not possible to cohabit in their home country even if they have been in a stable relationship for many years. This might be for cultural reasons or young age before fleeing their home country.

Unmarried couples forming a household in transit countries often do not have the necessary documentation to prove that they have lived together e.g., due to the instability of their living situation or their lack of official residence.

Similarly, couples that are religiously married without an official marriage registration are often not recognized as family members, even though a religious marriage in some situations might be the only possibility for a couple to get married.

Even when an unmarried couple is expecting a child or already have children together, a Member State can refuse family reunification, if they do not fulfil the national legal requirements.

All children have the right to stay with both parents as enshrined in the Convention on the Rights of the Child (CRC).<sup>24</sup> When a couple with children is being separated, and the child is forced to live with only one of his or her parents, it is thus a violation of the rights of the child.

Additional obstacles often exist for same sex couples, because it can be even more difficult for them to live together in their home country as the national legislation in some countries does not allow same sex marriage or cohabitation.

Furthermore, some Member States do not provide same sex couples with an equal status to other couples in their national legislation on family reunification and refuse same sex couples the right to apply for family reunification.<sup>25</sup>

Unmarried couples, who do not fulfil the criteria of national legislation, can usually only hope to be reunited under the discretionary clause.<sup>26</sup> But since the Member States rarely utilise the discretionary clause, many unmarried couples are being forced to live apart.<sup>27</sup>

DRC thus calls for all unmarried partners in stable relationships to be recognized as family members regardless of national law.

23 The [Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification](#) (the Family Reunification Directive) applies to all Member States except for Denmark, Ireland and UK.

24 [Convention on the Right of the Child \(CRC\) Article 9.](#)

25 European Commission, [Report on the implementation of f Directive 2003/86/EC on the right to family reunification](#), COM(2019) 162 final, 29 March 2019, page 4, footnote 32.

26 The Dublin III Regulation Article 17 and the RAMM Article 25.

27 UNHCR, [Left in Limbo: UNHCR Study on the Implementation of the Dublin III Regulation](#), August 2017, page 102.

## Family should be kept together

DRC welcomes the expansion of the definition of ‘family members’ in the RAMM Article 2(g) to include siblings and families formed in transit.

**DRC calls for** further expansion of the definition of ‘family members’ in the RAMM Article 2(g) so it is based on actual family ties and includes parents, who used to live with their adult child and vice versa, as well as all unmarried couples in a stable relationship regardless of national law and practice in the Member States.

**DRC also calls for** more frequent and less restrictive use of the family provisions as well as the dependency and discretionary clauses.

## No sanctions for onward movement

The RAMM imposes an obligation on asylum seekers to stay in specific Member States<sup>28</sup> and introduces the possibility to sanction asylum seekers in the case of non-compliance.<sup>29</sup> Obligations and sanctions imposed on asylum seekers is a new phenomenon that is not currently part of the Dublin III Regulation.

### The RAMM’s impact on asylum seekers

With the RAMM asylum seekers, who do not comply with decisions to be transferred back to a Member State of first registration and have been informed about the consequences, shall not be entitled to reception conditions.<sup>30</sup>

Although it is noted that the sanction “*shall be without prejudice to the need to ensure a standard of living*”<sup>31</sup>, the threshold for ‘a standard of living’ remains unclear since the term does not directly refer to any specific Union law or international obligations.

The Explanatory Memorandum of the RAMM does not provide further guidance on this matter and the preamble only mentions that the immediate material needs of the asylum seekers should be covered in accordance with the Charter.<sup>32</sup>

The sanction is mirrored in the 2016 recast Reception Conditions Directive, which states that asylum seekers only have the right to reception conditions in the Member States, where they are required to be present.<sup>33</sup> As a minimum, the Member States must ensure that asylum seekers have access to health care and a dignified standard of living in accordance with fundamental rights.

28 The RAMM Article 9(4).

29 The RAMM Article 10.

30 The RAMM Article 10(1).

31 The RAMM Article 10(1).

32 The RAMM preamble (53).



It is left to the Member States' discretion to determine in which situations they must refrain from imposing sanctions on the asylum seekers in order to comply with Union law, and the removal of all material reception conditions could thus constitute a violation of the right to human dignity.

Asylum seekers move onward for several reasons, such as family reunification and poor reception conditions, and if such drivers are not addressed, the asylum seekers will continue to travel. If Member States sanction asylum seekers by refusing access to reception conditions, there is thus a risk that asylum seekers end up in living under undignified and inhuman conditions.

### **The right to human dignity**

According to the Charter, human dignity must be protected and respected.<sup>34</sup> To protect the right to human dignity, Member States must provide asylum seekers with reception conditions that ensure 'an adequate standard of living'.<sup>35</sup>

In specific situations e.g., if the asylum seekers abscond or lodge a subsequent asylum application, Member States can reduce or withdraw material reception conditions but must always ensure that asylum seekers have access to health care and 'a dignified standard of living'.<sup>36</sup>

The RAMM reference to 'a standard of living' is thus different from 'an adequate standard of living' or 'a dignified standard of living', which are described in the recast Reception Conditions Directive.

Case law from the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) regarding the prohibition against inhuman and degrading treatment and the right to human dignity can form a basis for the threshold Member States must met about reception conditions for asylum seekers.

The ECtHR has extensive case law on the standard of living conditions for asylum seekers in relation to the prohibition of inhuman or degrading treatment.<sup>37</sup> Even though there is no general obligation for Member States to provide housing to asylum seekers, the ECtHR has found that "*asylum seekers are members of a particularly underprivileged and vulnerable population group in need of special protection.*"<sup>38</sup>

In *N.H. and others v. France*, the ECtHR found that the dignity of the asylum seekers had not been respected, because they for several months had been without accommodation and access to sanitary facilities, had no means of subsistence, and were in constant fear of being attacked or robbed.<sup>39</sup>

Additionally, the CJEU has stated that excluding asylum seekers from reception conditions even for a temporary period of time is not compatible with the right to human dignity.<sup>40</sup>

33 The [Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection \(recast\)](#) (2016 recast Reception Conditions Directive), COM(2016) 465 final, 2016/0222 (COD), 13 July 2016, Article 17a(2).

34 The Charter of Fundamental Rights of the European Union (the Charter) Article 1.

35 EASO, [EASO guidance on reception conditions: operational standards and indicators](#), September 2016, page 7, and the current recast [Reception Conditions Directive](#) e.g., Article 17(2) that is copied in the 2016 [recast Reception Conditions Directive](#) Article 16(2).

36 The recast Reception Conditions Directive Article 20(5) and the 2016 recast Reception Conditions Directive Article 19(3).

37 European Convention on Human Rights Article 3.

38 ECtHR, *M.S.S. v. Belgium and Greece*, 21 January 2011.

39 ECtHR, *N.H. and others v. France*, nos. 28820/13, 75547/13 and 13114/15, 2 July 2020.

40 CJEU, *Cimade, Gisti v. Frankrig*, paragraph 56.

41 CJEU (Grand Chamber), C-233/18, *Haqbin*, 12 November 2019, *N.H. and Others v. France*, 2020, Application no. 28820/13, 75547/13 & 13114/15, 2 July 2020.



The threshold was further interpreted in *Haqbin*,<sup>41</sup> where the CJEU concluded that respect of human dignity requires a Member State to ensure that an asylum seeker will not end up in a situation of “*extreme material poverty that does not allow that person to meet his or her most basic needs such as a place to live, food, clothing and personal hygiene, and that undermines his or her physical or mental health or puts that person in a state of degradation incompatible with human dignity.*”<sup>42</sup>

The case law from both Courts state that asylum seekers must have fulfilled their basic needs and have access to subsistence and personal hygiene and that the asylum seekers physical or mental health must not be undermined.

### **Sanctions can create further onward movement and destitution among asylum seekers**

Through DRC’s representation of asylum seekers in the Dublin procedure, we know that asylum seekers move onward for many reasons, but mainly because they see no other option.

Apart from reuniting with family, the main drivers behind asylum seekers’ onward movement within EU are often protection-related: Asylum seekers often experience violence and abuse by authorities such as violent pushbacks by the border police<sup>43</sup> or they lack security and access to dignified reception conditions, while living in overloaded asylum camps.<sup>44</sup>

There is no indication or evidence supporting that the use of punitive measures and sanctions will deter asylum seekers from moving onward.<sup>45</sup> On the contrary, punitive approaches and criminalization of onward movement creates mistrust in the system and further destitution, irregularity and marginalization.<sup>46</sup> As long as the drivers are not addressed, the incentives for moving are strong and still present even if sanctions are imposed.<sup>47</sup>

A likely consequence of introducing sanctions for onward movement is thus an increase in the number of asylum seekers living in the streets in destitution,<sup>48</sup> which can violate the asylum seekers’ right to human dignity.

DRC thus calls for the removal of the punitive measures in the RAMM. Rather than introducing sanctions, the EU and its Member States should seek to address the drivers of onward movement by e.g., assisting families to be reunited in the Dublin procedure, preventing violence and pushbacks against asylum seekers, harmonizing asylum procedures and ensuring dignified reception conditions in all parts of the EU.

42 CJEU (Grand Chamber), C-233/18, *Haqbin*, 12 November 2019, paragraph 46.

43 Protecting Rights at Borders (the PRAB initiative), *Pushing Back Responsibility*, April 2021, and Protecting Rights at Borders (the PRAB initiative), *Pushing back Responsibility*, July 2021.

44 The European Parliamentary Research Service, *Dublin Regulation on international protection applications European Implementation Assessment*, February 2020, pages 8 and 21.

45 The European Parliamentary Research Service (EPRS), *The European Commission’s New Pact on Migration and Asylum – Horizontal substitute impact assessment*, August 2021, page 25.

46 The European Parliamentary Research Service, *Dublin Regulation on international protection applications European Implementation Assessment*, February 2020, page 21, and CEPS paper, *When mobility is not a choice – problematizing asylum seekers’ secondary movements and their criminalization in the EU*, December 2019, pages 1-6.

47 Often, asylum seekers move to other Member States to reunite with their family members, cf. DRC Policy brief, *When the Dublin system keeps families apart*, May 2018.

48 CEPS paper, *When mobility is not a choice – problematizing asylum seekers’ secondary movements and their criminalization in the EU*, December 2019, pages 1-6.

## No sanctions for onward movement

The right to human dignity should be protected for all asylum seekers.

**DRC calls for** the removal of the punitive measures in the RAMM Article 10, because asylum seekers should not be sanctioned for onward movement. Instead, drivers of onward movement should be addressed e.g., by facilitating family reunification, preventing violence towards asylum seekers and harmonizing asylum procedures and reception conditions across the Member States.

## Primacy to the best interests of the child

The best interests of the child must always be a primary consideration in all decisions concerning children.<sup>49</sup>

The Dublin III Regulation includes references to the CRC and the Charter in the preamble and states that the responsible Member State “*shall be that where the unaccompanied minor has lodged his or her application for international protection, **provided that it is in the best interests of the minor.***”<sup>50</sup>

In 2013, the CJEU ruled in the judgement *MA and others*<sup>51</sup> that an unaccompanied minor asylum seeker without family members in the EU should not be transferred back to the first entry Member State due to the prolonged procedures and waiting time, because such circumstances were not considered to be in the best interests of the child.<sup>52</sup>

This CJEU judgement was rendered at the same time as the Dublin III Regulation was approved by the Member States, thus the wording of the judgement was not included in the Dublin III Regulation. However, *MA and others* has resulted in a practice, where most Member States do not transfer unaccompanied minor asylum seekers under the Dublin III Regulation, unless it is in the best interests of the child to reunite with family members or relatives in the EU territory.

### The RAMM’s impact on asylum seekers

DRC welcomes the RAMM’s introduction of a mechanism for determining the best interests of the child and the strengthening of the representation of the unaccompanied minor asylum seekers.<sup>53</sup> The mechanism is an improvement compared to the Dublin III Regulation,<sup>54</sup> providing further requirements for the best interests assessment performed by the Member States.

49 The Convention on the Rights of the Child (CRC) Article 3(1) and the Charter of Fundamental Rights of the European Union (the Charter) Article 24.

50 The Dublin III Regulation Article 8(4). DRC’s bold highlighting.

51 CJEU, C-648/11, *MA and others v. UK*, 6 June 2013.

52 CJEU, C-648/11, *MA and others v. UK*, 6 June 2013, section 60 and 66.

53 The RAMM Article 13.

54 The Dublin III Regulation Article 6.

In the RAMM,<sup>55</sup> Member States are required to make a best interests assessment before any decision to transfer a child is made. The assessment shall be based on a number of factors such as the views and well-being of the child, and the conclusions of the assessment shall be clearly stated in the transfer decision.

The strengthened requirements to the decision to transfer unaccompanied minor asylum seekers are significant improvements for the practical application and implementation of the principle of the best interests of the child compared to the Dublin III Regulation.

However, the RAMM also reverses the burden of proof from the Member States to the child in transfer decisions,<sup>56</sup> which will never be in the best interests of the child.

### **Reversed burden of proof will never be in the best interests of the child**

In situations, where unaccompanied minor asylum seekers do not have family in the EU, the RAMM states that Member States of ‘first registration’ will be the responsible for child, “*unless it is demonstrated that this is **not** in the best interests of the minor*”.<sup>57</sup>

Contrary to the Dublin III Regulation, the RAMM thus reverses the burden of proof regarding the best interests of the child from the Member States to the children.<sup>58</sup>

The current Dublin practice based on *MA and others* has thereby been abandoned and the unaccompanied minor asylum seekers thus become responsible for documenting that a transfer decision is not in their best interests. This change can potentially affect many children, since the majority of unaccompanied minors seeking asylum in Europe do not have family or relatives present in the EU Member States.<sup>59</sup>

In DRC’s experience most Member States already have very high demands for documentation required to prove the best interests of the child.<sup>60</sup> DRC thus finds that it is not in the best interests of any child to put the burden of proof on them.

Due to time constraints, lack of available documentation and limited resources of the unaccompanied minors and their representatives, it is already complicated to document vulnerabilities or other relevant reasons why the transfer decisions in the individual situations would not be in the best interest of the child.

Even though the RAMM also introduces improvements to the representation of unaccompanied minor asylum seekers and the process to determine the best interests of the child, these improvements do not outweigh the fact, that the rights of children become diluted by a reversion of the burden of proof.

55 The RAMM Article 13(5).

56 The RAMM Article 15(5).

57 The RAMM Article 15(5). DRC’s bold highlighting.

58 The RAMM Article 15(5) is similar to the Dublin III Regulation Article 8(4) but reverses the burden of proof regarding the best interests of the child.

59 European Migration Network (EMN), [EMN Inform – Approaches to unaccompanied minors following status determination in the EU plus Norway](#).

60 DRC Policy brief, [When the Dublin system keeps families apart](#), May 2018, provides examples on the type of documentation Member States require from the unaccompanied minor asylum seekers.

### Reception conditions for unaccompanied minors

According to the ECtHR, asylum seeking children have specific needs and are extremely vulnerable, even when accompanied by their parents.<sup>61</sup> Because of this, reception conditions for asylum seeking children must be adapted to their age and the Member State must ensure “*that the conditions will not create a situation of stress and anxiety with particularly traumatic consequences*”.<sup>62</sup>

The RAMM recognises that unaccompanied minor asylum seekers are vulnerable and aims to prevent children from moving onwards.<sup>63</sup> Thus, the preamble presupposes that the transferring Member States will take all necessary and appropriate measures to ensure adequate protection of the unaccompanied minor asylum seekers in the receiving Member States.

However, DRC is concerned that unaccompanied minor asylum seekers risk being transferred back to the Member States of first registration, which are often overburdened and lack sufficient reception conditions for children.<sup>64</sup>

Prior to the transfer, the Member States communicate about the asylum seekers, and the RAMM<sup>65</sup> regulates which information should be shared before a transfer is carried out. The sending Member States are required to notify the receiving Member States with relevant information concerning the asylum seekers, especially information regarding potential special needs or any essential health care that might be required.

In DRC’s experience, the documentation of vulnerabilities of unaccompanied minor asylum seekers can be complicated to obtain, both due to time constraints and the children’s ability to seek professional help. There is thus a risk that the receiving Member States may not be informed of the special needs of the children, and thus will not be able to meet their special reception needs.

In situations of doubt regarding the protection of unaccompanied minor asylum seekers in the receiving Member States, transfers should be prohibited altogether.<sup>66</sup>

DRC finds that it is not in the best interests of any child to be subject to transfers between Member States unless for the purpose of reuniting with family or relatives. Finally, there is no evidence that the reversal of the burden of proof will prevent onward movement in practice.

61 ECtHR, Tarakhel v. Switzerland, Application no. 29217/12, paragraph 119.

62 ECtHR, Popov v. France, Application Nos. 39472/07 and 39474/07, paragraph 102.

63 RAMM preamble (48).

64 UNHCR, UNICEF and IOM, Refugee and Migrant Children in Europe, January-June 2018.

65 The RAMM Articles 37-39.

66 The European Parliamentary Research Service (EPRS), The European Commission’s New Pact on Migration and Asylum – Horizontal substitute impact assessment, August 2021, page 126.

## Primacy to the best interests of the child

All decisions regarding unaccompanied minor asylum seekers must be based on the best interests of the child.

**DRC calls for** the RAMM Article 15(5) to continue the current practice of *MA and others*. If the family provisions do not apply, the asylum applications of unaccompanied minor asylum seekers should be examined in the Member States, where the children are present, instead of the first Member State of registration.

## Access to effective remedies

The Dublin III Regulation introduced the right to effective remedies for asylum seekers in the Dublin procedure to ensure they got full access to their rights under the Regulation.<sup>67</sup>

The lack of effective remedies under the previous Dublin II Regulation had been criticized by legal scholars as rights of asylum seekers were being violated. It was thus questioned whether mutual trust between the Member States would be sufficient to ensure correct implementation of the Dublin Regulation.<sup>68</sup>

In line with the concerns raised by legal scholars, the CJEU in 2016 decided that asylum seekers should have the right to appeal whether the criteria for determining the responsible Member State had been applied correctly.<sup>69</sup>

The right to request for a court or tribunal to suspend a transfer to ensure access to effective remedies has been continued from the Dublin III Regulation to the RAMM.<sup>70</sup> However, compared to the Dublin III Regulation, the RAMM<sup>71</sup> considerably restricts asylum seekers' access to effective remedies by limiting the scope of the remedy; especially for asylum seekers, who have been registered in different Member States.

### The RAMM's impact on asylum seekers

In the RAMM, the access to effective remedies is being considerable limited in take back cases,<sup>72</sup> where the asylum seekers have been registered as having lodged an asylum application in another Member State.

67 The Dublin III Regulation Article 27.

68 European Database of Asylum Law, [The Dublin System and the Right to an Effective Remedy](#) – The case of C-394/12 Abdullahi, 13 December 2013.

69 CJEU, [C-63/15 Ghezelbash](#), 7 June 2016, paragraph 54.

70 The Dublin III Regulation Article 27(3)(c) and the RAMM Article 33(3).

71 The RAMM Article 33.

72 The RAMM Article 26(1)(b)-(d).

Asylum seekers in the take charge procedure<sup>73</sup> of the RAMM have the right to appeal in cases regarding the right to family life, the rights of the child and the dependency clause<sup>74</sup>. Whereas asylum seekers in the take back procedure only can appeal, if the transfer potentially constitutes a violation of the prohibition of torture and inhuman or degrading treatment or punishment<sup>74</sup>.

The access to effective remedies for asylum seekers will thus become severely restricted compared to their rights under the Dublin III Regulation, where asylum seekers have the right to appeal about all factual and legal circumstances in the cases and the correct application of the criteria.

For asylum seekers in the take back procedure, the access to effective remedies is limited even further and only become available in the most severe situations that concern very serious fundamental rights infringements.

### **The right to information and the personal interview**

The limitation to the access to effective remedies in the take back procedure is based on the presumption that upon arrival to the first Member State of registration, asylum seekers have been informed about the asylum system and the Dublin procedure before being registered as asylum seekers, and that the first Member State of registration has made a thorough examination of the individual situation of the asylum seeker.

In DRC's experience, most asylum seekers in the Dublin procedure do not know how they have been registered in the first Member State, or they have been informed by the authorities that they had to give fingerprints in order to demonstrate that they had not committed a crime and have not been informed about the Dublin procedure.

Although asylum seekers have a right to information<sup>76</sup>, the Member States do not have a uniform procedure for providing information on the Dublin procedure. The provision of information is often challenged due to the lack of qualified interpreters and limited access to legal assistance.<sup>77</sup>

Another obstacle for asylum seekers is that they are obliged to provide all information relevant to the Dublin decision at an early stage in the procedure, upon arrival in the Member State.<sup>78</sup>

In DRC's experience, asylum seekers are often very affected – or even traumatized – by a long and perilous flight. Some asylum seekers explain that they do not have sufficient knowledge about the European asylum system and the Dublin procedure and thus do not understand the importance of disclosing all information from the beginning.

Some asylum seekers distrust authorities due to bad experiences in their home countries or in transit countries. Trust in the authorities is essential in all parts of the asylum procedure, because asylum seekers often need to disclose very private and intimate information regarding their personal situation, such as vulnerabilities and reasons for applying for asylum.

73 The RAMM Article 26(1)(a).

74 The RAMM Articles 15-18 and 24.

75 The Charter of Fundamental Rights of the European Union (the Charter) Article 4.

76 The Dublin III Regulation Article 4 and RAMM Article 11.

77 The European Parliamentary Research Service, [Dublin Regulation on international protection applications European Implementation Assessment](#), February 2020, pages 1, 10, 12 and 27.

78 The Dublin III Regulation Article 5 and RAMM Article 9(3).

In other cases, asylum seekers are not in possession of the information that can be relevant to the Dublin decision at the time of the first registration in the Member State e.g., knowledge about the whereabouts of family in the EU territory. Additionally, some asylum seekers have experienced that the authorities have misunderstood or inaccurately referred information that they have provided to their case.

All these situations can result in wrong Dublin decisions by the Member States e.g., that the Member State of first registration does not initiate a take charge procedure with the aim of reuniting a family, or that a Member State makes a take back decision although the asylum seeker is too vulnerable to be transferred to another Member State.

All decisions regarding transfers of asylum seekers can have an impact on their fundamental rights,<sup>79</sup> and asylum seekers should thus have an equivalent right to appeal in accordance with the right to an effective remedy<sup>80</sup>.

### **Information disclosed during the appeals procedure**

When DRC represents asylum seekers in the Dublin procedure, we conduct interviews with the asylum seekers to prepare their complaints.

During the interviews, DRC often receives information about the asylum seekers' vulnerabilities, medical conditions or presence of family in another Member State that has not been disclosed during the interview with the authorities. DRC then assists the asylum seekers in obtaining documentation that can support their complaints such as medical files and information about family members.

DRC often experiences that crucial information about the asylum seekers' individual situations first appear during the appeals process of the Dublin procedure. Some times information relevant to the Dublin case has not been identified by the authorities in neither the Member State conducting the Dublin procedure nor in the Member State of first registration.

DRC thus calls for all asylum seekers to have full access to effective remedies in all Member States and in all stages of the procedure; both in take charge and take back cases.

## **Access to effective remedies**

All asylum seekers must have access to effective remedies.

**DRC calls for** ensuring full access to effective remedies for all asylum seekers by retaining the wording of the Dublin III Regulation Article 27(1) instead for the proposed RAMM Article 33(1).

79 The European Parliamentary Research Service (EPRS), [The European Commission's New Pact on Migration and Asylum – Horizontal substitute impact assessment](#), August 2021, page 126.

80 The European Union Charter of Fundamental Rights Article 47.



Table 1

## DRC's observations and recommendations on the proposed Regulation on Asylum and Migration Management

Changes to the Commission's proposal on the RAMM are marked as ***new text*** and ***deleted text***.

### Family should be kept together

Dublin III Regulation	RAMM Proposal	DRC's observations	DRC's recommendation
<p><b>Article 2(g)</b></p> <p>'family members' means, insofar as the family already existed in the country of origin, the following members of the applicant's family who are present on the territory of the Member States:</p> <p>— the spouse of the applicant or his or her unmarried partner in a stable relationship, where the law or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to third-country nationals,</p> <p>— the minor children of couples referred to in the first indent or of the applicant, on condition that they are unmarried and regardless of whether they were born in or out of wedlock or adopted as defined under national law,</p> <p>— when the applicant is a minor and unmarried, the father, mother or another adult responsible for the applicant, whether by law or by the practice of the Member State where the adult is present,</p> <p>— when the beneficiary of international protection is a minor and unmarried, the father, mother or another adult responsible for him or her whether by law or by the practice of the Member State where the beneficiary is present;</p>	<p><b>Article 2(g)</b></p> <p>'family members' means, insofar as the family already existed before the applicant or the family member arrived on the territory of the Member States, the following members of the applicant's family who are present on the territory of the Member States:</p> <p>(i) the spouse of the applicant or his or her unmarried partner in a stable relationship, where the law or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to third-country nationals,</p> <p>(ii) the minor children of couples referred to in the first indent or of the applicant, on condition that they are unmarried and regardless of whether they were born in or out of wedlock or adopted as defined under national law,</p> <p>(iii) where the applicant is a minor and unmarried, the father, mother or another adult responsible for the applicant, whether by law or by the practice of the Member State where the adult is present,</p> <p>(iv) where the beneficiary of international protection is a minor and unmarried, the father, mother or another adult responsible for him or her whether by law or by the practice of the Member State where the beneficiary is present,</p> <p>(v) the sibling or siblings of the applicant;</p>	<p>DRC welcomes the expansion of the definition of 'family members' in the RAMM Article 2(g) to include families created in transit and siblings.</p> <p>However, we regret to see that the RAMM proposal does not fully reflect the diverse composition of families arriving as asylum seekers in the EU, such as:</p> <ul style="list-style-type: none"> <li>• Parents, who used to live with their adult children, and vice versa.</li> <li>• Unmarried couples in a stable relationship, which is not recognized as a marriage by the Member States.</li> </ul> <p>The dependency and discretionary clauses, the Dublin III Regulation Articles 16 and 17(1) and the RAMM Articles 24 and 25(1), can provide a much-needed safeguard for asylum seekers seeking to reunite with family that is not included in the definition of family members.</p> <p>However, in practice most Member States utilise the Dublin III Regulation family provisions as well as the dependency and discretionary clauses less frequent than articles related entry.</p>	<p>DRC recommends expanding the definition of 'family members' to be based on actual family ties between asylum seekers and their family members by including parents, who lived with their adult child and vice versa, and all unmarried couples in a stable relationship regardless of national law and practice in the Member States.</p> <p>To ensure that the right to family life is protected and families are reunited, DRC also calls for a more frequent and less restrictive use of the family provisions as well as the dependency and discretionary clauses. We suggest the following changes to RAMM Article 2(g):</p> <p>'family members' means, insofar as the family already existed before the applicant or the family member arrived on the territory of the Member States, the following members of the applicant's family who are present on the territory of the Member States:</p> <p>(i) the spouse of the applicant or his or her unmarried partner in a stable relationship, <b><i>where the law or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to third-country nationals,</i></b></p> <p>(ii) the <b><i>minor</i></b> children of couples referred to in the first indent or of the applicant, <b><i>on condition that they are unmarried and</i></b> regardless of whether they were born in or out of wedlock or adopted as defined under national law,</p> <p>(iii) <b><i>where the applicant is a minor and unmarried,</i></b> the father, mother or another adult responsible for the applicant, whether by law or by the practice of the Member State where the adult is present, (iv) <b><i>where the beneficiary of international protection is a minor and unmarried,</i></b> the father, mother or another adult responsible for him or her whether by law or by the practice of the Member State where the beneficiary is present,</p> <p>(v) the sibling or siblings of the applicant;</p>

## No sanctions for onward movement

Dublin III Regulation	RAMM	DRC's observations	DRC's recommendation
Not present.	<p><b>Article 9(4) <i>Obligations of the applicant</i></b></p> <p>The applicant shall be required to be present in:</p> <p>(a) the Member State referred to in paragraphs 1 and 2 pending the determination of the Member State responsible and, where applicable, the implementation of the transfer procedure;</p> <p>(b) the Member State responsible;</p> <p>(c) the Member State of relocation following a transfer pursuant to Article 57(9).</p> <p><b>Article 10(1) <i>Consequences of non-compliance</i></b></p> <p>The applicant shall not be entitled to the reception conditions set out in [...] the [<i>Reception Conditions Directive</i>] [...] in any Member State other than the one in which he or she is required to be present pursuant to Article 9(4) of this Regulation from the moment he or she has been notified of a decision to transfer him or her to the Member State responsible, provided that the applicant has been informed of that consequence pursuant to Article 8(2), point (b) of [<i>Screening Regulation</i>]. This shall be without prejudice to the need to ensure a standard of living in accordance with Union law, including the Charter of Fundamental Rights of the European Union, and international obligations.</p>	<p>The RAMM Article 9(4) imposes an obligation on asylum seekers to be present in specific Member States.</p> <p>The RAMM Article 10(1) obligates Member States to sanction asylum seekers, who have moved onward to other Member States.</p> <p>Such punitive measures are a new phenomenon and not part of the Dublin III Regulation.</p> <p>The exclusion from reception conditions is an intrusive measure that will have a serious impact on the asylum seekers' right to human dignity.</p> <p>In the experience of DRC, asylum seekers move onward for many reasons such as family reunification, protection-related problems and undignified reception conditions.</p> <p>Punitive measures will not prevent onward movement, and a likely consequence of introducing sanctions is thus an increase in the number of asylum seekers living in the streets in destitution.</p>	<p>DRC recommends that the RAMM Article 10(1) is removed, because all asylum seekers should be treated with respect and dignity and not be sanctioned for onward movement.</p> <p>Instead drivers of onward movement should be addressed e.g., by Member States assisting families to be reunited, preventing violence towards asylum seekers and harmonizing asylum procedures and reception conditions across the Member States.</p>

## Primacy to the best interests of the child

Dublin III Regulation	RAMM	DRC's observations	DRC's recommendation
<p><b>Article 8(4) Minors</b></p> <p>In the absence of a family member, a sibling or a relative as referred to in paragraphs 1 and 2, the Member State responsible shall be that where the unaccompanied minor has lodged his or her application for international protection, provided that it is in the best interests of the minor.</p>	<p><b>Article 15(5) Unaccompanied minors</b></p> <p>In the absence of a family member or a relative as referred to in paragraphs 2 and 3, the Member State responsible shall be the one where the unaccompanied minor's application for international protection was first registered, unless it is demonstrated that this is not in the best interests of the minor.</p>	<p>DRC welcomes that the RAMM Article 13 includes improvements compared to the Dublin III Regulation Article 6, which concern the qualification requirements for a representative and a mechanism for determining the best interests of the child with regard to transfer decisions.</p> <p>However, contrary to the Dublin III Regulation Article 8(4), the RAMM Article 15(5) reverses the burden of proof by demanding that the child demonstrates that a transfer to the Member State of first registration "<i>is not in the best interests of the minor.</i>"</p> <p>DRC is of the opinion that a reversed burden of proof will never be in the best interests of any child.</p> <p>The change is additionally worrying, because Member States of first entry often would be the Member States at the EU's external borders, which already receive a lot of asylum seekers and have significant challenges in providing adequate reception conditions and access to qualified guardianship for unaccompanied minors.</p>	<p>All decisions regarding unaccompanied minor asylum seekers must be based on the best interests of the child.</p> <p>DRC recommends for the RAMM Article 15(5) to retain practice of <i>MA and others</i> to ensure that unaccompanied minor asylum seekers have their asylum applications examined in the Member States where they are present, unless they have family members or relatives in other Member States with whom they want to reunite.</p> <p>DRC thus suggests for the RAMM Article 15(5) to have the following wording:</p> <p>In the absence of a family member or a relative as referred to in paragraphs 2 and 3, the Member State responsible shall be the one where the <b><i>child is present provided that it is in the best interests of the child unaccompanied minor's application for international protection was first registered, unless it is demonstrated that this is not in the best interests of the minor.</i></b></p>

## Access to effective remedies

Dublin III Regulation	RAMM	DRC's observations	DRC's recommendation
<p><b>Article 27(1) Remedies</b></p> <p>1. The applicant or another person as referred to in Article 18(1) (c) or (d) shall have the right to an effective remedy, in the form of an appeal or a review, in fact and in law, against a transfer decision, before a court or tribunal.</p>	<p><b>Article 33(1) Remedies</b></p> <p>The applicant or another person as referred to in Article 26(1), point (b), (c) and (d) shall have the right to an effective remedy, in the form of an appeal or a review, in fact and in law, against a transfer decision, before a court or tribunal.</p> <p>The scope of the remedy shall be limited to an assessment of:</p> <p>(a) whether the transfer would result in a real risk of inhuman or degrading treatment for the person concerned within the meaning of Article 4 of the Charter of Fundamental Rights;</p> <p>(b) whether Articles 15 to 18 and Article 24 have been infringed, in the case of the persons taken charge of pursuant to Article 26(1), point (a).</p>	<p>The RAMM proposal considerably restricts asylum seekers' access to effective remedies by limiting the scope of the remedy and thus the possibility to complain about all factual and legal circumstances in a case, including wrongful application of the criteria.</p> <p>The RAMM Article 33 restricts the scope of the right to appeal by only allowing asylum seekers in the take charge procedure to appeal in cases regarding the right to family life, the rights of the child and the dependency clause (RAMM Articles 15-18 and 24). Asylum seekers in the take back procedure, who are registered in another Member State, have an even more limited right to appeal, because they only can appeal whether the transfer potentially constitutes a violation of the prohibition of torture and inhuman or degrading treatment or punishment (the Charter Article 4).</p> <p>The Member States do not have a uniform approach to providing information about the Dublin procedure and conducting personal interviews with asylum seekers in the Dublin procedure, which can result in decisions being based on lacking or wrong information.</p> <p>During the Dublin appeals procedure information relevant to the Dublin decision can be disclosed, which makes the possibility to appeal pivotal.</p>	<p>DRC recommends retaining the wording of the Dublin III Regulation Article 27(1) that ensures full access to effective remedies, including the possibility to appeal whether the criteria for determining the responsible Member State has been applied correctly.</p> <p>DRC thus suggests the following wording of the RAMM Article 33(1):</p> <p>The applicant or another person as referred to in Article 26(1), point <b>(a)</b>, (b), (c) and (d) shall have the right to an effective remedy, in the form of an appeal or a review, in fact and in law, against a transfer decision, before a court or tribunal.</p> <p><b><i>The scope of the remedy shall be limited to an assessment of:</i></b></p> <p><b><i>(a) whether the transfer would result in a real risk of inhuman or degrading treatment for the person concerned within the meaning of Article 4 of the Charter of Fundamental Rights;</i></b></p> <p><b><i>(b) whether Articles 15 to 18 and Article 24 have been infringed, in the case of the persons taken charge of pursuant to Article 26(1), point (a).</i></b></p>

# About DRC

The Danish Refugee Council (DRC) is a leading, international humanitarian displacement organisation, supporting refugees, asylum seekers and internally displaced persons during displacement, in exile, when settling and integrating in a new place or upon return. We provide protection and life-saving humanitarian assistance, including legal aid and assistance to asylum seekers in the Dublin procedure.

We support displaced persons in becoming self-reliant and included into hosting societies - and we work with communities, civil society and responsible authorities to promote protection of rights and peaceful coexistence. We have operations in countries around the world, including Denmark, Greece and Italy. Founded in Denmark in 1956, 9,000 staff, 7,500 volunteers.



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