

DANISH REFUGEE COUNCIL'S POSITION ON THE REFORM OF THE DUBLIN SYSTEM



Danish Refugee Council
Borgergade 10, 3rd
DK-1300 Copenhagen,
Denmark

T +45 3373 5000
drc@drc.dk
www.drc.dk

Danish Refugee Council
Brussels Representation
Place du Congrès 1
BE-1000 Brussels

T +32 2 894 4930

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On May 4 2016 the EU Commission submitted its proposals to reform the first part of the Common European Asylum System (CEAS), including a reform of the Dublin Regulation. On 9 March 2017 rapporteur Cecilia Wikström presented her proposed amendments to the Commission's proposal on the Dublin Regulation to the LIBE Committee.

The Danish Refugee Council (DRC) has for decades provided legal advice to asylum seekers in Denmark. Our activities cover a wide range of issues, including legal assistance to asylum seekers in the Dublin procedure. Through our role in the Dublin procedure in Denmark, we have assisted thousands of asylum seekers in their appeals against Dublin transfers. DRC thus has extensive first-hand experience of the present Dublin system's inability to effectively safeguard the fundamental rights of asylum seekers in Europe and ensure fast and efficient access to a fair asylum procedure. Accordingly, our comments on the Commission's proposal and the rapporteur's report are based on our practical experiences with the current Dublin system.



IN OUR VIEW, A MORE EFFICIENT AND SUSTAINABLE DUBLIN SYSTEM RESPECTING THE RIGHTS OF ASYLUM SEEKERS SHOULD RELY ON **5 KEY PRINCIPLES:**

- 1. Respect for the fundamental rights of the people seeking asylum in Europe.** All asylum seekers must be met with dignity and provided decent standards of living while in Europe. Further, special attention and enhanced safeguards must be granted to people with special needs, such as unaccompanied children and people with specific vulnerabilities. Member States must ensure that the best interest of a child is always carefully considered and respected in the Dublin procedure.
- 2. Respect for the preservation of family unity and reunification of family members, who have been separated, either inside or outside the European borders.** Keeping families together must always be given higher priority than administrative considerations whether in new allocative mechanisms or in the Dublin procedure. A sustainable Dublin system cannot be obtained without fully respecting the family life of asylum seekers.
- 3. Ensure quick access to a fair asylum procedure in Europe, respecting all legal and procedural safeguards.** A complicated and lengthy Dublin procedure constitutes an obstacle to a quick and efficient access to the asylum procedure - putting people in a vulnerable situation under further pressure.
- 4. Avoid unnecessary secondary movement.** DRC supports the idea of a matching-based system that takes into account the personal circumstances of an asylum seeker, as well as meaningful links with a Member State. It is in the best interest of both the asylum seeker and the system to avoid secondary movement between Member States after an asylum procedure has been initiated. A reformed Dublin system should address the shortcomings of the current system - for example separation of families, deteriorating asylum procedures and reception conditions and lack of information on the Dublin procedure and legal advice - rather than penalizing the individual asylum seeker for secondary movement.
- 5. Ensure solidarity between the Member States.** The effective protection of asylum seekers' rights as well as the efficiency of the Dublin system depend on a fair sharing of responsibility between the Member States in the allocation mechanism.

THE DANISH REFUGEE COUNCIL WELCOMES:

An extension of the definition of family members (in article 2g of the Regulation).

While concerns remain, DRC regards the proposed expansion of the family definition as a big step in the right direction to ensure family unity as well as the integration prospects of those granted protection. The narrow definition of family members in the current Dublin III Regulation (article 2g) and the limited application of the discretionary clauses often result in the separation of families within Europe. DRC knows of many cases where adult siblings of a young age are separated from each other. Our experience is that despite the siblings' strong family ties established in their home country, the current Dublin Regulation provides little chance of the siblings sustaining their family life, even if this is the only family members they have in Europe. DRC therefore warmly welcomes the inclusion of 'siblings' in the proposed definition, as well as the proposed inclusion of family founded in transit. (Recital 19)

A right to appeal based on the omission of the Member State to submit a Dublin request.

Several studies have shown that the current Dublin system has failed to provide a uniform and consistent application of the Regulation. DRC finds that asylum seekers should be able to rely on a legal foundation that ensures that regardless of the Member State, their family relations and humanitarian and cultural considerations will be taken into account. The current limitations on appeal in the Dublin III Regulation result in widely varying practices of the Member States regarding the interpretation of humanitarian considerations. In Denmark, DRC has provided legal assistance in several cases where an 18-19-year-old adult child is separated from his/her mother and siblings, with whom they had fled from their home country and are financially and emotionally dependent upon. The Danish authorities have refused to send a separate request for the take charge of the adult child along with the request to take charge of the mother and siblings, thus resulting in the separation of the adult child from his or her entire family. The Commission's proposed revision would mean a wider possibility for asylum seekers to be reunited with family members in other Member States (article 28(5)), as the provision would provide a possibility to challenge a very strict application of the definition of family ties and cultural considerations. In a Danish context, DRC finds that a reform of the current Regulation could mean a significant step in ensuring better protection of the preservation of family ties. (Recital 24)

A main objective to ensure quick and efficient access to asylum procedures.

DRC welcomes the Commission's focus on preventing prolonged negotiations between the Member States in the Dublin procedure. Avoiding unnecessary secondary movement and prolonged negotiations during the Dublin procedure will be in the interest of both the asylum seekers and the Member States. (Recital 5, 26-27)

A main objective to ensure more responsibility-sharing between member states through the introduction of a corrective allocation mechanism.

The DRC agrees that in order to achieve greater solidarity and a more matching based system between the Member states, a binding corrective allocation mechanism is needed. Since the beginning of the Dublin system, it has been evident that some Member States are not able to provide suitable reception conditions or quick access to fair asylum procedures. Serious shortcomings in asylum systems and reception conditions result in the deterioration of asylum seekers' fundamental rights and thus understandably serves as one of the drivers for secondary movement. This undermines the sustainability and efficiency of the Dublin system, but most importantly, it puts asylum seekers at risk of inhuman and degrading treatment. A corrective allocation mechanism would help ensure a functioning reception system also in times of pressure on the EU's borders. (Recital 9, 31-35)

A manifestation of solidarity with refugee-hosting countries in regions of origin by including the number of resettled refugees in the key for the corrective allocation mechanism.

It is the view of DRC that solidarity should be a key factor for establishing an improved and sustainable Dublin system. Member States should show solidarity and share responsibility not only with fellow Member States and asylum seekers in Europe, but also with countries that host large numbers of the world's refugees. Strengthening the resettlement framework under the UNHCR scheme is key to increasing safe pathways to gain protection and is also an important demonstration of solidarity with refugee-hosting countries in the regions of origin. Thus, including the number of refugees actually resettled in the enumeration that can trigger the allocation mechanism will be a positive driving force towards a shared responsibility for vulnerable refugees, who need resettlement according to UNHCR. (recital 32)

CASE

WE ARE NOT FAMILY?

Ahmed (18) and Mohammad (22) are brothers from Syria. They grew up together in Aleppo, where they lived with their mother and father. Mohammad, being the oldest brother, felt great responsibility for the well-being of the family and his younger brother, whom he financially supported through his university studies. Due to the risk of being called for mandatory military service by the Syrian regime, Mohammad and Ahmed had to flee the country. During the flight across the Mediterranean Mohammad and Ahmed were unfortunately separated, and Ahmed therefore arrived in Denmark before Mohammad. Mohammad's boat from Libya was stopped by the Italian Coast Guard, who informed him that he had to provide his fingerprints. Mohammad tried to tell the coast guards that he had to get to his 18-year-old brother, whom he had promised his mother to take care of, but the coast guards said that he would still be able to join his brother, as long as he agreed to be fingerprinted. After being fingerprinted, Mohammad joined Ahmed in Denmark. Now the Danish authorities want to separate Mohammad from his younger brother, as they are not considered to be close family under the Dublin Regulation.

THE DANISH REFUGEE COUNCIL'S KEY CONCERNS ARE:

That the definition of family members (in article 2g) is still too narrow and that families will therefore still be separated because of the Dublin system.

While DRC finds the proposed extension of the definition of family members in article 2g very positive, we find that the definition of family should be further extended to include at least adult unmarried children. Young adults, who have fled war and persecution to find refuge in a foreign country, can be very dependent on their families for emotional support and guidance. Separation of young adults of 18-19 years from the rest of the family can be very traumatic for all family members involved – as well as a big hindrance to successful integration post recognition. In practice, the Commission's proposal would have a positive impact in cases concerning siblings. However, the proposal would have the very unfortunate impact that a young adult's right to be reunited with his or her parents, would be decided solely on whether he or she had siblings, and if these siblings were present on the territory of the Member States with the parents.

DRC welcomes the rapporteur's proposed amendments to article 19 and the inclusion of Article 19 (2 a), which will ensure asylum seekers' right to lodge an application to be reunited on humanitarian grounds, such as family, social, cultural and language linkages to a Member State. As mentioned previously, DRC is concerned about the large number of families, who are separated, because they do not meet the very narrow definition of family in article 2g. As practice shows that the discretionary clauses are seldom applied, DRC would like to push for a stronger use of language on the Member States' obligations to apply the provisions in practice, so the provision will have an actual impact on the protection of asylum seekers' family life

CASE

BEST INTEREST OF THE CHILD?

Ammara is an Eritrean refugee. She entered the EU through Italy, where she was fingerprinted by the Coast Guard. She quickly left Italy to get to Denmark where her fiancé of 3 years, Teclé, had been granted refugee status. During her stay in Denmark, Ammara and Teclé found out that they were expecting their first child together. Ammara, now 6 months' pregnant, was informed by the Danish authorities that she was to be sent to Italy and that she would be separated from her fiancé and the father of her child. Ammara and Teclé are not considered to be close family under the Regulation and the Danish authorities do not find humanitarian grounds to keep the family together, or that it would be contrary to the best interest of the child to separate the family.

That the proposed changes to the provisions regarding unaccompanied children risk violating the best interest of the child.

The Commission has proposed, contrary to current practise and the jurisprudence of the European Court of Justice¹, that unaccompanied children can be transferred under the Dublin Regulation, unless it is sufficiently demonstrated that a transfer to the Member State where the child first applied for asylum does not serve the best interest of the minor (article 10(5)). As unaccompanied children belong to an extremely vulnerable group, DRC finds article 10(5) to be an unnecessary and serious obstacle in securing the best interest of unaccompanied children. It is our experience that children often find it difficult to understand the complexity of the Dublin procedure, including the appeals procedure. To assume that a transfer to another Member State will be in the best interest of the child will not only put added pressure on the child's capability to put forward evidence or statements to demonstrate otherwise, it will also delay unaccompanied children's access to the asylum procedure, international protection and subsequently access to lodge an application for family reunification.

DRC welcomes the rapporteur's proposed amendments to article 10(5), as we find that the Commission's proposal poses an obstacle in ensuring the best interest of unaccompanied children. DRC supports the rapporteur's proposed enhanced safeguards for unaccompanied children, including the obligation on Member States to provide a guardian, conduct best interest assessments (BIA) by multi-disciplinary staff and ensuring improved and child-friendly information through-out the procedure. However, DRC finds that the wording of the current Dublin III Regulation provides a stronger safeguard for unaccompanied children with no family members or relatives in the territory of the Member States, and thus recommends that the wording of article 10(5) be brought back to that of the current article 8(4). DRC is concerned that the proceedings under the proposed article 10(5) will be lengthy and that Member States' practice will ultimately not adequately consider the best interest of the child.

That the one-sided focus on the use of punitive and coercive measures to prevent secondary movement will result in the deterioration of asylum seekers fundamental rights.

DRC finds the proposed use of accelerated procedures and minimizing the access to reception conditions to be both unreasonable and disproportionate. It is the experience of DRC that asylum seekers' secondary movement is often linked to family life and a strong wish to be reunited with family members or relatives in other Member States. Inhuman and degrading conditions in the asylum seekers' first country of arrival can play a decisive or contributing role in secondary movement. When providing legal advice to asylum seekers (including children) in the Dublin procedure, we often hear accounts of serious ill-treatment in various countries in the EU. Some asylum seekers have experienced violence and even sexual abuse committed by public servants, many have been detained for longer durations of time with no access to a trial, legal representation or even access to seek asylum. Many asylum seekers also give account of life on the streets with little or no access to basic necessities, such as medical care and food. Looking at the abovementioned drivers of secondary movement, it is clear that the reform of the Dublin system should take into account the broader challenges and problems of the current system (i.e. separation of family and deteriorating asylum and reception systems) instead of penalizing the individual asylum seeker for secondary movement.

DRC welcomes the rapporteur's proposed amendments on the obligations on asylum seekers and sanctions for non-compliance (article 4 and 5 of the Commission's proposal). Instead of imposing unreasonable and disproportionate sanctions on asylum seekers for moving between the Member States, a reformed Dublin system should aim to tackle the underlying issues for asylum seekers movement – i.e. ensuring fundamental rights for asylum seekers in all Member States by offering adequate reception conditions and keeping families together.

1 M.A. and Others v. UK (C-648/11) of June 6 2013, para 55

That the lack of legal aid to asylum seekers in the Dublin procedure will cause serious distrust in the system.

Given that the Commission's Dublin IV proposal imposes obligations for asylum seekers and punitive measures for non-compliance with these obligations, DRC finds it concerning that the proposal does not introduce an obligation for Member States to provide legal aid to asylum seekers. It is the experience of DRC that some grounds for secondary movement may be linked to the fact that asylum seekers have neither been informed nor advised sufficiently regarding the Dublin rules in an accessible and understandable manner. Many asylum seekers are simply not informed sufficiently about their rights and obligations. Also, it is our experience that some asylum seekers have been misinformed regarding e.g. the importance and consequence of fingerprinting. Misinformation will cause distrust in the system, which may lead to secondary movement, as asylum seekers will, of course, attempt to ensure their future in a Member State in which they have family ties, or other meaningful links. Thus, it is the position of DRC that the proposal should include an obligation to provide asylum seekers with legal aid immediately upon arrival in a Member State. Legal aid would help to ensure that asylum seekers have a correct overview of the Dublin rules, including their rights and obligations.

The rapporteur has proposed excellent progress to the provisions on asylum seekers' right to information. The amendments also contain the inclusion of article 6(1)(i b), which grants the asylum seekers access to free legal assistance in the Dublin procedure. DRC strongly supports the many positive amendments to article 6 of the Commission's proposal and agrees with the rapporteur that an enhanced focus on information and impartial and free legal assistance through-out the procedure, will increase the trust in the Dublin system and ensure that asylum seekers can make informed decisions about important aspects of their lives.

That the access to appeal under Dublin IV is restricted.

The European Court of Justice has established several times that the current Dublin Regulation entails a right to appeal regarding both violations of fundamental rights, as well as the Member States' wrongful application of the provisions.² In its proposal, the Commission intends to limit the right to appeal to cases falling under article 3(2), article 10-13 and article 18. The Danish Refugee Council finds that the limited access to appeal within the Dublin IV proposal risks violating the asylum seekers' right to an effective remedy under article 47 of the EU Charter of Fundamental Rights.

DRC supports the rapporteur's proposed deletion of article 28(4) of the Commission's proposal, which will gravely diminish the scope of the effective remedy provided to asylum seekers in the Dublin procedure. DRC further supports the amendments to article 28(5), which will ensure that the misapplication of the criteria in the Dublin Regulation can be tried by asylum seekers before a court or tribunal.

That the automated process of the corrective allocation mechanism will prevent a quick reunification of family members within the borders of the European Union.

According to the Commission's proposal, the process of allocating asylum seekers to other Member States will be automated to ensure efficiency of the process. Thus, the EU Asylum Agency, who will be in charge of the allocation, will not conduct any assessment of the asylum seekers' family ties or other meaningful links. In practice this means that asylum seekers, who have family in Europe, will first have to wait for the completion of the admissibility procedure. Then the allocation mechanism will commence and the asylum seeker will be transferred to another Member State. Once the asylum seeker has reached the other Member State, the Dublin procedure will finally start and give he/she the possibility to be reunited with family in a third Member State. It is the experience from working directly with asylum seekers that a driver for secondary movement within the Member States is often linked to a strong desire to be reunited with family. Not taking the asylum seekers' family ties and other meaningful links into consideration in the process of allocation will

² Mehrdad Ghezalbash v. Staatssecretaris van Veiligheid en Justitie, (Case C-63/15) of June 7 2016 and George Karim v. Migrationsverket, (C-155/15) of June 7 2016

cause unnecessary transfers at high costs, both human and economical. Taking the asylum seekers' family ties and meaningful links into consideration will most likely be less expensive and a more efficient way to reduce secondary movement.

DRC welcomes the rapporteur's suggested inclusion of a 'light' family reunification procedure prior to the corrective allocation in article 36(b). The provision would allow asylum seekers to avoid unnecessary allocation and instead reunite with family members in other Member States. However, as many Member States have a varying practice on the application of family provisions, DRC is concerned that the non-mandatory application of article 36b and the varying practices of the Member States in relation to the definition of family in article 2g might circumvent the positive intent of the provision. DRC often sees families torn apart due to a very narrow interpretation of the family definition. In Denmark, the application of strict national legislative standards for the evidence needed to prove your marital status, in practice results in married couples being separated and even children being separated from one of their parents. National requirements and practices might constitute a problem to the light family reunification under article 36b, as it could result in the forced allocation of family members under article 24a, if they do not meet the Member States interpretation of family under article 2g.

That the Commission proposes to maintain the hierarchy of the Dublin regulation.

Instead of taking advantage of the possibility to create a sustainable Dublin system, which to a higher degree takes into consideration where the asylum seeker has a 'meaningful link', the criteria from the present Dublin regulation are maintained. This means that an asylum seeker, who has no family (as covered by article 2g, will have no chance to establish a connection on the basis of any other factors; language skills, educational background, extended family etc. Most likely, the Member State of first entry will be responsible for the processing of the asylum seeker's claim. In practice this means that in the majority of the cases, the border countries will still have to bear the responsibility for a large number of cases.

That the corrective allocation mechanism will only trigger at 150 pct.

As mentioned above, some Member States have for years been at their maximum capacity and are still struggling to provide appropriate reception conditions, as well as access to a well-functioning asylum system. A future Common European Asylum System will require more than operational support and funding from the EU to these Member States. Even if funds were appropriately used and monitored, it will be crucial for Member States to divide the number of asylum seekers more evenly. Not only to provide immediate reception conditions at an appropriate level and access to the asylum procedure, but also for the longer-term process of integration. Thus, it is the opinion of DRC that Member States, who are already at 100 pct. of their capacity, should be able to instantly allocate asylum seekers to Member States, who have not yet reached their capacity.

DRC further finds that the possibility for states to buy their way out of the allocation mechanism for a period of up to 12 months is both illogical, unfair and counteracts the stated objective of establishing a system based on solidarity among the Member States. Since the allocation system is already based on several factors to evaluate capacity, Member States should be obligated to receive asylum seekers under the mechanism, unless they have reached their capacity.

Responsibility-sharing and solidarity should be a main objective in a reformed Dublin system, as the failure of the current structure has shown that the system will not be able to function without the joint efforts of the Member States. Thus, DRC welcomes the rapporteur's proposed amendments on the reference key used to trigger the corrective allocation mechanism. The rapporteur proposes to amend article 34(2) and article 43, which would mean that, if a Member State exceeds 100 pct. of the figure identified in the reference key, the corrective allocation would automatically trigger and not cease to apply until the figure would drop below 75 pct.

That the proposed admissibility procedure risks undermining the protection of refugees by shifting responsibility to third countries already hosting large numbers of refugees.

In article 45 of the proposal for the Asylum Procedure Regulation (APD) the requirements for the assessment of 'the safe country' will be diminished, leaving room to reject asylum applications due to the established 'connection' to a transit country. The already existing EU-Turkey Statement relies on similar considerations and has met massive critique from human rights organisations. Like the EU-Turkey Statement, the proposed admissibility procedure in article 3(3) of the Dublin IV Regulation will put further strain on the asylum systems in Member States on the borders of the European Union. As the assessment under Article 3(3) of the Dublin Regulation will require a thorough court review and due to the strained asylum systems in some EU countries, asylum seekers risk spending a long time in the initial admissibility procedure before gaining access to the asylum procedure. It is the opinion of DRC that the question regarding the admissibility of the asylum seeker's claim is more appropriately dealt with after responsibility under the Dublin Regulation has been established. This will ensure quick and easy access to the asylum procedure for asylum seekers.

As mentioned previously, one of the worrying aspects of the Commission's proposal is the admissibility procedure introduced in article 3(3) that would introduce an initial assessment of the asylum seeker's claim in relation to the first country of asylum, safe third country, safe country of origin and asylum seekers presenting security concerns. DRC thus welcomes the rapporteur's proposed deletion of article 3(3).

SHOULD ALI BE SANCTIONED FOR SECONDARY MOVEMENT?

CASE

Ali is an Iraqi national, who entered the EU through Bulgaria where he was apprehended by border police. The border police brought him to a prison-like facility, where he was ordered to hand over his belongings and strip naked in front of a group of prison guards, who then ridiculed and beat him before throwing him in a small, dirty cell. During his detention, Ali was left naked in his cell and systematically exposed to severe ill-treatment by the prison guards, who repeatedly beat and sexually molested him. Even though he was terrified, Ali tried asking for help at the senior-level of the detention facility, but was turned away. After his meeting with the senior-level, the ill-treatment by the guards intensified. When Ali was finally released, he immediately left Bulgaria and applied for asylum in Denmark. The Danish authorities requested Bulgaria to take Ali back, because he had fingerprints for illegal entry in Bulgaria and no family in Denmark. The thought of being sent back to Bulgaria again, has caused Ali to experience severe anxiety attacks, and he therefore appealed this decision

TO SUM UP, DRC PROPOSES THAT THE WAY FORWARD TO A FAIRER AND MORE SUSTAINABLE DUBLIN SYSTEM IS:

- to ensure that families are not separated from each other, taking into account the location of the asylum seekers' close relatives or other meaningful links that the asylum seeker might have to a specific EU Member State;
- to improve access to correct information and legal advice regarding the Dublin regulation;
- to ensure improved protection and reception conditions in the border countries;
- to ensure that the number of asylum seekers is more evenly shared through the allocation mechanism and
- to avoid the use of force and punitive measures, as they are expensive, inefficient and not proportionate to the cost in both human and economic resources.