

"Procedural rights in the proposed Dublin IV Regulation"

Comments of the International Commission of Jurists on specific procedural measures in the Recast of the Dublin Regulation

27 September 2016

1. Introduction

On 4 May 2016, the European Commission published a proposal (Dublin IV)¹ to recast the current Dublin Regulation (Dublin III).² In this briefing paper, the ICJ presents its comments on three key procedural aspects of the proposed Dublin IV Regulation in view of the possible impact on the rights of asylum seekers in Europe. The areas most impacted include the **right to an effective remedy** (article 47 EU Charter on Fundamental Rights (EU Charter)), the **principle of non-refoulement** (article 19.2 EU Charter, article 4 EU Charter) and economic and **social rights** (articles 9, 11 and 12 International Covenant on Economic, Social and Cultural Rights (ICESCR) and articles 13 and 31 European Social Charter (ESC)).

The Dublin Regulation is one of the instruments of the Common European Asylum System³ of the EU. It is based on the principle that there should be only one EU Member State responsible for dealing with every asylum application made by a refugee within the EU. The Regulation establishes the criteria and mechanisms determining which Member State will be responsible in each case.

The proposal of 4 May 2016 was developed in reaction to the increase of arrivals of refugees in 2015 which was identified by the European Commission as a "refugee crisis for the EU."⁴ In 2015, over one million people – refugees, displaced persons and other migrants – made their way to EU countries. The International Organization for Migration has estimated that some 3,771 of these persons died on their journey⁵ and a high number of people were stranded in the border countries, mainly Italy and Greece. The European Commission reacted with a number of legislative and policy proposals, among them a proposal for intra-EU relocation schemes,⁶ which have so far not been very successfully implemented.⁷

¹ COM(2016) 270 final 2016/0133 (COD) Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), See: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160504/dublin_reform_proposal_en.pdf

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 (recast), See: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:180:0031:0059:EN:PDF>

³ http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/index_en.htm

⁴ http://ec.europa.eu/echo/refugee-crisis_en

⁵ <https://www.iom.int/news/iom-counts-3771-migrant-fatalities-mediterranean-2015>

⁶ http://europa.eu/rapid/press-release_IP-15-5039_en.htm, http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/asylum/general/docs/proposal_for_a_council_decision_on_provisional_relocation_measures_for_italy_and_greece_en.pdf

⁷ See for instance the Commission Communication: Fourth report on relocation and resettlement, June 2016, p.3: "Despite this increase, Member States are far from complying with their allocations under the Council Decisions. As we approach the half-way point of the duration of the Council Decisions, the rate of implementation of relocation stands at a mere 2%." http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160615/4th_report_on_relocation_and_resettlement_en.pdf

In November 2015, EU leaders concluded an informal agreement with Turkey in which the EU offered Turkey three billion EUR in exchange for help in tackling the refugee crisis.⁸ On 18 March an agreement between Turkey and the EU was confirmed in a joint statement.⁹ The statement indicated that the objective of the parties was to legalize returns of Syrian refugees from Greece to Turkey and establish Turkey as a "safe third country." Turkey agreed to prevent new sea or land routes for illegal migration opening from Turkey to the EU, and to cooperate with neighboring States as well as the EU to this effect.

The ICJ has expressed concern and warned of the potential for human rights violations stemming from this agreement.¹⁰

Following these developments, on 6 April 2016, the Commission set out its priorities for improving the Common European Asylum System (CEAS) in its Communication "Towards a reform of the Common European Asylum System and enhancing legal avenues to Europe".¹¹ The Commission announced that it would progressively work towards reforming the existing Union framework on asylum.

The proposed reform of the Dublin Regulation, building on these developments, aims, among other objectives, at increasing obligations and sanctions on asylum seekers in order to prevent them from moving from one EU Member State to another, and making the system more efficient by shortening time limits and deadlines.

2. Time limits for remedies

(a) Dublin IV proposal

The proposal sets out a strict time limit for persons to seek remedies against a transfer to another EU Member State under the Dublin system. The new Article 28 (Remedies) replaces the former formulation of a "reasonable period of time" with a strict term of seven days from the moment of the notification of a transfer decision.

(b) International and EU law

The right to an effective remedy for violations of human rights is protected under international human rights law, including under Article 13 European Convention on Human Rights (ECHR), Article 2.3 International Covenant on Civil and Political Rights (ICCPR), Articles 3 and 14 of the UN Convention against Torture (CAT) and Articles 32 and 33 Geneva Refugee Convention (GRC). All EU Member States, as well as Turkey, are parties to each of these four treaties. The right to an effective remedy is also guaranteed under article 47 of the EU Charter of Fundamental Rights, and is recognized as universally applicable under the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.

Where the concerned persons alleges that a transfer will violate or pose a real risk of a violation of human rights, the person must be able to seek a remedy that is independent, impartial, prompt, **accessible and effective** in practice as well as in law, and must not be hindered by the acts of State authorities. The remedy should be

⁸ <http://www.consilium.europa.eu/en/meetings/international-summit/2015/11/29/>

⁹ <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/>

¹⁰ <http://www.icj.org/eu-turkey-deal-puts-human-rights-at-risk-warns-icj/>

¹¹ COM(2016) 197 final, http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160406/towards_a_reform_of_the_common_european_asylum_system_and_enhancing_legal_avenues_to_europe_-_20160406_en.pdf

provided by a judicial body, but if it is not, it must be provided by an independent and impartial body, and be capable to review and overturn the decision to expel.

In several cases, the European Court of Human Rights has held that, in order to comply with the right to an effective remedy under article 13 of the ECHR, a person threatened with an expulsion which violates or risk violating another Convention right must have:

- Access to relevant documents and accessible information on the legal procedures to be followed in his or her case;
- Where necessary, translated material and interpretation;
- Effective access to legal advice, if necessary by provision of legal aid;¹²
- The right to participate in adversarial proceedings;
- Reasons for the decision to expel (a stereotyped decision that does not reflect the individual case will be unlikely to be sufficient) and a fair and reasonable opportunity to dispute the factual basis for the expulsion.¹³

The jurisprudence of the European Court of Human Rights, in addition to clarifying the scope of ECHR obligations, is similarly critical to the clarification of the scope and content of rights under the EU Charter. According to article 52.3 EU Charter, it constitutes one of the main sources of interpretation of its articles.

Under EU law, the Court of Justice of the EU (CJEU) in the *Case C-457/09 Chartry*, confirmed that "(...) *the right to an effective legal remedy, guaranteed by Article 6(1) of the ECHR, referred to by the national court, constitutes a general principle of Union law (...), and was reaffirmed by Article 47 of the Charter, (...).*"¹⁴

The CJEU ruled specifically on the content of the right to appeal in connection with a time-limit in the *Diouf* case.¹⁵ The CJEU stressed "that the period prescribed must be sufficient in practical terms to enable the applicant to **prepare and bring an effective action**".

Similarly, according to the ECHR, time-limits must not be applied in a way that prevents litigants from **using an available remedy** (*Zvolský and Zvolská v. the Czech Republic*¹⁶). **Practical and effective access** to the appeal must be ensured (*Souza Ribiero v. France*¹⁷).

These principles are also enshrined in the Council of Europe Committee of Ministers' Twenty Guidelines on Forced Return, which state that the time-limits to exercise the remedy **shall not be unreasonably short**; the remedy must be accessible, with the possibility of granting legal aid and legal representation.¹⁸

In the case of *I.M. v France*,¹⁹ the resort to an accelerated asylum procedure to examine the first application of an asylum seeker resulted in **excessively short time limits** for the asylum seeker to present his arguments, lack of access to legal and linguistic assistance, and a series of material and procedural difficulties, exacerbated by the asylum seeker's detention, which rendered the legal guarantees afforded to him merely theoretical, in breach of Article 13 ECHR. While this case referred to an accelerated asylum procedure, the European Court of Human Rights considered it in

¹² *M.S.S. v. Belgium and Greece*, ECtHR, GC, Application No. 30696/09, Judgment of 21 January 2011, para. 301.

¹³ *M.S.S. v. Belgium and Greece*, ECtHR, para. 302; *C.G. and Others v. Bulgaria*, ECtHR, paras. 56-65. *Hirsi Jamaa and Others v. Italy*, ECtHR, GC, paras. 202-204.

¹⁴ *C-457/09 Claude Chartry v Etat belge* ([2011] ECR I-0000, para. 25

¹⁵ *C-69/10, Brahim Samba Diouf v Ministre du Travail, de l'Emploi et de l'Immigration*, 28 July 2011, para. 66

¹⁶ *Zvolský and Zvolská v the Czech Republic*, Application no. 46129/99, 12 February 2003, para. 51

¹⁷ *Souza Ribiero v. France*, Application no. 22689/07, 13 December 2012, para. 95

¹⁸ Twenty Guidelines on Forced Return, Guideline 5.2.

¹⁹ *I.M. v France*, Application No. 9152/09, 2 May 2012, paras. 150-154

terms of the effectiveness of the remedy against the risk of arbitrary *refoulement*, an issue central to Dublin procedures cases (see *MSS v Belgium and Greece*²⁰). The same reasoning can therefore be applied to access to effective remedies against Dublin transfers.

Placing a fixed time limit of seven days for all cases would contravene the European Convention of Human Rights, particularly given the European Court's holding in *Jabari v. Turkey*. In that case the Court held that the **automatic application of a five-day time limit** for registering a claim for asylum, which denied the applicant any scrutiny of her fear of ill-treatment following expulsion, and the subsequent failure of the appeal court to consider the substance of those fears, meant that her deportation would constitute a violation of Article 3 ECHR, as well as the right to an effective remedy under Article 13 ECHR.²¹

(c) Conclusions and recommendations

The impact of the fixed seven-day time limit on the effectiveness of the remedy against a Dublin transfer will no doubt vary on an individual basis. However, especially with regard to essential procedural guarantees in asylum procedures, such as speedy access to quality information in a language that the applicant understands, and legal aid and legal representation, a seven-day limit will very frequently constitute a significant hindrance to their enjoyment.

The legal systems of Member States may be differently equipped to provide all required procedural guarantees in such a short timespan, with very uneven consequences on the application of asylum law across the EU and with the risk of significant breaches of the right to an effective remedy. Furthermore, the situation of asylum seekers differs considerably depending on several factors, including the reasons for their asylum request, possible family links, and different situations of vulnerability.²² In complex cases, the seven-day deadline for lodging an appeal would rarely be sufficient in order to allow for effective access to a fair review of their claim.

The ICJ stresses that, for a remedy to be effective, the applicant must be in a position to adequately prepare her or his case. Therefore, the application of a fixed time limit of seven days for appeals in all circumstances, for all asylum seekers, including those exposed to situations of disadvantage or vulnerability, including children, and in all Member States with clearly varied national systems, is not compatible with the EU Charter's right to an effective remedy under its Article 47, Articles 2 and 6 Treaty on European Union (TEU),²³ Article 13 ECHR and other international and EU legal standards.

The ICJ therefore recommends retention of the current and more flexible formulation contained in the Dublin III Regulation: a "reasonable period of time".

²⁰ *M.S.S. v. Belgium and Greece*, ECtHR, para 316.

²¹ *Jabari v. Turkey*, ECtHR, Application No. 40035/98, Judgment of 11 July 2000, paras. 39-42.

²² ECtHR, *Tarakhel v. Switzerland* (Application no. 29217/12); ECtHR, *M.S.S. v. Belgium and Greece* (Application no. 30696/09)

²³ Treaty on European Union, 2012/C 326/01

<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012M/TXT&from=en>

3. Limitation of the material scope of the remedy

(a) Dublin IV proposal

The new paragraphs 4 and 5 of Article 28, if approved, will limit **the material scope of the remedy against transfer to another Member State** to an assessment of whether it complies with article 3(2) in relation to the existence of a risk of inhuman or degrading treatment upon return. It will also cover procedures in cases where the applicant claims that a family member or, in the case of unaccompanied minors, a relative is legally present in a Member State other than the one which is examining his or her application for international protection, and considers therefore that other Member State as responsible for examining the application (article 10 [Minors], 13 [Family procedure] and 18 [Dependent persons]).

Article 28 Remedies (...)

4. *The scope of the effective remedy laid down in paragraph 1 shall be limited to an assessment of whether Articles 3(2) in relation to the existence of a risk of inhuman or degrading treatment or Articles 10 to 13 and 18 are infringed upon.*

5. *Where no transfer decision referred to in paragraph 1 is taken, Member States shall provide for an effective remedy before a court or tribunal, where the applicant claims that a family member or, in the case of unaccompanied minors, a relative is legally present in a Member State other than the one which is examining his or her application for international protection, and considers therefore that other Member State as Member State responsible for examining the application.*

(b) International and EU law

As mentioned above (*under 2(b)*), the right to an effective remedy for violations of human rights is protected under international human rights law, including under Article 13 ECHR, Article 2.3 ICCPR, Articles 3 and 14 CAT, Article 47 EU Charter and other international law and standards. The right to an effective remedy applies to all human rights protected under these instruments and to all human beings, regardless of nationality or immigration status.

The right to a remedy applies not only to *non-refoulement* cases, but all cases that may give rise to violation of internationally-protected human rights (including during the expulsion process). For example, the ECtHR has applied the right to an effective remedy not only the right to family life but also, inter alia, to the right to freedom of opinion and expression, and the right to freedom of religion.²⁴ Article 2(3) of the ICCPR applies to all rights under that Convention. The currently proposed limited scope of the remedy does not provide a remedy for violations of certain human rights, including the full scope of the right to private and family life (protected by Article 8 ECHR), access to education (Article 2 Protocol 1 ECHR, Article 17 ESC) or other economic, social and cultural rights.

Specifically in the Dublin Regulation context, a recent CJEU judgment²⁵ on the scope of the right to an effective remedy in the Dublin III Regulation confirmed that an asylum seeker is entitled to **plead, in an appeal against a decision to transfer him or her, that one of the criteria for determining responsibility**, laid down in Chapter III of the Dublin III Regulation had been wrongly applied.

²⁴ Nolan and K. v. Russia, ECtHR, Application No. 2512/04, Judgment of 12 February 2009, para 62; Z and T v. United Kingdom, ECtHR, Application No. 27034/05, Admissibility Decision, 28 February 2006, The Law.

²⁵ Mehrdad Ghezalbash v Staatssecretaris van Veiligheid en Justitie, C-63/15, 7 June 2016

(c) Conclusions and recommendations

Under international human rights law, including under the jurisprudence of the European Court of Human Rights, the principle of *non-refoulement* encompasses, at a minimum, torture and other ill-treatment, the right to life, as well as flagrant violations of the right to a fair trial and the right to liberty (*Othman v UK*) and, more generally, other serious violations of human rights, for instance arbitrary detention.²⁶ In addition, the scope of the rights covered in the regulation proposal is inconsistent with the definition of *non-refoulement* enshrined in the Maritime Surveillance Regulation (656/2014),²⁷ where the risk to be expelled to a place of persecution and risk of death penalty are also included.

An effective remedy must be capable of reviewing and overturning the decision to expel. Everyone should have the right to submit reasons against his or her expulsion, not only when it comes to *non-refoulement* but also with reference to private and family life (Article 8 ECHR) access to education (Article 2 ECHR, Article 17 ESC) or other reasons. Limiting the material scope of the remedy is in breach of international and EU law standards, namely Article 47 of the EU Charter and Article 13 ECHR.

Furthermore, the identified scope of assessment fails even to match that of the EU Charter, which expressly identifies that “No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment” (Article 19.2 EU Charter).

The ICJ recommends that, with regard to the scope of the remedy, the text of the current Article 27 of Regulation 604/2013 (Dublin III) should be retained.

4. Punitive measures as a result of secondary movement

(a) Dublin IV proposal

The proposed Regulation reshuffles the hierarchy of criteria to determine which State is competent to examine an asylum application and gives priority to the Member State where the asylum seeker entered irregularly for the first time into the Schengen space or was irregularly resident (Article 4).

This has procedural and material consequences in case of non-compliance with the obligation to remain in the Member State responsible for the asylum application. According to the proposed Regulation, the applicant shall **not be entitled to the reception conditions** set out in the Reception Conditions Directive²⁸ with the

²⁶ See also Article 2.3 ICCPR and the Human rights Committee General Comment 31, para 12: „Moreover, the article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.”, Article 3 CAT and Article 16 International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED).

²⁷ REGULATION (EU) No 656/2014 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014R0656>

²⁸ Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for

exception of emergency health care (Article 5(3)) in any Member State other than the one in which he or she is required to be present.

(b) International and EU law

Although in the current proposal there would always be one EU Member State responsible for providing the reception conditions, article 5(3) does not specify that it applies only when the applicant has fled the procedure in the assigned State. There might be reasons, such as family links, specific vulnerabilities or inability to access the reception conditions in the Member State responsible, that force the applicant to move to another EU Member State than the one responsible for her/his application.

It is especially striking that there are no exceptions possible even for children or at the very least for unaccompanied minors. These new provisions would undermine the CJEU case law on the current Regulation, according to which unaccompanied minors can move to another Member State and apply there (*Case C-648/11*).

The CJEU ruling in *CIMADE and GISTI*²⁹, based on the right to dignity in the EU Charter, has confirmed that:

*Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers in the Member States (RCD) must be interpreted as meaning that a **Member State in receipt of an application for asylum is obliged to grant the minimum conditions for reception of asylum seekers laid down in Directive 2003/9 even to an asylum seeker in respect of whom it decides, under Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, to call upon another Member State, as the Member State responsible for examining his application for asylum, to take charge of or take back that applicant.***

The introduced punitive measures might lead to the Member State breaching its obligations under the International Convention on the Rights of the Child (article 24 concerning the right to health), Covenant on Economic, Social and Cultural Rights (ICESCR) (Articles 9 (right to social security), 11 (adequate standard of living including adequate food, clothing and housing) and 12 (right of everyone to the enjoyment of the highest attainable standard of physical and mental health)) and the European Social Charter (ESC) (articles 13 (right to social and medical assistance) and 31 (right to housing)).

Under the CESCR, the discharge of obligations to respect, protect and fulfill rights cannot be made dependent on citizenship or residency status, consonant with the prohibition on discrimination. Obligations of immediate effect under CESCR include protecting minimum of essential levels of the Covenant rights.³⁰

The European Committee of Social Rights³¹ specifically stated in *CEC v. the*

the reception of applicants for international protection, Art 14-19

²⁹ Case C-179/11, *Cimade, Groupe d'information et de soutien des immigrés (GISTI) v Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration*, 27 September 2012

³⁰ See, Articles 2 and 11 ICESCR and Article 27(2) CRC. See also, CRC, *General Comment No. 6*, para. 44: "States should ensure that separated and unaccompanied children have a standard of living adequate for their physical, mental, spiritual and moral development. As provided in art 27(2) of the Convention, States shall in particular provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing."

³¹ See also the CESCR General comment No. 14 The right to the highest attainable standard of health, para 34: In particular, States are under the obligation to *respect* the right to health by, *inter alia*, refraining from denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum seekers and illegal

*Netherlands*³² that

- Food, water, shelter and clothing must be provided to everyone, including adult migrants in an irregular situation;
- Such deprivation of access to rights would be a violation of human dignity;
- There must always be a case by case assessment;
- Emergency social assistance should be supported by a right to appeal to an independent body.

In *DCI v the Netherlands*³³ the Committee ruled that migrant children must always be provided with food, clothing and shelter in order to comply with rights under Articles 17.1.c and 31.2 ESC.

In addition, implementation of such punitive measures risks putting asylum seekers in a situation of destitution amounting to inhuman and degrading treatment in breach of Article 3 ECHR, as was found to be the case in *M.S.S. v. Belgium and Greece*³⁴ and CJEU case *N.S. v. Secretary of State for the Home Department*³⁵.

Rights that prevent destitution are the minimum core of economic, social and cultural rights and should not be conditional on there being a possibility of attaining them in another Member State. Although there might be other social security laws in some Member States that would allow people to benefit from even if not eligible to reception conditions, this is not the case in every EU Member State, especially when it comes to effective enjoyment of these rights.

(c) Conclusions and recommendations

The ICJ is concerned at this blanket imposition of punitive measures for secondary movements without having provided for, at the very least, exceptions for persons falling in vulnerable situations or members of vulnerable groups, and the evaluation of specific circumstances in a case-by-case assessment or a clear measure obliging all EU Member States to provide for social security for everyone.

In order to comply with EU and international law and standards, the ICJ stresses that the proposed Regulation must allow for the provision of effective access to social assistance to ensure that States meet their obligation to ensure minimum essential protection of ESC rights which must be enjoyed by everyone within the jurisdiction of EU Member States.

immigrants, to preventive, curative and palliative health services; abstaining from enforcing discriminatory practices as a State policy; and abstaining from imposing discriminatory practices relating to women's health status and needs. (...)

³² European Committee of Social Rights, Conference of European Churches (CEC) v. the Netherlands, Complaint No. 90/2013, 10 November 2014

³³ European Committee of Social Rights, Defence for Children International (DCI) v. the Netherlands, Complaint No. 47/2008, 20 October 2009

³⁴ ECtHR, *M.S.S. v. Belgium and Greece*, GC, Application No. 30696/09, 21 January 2011

³⁵ *N.S. v. Secretary of State for the Home Department*, CJEU, Case C-411/10, Judgment of 21 December 2011