Human Rights Law Clinic Papers 2017

REFORM OF THE COMMON EUROPEAN ASYLUM SYSTEM UNDER THE 'DUBLIN IV' PROPOSAL

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Introduction

In May last year, the European Commission made a proposal for a regulation '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' (Dublin IV),[1] as a replacement of the existing 'Dublin III' regulation. The International Commission of Jurists is particularly concerned with three elements of this proposal: limitations on the material scope of the remedy; reduction of time limits for seeking a remedy; and punitive measures for secondary movement.

This memorandum begins with an overview of the background to this proposal, before going on to discuss each issue in turn. It proposes that limitations on the material scope of the remedy is incompatible with case law of the Court of Justice of the European Union (CJEU), that evidence shows there is a need in particular for a remedy against arbitrary detention and that these limitations fail to adequately protect unaccompanied minors, contrary to State obligations under the Convention on the Rights of the Child. The memorandum sets out arguments in support of the proposal for an automatic suspensive effect where an appeal is made, but criticises the reduction of time limits to seek a remedy as incompatible with the right to an effective remedy, and suggests that the use of accelerated procedures be prohibited or, at a minimum, limited to second applications. Finally, consideration is given to the use of punitive measures as both ineffective and contrary to CJEU judgements.

Background

The case of *MSS v Belgium & Greece*[2] was decided while Dublin II[3] was in force. It concerned a request made by Belgium for Greece to take charge of the applicant's asylum application.[4] The European Court of Human Rights (ECtHR) found that Greece had violated Article 3 of the European Convention on Human Rights (ECHR) because of the conditions of detention,[5] and because of the applicant's living conditions,[6] as well as being responsible for a violation of Article 13 (right to an effective remedy) taken in conjunction with Articles 2 (right to life) and 3 (prohibition of torture and cruel, inhuman or degrading treatment) due to shortcomings in its asylum procedure.[7] It also found that Belgium had violated Articles 2 and 3 by exposing the applicant to risks arising from deficiencies in the asylum procedure in Greece,[8] as well as Article 3 taken alone, by exposing the applicant to the detention and living conditions in Greece.[9]

Most cases under the Dublin II Regulation were based on the principle that the State in which an individual enters Europe shall be the one which is responsible for processing their asylum application. The ECtHR itself in *MSS v Belgium & Greece* held that this Regulation at that time no longer reflected the reality of the immigration 'crisis' in Europe.[10] Dublin II was identified as undermining the principle of solidarity by placing 'responsibility to determine

[1] European Commission, '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)', COM(2016) 270 final/2 of 04.05.16, 2016/0133 (COD) – the Dublin IV proposal.
[2] *MSS v Belgium & Greece*, App. No. 30696/09 (2011).
[3] Council Regulation (EC) No 343/2003, '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' (2003) OJEU, L 50/1.
[4] Ibid, para 14.
[5] Ibid, para 234.
[6] Ibid, para 264.
[7] Ibid, para 32.
[8] Ibid, para 360.
[9] Ibid, para 397.
[10] Ibid, para 91.

asylum claims on a handful of Member States forming the external borders of the EU.[11] It was based on the premise that all 'Member States of the EU were safe countries.[12] The conditions in Greece demonstrated that this could no longer be assumed to be the case.

The Dublin III[13] Regulation, currently in force, made some changes but was largely underwhelming. It failed to address the underlying problem identified in *MSS v Belgium & Greece*, and, 'three years later in 2014, despite harsh criticism by the continent's highest human rights court, the imposition of the troubled Dublin system meant that only five Member States of the European Union were responsible for processing 72% of all asylum applications made on the continent.[14] The Dublin IV proposal is therefore stated to be focussed on solidarity, burden-sharing and improving 'efficiency, on the surface representing a positive reconception of Europe's asylum system. It is a shame, however, that it has failed to adequately balance these goals with the protection of fundamental rights.

Material scope of the remedy

Article 27 Dublin III on remedies is to be replaced by Article 28 of Dublin IV which adds, inter alia:

> '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.'

Articles 10 to 13 and 18 concern minors, family members who are applicants for international protection, family procedure and dependent persons respectively, although mostly in relation to family reunification rather than other specific needs of those groups. The main points of concern in relation to this proposed amendment are that: it is likely to be found invalid by the CJEU, creating administrative costs and inconveniences for States; it does not provide a remedy where an individual is returned to a State which is known to systematically detain asylum seekers; and it has not gone far enough in protecting unaccompanied minors. Each of these concerned are discussed in turn.

CJEU rulings

The case of *Adbullahi*[15] concerned the question of what grounds an individual could appeal a 'take charge' request under Article 19 Dublin II. The case concerned a take-charge request made by Austria to Hungary.[16] The applicant brought an appeal against this decision on the basis of procedural flaws, criticising the asylum situation in Hungary in relation to Article 3 ECHR. The Asylgerichtshof requested a preliminary ruling from the CJEU regarding the scope of Article 19. The CJEU held that, in interpreting the provision, it was important to look at its context. The Court noted that Dublin II was adopted at a time where there was a mutual confidence between States that they all respected fundamental rights.[17] It was not the role of the Regulation to confer rights on individuals, instead it addressed States.[18] The CJEU concluded that an individual could only appeal a decision by 'pleading systematic

[11] P. Mallia, 'The Case of MSS v Belgium and Greece: A Catalyst in the Re-thinking of the Dublin II Regulation, (2011) 30(3) *Refugee Survey Quarterly* 107, 115.
[12] Ibid, 121.
[13] Regulation (EU) No 604/2013, '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)' (2003) OJEU, L 180/31 – Dublin III.
[14] S. Young, 'Dublin IV and the Demise of Due Process', (2017) 31(1) *Immigration, Asylum and Nationality Law* 34, 36.
[15] *Shamso Adbullahi v Bundesasylamt*, Case C-394/12 (2013).
[16] Ibid, para 28.
[17] Ibid, para 52.
[18] Ibid, paras 49 and 59. See also Meijers Committee, 'Note on the proposed reforms of the Dublin Regulation (COM (2016) 197), the Eurodac recast proposal (COM (2016) 272 final), and the proposal for an EU Asylum Agency (COM(2016)271 final) Comments on the Dublin recast proposal' (2016) *CM1609*, 3.

deficiencies in the asylum procedure and in the conditions for the reception of applicants for asylum in that latter Member State, which provide substantial grounds for believing that the applicant for asylum would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter'.[19]

This approach was overturned in *Ghezelbash*,[20] where the applicant had filed a claim for asylum in the Netherlands. However, the EU Visa Information Service disclosed that he had previously been granted a visa in France. Therefore, the Secretary of State Security requested that the French authorities take charge of his claim.[21] The applicant attempted to rely on Article 19(2) which provides for a cessation of responsibility where the applicant has left the territory of the EU for more than three months as he claimed he had been in Iran. The referring court considered whether the decision to refuse asylum should be annulled on account of the authority's failure to exercise due care and attention by examining the application under the extended asylum procedure so that full account could be taken of the documents produced by the applicant as evidence of his time in Iran[22]. The court referred, inter alia, the following question to the CJEU for a preliminary ruling:

> 'What is the scope of Article 27 of Regulation No 604/2013, whether or not read in conjunction with recital 19 of that regulation? Does an asylum seeker... have the right, pursuant to that article, to an (effective) legal remedy against the application of the criteria for determining the Member State responsible laid down in Chapter III of Regulation No 604/2013?'[23]

The CJEU again held that it had to interpret the provision according to its 'general scheme, its objectives and its context'.[24] However, the concept of 'mutual confidence' could no longer be relied on. The objective of Dublin III was instead 'to establish a clear and workable method based on objective, fair criteria *both* for the Member States and for the persons concerned for determining the Member State responsible for examining an asylum application' (emphasis added).[25] The CJEU held that 'a restrictive interpretation of the scope of the remedy provided in Article 27(1) might thwart the attainment of that objective by depriving the other rights conferred on asylum seekers by that regulation of any practical effect',[26] and that the judicial protection of asylum seekers should not 'be sacrificed to the requirement of expedition in processing asylum applications'.[27] This is particularly important in relation to the Dublin IV Proposal for which, one of the objectives is to improve the efficacy of the system.[28] The question was therefore answered in the positive.[29]

The case of *Karim*[30] clarified this further, providing that an applicant has a right to 'an effective remedy against a transfer decision made in respect of him... even where there are no systemic deficiencies in the asylum process or in the reception conditions for asylum applicants in that Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union'.[31]The Meijers Committee has expressed concern that, so soon after the CJEU widened the material scope of the remedy, the Dublin IV Proposal seeks to narrow it.[32] Although the Dublin IV proposal does not restrict the remedy solely to cases where there is a risk of

[19] *Shamso Adbullahi*, op cit, para 60.
[20] *Ghezelbash v Staatssecretaris van Veiligheid en Justitie*, Case C-63/15 (2016).
[21] Ibid, para 20.
[22] Ibid, para 26.
[23] Ibid, para 28.
[24] Ibid, para 35.
[25] Ibid, para 42.
[26] Ibid, para 53.
[27] Ibid, para 57.
[28] Dublin IV, op cit, para 97.
[29] Ibid, para 61-62.
[30] *George Karim v Migrationsverket*, Case C-155/15 (2016).
[31] Ibid, para 22.
[32] Meijers Committee, op cit, para 3.

inhuman or degrading treatment, its nevertheless restrictive approach is out of line with the direction of these judgments. Furthermore, one of the main objectives of Dublin IV is to prevent secondary movement.[33] Failure to respect fundamental rights is unlikely to achieve this, and is more likely to increase numbers of asylum seekers in orbit. The UNHCR has therefore called for 'the scope of effective remedies' to 'be broadened in line with Article 13 of the ECHR (Right to effective remedy) and Article 47 of the EU Charter'.[34]

Arbitrary detention

Of particular concern, is the absence of a remedy for violation of the right to liberty.[35] This is particularly significant as both Amnesty International and the UNHCR have identified that Dublin returnees, including vulnerable ones, are being automatically detained on arrival.[36] Dublin IV therefore appears to restrict recourse to detention. In particular, proposed Article 29(3) reduces:

- The maximum period an individual can be detained for before a take charge request or take back notification is made from one month to two weeks;
- The period in which a reply shall be given from two weeks to one week; and
- The maximum period in which an individual must be transferred from six weeks from the acceptance of the request or notification to four weeks from the final transfer decision.

Without recourse to review through a remedy, these changes amount to little more than 'window dressing'. The Dublin system is often viewed as one which is administrative in nature however, Hastie and Crepeau have argued that elements of it, one being detention, have become quasi-criminal.[37] They recognised that, unlike penitentiary detention, there is no common regulatory framework defining what detainees in administrative detention are entitled to,[38] such that 'irregular migrants become subject to the full force of the law without the benefit of its protection'.[39] The Dublin IV should acknowledge the true nature of detention, and demand a higher expectation of effective remedy in line with criminal procedure, better balancing individual rights with efficiency.

Articles 28(1) and (2) Dublin III are retained in proposed Articles 29(1) and (2):

> '(1) Member States shall not hold a person in detention for the *sole reason that he or she is subject to the procedure* established by this Regulation.
>
> (2) When there is a *significant risk of absconding*, Member State may detain the person concerned in order to secure transfer procedures in accordance with this regulation, on the basis of *individual assessment* and only in so far as detention is *proportional* and *other less coercive alternative measures cannot be applied effectively*.' (emphasis added)

As italicised, there a numerous variables which, without recourse to remedy, remain at the discretion of Member States. In particular, the UNHCR has criticised the proposal's failure to

[33] Dublin IV, para 97.
[34] UNHCR, 'Comments on the European Commission 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)' – COM (2016) 270, 37.
[35] Article 5, European Convention on Human Rights; Article 6, Charter of Fundamental Rights of the European Union.
[36] Amnesty International, 'The Dublin II Trap: Transfers of Asylum-Seekers to Greece' (Amnesty International Publications, 2010) 5; UNHCR, 'Position on the Return of Asylum-Seekers to Greece Under the "Dublin Regulation"' (2008), 2.
[37] B. Hastie and F. Crepeau, 'Criminalising irregular migration: the failure of the deterrence model and the need for a human rights-based framework' (2014) 28 *Journal of Immigration, Asylum and Nationality Law* 213, 215.
[38] Ibid, 228.
[39] Ibid, 214.

define 'significant risk of absconding'.[40] Although it could be argued that there is a remedy for arbitrary detention but only where this meets the threshold of inhuman and degrading treatment, the fact that Article 29(1) is so clear that individuals should not be detained for the sole reason of their status *at all*, the need to meet this threshold is nonsensical.

There are a number of other avenues through which an individual may hold Member States accountable for deprivation of their liberty, outside of the Dublin system. The UN Special Rapporteur on the human rights of migrants highlighted, in particular, that article 3 of the Universal Declaration of Human Rights (UDHR) provides *everyone* 'including migrants in an irregular situation' with 'the right to life, liberty and the security of person', and article 9 'provides that "no one" shall be subjected to arbitrary arrest, detention or exile'. Furthermore, Article 9(1) of the International Covenant on Civil and Political Rights (ICCPR) 'provides that everyone has the right to liberty and security of person, no one shall be subjected to arbitrary arrest or detention and no one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.'[41] More recently, in *Ilias & Ahmed v Hungary*,[42] the ECtHR has demonstrated an unwillingness to find such restrictions on remedies compatible with Article 5(4) ECHR which provides:

> 'Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful'.

The case concerned the applicants' confinement in a transit zone between Hungary and Serbia, as the applicants were not allowed to enter the Hungarian side, but risked inhumane and degrading treatment on the Serbian side. The ECtHR held that although such transit zones are 'not in every aspect comparable to... [confinement] in detention centres', they are 'acceptable only if accompanied by safeguards for persons concerned and is not prolonged excessively.'[43] The Dublin IV proposal should be brought in line with the approach of these bodies.

Of particular concern is the fact that there is no exception for vulnerable groups. Article 37(b) of the Convention on the Rights of the Child provides for a greater level of exceptionality when detaining minors which should be 'a measure of last resort'. It is particularly important that exceptions should be made for such groups when reflecting on the reality of the situation on the ground. For instance, Human Rights Watch reported that:

> 'Unaccompanied children who have not filed an asylum application, who have fallen out of the asylum system, or who have had their applications denied have no regular status while in Greece. As such, they are subject to repeated detention'.[44]

Again, in light of such findings, the principle of mutual confidence cannot be relied on, and decisions must be subject to review through an appeals procedure.

Unaccompanied minors

Proposed Article 10 details the procedure for identifying the Member State responsible for processing the application of an unaccompanied minor. An individual would have recourse to remedy concerning the application of this provision. However, better drafting would prevent the need for many appeals. The proposal expands the definition of 'family' to include siblings and families formed in transit,[45] better reflecting the realities of asylum seekers. However, it fails to clarify the criteria for establishing a dependency link necessary for identifying families

[40] UNHCR (2016), op cit, 4.
[41] Report of the Special Rapporteur on the Human Rights of Migrants, UN Doc A/HRC/20/24 (2012), para 5.
[42] *Ilias & Ahmed v Hungary*, App. No. 47287/15 (2017).
[43] Ibid, para. 52.
[44] Human Rights Watch, 'Left to Survive Systematic Failure to Protect Unaccompanied Migrant Children in Greece' (2008) *1-56432-418-4*, 56.
[45] Dublin IV, op cit, para. 5(16).

formed in transit.[46] This is likely to lead to numerous appeals regarding Member States' interpretation of 'family relations which were formed after leaving the country of origin but before arrival on the territory of the Member State'.

Additionally, Article 8 makes some important provisions for unaccompanied minors but is not subject to appeal. Article 8(2) provides:

> 'Each Member State where an unaccompanied minor is obliged to be present shall ensure that a representative represents and/or assists the unaccompanied minor with respect to the relevant procedures provided for in this Regulation'.

This indicates that, if an unaccompanied minor was to undertake secondary movement, they may not be represented in any decision to transfer them back to the first Member State, nor in any appeal on this, thus rendering the remedy ineffective. The UNHCR has stated that this 'raises serious concerns' of minors exposed to 'an evident protection gap'.[47] Furthermore, the provision is not subject to an appeal so even if the Member State where the minor *is* obliged to be present does not provide them with representation, they would have no remedy for this. This is contrary to the Committee on the Rights of the Child's General Comment No 6, which explains that, if a child's return poses a risk of refoulement, they must be given an effective remedy, and Member States should ensure they are represented by a lawyer or guardian in such proceedings.[48]

Proposed Article 10(5) provides that, where unaccompanied minors have no family members in the EU, the State in which they first lodged their application shall be the one which is responsible for them, unless it is not in their best interests. Although this is subject to a remedy, the transfer of minors should be the exception, not the norm. The European Council on Refugees and Exiles (ECRE) has expressed concerns about exposing minors to unnecessary transfers.[49] The provision is also contrary to CJEU case law, and risks being held to be invalid by the Court. In *MA, BT & DA*[50] it held:

> 'Since unaccompanied minors form a category of particularly vulnerable persons, it is important not to prolong more than is strictly necessary the procedure for determining the Member State responsible, which means that, as a rule, unaccompanied minors should not be transferred to another Member State'...
>
> 'The Member State in which that minor is present after having lodged an asylum application there is to be designated the 'Member State Responsible'.[51]

This provision is likely to mean that many unaccompanied minors have to go through unnecessary appeals since it will rarely be in an unaccompanied minor's best interests to be transferred back to the Member State in which they first lodged their application.

Time limits for seeking a remedy

As discussed, improving efficiency is one of the main aims of the proposal, but this must not be done at the expense of individual rights. This is a balance which the proposal has, in certain respects, failed to achieve. Proposed Article 28(2) replaces Article 27(2) Dublin III, reducing the time in which an individual may access their right to an effective remedy from 'a reasonable time period' to 'a period of 7 days after the notification of the transfer decision'. This is not in line with CJEU judgements, and obligations under Article 13 ECHR and Article

[46] UNHCR (2016), op cit, 3.
[47] Ibid, 4.
[48] Committee on the Rights of the Child, 'General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin', UN Doc CRC/GC/2005/6 (2005), para 33.
[49] European Council on Refugees and Exiles (ECRE), 'Comments from the European Council on Refugees and Exiles: On the European Commission Proposal to recast the Dublin Regulation' (2009), para. 2.5.
[50] *The Queen (on the application of MA, BT & DA) v Secretary of State for the Home Department*, Case C-648/11 (2013).
[51] Ibid, para 55 and 66.

47 of The Charter. The retention of 'accelerated procedures' further aggravates this, and the lack of guidelines has left them open to abuse. One amendment which must be praised and retained is the automatic suspensive effect of appeals,[52] which ensures that the remedy is, in fact, effective.

Automatic suspensive effect

Where a decision to transfer an individual has been appealed, suspensive effect halts the transfer from taking place. This was not considered necessary at the beginning of the Dublin system due to the principle of mutual confidence[53]. Today it is accepted that without suspensive effect, a remedy cannot be said to be effective because, even if an appeal is successful, the damage may have already been done.[54] In *TI v UK*[55], the CJEU allowed for a presumption that a third Member State was safe, so long as the individual was given the opportunity to rebut that presumption. Following from this, Article 26(2) Dublin III provided the right to *apply* for suspensive effect. However, in reality States may be reluctant to allow applications for suspensive effect as it suggests scepticism towards the other Member State's removal practices.[56] No such fear of bad relations is necessary where the suspensive effect is automatic. Furthermore, Noll recalls 'that the Dublin Convention was conceived as a tool which should simplify and shorten asylum procedures'. However, hearings for applications for suspensive effect saw 'procedures... getting more lengthy and resource-consuming, as an assessment of safety in the responsible Member State [was]... added to them'.[57] Automatic suspensive effect reduces the cost and length of such procedures, and is in line with the ECtHR's case law on Article 13 of the ECHR:

> 'the effectiveness of a remedy within the meaning of Article 13... requires that the person concerned should have access to a remedy with an automatic suspensive effect'.[58]

Seven days

In *MSS v Belgium and Greece*, the ECtHR held that 'whilst the effectiveness of a remedy does not depend on the certainty of a favourable outcome for the applicant, the lack of any prospect of obtaining adequate redress raises an issue under Article 13'.[59]. In *Bahaddar v The Netherlands*,[60] the ECtHR held that 'in applications for recognition of refugee status it may be difficult, if not, impossible, for the person concerned to supply evidence within a short time, especially if... [s]uch evidence must be obtained from the country from which he or she claims to have fled'. Factors such as language barriers and detention may heighten these difficulties. The UNHCR has therefore argued that, in order to achieve an effective remedy in asylum cases, time is 'an essential resource'.[61]

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[52] European Commission, '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)', COM(2016) 270 final/2 of 04.05.16, 2016/0133 (COD) Explanatory Memorandum 3.5, 13.

[53] P. Mallia, 'The Case of MSS v Belgium and Greece: A Catalyst in the Re-thinking of the Dublin II Regulation, (2011) 30(3) *Refugee Survey Quarterly* 107, 121.

[54] J. Lenart, ''Fortress Europe': Compliance of the Dublin II Regulation with the European Convention for the Protection of Human Rights and Fundamental Freedoms' (2012) 28 *Utrecht Journal of International and European Law* 4, 15.

[55] *TI v UK*, App. No. 43844/98 (2000).

[56] G. Noll, 'Formalism v Empiricism: Some Reflections on the Dublin Convention on the Occasion of Recent European Case Law,' (2001) 70 *Nordic Journal of International Law* 161, 170.

[57] Ibid, 172.

[58] *MSS v Belgium and Greece*, op cit, para 293.

[59] Ibid, para 394.

[60] *Bahaddar v The Netherlands*, App. No. 25894/94 (1998), para 45.

[61] UNHCR, 'Improving Asylum Procedures, Comparative Analysis and Recommendations for Law and Practice' (2010) s.9 [3].

It is suggested that seven days is not sufficient and does not adequately balance efficiency with individual rights. In the case of *Diouf*, the CJEU held that 'a 15-day time limit for bringing an action does not seem, generally, to be insufficient in practical terms to prepare and bring an effective action and appears reasonable and proportionate in relation to the rights and interests involved'.[62] The UNHCR has therefore recommended that 'the time limit to lodge an appeal should be extended to at least fifteen days for lodging the appeal or longer if particular circumstances (to be evaluated on a case-by-case basis) apply'.[63] *IM v France*,[64] and *ME v France*,[65] both concerned a five day procedure in operation in France. The ECtHR found its application to amount to a violation of the applicant's right to an effective remedy in *IM v France* because he had been in detention and he was applying for asylum for the first time.[66] Conversely, it found its application to be permissible in *ME v France* because the applicant had been in France for three years therefore 'had had sufficient time to gather documentation in support of the asylum procedure'.[67] The ECtHR and CJEU are therefore unlikely to blanketly rule that the seven day period is invalid due to its incompatibility with Article 13 ECHR and Article 47 The Charter, whereas the provision is likely to lead to multiple applications which the courts will have to consider based on the facts on a case by case basis, causing huge costs and inconvenience to Member States.

Accelerated procedures

It is important to note that the ECtHR's judgement in *Diouf* concerned accelerated procedures.[68] Therefore, a longer time period to lodge an appeal may be necessary in ordinary procedures. Alternatively, this draws into question whether shorter periods for accelerated procedures would be permissible at all. The Dublin IV Proposal reduces the grounds on which an application can be processed under the accelerated procedure to where an individual comes from a 'safe country', where they pose a security risk, and where the individual has lodged their application in a Member State other than that of their first entry[69], however, it fails to define what such a procedure should entail. It is questionable whether, without recourse to appeal, so much should be left to Member States' discretion,

[62] *Brahim Samba Diouf v Ministre du Travail se l'Emploi et de l'Immigration*, Case C-69/10 (2011) , para 67.
[63] UNHCR (2016), op cit, 39.
[64] *IM v France*, App. No 9152/09 (2012) – judgment only available in French.
[65] *ME v France*, App. No. 50094/10 (2013).
[66] ECtHR Press Release, 'First-time asylum seeker was not given effective remedy under fast-track procedure for examination of his case' (2012), 3.
[67] M. Reneman, 'Speedy Asylum Procedures in the EU: Striking a Fair Balance Between the Need to Process Asylum Cases Efficiently and the Asylum Applicant's EU Right to an Effective Remedy' (2014) 25(4) *International Journal of Refugee Law* 717, 723.
[68] *Brahim Samba Diouf v Ministre du Travail se l'Emploi et de l'Immigration*, Case C-69/10 (2011) [67].
[69] Dublin IV proposal, op cit. See Article 3(3):

> 'Before applying the criteria for determining a Member State responsible in accordance with Chapters III and IV, the first Member State in which the application for internal protection was lodged shall.. (b) examine the application in accelerated procedure pursuant to Article 31(8) of Directive 2013/32/EU when the following grounds apply:
> (i) the applicant has the nationality of a third country, or he or she is a stateless person and was formerly habitually resident in that country, designated as a safe country of origin in the EU common list of safe countries of origin established under Regulation [Proposal COM (2015) 453 or 9 September 2015]; or
> (ii) the applicant may, for serious reasons, be considered a danger to the national security or public order of the Member State, or the applicant has been forcibly expelled for serious reasons of public security or public order under national law.'

Article 5(1):

> 'If an applicant does not comply with the obligation set out in Article 4(1), the Member State responsible in accordance with this Regulation shall examine the application in an accelerated procedure, in accordance with Article 31(8) of Directive 2013/32/EU.'

Article 4(1):

> 'Where a person who intends to make an application for international protection has entered irregularly into the territory of the Member States, the application shall be made in the Member State of that first entry. Where a person who intends to make an application for international protection is legally present in a Member State, the application shall be made in that Member State.'

undermining the aim of the Dublin system in establishing harmonised procedures. It must be borne to mind that accelerated procedures do not meet their goal 'to conserve legal administrative resources for the determination of "genuine" refugee claims' where they result in 'valuable resources... [being] diverted'[70] to ECtHR and CJEU applications claiming violations of the right to an effective remedy.

Despite the grounds for subjecting an application to an accelerated procedure being reduced from five to three, this is still too expansive. In some States, 95 per cent of asylum applications are processed under such procedures.[71] Mullally expresses concern that '[d]esignating a country as safe may amount to a *de facto* geographical reservation to the 1951 Convention... [it] precludes an individual assessment of an asylum claim, preferring instead a sledgehammer approach'.[72] First time applications amount to 62.5 per cent of applications processed under the accelerated procedure.[73] This is concerning because the ECtHR has provided, '[w]hile the re-examination of an asylum application under the fast track-procedure did not deprive aliens in administrative detention of a detailed review of their claims, in so far as they had had a first application examined under the normal procedure, this was not the case with first time applications.'[74] The three grounds for processing an application under an accelerated procedure should therefore be replaced with one where the individual's application has already been *processed* in another Member State.

Punitive measures

In a misguided effort to combat secondary movements, the Dublin IV Proposal provides for a number of punitive measures where an asylum-seeker is present in a Member State other than the one which is deemed responsible for their application. As discussed, proposed Article 5(1) provides that an individual, who lodges an application for asylum in a State other than that of first entry, shall have their application processed under an accelerated procedure. Proposed Article 20(5) provides that an individual who has had their application rejected in another Member State 'and who made an application in another Member State or who is on the territory of another Member State without a residence permit' shall no longer have access to a remedy for that rejection. Finally, proposed Article 5(3) provides that '[t]he applicant shall not be entitled to the reception conditions set out in Articles 14 to 19 of Directive 2013/33/EU, with the exception of emergency health care, during the procedures under the Regulation in any Member State other than the one in which he or she is required to be present'.

Punitive measures imply that there is a criminal action which needs to be punished, running contrary to the UN Special Rapporteur's desire to stress 'that irregular entry or stay should never be considered criminal offences'.[75] Accelerated procedures have already been discussed in the previous chapters, and although the UNHCR has urged 'that the proposed preclusion of an effective remedy against the rejection of an application, where an applicant is returned to the Member State that issued such a decision, be deleted from proposed recast Article 20(5)',[76] the main focus of this section of the memorandum is on the limitations to reception conditions under proposed Article 5(3).

[70] S. Mullally, 'Accelerated Asylum Determination Procedures: Fair and Efficient?' (2001) 23 *Dublin University Law Journal* 55, 62.
[71] UNHCR (2010), op cit, 6.
[72] S. Mullally, op cit, 57.
[73] *IM v France*, op cit, para 63.
[74] ECtHR Press Release, op cit, 3.
[75] Report of the Special Rapporteur on the Human Rights of Migrants, op cit, para 3.
[76] UNHCR (2016), op cit, 12.

Deterrence-based measures are ineffective

Deterrence-based measures have proved to be ineffective in preventing secondary movement 'because of their inability to connect with the true reality of the situation'.[77] Asylum-seekers will continue to undertake secondary movements so long as their human rights are not respected for example, they are not provided with sufficient water, shelter, and consideration is not given for family reunification. The deterrence-based model fails to connect to the reality that 'very substantial numbers of asylum applicants do not claim asylum upon arrival in the EU' therefore limiting reception conditions is likely to result in 'asylum seekers being forced to live on the streets on a massive scale'.[78] Such conditions are likely to result in a flood of appeals on the basis of inhuman and degrading treatment. Additionally, the Meijers Committee has highlighted that it is legally questionable 'that no exception is made for persons who have not applied for asylum in a Member State where there are systematic flaws in the asylum procedure and reception conditions'.[79]

Even more significant is the lack of exception for minors in imposing punitive measures under proposed Article 5(1).[80] This runs contrary to the approach in General Comment No 6 of the Committee on the Rights of the Child, which provides that children should never be criminalised solely for reasons or irregular entry or presence in a country.[81] Without reception conditions under Directive 2013/33/EU being provided, 'unaccompanied children are vulnerable to becoming victims of human rights violations, such as sexual and economic exploitation and trafficking'.[82] Far from gaining greater control over secondary movements, deterrence-based models are more likely to increase the numbers of migrants in orbit, as individuals are less likely to register in the first Member State if they do not have family or other reasons to be transferred on to another State.[83]

Out of line with CJEU case law

Proposed Article 5(1) appears not to be in line with CJEU case law, namely the cases of Cimade[84] and Sacri.[85] In Cimade, the applicants applied to have invalidated a circular, which excluded asylum seekers' entitlement to ATA where the French Republic calls upon another Member State it considers responsible, to take charge of processing an asylum application.[86] The CJEU held that 'only the actual transfer of the asylum seeker by the requesting Member State brings to an end the examination of the application for asylum by that State and its responsibility for granting the minimum reception conditions'.[87] The CJEU made its ruling with reference to fundamental rights:

> 'In addition, further to the general scheme and purpose of Directive 2003/9 and the observance of fundamental rights, in particular the requirements of Article 1 of the Charter, under which human dignity must be respected and protected, the asylum seeker may not... be deprived – even for a temporary period of time after the making of the application for asylum and before being actually transferred to the responsible

[77] B. Hastie and F. Crepeau, 'Criminalising irregular migration: the failure of the deterrence model and the need for a human rights-based framework' (2014) 28 *Journal of Immigration, Asylum and Nationality Law* 213, 236.
[78] Meijers Committee, op cit, 2.2.
[79] Meijers Committee, op cit, 2.2.
[80] Ibid, 14.
[81] Committee on the Rights of the Child, General Comment No. 6, op cit, para. 62.
[82] Report of the Special Rapporteur on the Human Rights of Migrants, op cit, para 41.
[83] UNHCR (2016), op cit, 2 and 14.
[84] *Cimade, Group d'information et de soutien des immigres (GISTI) v Ministre de l'Intrerieur de l'Outre-mer, des Collectives territoriales et de l'Immigration*, Case C-179/11 (2012).
[85] *Federaal Agentschap Voor de Opvang Ven Asielzoekers v Selver Sacri and others*, Case C-79/13 (2014).
[86] *Cimade*, op cit, para 34.
[87] Ibid, para 55.

> Member State – of the protection of the minimum standards laid down by that directive.'[88]

The ruling in Cimade was affirmed in Sacri[89] just three years ago. It is therefore unlikely that the position of the CJEU will have changed, and it is probable that Article 5(3) will be found incompatible with fundamental rights.

Conclusion

Dublin IV has the potential to be a positive proposal for both States and individuals alike. Its expansion of the definition of 'family' and introduction of mandatory suspensive effect are to be highly commended. However, as this memorandum highlights, in some aspects it has failed to adequately balance effectiveness with individual rights.

To correct this, the following recommendations are made:

1. The material scope of the remedy should be expanded with respect to *all* human rights;
2. 'Risk of absconding' and the dependency link with respect to 'families formed in transit' must be defined;
3. Unaccompanied minors must have access to representation in *all* proceedings, *wherever* they are and must be protected against unnecessary transfer;
4. The time limit for seeking a remedy should be amended to a minimum of 15 days;
5. Accelerated procedures should be prohibited or, failing that, better defined and limited to cases where the individual has already applied for asylum in another member state; and
6. Punitive measures should be removed from the proposal.

[88] Ibid, para 56.
[89] *Federaal Agentschap*, op cit, para 35.