Council of the European Union

Brussels, 8 December 2016
(OR. en)

15313/16

Interinstitutional File:
2016/0133 (COD)

ASILE 90
CODEC 1836

COVER NOTE

From:	European Union Agency for Fundamental Rights
date of receipt:	8 December 2016
To:	Mr. Peter Javorcik, Ambassador Extraordinary and Plenipotentiary, Permanent Representative of the Slovak Republik to the EU
Subject:	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) - Opinion of the European Union Agency for Fundamental Rights

Delegations will find attached the letter and the opinion of the European Union Agency for Fundamental Rights regarding the above mentioned subject.

Please note that the opinion can be downloaded also here:

http://fra.europa.eu/sites/default/files/fra_uploads/fra-opinion-04-2016-dublin_en.pdf

EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS

To the attention of:

Peter Javorčík
Ambassdor Extraordinary & Plenipotentiary
Permanent Representation of the Slovak Republik to the EU
Avenue de Coretnbergh 107
1000 Brussels, Belgium

Via email: daniela.acova@mzv.sk

Vienna, 28 November 2016
2016-outgoing-001615

Dear Ambassador,

On 31 August 2016, the EU Agency for Fundamental Rights (FRA) received a request from the European Parliament to deliver an opinion on the "fundamental rights implications for children of the 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; 2016/0133 (COD))".

In response, FRA has formulated the Opinion attached to this letter. I am enclosing an advanced copy, as delivered to the Parliament.

The Opinion will be published on 8 December 2016.

The Agency remains available to provide any additional information you might need.

Yours sincerely,

Michael O'Flaherty

cc: Marián Filčík, FREMP Chair, at: marian.filcik@justice.sk;
Jana Juričkova, SCIFA Committee Chair, at: jana.jurickova@mzv.sk;
Nina Sečíková, Asylum Working Party Chair, at: nina.secikova@mzv.sk;
Christine Roger, Director General Justice and Home Affairs, Council Secretariat, at: christine.roger@consilium.europa.eu;
Raoul Ueberecken, Director Home Affairs, Council Secretariat, at: raoul.ueberbecken@consilium.europa.eu;

Michael O'Flaherty, Director
European Union Agency for Fundamental Rights | Agentur der Europäischen Union für Grundrechte | Agence des droits fondamentaux de l'Union Européenne
Schwarzenbergplatz 11 | 1040 Vienna | Austria | T +43 (1) 580 30 - 0 | info@fra.europa.eu
fra.europa.eu | www.facebook.com/fundamentalrights | twitter.com/EURightsAgency | www.linkedin.com/company/eu-fundamental-rights-agency

FRA Opinion – 4/2016
[Dublin]

Vienna, 23 November 2016

Opinion of the European Union Agency for Fundamental Rights on the impact on children of the proposal for a revised Dublin Regulation (COM(2016)270 final; 2016/0133 COD)

Contents

Opinions....6
Introduction....15
1. Excluding certain categories of applicants from the Dublin Regulation and its impact on the rights of the child and the right to respect for family life....21
1.1 Excluding children in need of special procedural guarantees from admissibility and accelerated procedures....21
1.2 Giving priority to family unity over admissibility and safe countries of origin procedures....23
1.3 Providing fair procedures to children with public order and national security issues....26
2. The impact of sanctions for unauthorised secondary movements....28
2.1 Avoiding unjustified fast track procedures for applicants applying in a Member State other than that of first entry or legal stay....29
2.2 Allowing another Member State to continue the Dublin procedure when children join family members....31
2.3 Respecting minimum social, economic and cultural rights....33
2.4 Removing the prohibition to present new facts on members of family....36
2.5 Ensuring future asylum claims are examined in substance if first asylum application is withdrawn....37
3. Procedural safeguards for children....40
3.1. Informing children adequately....40
3.2. Respecting the right to be heard....41
3.3. Ensuring that Member States cooperate in gathering evidence....44
3.4. Ensuring effective guardianship....46
3.5. Respecting the right to an effective remedy....49
4. Best interests of the child....56
4.1. Respecting the best interests of unaccompanied children who do not have family members in the Dublin area....56
4.2. Applying fair procedures to best interests assessment....58

4.3. Verifying family links of unaccompanied children before allocating them to another Member State 59
4.4. Allowing a change of responsible Member State in case of new information on family members 60
4.5. Keeping Member State's discretion in case of humanitarian considerations not linked to family life 61
5. Corrective allocation mechanism and fundamental rights 63
5.1. Reducing the risk of information leaks to persecutors 63
5.2. Not retaining data on children longer than necessary 64
5.3. Requiring rejections by Member States of allocation to be individually justified 66
5.4. Preserving family life when applying the corrective mechanism 67
Annex: ..... Time limits for appealing a Dublin transfer in 21 EU Member States (sources) 69

THE EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS (FRA),

Bearing in mind the Treaty on European Union (TEU), in particular Article 6 thereof,

Recalling the obligations set out in the Charter of Fundamental Rights of the European Union (the Charter),

In accordance with Council Regulation 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights (FRA), in particular Article 2 with the objective of FRA "*to provide the relevant institutions, bodies, offices and agencies of the Community and its EU Member States when implementing Community law with assistance and expertise relating to fundamental rights in order to support them when they take measures or formulate courses of action within their respective spheres of competence to fully respect fundamental rights*",

Having regard to Article 4 (1) (d) of Council Regulation 168/2007, with the task of FRA to "*formulate and publish conclusions and opinions on specific thematic topics, for the Union institutions and the EU Member States when implementing Community law, either on its own initiative or at the request of the European Parliament, the Council or the Commission*",

Having regard to Recital (13) of Council Regulation 168/2007, according to which "*the institutions should be able to request opinions on their legislative proposals or positions taken in the course of legislative procedures as far as their compatibility with fundamental rights are concerned*",

Having regard to previous opinions of FRA on related issues; in particular the *Opinion of the European Union Agency for Fundamental Rights concerning an EU common list of safe countries of origin,* dated 23 March 2016.

Having regard to the request of the European Parliament of 31 August 2016 to FRA for an opinion on the fundamental rights implications for children (both unaccompanied and in families) of the Commission proposal for a recast Dublin Regulation (COM(2016)270 final; 2016/0133 COD) which requested FRA to cover the following matters: "*It is of particular interest to have an assessment of the respect of the fundamental rights of children (both unaccompanied and in families) before the application, by making sure that the proposed changes do not incentivise absconding, and at the moment of application, in particular with regards to the admissibility procedure, the automated corrective allocation mechanism and with regard to the sanctions foreseen for unauthorised secondary movements (which should be analysed thoroughly also with regard to adults). This assessment should include the application of the best interests of the child principle, also with regard to family reunification, the right to be heard and adequately informed, and effective access to legal assistance in practice. In addition, attention needs to be paid to the rights of children to the protection of their personal data and private life. It would also be of interest to have an assessment of the fundamental rights aspects of the proposed changes to the procedural provisions relating in particular to deadlines and procedural requirements on applicants*."

SUBMITS THE FOLLOWING OPINION

Opinions

Excluding certain categories of applicants from the Dublin Regulation and its impact on the rights of the child and the right to respect for family life

Under the current Dublin Regulation (Regulation (EU) No. 604/2013), all asylum applications are subject to the responsibility allocation mechanism. The proposed changes to Article 3 of the Dublin Regulation intend to exclude certain types of applications from the Dublin procedure, namely: applicants coming from a country of first asylum; a safe third country; a country that is listed in the European Union (EU) common list of safe countries of origin; and asylum applicants considered for serious reasons a danger to the national security or public order of the Member States, or who have been forcibly expelled for the above reasons.

FRA Opinion 1

Excluding children in need of special procedural guarantees from admissibility and accelerated procedures

Children are a vulnerable category of asylum applicants and may be in need of specific procedural or other safeguards. Asylum procedures must allow for sufficient time to assess and respond to such specific needs; otherwise, Member States would not comply with the duty to provide the protection and care necessary for a child's well-being as required by Article 24 of the Charter of Fundamental Rights of the European Union (Charter). The two weeks and one month timeframes envisaged in Article 24 (1) of the proposed recast Dublin Regulation will raise serious challenges in this regard.

The EU legislator should exclude children in need of special procedural guarantees from admissibility and accelerated procedures envisaged in Article 3 of the proposed recast Dublin Regulation. Some EU Member States confronted with persons arriving in large numbers at their borders have enacted exceptions, excluding vulnerable people from admissibility and accelerated procedures. The European Union could consider following this approach by excluding the applicability of Article 3 (3) of the proposal to asylum applicants who belong to categories of applicants listed as vulnerable.

FRA Opinion 2

Giving priority to family unity over admissibility and safe countries of origin procedures

The right to respect for private and family life guaranteed by Article 7 of the Charter and Article 8 of the European Convention on Human Rights (ECHR) requires that any restriction to this right be justified in each individual case.

To comply with this requirement, the EU legislator should allow a rejection of an asylum application as inadmissible or through an accelerated procedure only after having examined the rules to protect unaccompanied children and promote family unity included in Articles 8 to 11 of the current Dublin Regulation.

FRA Opinion 3

Providing fair procedures to children with public order and national security issues

Regardless of whether they are alone or with their families, child applicants, who for serious reasons are considered a danger to the national security, public security or public order of the Member States, may often have complex claims. Due to their background, they are likely to be in need of specific procedural safeguards. Such specific safeguards cannot be met in fast track procedures since sufficient time is needed to establish a relationship of trust with them.

Although their applications should be assessed as soon as their specific needs are met, the EU legislator should exclude child applicants from Article 3 (3) (b) (ii) of the proposed recast Dublin Regulation.

The impact of sanctions for unauthorised secondary movement

The proposed recast of the Dublin Regulation introduces explicit obligations for asylum seekers during the Dublin procedure (Article 4 of the proposal). To enhance compliance with these obligations and to prevent unauthorised secondary movements, certain sanctions and other punitive procedural consequences are envisaged in case of a breach (Articles 5 and 20 (3)-(5) of the proposal). These should not lead to the violation of asylum seekers' fundamental rights protected by the Charter.

FRA Opinion 4

Avoiding unjustified fast track procedures for applicants applying in a Member State other than that of first entry or legal stay

Asylum applicants may have good reasons to move to another country, as suggested in Article 40 (1) (g) of the proposed recast of the EU instrument regulating asylum procedures – the Asylum Procedure Regulation. They may, for example, move due to gaps or inadequate standards in national asylum systems, notably when it comes to families with children staying in Member States which do not provide adequate reception conditions.

Penalising such Dublin transferees by referring them into fast track procedures is not the appropriate solution. It carries with it significant protection risks. Adhering to protection standards is not a discretionary duty of Member States. As a minimum, the revised rules of the proposed recast Dublin Regulation (Articles 5 (1) and 20 (3)) should be brought in line with Article 40 (1) (g) of the proposed recast of the EU instrument regulating asylum procedures.

Channelling an application made by an unaccompanied child into an accelerated procedure undermines the duty to assess the applicant's special needs and best interests in line with Article 24 (2) of the Charter and Article 3 of the United Nations (UN) Convention on the Rights of the Child (CRC). To ensure a genuine assessment of their best interests, unaccompanied children should be excluded from accelerated procedures after their transfer back to the responsible Member State.

FRA Opinion 5

Allowing another Member State to continue the Dublin procedure when children join family members

The proposed obligation for the Member State of first entry to continue the Dublin procedure in case of the applicant's onward movement should be reconciled with requirements stemming from Articles 7 (respect for private and family life) and 24 (the rights of the child) of the Charter, as well as the right of a child to be heard. An application of the proposed rule as it stands runs the risk of not properly taking into account the criteria of the Dublin Regulation to protect unaccompanied children and family life, particularly if decisions under the Dublin Regulation are taken without conducting a personal interview.

To ensure that family criteria are correctly applied and that primary consideration is given to the best interests of the child, exceptions to Article 5 (2) of the proposed recast Dublin Regulation should be envisaged for unaccompanied children as well as for families who reunited spontaneously.

FRA Opinion 6

Respecting minimum social, economic and cultural rights

Various human rights obligations, the Charter and case law of the Court of Justice of the European Union (CJEU) considerably limit the freedom of Member States to withdraw or significantly reduce material reception conditions of asylum seekers, particularly for asylum-seeking children.

Recital (22) of the proposed recast Dublin Regulation calls upon Member States to act in compliance with the Charter and to ensure that the immediate material needs of asylum applicants are covered. The new rules in Article 5 (3) of the proposed recast Dublin Regulation restrict a number of social and economic rights and should at least be streamlined so as to better reflect the states' duties under Recital (22) of the proposal.

The concept of 'immediate material needs' covers at a minimum an obligation to provide housing, food, clothing and education in addition to necessary healthcare. It should be adequately reflected in the operative provisions as a non-derogable minimum, in order to be in full compliance with Articles 1 (human dignity) and 4 (prohibition of inhuman and degrading treatment) of the Charter. In parallel, steps should be taken to address the gaps in Member States' reception standards.

FRA Opinion 7

Removing the prohibition to present new facts on members of family

Asylum applicants must be given the possibility of presenting new facts and new evidence concerning the presence of family members in another Member State, without a pre-determined deadline.

Curtailing the right to submit new information and elements after the completion of the personal interview as envisaged in Articles 4 (2) and 5 (4) of the proposed recast Dublin Regulation is difficult to reconcile with duties of Member States to give a primary consideration to the best interests of the child and to respect family life, included respectively in Articles 24 and 7 of the Charter.

FRA Opinion 8

Ensuring future asylum claims are examined in substance if first asylum application is withdrawn

The right of effective access to asylum procedures, inherent in the right to asylum enshrined in Article 18 of the Charter, must be respected in all circumstances, without exceptions. To comply with this requirement and to protect the applicant from refoulement, Member States are bound to ensure not to reject any asylum application without in-merit examination.

The approach envisaged in Article 20 (4) of the proposed recast Dublin Regulation to consider a new asylum application as a subsequent one after a take back transfer of the asylum seeker to the responsible Member State may result in applications not being examined in substance. FRA suggests leaving the current legal regime in Article 18 (2) of the Dublin Regulation unchanged, thus allowing Member States to examine such new applications under the regular asylum procedure.

Procedural safeguards for children

The proposed recast of the Dublin Regulation aims to strengthen the duty to inform asylum applicants at different steps of the procedure. Some new rules, however, might have an adverse impact on various procedural safeguards. These include the right to be heard, the right to legal representation of unaccompanied children, or the right to effective remedy, coupled with a shift in the burden of proof towards applicants to substantiate the presence of family members in other Member States.

FRA Opinion 9

Informing children adequately

A fair asylum procedure is one where applicants know their rights and duties, and where they understand its different stages. The proposed recast of the Dublin Regulation contains important safeguards in this regard. These could, however, be further enhanced by spelling out a duty in Article 6 of the proposed recast Dublin Regulation to provide information to children in a child-friendly manner. Language requirements set forth in Article 6 of the proposal should also apply to the notifications of transfers under Article 27 of the proposal.

FRA Opinion 10

Respecting the right to be heard

To comply with the right to be heard, which the Court of Justice of the European Union (CJEU) has recognised as a general principle of EU law, asylum applicants must be given a realistic opportunity to present relevant facts and evidence. Observing the right to be heard is particularly important to ensure that family criteria are correctly applied and that primary consideration is given to the best interests of the child.

For situations where a personal interview with the applicant is omitted on the basis of Article 7 (1) of the proposed recast Dublin Regulation, the EU legislator should provide for a duty by Member States to give applicants the opportunity to present relevant facts and evidence at a subsequent stage.

As the right to be heard applies regardless of whether the relevant legislation expressly provides for it, the EU legislator should make it clear in Article 7 (2) of the proposed recast Dublin Regulation that applicants must also be heard before they are notified that they will be transferred back to the responsible Member State.

FRA Opinion 11

Ensuring that Member States cooperate in gathering evidence

The onus of providing evidence regarding the presence of family members, relatives or any other family relations in a Member State should not lie only on the applicant, but also on the Member States, which should cooperate in gathering the necessary information.

The duty for an applicant to substantiate his or her claim should be accompanied by the obligation of a Member State to cooperate with the applicant in gathering all the information required for a correct assessment of the criteria set out in the Dublin Regulation. This could be achieved by inserting a recital reflecting this obligation in the proposed recast of the Dublin Regulation, inspired by the relevant provisions of the Commission Implementing Regulation No. 1560/2003 as amended by Regulation (EU) No. 118/2014).

FRA Opinion 12

Ensuring effective guardianship

The UN Convention on the Rights of the Child (CRC) stipulates that a guardian must support an unaccompanied child complementing the child's limited legal capacity and ensure that the child's best interests are duly considered within the legal procedure at stake. The EU legislator should consider requiring Member States to appoint a 'guardian' and not a legal representative to assist an unaccompanied child in the asylum procedure. In doing so, the legislator would bring the wording of the proposed recast of the Dublin Regulation in line with the proposed amendments to other EU instruments on asylum.

The right of unaccompanied children to be assisted by a person who promotes his or her best interests does not end when a child moves to another Member State. The proposed amendment in Article 8 (2) of the Dublin Regulation that would require the appointment of a legal representative only in the Member State where an unaccompanied child is obliged to be present raises serious compatibility issues with Articles 24 (the rights of the child) and 47 (right to an effective remedy and a fair trial) of the Charter and should be removed from the text.

FRA Opinion 13

Respecting the right to an effective remedy

Time limits must not render the submission of an appeal impossible or excessively difficult. Whether a 7-day deadline to appeal transfer decisions, as envisaged in Article 28 of the proposed recast Dublin Regulation, meets the requirements of an effective remedy under Article 47 of the Charter needs to be examined. The effectiveness of the remedy depends, among other things, on the availability of social, linguistic and legal support which is provided to asylum applicants. Practical arrangements concerning the provision of information, legal and linguistic support

to asylum seekers significantly differ between Member States. The wording of Article 28 of the proposed recast Dublin Regulation should be adjusted to provide Member States a certain degree of flexibility in determining the deadline to appeal; as otherwise the right to an effective remedy may not be considered effective.

The right to an effective remedy applies any time the rights and freedoms under the Charter are violated. Restricting the possibility to appeal an administrative decision only if it violates some Charter articles but not others would not be compatible with its Article 47. Article 28 (4) of the proposed recast Dublin Regulation should either be deleted or brought in line with Article 47 of the Charter.

Best interests of the child

One of the core principles of the Dublin system is to promote family reunification of unaccompanied children with their families. Article 8 of the proposed recast Dublin Regulation underlines that the "best interests of the child shall be a primary consideration for Member States" with respect to all Dublin-related procedures. The best interests of the child principle applies to unaccompanied children as well as to children accompanied by their parents. Some of the proposed changes may, however, negatively affect the best interests of asylum-seeking children.

FRA Opinion 14

Respecting the best interests of unaccompanied children without family members in the Dublin area

Unaccompanied children are a particularly vulnerable category of asylum applicants in need of special protection. To comply with Article 24 (the rights of the child) of the Charter and with the requirements of the UN Convention on the Rights of the Child (CRC), asylum applications submitted by unaccompanied children without family members or relatives in any of the Member States should be examined in the country where it is in the best interests of the child. In most cases, this will be in the Member State where the child is physically present to avoid any delay in the status determination process caused by a transfer according to the Dublin Regulation. Only exceptionally would such transfer be in the child's best interests. This would be the case, where the child's protection situation in the first Member State of application enables the child to better enjoy the rights enshrined in the CRC.

Building on the case law by the Court of Justice of the European Union (CJEU), the EU legislator should not add the word 'first' in Article 10 (5) of the proposed recast Dublin Regulation. In the same article of the proposal, the wording 'unless it is demonstrated' could be changed to 'unless it is determined/assessed', thereby aligning it with the formal best interests assessment in Article 8 (4) of the proposal.

FRA Opinion 15

Applying fair procedures to best-interests assessment

The formal assessment of the best interests of the child envisaged in Article 8 (4) of the proposed recast Dublin Regulation is an important child protection safeguard which derives from Article 3 of the UN Convention on the Rights of the Child (CRC).

To ensure an adequate assessment of the child's best interests, the future regulation should provide that a multi-disciplinary team undertakes these assessments and that the child's guardian be heard.

FRA Opinion 16

Verifying family links of unaccompanied children before allocating them to another Member State

To reduce the risk of abuse and exploitation of unaccompanied children or of them going missing, a special scheme should be established for the transfer of unaccompanied children to Member States based on the proposed corrective allocation mechanism (Chapter VII of the proposed recast Dublin Regulation). In line with Articles 7 (the right to respect for private and family life) and 24 (the rights of the child) of the Charter, such scheme should consist first in assessing the possibility of family reunification in another Member State before transferring the child to the Member State of allocation.

FRA Opinion 17

Allowing a change of responsible Member State in case of new information on family members

The right to respect for private and family life enshrined in Article 7 of the Charter and Article 8 of the European Convention on Human Rights (ECHR) encompasses the right of family members to live together. Any definitive allocation of a Member State responsible for the asylum claim under the Dublin system, which remains binding for the future (and thus risks a blanket deprivation of family reunification possibilities), should allow for exceptions to bring family members together. In light of the rights of the child as laid down in Article 24 of the Charter, this is particularly important for unaccompanied children and children whose parents are in two different Member States. Articles 3 (5) and 9 of the proposed recast Dublin Regulation should be adjusted to oblige a Member State to examine and give priority to the criteria set out in Articles 10 to 13 of the proposal.

FRA Opinion 18

Keeping Member State's discretion in case of humanitarian considerations not linked to family life

Article 24 of the Charter requires flexibility by Member States to adjust their actions to respect the rights of the child and to let their best interests prevail. The current discretionary clauses of the Dublin Regulation allow Member States to avoid hardship cases, including cases affecting particularly vulnerable children. The discretionary clauses in Article 19 (and Recital (21)) of the proposed recast Dublin Regulation should enable Member States not only to bring together family relations, but also to assume responsibility for compelling humanitarian reasons. The rules in force should thus remain unchanged. To avoid hardship cases, the discretionary clauses should remain applicable also after a Member State has been declared as responsible for the asylum claim.

Corrective allocation mechanism and fundamental rights

The proposed recast of the Dublin Regulation envisages the creation of an EU-level database to store selected personal data of asylum applicants. The database serves to monitor the share of asylum applications in each Member State and to trigger the corrective allocation mechanism to support Member States when they reach 150 % of their share of asylum applicants. The processing of personal data and the use of the corrective allocation mechanism must comply with fundamental rights, especially with Articles 8 (protection of personal data), 18 (right to asylum) and 52 (1) (principle of proportionality) of the Charter.

FRA Opinion 19

Reducing the risk of information leaks to persecutors

Abusive access to personal data stored in the centralised registration and monitoring system as well as Eurodac by the country of origin would undermine the right to asylum enshrined in Article 18 of the Charter. It may expose family members, including children, who remained in the country of origin to acts of retaliation to force dissidents to come back home.

The EU legislator should carefully assess whether the proposed safeguards concerning data security, data sharing and data retention included in the proposed recast of the Dublin and Eurodac regulations (e.g. Articles 23, 47 and 50 of the proposal as well as corresponding Articles of the Eurodac proposal) are sufficient to protect asylum applicants and their families in their countries of origin. The centralised registration and monitoring system, as well as the Eurodac database, need to be immunised against unlawful access to personal data stored therein by countries of origin.

FRA Opinion 20

Not retaining data on children longer than necessary

The storage of data in the automated system for 10 years in Article 23 (4) of the proposed recast Dublin Regulation appears too long and lacks flexibility, especially with regard to children's data, and may raise serious issues of necessity and proportionality. Once the responsible Member State has been determined, security alerts entered into the system against children should be revisited as soon as the child reaches majority, and deleted if no longer relevant.

FRA Opinion 21

Requiring rejections of allocation by Member States to be individually justified

To reduce the risk of a discriminatory application of the national security and public order exception, its application should be limited to cases where there are individualised reasons for considering the applicant to be a danger to the national security and public order. Member States could be required to record the reasons for refusing to accept an asylum applicant and make such records available to the future EU Agency for Asylum. The future EU agency should be given the authority to monitor whether the justifications given comply with the Dublin Regulation requirements, as interpreted in light of the Charter.

FRA Opinion 22

Preserving family life when applying the corrective mechanism

Taking into account that the right to respect for family life as enshrined in Article 7 of the Charter also applies to extended family members, the duty to allocate family members to the same Member State under Article 41 (2) of the proposed recast Dublin Regulation should also cover 'relatives' as reflected in Article 22 (1) of the proposal.

The obligation to allocate family members to the same Member State should also apply to family members who are in the same Member State but did not travel together. This could be done by requiring Member States to record such family links by updating the automated system. Consideration could be given to including a special alert for applicants who indicate that they have family members in another Member State, as this could enable the Member State of allocation to follow up immediately.

1. INTRODUCTION

In light of the request by the European Parliament, this legal opinion by the European Union Agency for Fundamental Rights (FRA) analyses the effects on children of the proposed recast Dublin Regulation. It covers child-specific rules as well as provisions relating to all asylum applicants that significantly affect children. Where possible, the opinion points to the potential practical effects on children of the envisaged changes to the Dublin system, drawing on the results of the 2015 evaluation of the Dublin Regulation. This legal opinion does therefore not look at all fundamental rights issues arising from the proposed changes to the Dublin Regulation.

The opinion touches in particular on the following fundamental rights of the Charter of Fundamental Rights of the European Union (Charter):

- the right to human dignity (Article 1)
- the right to respect for private and family life (Article 7)
- the right to the protection of personal data (Article 8)
- the right to asylum (Article 18)
- the protection in the event of removal, expulsion or extradition (Article 19)
- the protection of the rights of the child (Article 24)
- the right to healthcare (Article 35)
- the right to good administration, in particular the right to be heard (Article 41 (2))
- the right to an effective remedy and to fair trial (Article 47).

As the Dublin Regulation itself recalls, Member States are also bound by their obligations under instruments of international law, when treating persons falling within the scope of the Dublin Regulation.[1] These obligations include the 1951 United Nations (UN) Convention relating to the Status of Refugees, the UN Convention on the Rights of the Child (CRC) or the European Convention on Human Rights (ECHR), including the relevant case law of the European Court of Human Rights (ECtHR). Where relevant, this legal opinion references the international law instruments.

The Dublin Regulation as a component of EU asylum policy

The Dublin Regulation (Regulation (EU) No. 604/2013)[2] establishes a system to determine the Member State responsible to examine an asylum application (Dublin system). It is one of the instruments of the common European policy on asylum envisaged under Article 78 of the Treaty on the Functioning of the EU (TFEU). According to the Treaty, this "policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the Status of Refugees, and other relevant treaties".

[1] See Recital (45) of Regulation (EU) No. 604/2013 (Dublin Regulation), which is also included in the European Commission proposal for a recast Dublin Regulation (COM(2016) 270 final).

[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, OJ L 180, 29.6.2013, pp. 31-59.

The common European policy on asylum also encompasses rules on asylum procedures, on the rights and obligations of asylum seekers and people granted international protection, and on the criteria to determine if a person is entitled to international protection.[1] When assessing the fundamental rights impact of the proposed changes to the Dublin Regulation on children, it is important to take into account the effects that these changes may have on the whole EU asylum *acquis* particularly in light of the rules governing asylum procedures.

The Dublin system

The Dublin system is based on criteria to allocate responsibility for asylum applicants across Member States, which are applied in hierarchical order (Dublin criteria). First priority is given to rules protecting unaccompanied children and facilitating family reunification. If these are not applicable, the Member State who issued a visa or residence permit becomes responsible, and finally the Member State through which the applicant has entered the common area.

The Dublin Regulation applies to all EU Member States as well as to the Schengen Associated Countries (Iceland, Liechtenstein, Norway and Switzerland). A system to allocate responsibility between Member States was first developed in the Dublin Convention,[2] adopted in 1990, which was later incorporated in EU law by Regulation (EC) No. 343/2003[3] and subsequently amended through Regulation (EU) No. 604/2013 (recast).[4] The proposed changes, submitted by the European Commission in May 2016,[5] will create a forth version of the Dublin system. The European Commission adopted implementing rules[6] for the operation of the Dublin Regulation in 20013 and amended these in 2014; they would need to be revised further once the current proposal is adopted.[7]

---

1 Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection, OJ L 180, 29.6.2013, pp. 96–116. Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013) on common procedures for granting and withdrawing international protection (recast), OJ L 180, 29.06.2013, pp. 60–95. Directive 2011/95/EU of the European Parliament and Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), OJ L 337, 20.12.2011, pp. 9–26.

2 Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities – Dublin Convention, OJ C 254, 19.8.1997, pp. 1-12.

3 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, OJ L 50/1, 25.02.2003, pp. 1-10.

4 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, OJ L 180, 29.6.2013, p. 31–59.

5 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)*, Explanatory Memorandum, Brussels, 4.5.2016 COM(2016) 270 final.

6 European Commission, Commission **Regulation (EC) No. 1560/2003 of 2 September 2003 laying down detailed rules for the application of 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,** OJ L 222, 5.9.2003, pp. 3–23.

7 European Commission, Commission Implementing Regulation (EU) No. 118/2014 amending Regulation (EC) No. 1560/2003 laying down detailed rules for the application of 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, 30 January 2014, OJ L 39, 8.2.2014, pp. 1-43.

The responsibility setting mechanism of the Dublin Regulation applies to all asylum applicants, including children. The procedure to determine the Member State responsible under the Dublin system precedes the examination of the asylum claim in substance. Although intended to be swift, practice shows that the application of Dublin procedures can lead to significant delays, contributing to protracted asylum procedures. According to the European Commission, the Dublin procedure may last for up to 10-11 months.[1] Long asylum procedures are neither in the interests of asylum applicants nor in the interests of Member States. The lack of clarity about future prospects significantly affect children, in particular when decisions about their full access to rights are kept on hold until their status is clarified.[2]

Given the human and financial costs of the Dublin system, experts and civil society actors proposed drastic changes to it, taking into account, at least to some degree, the applicant's preferences.[3] In addition, the applicants' characteristics should also be reflected when applying the future corrective allocation mechanism to avoid further unauthorised secondary movements and, if granted international protection, facilitate their integration in that particular Member State. Another way to overcome some of the difficulties experienced so far could be the provision of mutual assistance between Member States, as happens in the field of visa policy, for example. Where asylum applicants move on to another Member State, instead of focusing all attention to transfer the applicant back, consideration could be given to request the state of factual stay to carry out the personal interview and prepare a credibility assessment. This together with the interview protocol would then be forwarded to the responsible Member State to take a decision on the asylum claim. Such mutual assistance could be tested in a pilot to help identify and address the various domestic law questions that it would raise. The pilot could build on the lessons learned from the processing on the Greek islands supported by the European Asylum Support Office (EASO).[4]

---

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)*, Explanatory Memorandum, Brussels, 4.5.2016 COM(2016) 270 final, p. 9.

2 See in this regard also UN Committee on the Rights of the Child (2013), General Comment No. 14, para. 93: "Delays in or prolonged decision-making have particularly adverse effects on children as they evolve. It is therefore advisable that procedures or processes regarding or impacting children be prioritized and completed in the shortest time possible."

3 See, for example, Francesco Maiani, *The Reform of the Dublin III Regulation*, Study commissioned by the Directorate General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs, Civil Liberties, Justice and Home Affairs, European Parliament, June 2016; European Council on Refugees and Exiles, *ECRE Comments on the Commission Proposal for a Dublin IV Regulation – COM(2016) 270*, October 2016; Marcello Di Filippo, *Dublin 'reloaded' or time for ambitious pragmatism?*, http://eumigrationlawblog.eu/dublin-reloaded/, 12 October 2016; Churches' Commission for Migrants in Europe, *Comments on the European Commission's 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 stateless person – Dublin IV – (recast – COM (2016) 270 final)*, October 2016.

4 See in this regard also FRA, *Opinion of the European Union Agency for Fundamental Rights on fundamental rights in the "hotspots" set up in Greece and Italy*, Nov. 2016.

Eurodac

Eurodac, which stands for European Dactyloscopy, is a large-scale database of fingerprints to assist Member States in determining where asylum applicants without valid travel documents first entered the EU. Under Eurodac Regulation (EU) No. 603/2013,[1] all asylum seekers and migrants in an irregular situation apprehended in connection with an irregular border crossing – except for children under the age of 14 years – must provide their fingerprints. The storing of fingerprints in Eurodac allows a Member State to know if the individual has already applied for asylum elsewhere or whether he or she has been apprehended in another Member State after an irregular entry. On the basis of this information, the Member State can determine whether or not it is responsible to examine the asylum claim. If another Member State is responsible, that Member State is under the obligation to admit the applicant (or to re-admit him or her, when, for whatever reason, the applicant moved on to another Member State).

As the majority of asylum applicants come to the EU without valid travel documents, the Dublin Regulation would not be implementable without Eurodac. The Eurodac Regulation is currently also under review.[2] The proposed changes to this regulation also affect children. They relate, for example, to the data retention period, the processing of biometric data from persons as of six years of age and the expansion of data to be stored in the central system to include various categories of alphanumeric data. As the request for this legal opinion is, however, limited to the Dublin Regulation, it does not contain Eurodac-related considerations, unless these are closely related to the effects on children of the proposed changes to the Dublin Regulation.

The Dublin system and fundamental rights

Persons granted international protection do not enjoy free movement in the EU as long as they do not fulfil all the requirements to receive long-term residence status set out in Directive 2003/109/EC,[3] as amended by Directive 2011/51/EU.[4] Therefore, in practice the Dublin Regulation determines not only which Member State will examine an asylum application, but also defines where the person will stay in the EU, if granted international protection.

---

1 Regulation (EU) No. 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of 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 and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No. 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice, OJ L 180, 29.6.2013, pp. 1-30.

14 European Commission, *Proposal for a Regulation of the European Parliament and of the Council on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of [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], for identifying an illegally staying third-country national or stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes (recast)*, Brussels, 4 May 2016, COM(2016) 272 final (http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1476949327953&uri=CELEX:52016PC0272(01)).

3 Council Directive **2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents,** OJ L 16, 23.1.2004, pp. 44–53.

4 Directive 2011/51/EU of the European Council and the Parliament of 11 May 2011 amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection, OJ L 132/1, 19.05.2011, pp.1-4.

The application of the Dublin system has led to a considerable amount of litigation at national as well as at European level. Among the 38 cases on the EU asylum *acquis* dealt with by the Court of Justice of the European Union (CJEU) by September 2016, about one third (13 cases) relate to the Dublin Regulation. The CJEU issued 11 judgements interpreting the Dublin Regulation, of which two cases were discontinued and four pending as of November 2016.[1] Most of these judgements concern fundamental rights of Dublin transferees, with the CJEU referencing the Charter for its reasoning in seven of the 11 cases. The European Court of Human Rights (ECtHR) also ruled on Dublin transfers, including Grand Chamber landmark cases, such as *M.S.S. v. Belgium and Greece*, and *Tarakhel v. Switzerland*.[2] It illustrates the substantial impact that the Dublin Regulation has on fundamental rights.

One reason for such considerable litigation is that the Dublin Regulation takes into account the aspirations, needs and interests of asylum applicants only to a very limited degree. Opportunities to get protection and to start a new life diverge substantially among Member States, as access to and standards for protection are in practice not uniform across Member States.[3] This is not likely to change in the near future. Many applicants view the Dublin system as unfair[4] as it forces people to stay for protracted periods of time in a country where they see little prospects for themselves and their families.

The proposed amendments to the Dublin Regulation, notably the envisaged restrictive measures and sanctions in case of unauthorised movement to another Member State, are likely to increase the sense of unfairness. This may further discourage asylum seekers to cooperate with the authorities, and rather lead them to move on to the country of their preferred destination while trying to avoid contacts with the authorities. In 2011, FRA has extensively described the fundamental rights risks that derive from irregularity, particularly for children and other vulnerable groups.[5] FRA currently looks into the fundamental rights implications of reducing secondary movements by restricting different rights of asylum seekers. The agency plans to continue this research in the year to come, with possible expert consultations.

Children as a vulnerable group.

The rights of the child as set out in Article 24 of the Charter and in the UN Convention on the Rights of the Child (CRC) are a central pillar of this legal opinion. The CRC as well as EU law requires that the best interests of the child be given 'a primary consideration' in all actions relating to children. This requirement reflects the particular vulnerability of children to abuse, neglect or exploitation, which is further aggravated in case of displaced children. When reviewing the compliance of a Dublin transfer with Article 3 of the ECHR, the ECtHR underlined the need to consider the specific needs and the extreme vulnerability of children seeking asylum, whether they are unaccompanied or with their parents.[6]

---

[1] Groenendijk, K. and Grütters, C., Centre for Migration Law, *Overview of judgments and pending cases of the Court of Justice of the European Union: September 2016, Quarterly update 2016/3*, Nijmegen, Radboud University Nijmegen.

[2] ECtHR, *M.S.S. v. Belgium and Greece* [GC], No. 30696/09, 21 January 2011 and *Tarakhel v. Switzerland* [GC], No. 29217/12, 4 November 2014.

[3] Currently, there are 17 ongoing infringement proceedings launched by the Commission against various Member States for failing to fully transpose and implement the EU acquis on the Common European Asylum System (see: http://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/index.cfm?lang_code=EN&r_dossier=&noncom=0&decision_date_from=&decision_date_to=&active_only=0&DG=HOME&title=&submit=Search).

[4] See European Commission (2015), *Evaluation of the Dublin III Regulation*, Final Report, Brussels, 4 December 2015, p. 7; Carrera S., Lannoo, K. (2015), *Treat the Root Causes of the Asylum Crisis, not the Symptoms*, CEPS Commentary, CEPS, Brussels, available at: https://www.ceps.eu/publications/treat-root-causes-asylum-crisis-not-symptoms, p. 3.

[5] FRA (2011), *Migrants in an irregular situation employed in domestic work: Fundamental rights challenges for the European Union and its Member States*, Luxembourg, Publications Office of the European Union; FRA (2011), *Migrants in an irregular situation: access to healthcare in 10 European Union Member States*, Luxembourg, Publications Office of the European Union; FRA (2011), *Fundamental rights of migrants in an irregular situation in the European Union*, Luxembourg, Publications Office of the European Union.

[6] ECtHR, *Tarakhel v. Switzerland* [GC], No. 29217/12, 4 November 2014, para. 119.

The right to respect for family life

In light of the right to respect for family life and the rights of the child included, respectively, in Articles 7 and 24 of the Charter of Fundamental Rights of the European Union (Charter) the Dublin system gives priority to family considerations. Even if according to Eurostat between 2008 and 2014, only 6,672 transfers were requested and 2,087 made based on family and dependency criteria, for those who were transferred, the Dublin Regulation resulted in an important tool to uphold the right to family life and the rights of the child.[1]

Given its focus on children, several parts of this legal opinion relate to the right to respect for family life as set forth in Article 7 of the Charter and in Article 8 of the ECHR. Such right encompasses also the right of family members to live together.[2] This right is not absolute. Restrictions to it are, however, only allowed if they are based on the grounds listed in Article 8 (2) of the ECHR. When states restrict such right, they must strike a fair balance between the competing interests of the individual and of the community as a whole, balancing in each case factors, such as the extent to which family life is effectively ruptured, the extent of the ties with a particular state and considerations of public order.[3]

Most of the ECtHR case law concerns situations where the family has in principle the option to live together in the country of origin but where they consider this unreasonable given their ties to the host country. In the case of Dublin procedures, preventing the reunification of an applicant with family members would in most cases result in keeping the family apart for a significant period of time. Since reunification in their country of origin is not an option for persons in need of international protection and lawful reunification in transit countries is usually not possible, asylum applicants would have to wait until their asylum claims are positively concluded – which may last for years – until they are entitled to initiate family reunification procedures. Reunification will not be automatic but may depend on fulfilment of certain requirements (see Section 2.4). These factors need to be considered when assessing whether restrictions to the right to respect for family life are proportionate.

Moreover, the definition of family in the Dublin Regulation does not include all family members. The current regulation essentially covers spouses and unmarried children until they reach the age of 18 years in its family definition. Article 2 (g) of the proposed recast Dublin Regulation suggests to expand this definition to include also the applicant's siblings. Other family members, for example, married minors or a son or daughter who reached 18 years of age remain excluded. Under the current Dublin system, the family definition covers only families formed in the country of origin. Article 2 (g) of the proposed recast Dublin Regulation suggests to include also families formed on the way to the EU, but it would still exclude families formed after the asylum applicant reached the territories of the Member States.

---

1 Total number of requests are the sum of reported outgoing taking charge requests based on Art. 8, 9, 10 and 11 in the EU-28 from 2008 to 2014 from the Eurostat table 'migr_dubro'; the total number of transfers are the sum of reported transfers based on the Art. 8, 9, 10 and 11 in the EU-28 in the same period from Eurostat table 'migr_dubto'. All data extracted on 21 October 2016. For some countries, data are not available for some years, which is why the numbers can be considered as minimum numbers. Numbers for 2015 were not included due to too many missing values.

2 ECtHR, *Abdulaziz, Cabales and Balkandali v. the United Kingdom* [Plenary], No. 9214/80; No. 9473/81; and No. 9474/81, 28 May 1985, paragraph 62, second indent. Protection against expulsion based on Article 8 can also occur in cases where there are no family ties with a host country national, but instead where this is required to protect private life. See ECtHR, *Slivenko et al. v. Latvia* [GC], No. 48321/99, 9 October 2003; *Sisojeva et al. v. Latvia* [GC], No. 60654/00, 15 January 2007. Both cases concern former Soviet citizens who had strong ties to Latvia.

3 ECtHR, *Rodrigues da Silva and Hoogkamer v. The Netherlands*, No. 50435/99, 31 January 2006 para. 39.

1. EXCLUDING CERTAIN CATEGORIES OF APPLICANTS FROM THE DUBLIN REGULATION AND ITS IMPACT ON THE RIGHTS OF THE CHILD AND THE RIGHT TO RESPECT FOR FAMILY LIFE

Under the current Dublin system, all asylum applications are subject to the responsibility allocation mechanism, although a Member State has always the option, under the discretionary clauses (Article 19), of assuming responsibility for applicants falling under the responsibility of another state. The proposed changes to Article 3 of the Dublin Regulation intend to exclude certain types of applications from Dublin transfers. This concerns asylum applicants:

- coming from a country of first asylum;
- coming from a safe third country;
- coming from a country which is listed in the EU common list of safe countries of origin;
- and applicants considered for serious reasons a danger to the national security or public order of the Member States or who have been forcibly expelled for serious reasons of public security or public order under national law.

Applications falling under the first two categories must first undergo an admissibility procedure to determine if they can be returned to a third country without having to examine their asylum claim in substance. Only if this is not the case will these applications be subject to the Dublin system. Applications falling under the third and fourth categories must be examined in substance in an accelerated procedure, which means that the responsibility remains with the first Member State in which the application was lodged.

In practice, these provisions may potentially exclude a significant portion of applicants from Dublin transfers. Hence, Dublin criteria developed to protect unaccompanied children and to promote family unity will not apply to them resulting in a blanket deprivation of family reunification possibilities for pre-set categories of applicants. It would exclude, for example, applicants originating from the Western Balkans (as all Western Balkan states are proposed for inclusion in the EU common list of safe countries of origin) and those who entered Hungary through neighbouring Serbia, which is considered to be a safe third country under Hungarian law.[1]

This section covers the impact on children of removing the obligation to examine family and dependency links for those categories of applicants. It deals with the admissibility and safe countries of origin procedures as well as with child applicants considered for serious reasons a danger to the national security or public order of the Member States.

1.1 Excluding children in need of special procedural guarantees from admissibility and accelerated procedures

The EU asylum *acquis* guarantees specific protection to vulnerable people. Article 21 of the Reception Conditions Directive (2013/33/EU) provides a non-exhaustive list of vulnerable categories which include children, unaccompanied children, as well as a number of other categories: “disabled people, elderly people, pregnant women, single parents with minor children, victims of human trafficking, persons with serious illnesses, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, such as victims of female genital mutilation”.

[1] Hungary, Gov. Decree No. 191/2015. (VII. 21.).

Under Article 22 of the Reception Conditions Directive and Article 24 of the Asylum Procedures Directive (2013/32/EU) Member States must assess if applicants require a special treatment or if they are in need of special procedural guarantees to enable them to benefit from the rights and comply with their obligations during the asylum procedure. Such assessment should take place at an early stage of the procedure in order to enable the authorities to take the applicant's specific needs into account when preparing and carrying out the personal interview.

Where Member States identify children with specific needs – for example, to protect them from violence and exploitation as required by Articles 19, 32 and 34 of the CRC – it follows from Article 24 of the Charter that they are also under a duty to respond to such needs, so that every child is provided with the protection and care as is necessary for their well-being. Identifying and responding to the specific protection needs of children at risk may require time. This is also acknowledged in another EU asylum instrument: Recital (30) of the Asylum Procedures Directive states that: "Where adequate support cannot be provided to an applicant in need of special procedural guarantees in the framework of accelerated or border procedures, such an applicant should be exempted from those procedures."

These considerations apply to all children in need of special procedural guarantees but are even more compelling for unaccompanied children. In its legal opinion on the common EU list of safe countries of origin, FRA has already argued against the processing of asylum claims of unaccompanied children through accelerated procedures.[1] Asylum applicants channelled through accelerated procedures usually have shorter deadlines to appeal.[2] In addition, under Article 46 (6) of the Asylum Procedures Directive the submission of an appeal against a negative decision does not require the Member States to suspend automatically the implementation of the return or removal decision, a rule which will not change with the proposed Asylum Procedures Regulation (APR).[3]

Similar considerations apply to the processing of claims of unaccompanied children through admissibility procedures, including when these are carried out in the context of border procedures under Article 41 of the Asylum Procedures Directive (2013/32/EU). Under Article 24 (1) of the proposed recast Dublin Regulation, a Member State must complete the admissibility procedure within one month if it wants to request another Member State to take charge of the applicant. This timeline is reduced to two weeks, in case of a match in Eurodac or the Visa Information System. These deadlines will put pressure on Member States to complete the admissibility procedure as quickly as possible in order not to preclude a possible transfer of the applicant to another Member State.

The appointment of a legal representative and the processing of the asylum claim by personnel who have the necessary knowledge of the special needs of children – as envisaged by Articles 25 of the Asylum Procedures Directive – become meaningless, if there is no time to establish a relationship of trust with the child.

---

1 FRA, *Opinion of the European Union Agency for Fundamental Rights concerning an EU common list of "safe countries of origin"*, 23 March 2016, pp. 6, 24.

2 For example, a period of seven days to appeal a negative asylum decision taken in an accelerated procedure exists in Bulgaria, Hungary and Poland. See Asylum Information Database entries for these Member States, available at www.asylumineurope.org/reports/country/bulgaria/asylum-procedure/procedures/accelerated-procedure; www.asylumineurope.org/reports/country/hungary/asylum-procedure/procedures/accelerated-procedure; www.asylumineurope.org/reports/country/poland/asylum-procedure/procedures/accelerated-procedure.

3 European Commission (2016), *Proposal for a regulation establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU*, COM(2016) 467 final, Brussels, 13 July 2016, Article 54 read in conjunction with Article 40 (5).

Recent legislative changes adopted at a national level in Member States located at the external land or sea borders of the EU which are particularly affected by a rise in asylum applications have excluded vulnerable applicants from admissibility or accelerated procedures. In Greece, Law 4375/2016 excludes seven categories of vulnerable people – including unaccompanied children and single parents with minor children – from the special arrangements set up at borders in case of persons arriving in large numbers and applying for international protection.[1] Likewise, in Hungary, the 2015 amendments to the asylum law on border procedures in the transit zone exclude vulnerable people, including unaccompanied children, from these summary procedures primarily examining whether the applicant entered from a safe country or origin, a safe third country or a country of first asylum.[2]

FRA Opinion 1

Excluding children in need of special procedural guarantees from admissibility and accelerated procedures

Children are a vulnerable category of asylum applicants and may be in need of specific procedural or other safeguards. Asylum procedures must allow for sufficient time to assess and respond to such specific needs; otherwise, Member States would not comply with the duty to provide the protection and care necessary for a child's well-being as required by Article 24 of the Charter of Fundamental Rights of the European Union (Charter). The two weeks and one month timeframes envisaged in Article 24 (1) of the proposed recast Dublin Regulation will raise serious challenges in this regard.

The EU legislator should exclude children in need of special procedural guarantees from admissibility and accelerated procedures envisaged in Article 3 of the proposed recast Dublin Regulation. Some EU Member States confronted with persons arriving in large numbers at their borders have enacted exceptions, excluding vulnerable people from admissibility and accelerated procedures. The European Union could consider following this approach by excluding the applicability of Article 3 (3) of the proposal to asylum applicants who belong to categories of applicants listed as vulnerable.

1.2 Giving priority to family unity over admissibility and safe countries of origin procedures

The duty to examine first whether an applicant falls under the four categories listed in Article 3 of the proposed recast Dublin Regulation applies to all applicants, including unaccompanied children or children who are with one parent and have the second parent in another Member State. It also applies to parents who have an unaccompanied child in another Member State.

Under the current legal regime Member States have first to examine who is responsible to deal with an asylum application in light of the Dublin criteria. This also entails the verification of whether family and dependency criteria as well as rules to protect unaccompanied children apply.

[1] Greece, Law 4375/2016, Article 60. The seven categories of vulnerable people are listed in Article 14 (8).
[2] Hungary, Act No. 80 of 2007 on asylum, Article 71/A (7).

The proposed amendments will disallow Member States to request the transfer of an applicant falling under the four categories listed in Article 3 (3) of the proposal to another Member State based on family or dependency grounds. Making it compulsory for Member States to exclude certain categories of applicants from the Dublin procedure means that family-related criteria and criteria to protect unaccompanied children cannot be considered before declaring the application admissible. In practice, this would result in a blanket deprivation of family reunification possibilities for pre-set categories of applicants without assessing whether the requirements of Article 52 of the Charter are met in each individual case, which will be difficult to justify from a fundamental rights point of view.

The right to respect for private and family life guaranteed by Article 7 of the Charter and Article 8 of the ECHR does not entail a general obligation for a state to respect immigrants' choice of the country of their residence but requires that the facts of each case must be considered.[1] States must strike a fair balance between the competing interests of the individual and of the community as a whole, balancing in each case all relevant factors.[2] When assessing the interference with Article 8 of the ECHR, the ECtHR takes into account whether there are insurmountable obstacles for the family to live in a particular place.[3] This would, for example, be the case for people in need of international protection who fear serious harm if they were to live with their families in their home country.[4] Family reunification in a safe third country or a third country where an applicant would be returned to is often also not an option, as readmitted asylum seekers would in many cases lack the residence rights required by domestic law to initiate family reunification procedures. Finally, family reunification in the country in which the applicant applies for asylum is normally not possible as asylum applicants do not have the right to bring their family members into the country in which they are staying at least until they have not been granted international protection, which may last months and sometimes years.

For children, bringing families together is even more compelling. Articles 9 and 10 of the CRC contain a duty for State Parties not to separate children from their parents and to facilitate family reunification. Moreover, Article 24 of the Charter, which applies to all children, regardless of status, requires that "[c]hildren shall have the right to such protection and care as is necessary for their well-being" and that "[i]n all actions relating to children […] the child's best interests must be a primary consideration." Apart from specific situations of parental abuse or neglect, it is normally in the best interests of the child to be with both of his or her parents. This is also mirrored by Article 18 of the CRC which underlines that the best interests of the child will be the parents' basic concern. The proposed changes to Article 3 of the Dublin Regulation may also undermine family tracing duties under Article 24 (3) of the Reception Conditions Directive (2013/33/EU) and Article 6 (4) of the Dublin Regulation in force (604/2013) as it may be interpreted as reducing Member States duty to collect and consider evidence on the applicant's family links in the EU and the Schengen Associated Countries.

The right to respect for family life is not absolute but any restriction to it must be justified in each individual case line with the requirements of Article 52 (1) of the Charter. Member States have a margin of appreciation to balance the competing interests of the individual and of the community as a whole but need to respect the obligations flowing from the protection of fundamental rights.[5]

---

1 See, for example, ECtHR, *Gül v Switzerland*, No. 23218/94, 19 February 1996, para. 38; ECtHR, *Senigo Longue and Others v. France*, No. 19113/09, 10 July 2014, para. 61; ECtHR, *El Ghatet v. Switzerland*, No. 56971/10, 8 November 2016.

2 ECtHR, *Rodrigues da Silva and Hoogkamer v. The Netherlands*, No. 50435/99, 31 January 2006 para. 39.

3 ECtHR, *Şen v. the Netherlands*, No. 31465/96, 21 December 2001, para. 40; ECtHR, *Gül v. Switzerland*, No. 23218/94, 19 February 1996, para. 42.

4 UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons*, 25 July 1951, A/CONF.2/108/Rev.1.

5 CJEU, C-540/03, *European Parliament v. Council of the European Union*, 27 June 2006, paras. 54 and 104; C‑578/08, *Rhimou Chakroun v. Minister van Buitenlandse Zaken*, 4 March 2010, para. 44.

A further fundamental rights consequence of establishing an obligatory admissibility check before examining family considerations under the Dublin system relates to the principle of equality in Article 20 of the Charter and the prohibition of discrimination among nationalities reflected in Article 3 of the 1951 Geneva Convention. In case of large number of arrivals, national asylum authorities are likely to be inclined to concentrate their efforts to ensure that admissibility is assessed within the set deadlines so as not to preclude a possible Dublin transfer to another Member State. In the hotspots on the Greek islands, for example, FRA has observed that the prioritisation of admissibility procedures under the EU-Turkey statement have delayed the processing of asylum applications of nationals from countries such as Afghanistan, Iran or Iraq for more than six months.[1]

In practice, this approach is likely to increase the risk of absconding and to encourage irregular onward movements within the EU. A 2011 FRA report indicates that the desire to join close family members who are in the EU is an important driver of irregular migration. A survey carried out among civil society organisations working with migrants in an irregular situation revealed that spontaneous family reunification outside of formal procedures is a significant reason for irregularity of family members in the EU.[2] During the 2015 evaluation of the Dublin Regulation, 13 Member States highlighted that transfers in general lack effectiveness, indicating that secondary movements are 'often' observed following a Dublin transfer.[3] The European Commission estimates that up to 42 % of applicants not effectively transferred may still be staying as irregular migrants within the EU.[4] People interviewed for a study on Dublin by the Jesuit Refugee Service made on average four to five trips between EU countries prior to their interviews.[5]

FRA Opinion 2

Giving priority to family unity over admissibility and safe countries of origin procedures

The right to respect for private and family life guaranteed by Article 7 of the Charter and Article 8 of the European Convention on Human Rights (ECHR) requires that any restriction to this right be justified in each individual case.

---

1 FRA, *Opinion of the European Union Agency for Fundamental Rights on fundamental rights in the "hotspots" set up in Greece and Italy*, Vienna, November 2016.

2 FRA (2011), *Fundamental rights of migrants in an irregular situation in the European Union*, Luxembourg, Publications Office of the European Union, pp. 97-98.

3 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)*, Explanatory Memorandum, Brussels, 4.5.2016 COM(2016) 270 final, p. 11.

4 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)*, Explanatory Memorandum, Brussels, 4.5.2016 COM(2016) 270 final, p. 12.

5 Jesuit Refugee Service, *Protection Interrupted: The Dublin Regulation's Impact on Asylum seekers' Protection (The DIASP project)*, 5 June 2013, p. 25.

To comply with this requirement, the EU legislator should allow a rejection of an asylum application as inadmissible or through an accelerated procedure only after having examined the rules to protect unaccompanied children and promote family unity included in Articles 8 to 11 of the current Dublin Regulation.

1.3 Providing fair procedures to children with public order and national security issues

The fourth category of persons who would be excluded from the Dublin system are applicants who may, for serious reasons, be considered a danger to the national security or public order of the Member State; or who have been forcibly expelled for serious reasons of public security or public order under national law. Such applicants must be examined by Member States through an accelerated procedure.

Accelerated asylum procedures were originally conceived to handle applications that are simple to deal with because they are clearly abusive, manifestly unfounded or manifestly well-founded,[1] so that national authorities can focus their resources on those applications that require more attention. This logic would not apply to this category.

Children (unaccompanied or with their families) are not excluded from this provision, which could be used, for example, in case of adolescents who have been in conflict with the law or who are supporting extremist views. Children who raise national security or public order issues are likely to have a complicated personal background with experiences of violence, abuse or exploitation. They may have been victimised in the past, for example, if recruited as child soldiers.

Children falling under this category should therefore be assessed very carefully to determine if they are in need of special procedural guarantees or if they have special reception needs along the lines of Article 24 of the Asylum Procedures Directive (2013/32/EU) and Article 22 of the Reception Conditions Directive. Assessing such specific needs will often take time, as the personal background of the child may only come to the surface after the child has received the necessary psychological support and a relationship of trust has been established. Understanding the situation of the child is a pre-condition to assess his or her best interests and to decide which supportive actions the child may need. As noted under the previous point, Recital (30) of the Asylum Procedure Directive indicates that when adequate support cannot be provided, applicants in need of special procedural guarantees should be excluded form fast track procedures.

Asylum claims involving children who are considered a serious danger to national security, public security or public order of the Member State should indeed be prioritised. However, such claims are likely to be very complex, entailing in some situations an examination of the child's involvement in criminal acts. A comprehensive understanding of the child's history is necessary to assess such complex claims. It is difficult to imagine how such comprehensive understanding can be obtained if the claim is automatically channelled into an accelerated procedure.

[1] UNHCR, Conclusions of the Executive Committee of the UNHCR Programme, Conclusion No. 30 (XXXIV) of 1983; UNHCR, Summary of UNHCR's Provisional Observations on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, March 2005; UNHCR, UNHCR Central Mediterranean Sea Initiative (CMSI) – Proposal for a 'Response Package for Protection at Sea', October 2014.

FRA Opinion 3

Providing fair procedures to children with public order and national security issues

Regardless of whether they are alone or with their families, child applicants, who for serious reasons are considered a danger to the national security, public security or public order of the Member States, may often have complex claims. Due to their background, they are likely to be in need of specific procedural safeguards. Such specific safeguards cannot be met in fast track procedures since sufficient time is needed to establish a relationship of trust with them.

Although their applications should be assessed as soon as their specific needs are met, the EU legislator should exclude child applicants from Article 3 (3) (b) (ii) of the proposed recast Dublin Regulation.

2. THE IMPACT OF SANCTIONS FOR UNAUTHORISED SECONDARY MOVEMENTS

The proposed recast of the Dublin Regulation introduces explicit obligations of applicants for international protection during the Dublin procedure (Article 4 of the proposed recast Dublin Regulation). To enhance compliance with these obligations, certain procedural and other sanctions are envisaged in case of breaching them (Article 5 and Article 20 (3)-(5) of the proposed recast Dublin Regulation). In essence, the negative consequences under Article 5 of the new proposal include:

- the examination of the application in an accelerated procedure if the asylum seeker did not stay in the Member State of first entry and he or she was subsequently returned to the responsible Member State;
- the continuation of the Dublin procedure in the first Member State in case of onward movement or if the applicant is otherwise not available for the competent authorities of that Member State;
- the withdrawal of reception conditions under the Reception Conditions Directive, with the exception of emergency healthcare, in the Member State which is not the one where the applicant should be present;
- very limited admissibility of elements and information relevant for determining the Member State responsible if submitted after the Dublin interview.

Further to that, Article 20 (4) and (5) of the proposed recast of the Dublin Regulation set out additional punitive procedural consequences after "take back" transfers, namely that:

- following the withdrawal of the application, any further representations or application in the responsible Member State shall be treated as a subsequent application, i.e. a repeated application by the same applicant after a final decision of rejection;
- a formerly rejected applicant who was taken back is no longer entitled to appeal the negative first instance decision taken by the responsible Member State.

According to new Recital (22), these consequences of non-compliance, conceived as appropriate and proportional, are crafted to ensure that "the aims of [the Dublin] Regulation are achieved and the obstacles to its application are prevented, in particular to avoid absconding and secondary movements between Member States".

When they moved as part of the family, children in most cases did not take the decision to move but just followed their parents. They would be penalised because of a decision not taken by themselves. All the envisaged procedural and other sanctions might have a disproportionate effect on various fundamental rights of children, stemming from Articles 7, 24 and 47 of the Charter and from the CRC.

Moreover, the proposed changes might come at variance with Article 31 of the 1951 Geneva Convention, which institutes limitations on states not to impose penalties on account of irregular entry or presence of refugees and asylum seekers, under certain conditions. Having regard to the consistent interpretation of the term "penalties" incorporated in human rights treaties and legal scholarship,[1] it is generally accepted that penalties under the 1951 Geneva Convention cover measures beyond the boundaries of criminal law, including also the denial of economic, social and cultural rights that might have a punitive character.[2] Although the EU has not incorporated Article 31 of the 1951 Geneva Convention explicitly in the EU asylum *acquis*,[3] EU institutions are indirectly bound by this treaty provision through Article 18 of the Charter, which guarantees the right to asylum in accordance with the 1951 Geneva Convention and its 1967 Protocol.

This section dwells on the fundamental rights implications of the restrictive (procedural) measures and sanctions foreseen for unauthorised secondary movements, which, as requested by the European Parliament, are analysed not only in relation to children, but more generally, also with regard to adults. The below sub-sections examine in detail the above list of restrictive and punitive measures, except for Article 20 (5) that is dealt with in sub-section 3.5.

2.1 Avoiding unjustified fast track procedures for applicants applying in a Member State other than that of first entry or legal stay

According to Articles 5 (1) and 20 (3) of the proposed recast Dublin Regulation, after a responsible Member State takes charge or takes back an applicant who sought asylum in another Member State (either a first application or an additional one), the responsible Member State should fast-track the claim, applying accelerated procedures.

As noted in Section 1.3, the rationale for allowing swifter procedures is that certain applications require little time to establish international protection needs – a consideration which does not necessarily apply to applicants who move on to another Member State in an unauthorised manner. It can therefore be questioned whether channelling such applicants into accelerated procedures, which leads to reduced legal guarantees, is justifiable in light of the principle of non-discrimination.[4]

This new rule on accelerating the examination of the application, in principle, is supposed to apply also to unaccompanied children. Unaccompanied children are excluded from accelerated procedures only if preconditions laid down in Article 24 (3) of the Asylum Procedures Directive (and Article 19 (3) of the proposed Asylum Procedures Regulation) are fulfilled, that is when the unaccompanied child applicant is in need of special procedural guarantees as a result of torture, rape or other serious forms of psychological, physical, sexual violence or gender-based violence.

---

1 Goodwin-Gill, G., 'Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention, and Protection', in *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Feller, E., Türk, V., Nicholson, F., eds.), 2003, pp. 185, 189; Noll, G., 'Article 31 (Refugees Unlawfully in the Country of Refuge)' in *The 1951 Convention Relating to the Status of the Refugees and its 1967 Protocol: A Commentary* (Zimmermann, A., ed.), Oxford, OUP, 2011, paras. 70-80.

2 Social Security, Child Support and Pensions Appeal Commissioners Scotland, CIS/4439/1998 (1999), paras. 16-17. See also Noll, G., *ibid*., para. 79; Cholewinski, R., 'Economic and Social Rights of Refugees and Asylum Seekers in Europe', *Georgetown International Law Journal* 14 (1999), pp. 709-755.

3 CJEU, C-481/13, *Mohammad Ferooz Quarbani,* 17 July 2014, paras. 26-28.

4 See, *mutatis mutandis*, ECtHR, *Van Geyseghem v. Belgium* [GC], No. 26103/95, 21 January 1999, para. 33, where the Court clarified that a defendant cannot lose the benefit of the rights of the defence because he or she failed to attend a hearing on his or her case: "in spite of having been properly summoned, does not appear, cannot – even in the absence of an excuse – justify depriving him of his right under Article 6 § 3 of the Convention to be defended by counsel".

Unless they are found to be in need of special procedural guarantees, unaccompanied children will be channelled through the fast-track procedure. Therefore, the recast Dublin proposal would create an additional and fourth situation when asylum claims of child applicants without family members could be processed in an accelerated way, in addition to subsequent applications, children originating from a safe country of origin and children who constitute a serious danger to the national security or public order, or were forcibly expelled because of the former reasons.[1]

Channelling an application made by an unaccompanied child into an accelerated procedure cannot be made automatically, since an assessment needs to be carried out to determine the applicant's special needs and best interests, as required by Articles 24 (3) and 25 (6) of the Asylum Procedures Directive and Article 24 (2) of the Charter. Therefore, processing unaccompanied children's claims in fast-track procedures as set forth in Article 5 (1) of the proposed recast Dublin Regulation interferes with the duty to assess the bests interests of a child, which flows from Article 24 (2) of the Charter and Article 3 of the CRC, on account of not providing sufficient time for such assessment.

Further issues of procedural fairness emerge in those cases when the applicant, whether a child or an adult, did not lodge the asylum application in the first Member State but in a different Dublin state. In this case, the applicant may not have received any information on asylum procedures when entering the common Schengen area. He or she could not be duly informed in a timely manner about his/her obligations as required by Article 6 of the proposed recast Dublin Regulation, since information about the duty to apply in the Member State of first entry must be provided immediately after the application by virtue of the aforementioned article.

The proposal for an Asylum Procedures Regulation[2] envisages an exception from the accelerated procedure in Article 40 (1) (g), which is applicable to all asylum seekers who can demonstrate good reason for not applying for asylum in the Member State of first entry. This provision, read in conjunction with the relevant new Dublin rules, allows for the interpretation that applicants who can demonstrate that their failure was due to circumstances beyond their control (e.g. having family members in another Member State) cannot be referred to fast-track examination of their claims by virtue of the Dublin system. To create legal certainty and coherent legislation on the matter, without inconsistencies between related legal acts, it would be advisable to incorporate such an exception into the proposed recast of the Dublin Regulation, as well.

FRA Opinion 4

Avoiding unjustified fast track procedures for applicants applying in a Member State other than that of first entry or legal stay

Asylum applicants may have good reasons to move to another country, as suggested in Article 40 (1) (g) of the proposed recast of the EU instrument regulating asylum procedures – the Asylum Procedure Regulation. They may, for example, move due to gaps or inadequate standards in national asylum systems, notably when it comes to families with children staying in Member States which do not provide adequate reception conditions.

---

1 Asylum Procedures Directive, Article 25 (6) (a) and proposed recast Dublin Regulation, Article 3 (3) (b).

2 European Commission, *Proposal for a regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU*, Brussels, 13.7.2016 COM(2016) 467 final (http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1476973335275&uri=CELEX:52016PC0467).

Penalising such Dublin transferees by referring them into fast track procedures is not the appropriate solution. It carries with it significant protection risks. Adhering to protection standards is not a discretionary duty of Member States. As a minimum, the revised rules of the proposed recast Dublin Regulation (Articles 5 (1) and 20 (3)) should be brought in line with Article 40 (1) (g) of the proposed recast of the EU instrument regulating asylum procedures.

Channelling an application made by an unaccompanied child into an accelerated procedure undermines the duty to assess the applicant's special needs and best interests in line with Article 24 (2) of the Charter and Article 3 of the United Nations (UN) Convention on the Rights of the Child (CRC). To ensure a genuine assessment of their best interests, unaccompanied children should be excluded from accelerated procedures after their transfer back to the responsible Member State.

2.2 Allowing another Member State to continue the Dublin procedure when children join family members

Article 5 (2) of the European Commission proposed recast of the Dublin Regulation introduces a new rule whereby the Member State in which the applicant is obliged to be present must continue the Dublin procedure even when the asylum seeker has left that Member State without authorisation or is otherwise not available for the authorities. This rule has implications for a child who moved to another Member State spontaneously to join his or her family or – if he or she moved together with one parent – to join the other parent.

Such implications can be particularly grave in those cases in which the applicant(s) moved on before the personal interview was carried out or when the Member State concluded that a personal interview was not required as provided for in proposed Article 7 (1). Determining the responsible Member State by the country of first entry runs the risk of leaving out the assessment of family criteria, and thus determining a Member State as responsible other than the one where a child's family members are staying. Such an outcome might fail to ensure that the Dublin rules on family reunification are actually applied, and therefore goes at variance with the right to respect for family life of the child concerned, protected by Article 7 of the Charter.

The proposed rule applies to any applicant, including children, although for them the guarantees proposed in Article 8 must be respected. These include the duty to give a primary consideration to the best interests of the child and, if the transfer of an unaccompanied child is envisaged, undertake a *formal* best interests assessment beforehand. Such a formal assessment of the best interests of the child requires that the child be heard as expressly provided for in Article 8 (3) of the proposed recast Dublin Regulation. In the absence of mutual assistance arrangements, it is difficult to imagine how the Member State of first entry can do this, if the child is not present anymore on its territory.

Given that a genuine best interests assessment implies, *inter alia*, a detailed personal interview with the asylum-seeking child,[1] the lack of it also raises compatibility issues with the right to be heard – this right is a well-established general principle of EU law,[2] incorporated in Article 41 (2) of the Charter, and of international law with Article 12 of the CRC obliging state parties to give a child the opportunity to be heard[3] in any judicial and administrative proceedings affecting him or her.

The proposed rule precludes that a Dublin procedure could commence or continue in another Member State where the child is actually, physically present. It also triggers that children who found parents in another Member State, once apprehended, are required to return to the responsible Member State. All this creates a normative tension with the rights of the child guaranteed in Article 24 of the Charter and especially with the requirement that in all actions relating to children the child's best interests must be a primary consideration stemming from Article 3 of the CRC. It may further lead to serious infringements with the child's right to respect for family life enshrined in Article 7 of the Charter.

Depending on national rules on notification of negative asylum decisions, an applicant, being present in another Member State, will most likely not be able to appeal that decision within the envisaged seven-day deadline. This might raise issues relating to the right to effective judicial review as set out in Article 47 of the Charter.

FRA Opinion 5

Allowing another Member State to continue the Dublin procedure when children join family members

The proposed obligation for the Member State of first entry to continue the Dublin procedure in case of the applicant's onward movement should be reconciled with requirements stemming from Articles 7 (respect for private and family life) and 24 (the rights of the child) of the Charter, as well as the right of a child to be heard. An application of the proposed rule as it stands runs the risk of not properly taking into account the criteria of the Dublin Regulation to protect unaccompanied children and family life, particularly if decisions under the Dublin Regulation are taken without conducting a personal interview.

To ensure that family criteria are correctly applied and that primary consideration is given to the best interests of the child, exceptions to Article 5 (2) of the proposed recast Dublin Regulation should be envisaged for unaccompanied children as well as for families who reunited spontaneously.

---

1 UNHCR, *Guidelines on Determining the Best Interests of the Child*, May 2008, pp. 59-61.

2 CJEU, Case C-277/11, *M.M. v. Minister for Justice, Equality and Law Reform*, 22 November 2012, paras. 85-89.

3 Council of Europe, Committee of Ministers (2010), *Guidelines on child friendly justice*, 17 November 2010, which later endorsed by the European Commission (European Commission (2011), *An EU Agenda for the Rights of the Child*, COM (2011) 60 final).

2.3 Respecting minimum social, economic and cultural rights

The proposed new rules of the Dublin Regulation (Article 5 (3) of the proposed recast Dublin Regulation) aim to restrict a number of social, economic and cultural rights of asylum applicants in the event of engaging in unauthorised secondary movements. They envisage to strip the applicant's right to reception conditions as enumerated in Articles 14 to19 of the Reception Conditions Directive (2013/33/EU), save emergency healthcare, when the person concerned is irregularly in a Member State other than the one he or she is required to be present. These include schooling and education of children, access to the labour market, vocational training as well as material reception conditions and housing (providing an adequate standard of living for applicants).

Despite the existence of common European rules and standards, reception conditions continue to vary considerably between Member States in terms of the standards and benefits provided to applicants. In some Member States, there have been persistent problems in ensuring compliance with the reception standards required for the dignified treatment of applicants, while in others the standards provided are more generous.[1]

Member States are allowed to attach certain negative legal consequences to irregular entry and stay of non-nationals on their territory. However, these restrictive measures and sanctions, either rooted in EU law or in their national legislation, must fully comply with the Charter, in particular with the right to human dignity (Article 1),[2] the prohibition of inhuman or degrading treatment (Article 4),[3] and other Charter provisions that apply to everyone regardless of status.[4] They must also remain within the boundaries of international law, such as Article 31 of the 1951 Geneva Convention on the non-penalisation of refugees and asylum seekers for irregular entry and stay, as well as the basic social, economic and cultural rights contained in universal and regional human rights conventions. More specifically, in respect of children, it is a must to comply with the CRC regarding the rights of the child to access to healthcare (Article 24) and education (Article 28).

The Charter, international human rights law and the ECHR enshrine fundamental rights that are of general application as regards their personal scope (*ratio personae*). As a result, unless individuals are expressly excluded from their scope of application, fundamental rights and freedoms are applicable to everyone within Member States' jurisdiction. It comprises therefore also applicants for international protection not observing EU asylum procedures, moving onward from the responsible Member State to other Dublin states. Given that all non-nationals present in a Member State must enjoy a minimum set of rights, including economic, social and cultural rights, in case of non-compliance with the EU asylum *acquis* (e.g. when unauthorised secondary movements occur), neither EU law, nor Member States law can deprive applicants for international protection of certain basic economic, social and cultural rights shared by all human beings.[5]

---

1 European Commission (2016), *Proposal for a directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast)*, COM(2016) 465 final, Brussels, 13 July 2016, p. 3.

2 See CJEU, C-79/13, *Saciri and others,* 27 February 2014, para. 35.

3 See in this sense CJEU, Joined Cases C-411/10 and C-493/10, *N.S. v. Secretary of State for the Home Department and M.E and Others v. Refugee Applications Commissioner and Minister for Justice*, Equality and Law Reform, Judgement of 21 December 2011, paras. 94, 106.

4 See e.g. Articles 14 (right to education), 21 (non-discrimination), 24 (rights of the child), 35 (health care) or 47 (right to an effective remedy and to a fair trial). For more, consider e.g. FRA (2011), *Fundamental rights of migrants in an irregular situation in the European Union*, Luxembourg, Publications Office of the European Union.

5 See in this context also FRA (2011), *Fundamental rights of migrants in an irregular situation in the European Union. Comparative report*, Luxembourg, Publications Office of the European Union, p. 7.

As a matter of international law, States are obliged to meet minimum essential levels of each right enshrined in the International Covenant on Economic, Social and Cultural Rights (ICESCR) for all persons under their jurisdiction,[1] including asylum seekers, regardless of their legal status and documentation.[2] It implies that access to adequate food, clothing, essential healthcare, basic shelter and housing, and at least free primary education shall be provided for all (Articles 11-13 of the ICESCR). ECtHR affirmed that asylum seekers are particularly underprivileged and vulnerable population group and that the situation of extreme material poverty can raise an issue under Article 3 of the ECHR.[3]

Under EU law, the room for sanctions appears to be significantly restricted in light of the CJEU case law. In *Saciri*, the Court held that that the right to human dignity (Article 1 of the Charter) requires in all circumstances housing, food and clothing "sufficient to ensure a dignified standard of living and adequate for the health of the applicants and capable of ensuring their subsistence".[4] This ruling builds on *Cimade and GISTI*, in which the CJEU has set out that the right to human dignity "precludes the asylum seeker from being deprived – even for a temporary period of time after the making of the application for asylum and before being actually transferred to the responsible Member State – of the protection" of this minimum set of social rights.[5] This judgment has also clarified that "the period during which the material reception conditions must be granted to the applicants […] is to begin when the asylum seeker applies for asylum,"[6] covering thus the whole Dublin phase.

In view of the above, the protection of fundamental rights and the constraints imposed by states' asylum policy must be reconciled.[7] It is clear that asylum policy objectives aiming at restricting certain social rights and international human rights obligations would not be reconciled if asylum seekers, whatever their migration status is, were denied basic care and the aforementioned economic, social and cultural rights.[8] Denying these rights, in particular the reception conditions under the EU asylum *acquis*, disproportionately affects the most vulnerable.

A further issue, amongst others, to be explored more in depth is whether it is legally permissible to oblige and assist applicants to go back to the Member State responsible if they want to enjoy full access to reception rights under EU law.

When it comes to children, all rights protected by the CRC must be fully respected, as they apply to all children regardless of their nationality and legal or irregular status. These include the right to healthcare (Article 24) and to psychosocial support, the right to benefit from social security (Article 26), the right to a standard of living adequate for the child's physical, mental, spiritual, moral and social development (Article 27) or the right to education (Article 29). States must also provide appropriate support and assistance to children's parents in the performance of their child-rearing responsibilities (Article 18).

---

1 Committee on Economic, Social and Cultural Rights, *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, E/1991/23, 14 December 1990, para. 10.

2 Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, E/C.12/GC/20, 2 July 2009, para. 30.

3 ECtHR, *M.S.S. v. Belgium and Greece*, No. 30696/09, 21 January 2011, paras. 251-254, 263; reiterated in ECtHR, *Amadou v. Greece*, No. 37991/11, 4 February 2016, paras. 58-62.

4 CJEU, C-79/13, *Saciri and others,* 27 February 2014, paras. 36-37.

5 CJEU, C-179/11, *Cimade and GISTI v. France*, 27 September 2012, para. 56; echoed in CJEU, C-79/13, *Saciri and others,* 27 February 2014, para. 35.

6 CJEU, C-179/11, *Cimade and GISTI v. France*, 27 September 2012, para. 39; CJEU, C-79/13, *Saciri and others,* 27 February 2014, para. 33.

7 See ECSR, *International Federation of Human Rights Leagues v. France*, para. 42. *See* mutatis mutandis ECtHR, *Mubilanzila Mayeka and Kaniki Mitunga v Belgium*, No. 13178/03, 12 October 2006, para. 81.

8 In regard to healthcare see ECSR, *International Federation of Human Rights Leagues v. France*, Complaint No. 14/2003, 3 November 2004, paras. 31-32.

The margin of manoeuvre for Member States and EU institutions – who are bound by the above human rights norms as general principles of Union law[1] – is further restrained when treating children. Children's rights to healthcare and to psychosocial support, to benefit from social security, to an adequate standard of living and to education as well as their parents' entitlement to get support from the state cannot be derogated from. This interpretation is also reinforced by the Committee on the Rights of the Child, the treaty body supervising the CRC, which made clear that the enjoyment of CRC rights must be available to all children, including asylum seeking children, irrespective of their immigration status.[2] Under the aegis of the Council of Europe, the European Committee on Social Rights (ECSR) took a similar position when pinpointing that states are required, under Article 31 (2) of the European Social Charter, to provide adequate shelter to children unlawfully present in their territory for as long as they are in their jurisdiction, without resorting to detention.[3] The CJEU's above dicta in *Cimade and GISTI* and in *Saciri* represent a cardinal guiding principle also for asylum seeking children in the EU context. With regard to children in particular, the Court added that financial allowances must be sufficient to preserve family unity and the best interests of the child, and thus to enable, if necessary, children of asylum seekers to be housed with their parents.[4]

To sum up, EU efforts in stopping attempts to circumvent Dublin rules by applicants moving onward must not deprive child asylum seekers, especially if unaccompanied, of the protection their status warrants.[5] Depriving the essential social rights of applicants who are in the 'wrong' Member State, namely excluding them from the basic reception conditions, would run counter to the fundamental right to human dignity, as expressed in Article 1 of the Charter, and to the prohibition of inhuman or degrading treatment as enshrined in Article 4 of the Charter.

---

1 CJEU, **C 29/69, *Erich Stauder v. City of Ulm – Sozialamt*, 12 November 1969,** para. 7; CJEU **C 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, 17 December 1970,** , para. 4; CJEU **C 4/73, *J. Nold, Kohlen- und Baustoffgroßhandlung v. Commission of the European Communities*, 14 May 1974,** para. 13. See also e.g. Ziegler, K., *Autonomy: From Myth to Reality – or Hubris on a Tightrope? EU Law, Human Rights and International Law,* University of Leicester School of Law Research Paper No. 15-25, pp. 2, 20-21 (available at: http://ssrn.com/abstract=2665725).

2 Committee on the Rights of the Child, *General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, CRC/GC/2005/6, 1 September 2005, para. 12.

3 ECSR, *Defence for Children International v. the Netherlands*, Complaint No. 47/2008, merits, 20 October 2009, paras. 31-32, 64.

4 CJEU, C-79/13, *Saciri and others,* 27 February 2014, paras. 41, 45.

5 See, mutatis mutandis, FRA-ECtHR (2014), *Handbook on European law relating to asylum, borders and immigration*, Edition 2014*,* Luxembourg, Publications Office of the European Union, p. 217 and footnote 426 (referring to Complaint No. 47/2008 before the ECSR).

FRA Opinion 6

Respecting minimum social, economic and cultural rights

Various human rights obligations, the Charter and case law of the Court of Justice of the European Union (CJEU) considerably limit the freedom of Member States to withdraw or significantly reduce material reception conditions of asylum seekers, particularly for asylum-seeking children.

Recital (22) of the proposed recast Dublin Regulation calls upon Member States to act in compliance with the Charter and to ensure that the immediate material needs of asylum applicants are covered. The new rules in Article 5 (3) of the proposed recast Dublin Regulation restrict a number of social and economic rights and should at least be streamlined so as to better reflect the states' duties under Recital (22) of the proposal.

The concept of 'immediate material needs' covers at a minimum an obligation to provide housing, food, clothing and education in addition to necessary healthcare. It should be adequately reflected in the operative provisions as a non-derogable minimum, in order to be in full compliance with Articles 1 (human dignity) and 4 (prohibition of inhuman and degrading treatment) of the Charter. In parallel, steps should be taken to address the gaps in Member States' reception standards.

2.4 Removing the prohibition to present new facts on members of family

The proposed changes to the Dublin Regulation will introduce a quasi-prohibition to submit new evidence after the completion of the personal interview (Articles 4 (2) and 5 (4) of the proposed recast Dublin Regulation). This would mean that new information on the presence of family members in another Member State or successful tracing of parents of an unaccompanied child cannot anymore be considered if it is presented after the personal interview.

Such limitation to submit new evidence is difficult to reconcile with the right to respect for family life in Article 7 of the Charter and the duty to give primary consideration to the best interests of the child deriving from Article 24 of the Charter. This, because it would essentially result in situations where children may have one or both parents in another Member States but rules on allocation of responsibility to examine their asylum application would not make it possible to bring the family together.

In these cases family reunification would be governed by the Family Reunification Directive (2003/86/EC). Family reunification could be subject to substantial delays where the asylum application of all family members is still to be completed, as asylum seekers do not have any family reunification entitlements outside of the Dublin Regulation. In some cases, the prohibition of taking into account of new evidence by the authorities about the presence of family members during the Dublin procedure may lead to the family remaining separated for a longer period of time. For example, a Syrian child staying with her father in one Member State and whose mother is in another Member State, all of whom received subsidiary protection may only be entitled to family reunification after a certain period of time or not at all, if they do not meet the additional conditions set by some Member States, which refugees are not required to fulfil.[1]

FRA Opinion 7

Removing the prohibition to present new facts on members of family

Asylum applicants must be given the possibility of presenting new facts and new evidence concerning the presence of family members in another Member State, without a pre-determined deadline.

Curtailing the right to submit new information and elements after the completion of the personal interview as envisaged in Articles 4 (2) and 5 (4) of the proposed recast Dublin Regulation is difficult to reconcile with duties of Member States to give a primary consideration to the best interests of the child and to respect family life, included respectively in Articles 24 and 7 of the Charter.

2.5 Ensuring future asylum claims are examined in substance if first asylum application is withdrawn

In light of the reformed Dublin system if the responsible Member State takes back an asylum seeker who had previously withdrawn his or her application submitted there and then applied for international protection in another Member State, a new application following such a discontinued claim will be considered as a subsequent application (Article 20 (4) of the proposed recast Dublin Regulation).

[1] For an overview on the right to family reunification for subsidiary protection status holders to family reunification, see ECRE, *Information Note on Family Reunification for Beneficiaries of International Protection in Europe*, June 2016 and FRA, Regular overviews of migration-related fundamental rights concerns, Monthly data collection: September 2016, Thematic focus: Family tracing and family reunification.

According to the Asylum Procedures Directive (2013/32/EU) and the new proposal on an Asylum Procedures Regulation, qualifying an application as "subsequent" leads to an exception from the right to remain on the territory of the Member State concerned, and thus enables the removal of such applicants from Member States' territories after an administrative decision is taken on their applications, and the appeal against the rejection has no automatic suspensive effect either (Article 43 of the APR proposal). In case of subsequent applications, Member States may also decide to exclude free legal assistance and representation in the administrative procedure (Article 15 (3) (c) of the APR proposal).

Treatment of subsequent applications is dealt with in detail in Article 42 of the proposed Asylum Procedures Regulation. Pursuant to its Article 42 (4), the applicant must present in this phase new elements or findings as evidence, which could not be presented before due to the inability of the applicant to do so, through no fault on his or her own part. Otherwise, the application is rejected without in depth examination. As a result, treating new claims of applicants who have been taken back under Article 20 (4) of the proposed recast Dublin Regulation as "subsequent applications" may lead to no in-merit examination at all of the asylum claim, if after the first discontinued claim no further new elements or findings can be presented by the asylum seeker, which will result in the rejection of the application.

This scenario, reversing the rationale behind the current rules, is contrary to the objective of the Dublin system to "guarantee effective access to the procedures for granting international protection" (Recital (5)), i.e. that any application for international protection shall be examined in substance by one Member State, and raises compatibility concerns with the right to asylum enshrined in Article 18 of the Charter. Having regard to the principle of an effective access to the asylum procedure, which is an inherent part of the right to asylum, the current Dublin Regulation (Regulation (EU) No. 604/2013) obliges the Member State responsible to proceed to a full assessment of the protection needs of asylum seekers transferred to it under the Dublin procedure (Article 18(2) in force). It has remedied the flaws of the earlier regime which has led to transfers to situations where there was no possibility to reopen the claim, hence no examination of substance was carried out by any Member State before the final rejection of an application.[1] In practice, such a risk of having an application rejected without substantive consideration anywhere in the EU might affect children in particular, who have not decided to withdraw their application on their own, but their parents did so, following e.g. a convincing counselling on assisted voluntary return.

In cases of rejection following subsequent applications, the derogation from the right to remain on the territory of the responsible Member State must be without prejudice to the principle of *non-refoulement*, else Article 19 of the Charter (protection in the event of removal, expulsion and extradition) and Article 3 of the ECHR are violated. As a consequence, all these rejected asylum seekers who cannot be removed because of the prohibition of *refoulement* will most probably increase the number of irregular migrant population within the Member State concerned, given that their removal may be contrary to international law and the Charter, but they are not granted any protection status under the EU asylum *acquis*. This legal limbo situation, which in itself raises serious fundamental rights concerns, can also not be considered as desirable for the Member State concerned neither from the human security, nor from the public order perspective.

[1] See e.g. the Commission's Explanatory Memorandum to the former Dublin proposal (COM(2008) 820 final, Brussels, 3.12.2008), p. 12. For the same argument advanced by the Commission in an infringement procedure, see **Case C-130/08: Action brought on 31 March 2008 — *Commission of the European Communities v. Hellenic Republic*, OJ C 128,** 24.5.2008, p. 25 (plea in law No. 4).

FRA Opinion 8

Ensuring future asylum claims are examined in substance if first asylum application is withdrawn

The right of effective access to asylum procedures, inherent in the right to asylum enshrined in Article 18 of the Charter, must be respected in all circumstances, without exceptions. To comply with this requirement and to protect the applicant from* refoulement*, Member States are bound to ensure not to reject any asylum application without in-merit examination.

The approach envisaged in Article 20 (4) of the proposed recast Dublin Regulation to consider a new asylum application as a subsequent one after a take back transfer of the asylum seeker to the responsible Member State may result in applications not being examined in substance. FRA suggests leaving the current legal regime in Article 18 (2) of the Dublin Regulation unchanged, thus allowing Member States to examine such new applications under the regular asylum procedure.

3. PROCEDURAL SAFEGUARDS FOR CHILDREN

This section deals with the right to be heard and the right to an effective remedy. It examines the safeguards included in the proposed recast regulation and the impact it has on children. It covers the right to information, the burden of proof in relation to substantiating the presence of family members in other Member States, the right to be heard, legal representation of unaccompanied children and the right to an effective remedy.

3.1. Informing children adequately

The right to be informed at decisive moments of the procedure is an important element of procedural fairness. The purpose of the duty to inform asylum applicants is to ensure that they are equipped to take informed decisions at each stage of the procedure. It is, therefore, essential that information is not only provided to applicants, but that it is also understood by them.

The Dublin Regulation (No. 604/2013) contains several provisions on the duty to inform applicants at various steps of the procedure in Articles 4, 20 (4), 26 regarding formal notifications of a transfer decision and 28 (4) relating to detention as well as recitals (22), (23), (36). Written information must be complemented by oral information, where necessary. Information must be provided in a language that the applicant understands or is reasonably supposed to understand.

The evaluation of the functioning of the Dublin Regulation pointed to significant differences between Member States in providing information about the Dublin procedure to applicants, with half of the Member States providing only general information, which may fall short of the requirements established by the Regulation.[1]

The proposed recast Dublin Regulation contains several amendments strengthening the duty to inform applicants at various steps of the procedure, in particular Articles 6 and 27 as well as recitals (22) and (23). The amendments clarify that notifications of transfer decisions must be done in writing without delay. However, Article 27 of the proposal does not expressly require that this be done in a language the applicant understands.

[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)*, Explanatory Memorandum, Brussels, 4.5.2016 COM(2016) 270 final, p. 9. ICFI, *Evaluation of the implementation of the Dublin III Regulation*, Final Report, March 2016, p. 11.

Unaccompanied children seeking asylum interviewed by FRA in the past remarked that they could not understand the information provided to them, indicating in some cases that even their own legal representatives did not always explain the procedures to them adequately.[1] The Dublin Regulation recognises the need for child-specific information as it refers to a specific leaflet for unaccompanied children by the Commission.[2]

The proposed recast Dublin Regulation does however not include a duty to provide information in a child-friendly manner. Such safeguard would be particularly important for unaccompanied children, as they typically face significant difficulties in understanding the purpose and requirements of legal procedures and what their duty to cooperate with the authorities entails.

FRA Opinion 9

Informing children adequately

A fair asylum procedure is one where applicants know their rights and duties, and where they understand its different stages. The proposed recast of the Dublin Regulation contains important safeguards in this regard. These could, however, be further enhanced by spelling out a duty in Article 6 of the proposed recast Dublin Regulation to provide information to children in a child-friendly manner. Language requirements set forth in Article 6 of the proposal should also apply to the notifications of transfers under Article 27 of the proposal.

3.2. Respecting the right to be heard

An asylum seeker must normally be heard before a decision is taken on the Member State responsible to examine his or her application. There are two exceptions to this. No personal interview is needed if the applicant has absconded or if the information provided by him or her is already sufficient for determining the responsible Member State (Article 7 (1) of the proposed recast Dublin Regulation). These two exceptions already exist under the current Dublin regime. However, under the current system, where a personal interview has not taken place, the applicant must be given the opportunity to present further information – for example on the presence of family members – which is relevant to determine the Member State responsible. Such possibility is deleted by Articles 5 (4) and amended Article 7 of the recast proposal. This may lead to information on family members not being captured resulting in delays or difficulties in family reunification.

[1] FRA, *Separated, asylum-seeking children in European Union Member States*, 2011, p. 63.
[2] See Recital (47) and Article 6 (3) of the proposal, provisions which remain unchanged.

The right to good administration as mirrored in Article 41 of the Charter is a fundamental right forming an integral part of the EU legal order. As a general principle of EU law, it also binds Member States when they are acting within the scope of EU law. According to the CJEU, it "guarantees every person the opportunity to make known his views effectively during an administrative procedure and before the adoption of any decision liable to affect his interests adversely."[1]

The right to be heard also applies to children: Article 12 of the CRC obliges state parties to give a child the opportunity to be heard in any judicial and administrative proceedings affecting the child. Article 12 of the CRC as well as Article 24 (1) of the Charter underline that due weight must be given to the views of the child in accordance with his/her age and maturity.

The evaluation of the Dublin Regulation indicates that as a result of the current high influx, personal interviews were severely delayed in many Member States.[2]

The initial registration or admissibility interview carried out with new arrivals which takes normally place in all EU Member States may contain information about family members staying in another Member State. At that stage asylum seekers do not understand what they must do and are not informed and prepared to submit and substantiate the information about the presence of family members in other Member States. Such initial interview should therefore not be used as a sole basis for a Dublin decision. Asylum seekers must be given a fair chance to react to information received on the Dublin system and present their arguments and evidence at a subsequent stage. This is even more important in case of unaccompanied children, as they typically face additional difficulties in understanding the procedural requirements.

The CJEU has accepted that a failure to hear the individual concerned does not automatically annul the administrative decision at stake but that this depends on whether the infringement at issue actually deprived the party relying thereon of the possibility of arguing his defence better, to the extent that the outcome of that administrative procedure could have been different.[3] In a Dublin procedure this requirement should be fulfilled any time an applicant argues that he or she has a family member in another participating Member State or that the transfer would not be compatible with the best interests of an unaccompanied child.

---

1 CJEU C‑141/08, *Foshan Shunde Yongjian Housewares & Hardware v. Council*, 1 October 2009, para. 83; CJEU C‑27/09, *France v. People's Mojahedin Organization of Iran*, 21 December 2011, paras. 64-65; CJEU C-277/11, *M. M. v. Minister for Justice, Ireland, Attorney General,* 22 November 2012, para. 87; CJEU, C-166/13, *Sophie Mukarubega v. Préfet de police, Préfet de la Seine-Saint-Denis*, 5 November 2014, para. 46 and CJEU, C-249/13, *Khaled Boudjlida v. Préfet des Pyrénées-Atlantiques*, 11 December 2014, para. 36.

2 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)*, Explanatory Memorandum, Brussels, 4.5.2016 COM(2016) 270 final, p. 9.

3 CJEU, C-383/13, *M. G. and N. R. v. Staatssecretaris van Veiligheid en Justitie,* 10 September 2013.

Furthermore, the proposal envisages that the applicant is only heard before *a take charge request* is made (Article 7 (2) of the proposed recast Dublin Regulation) removing the obligation of hearing the applicant in case when he/she will be *transferred back* to the responsible Member State. The right to be heard is "inherent in respect for the rights of the defence, which is a general principle of EU law".[1] The CJEU has underlined that "observance of the right to be heard is required even where the applicable legislation does not expressly provide for such a procedural requirement".[2] Asylum applicants may have valid grounds to argue against a Dublin transfer back to the responsible Member State, particularly when they are part of a vulnerable group requiring special protection.[3] Valid grounds against a transfer back may be even more likely to exist in case of unaccompanied children, when the transfer would be at odds with the best interests of the child.

FRA Opinion 10

Respecting the right to be heard

To comply with the right to be heard, which the Court of Justice of the European Union (CJEU) has recognised as a general principle of EU law, asylum applicants must be given a realistic opportunity to present relevant facts and evidence. Observing the right to be heard is particularly important to ensure that family criteria are correctly applied and that primary consideration is given to the best interests of the child.

For situations where a personal interview with the applicant is omitted on the basis of Article 7 (1) of the proposed recast Dublin Regulation, the EU legislator should provide for a duty by Member States to give applicants the opportunity to present relevant facts and evidence at a subsequent stage.

As the right to be heard applies regardless of whether the relevant legislation expressly provides for it, the EU legislator should make it clear in Article 7 (2) of the proposed recast Dublin Regulation that applicants must also be heard before they are notified that they will be transferred back to the responsible Member State.

---

1 CJEU, C-166/13, *Sophie Mukarubega v. Préfet de police and Préfet de la Seine-Saint-Denis*, 5 November 2014, para. 45.

2 CJEU, C- 349/07, *Sopropé v. Fazenda Pública*, 18 December 2008, para. 38; CJEU, C-277/11, *M. M. v. Minister for Justice, Ireland, Attorney General,* 22 November 2012, para. 86; CJEU, C-383/13, *G & R v. Staatssecretaris van Veiligheid en Justitie*, 10 September 2013, para. 32 and CJEU C-249/13, *Khaled Boudjlida v. Préfet des Pyrénées-Atlantiques*, 11 December 2014, para. 39.

3 See for example ECtHR, *Tarakhel v. Switzerland* [GC], No. 29217/12, 4 November 2014, paras. 118ff.

3.3. Ensuring that Member States cooperate in gathering evidence

The proposed recast Dublin Regulation would shift the onus of providing evidence towards the applicant reducing the obligation of the authorities of cooperating in collecting the necessary information required to determine the responsible Member State.

As indicated in Article 4 (2) of the proposed recast Dublin Regulation, applicants have the obligation to submit all the elements and information relevant for determining the Member State responsible. This includes also the obligation to submit information regarding the presence of family members, relatives or any other family relations in the Member States.

Reading Article 4 (2) in conjunction with Article 6 (1) (d) of the proposal – which requires that applicants be informed about their obligation *to substantiate* the family information – may lead to the conclusion that the onus of collecting information on family relations is exclusively on the applicant relieving the authorities from their obligation to investigate the family situation before taking a transfer decision. This reading is further corroborated by the deletion (in Article 7 of the proposal) of the duty to allow the applicant to present all further relevant information in case the personal interview is omitted.

Whereas the duty to provide evidence on family relations in the Member States is indeed part of the general obligations by applicants to cooperate with the authorities, such duty should not lead to imposing an excessive burden on them. There may be situations in which applicants may have lost contacts with their family members in another Member State or face unsurmountable difficulties in communicating with them (for example, if they are hosted in facilities where there is no effective access to phone or email).

Gathering and submitting the necessary proof of family links required to enabling a Dublin transfer based on family criteria has been challenging. This, in spite of a specific provision indicating that if "there is no formal proof, the requested Member State shall acknowledge its responsibility if the circumstantial evidence is coherent, verifiable and sufficiently detailed to establish its responsibility" (Article 22 (5) of the Dublin Regulation (No. 604/2013)).

According to the European Commission, Member States usually require documentary evidence, such as birth or marriage certificate.[1] These documents are often difficult or impossible to produce, particularly for applicants who come from war-torn countries. There is moreover a lack of clarity regarding what documents are accepted by Member States as proof of family links.[2] Following the 2015 evaluation of the Dublin Regulation, the European Commission concluded that the "substantial divergence on what is acceptable proof of family connections makes it difficult to determine responsibility, leading to lengthy procedures" and that this could be a factor in driving secondary movements.[3]

The ECtHR held that Article 8 of the ECHR is not limited to protecting the individual against arbitrary action by the public authorities but states also have a positive obligation inherent to the right to private and family life.[4] This implies that the decision-making process must be fair and respect the interests protected by Article 8 of the ECHR and take into account the best interests of the child when assessing the reunification of families.[5] Obligations deriving from Articles 9 (3), 10 (2) and 22 (2) of the CRC include tracing of family members.[6] Article 8 (5) of the proposed recast Dublin Regulation obliges Member States to trace family members of unaccompanied children, although such a duty is not expressly envisaged for a child who is with one parent and has the other parent in another Member State.

Under EU law, in the field of asylum, national authorities have a duty to support the applicant in substantiating his or her claim. The CJEU has ruled that the national authorities' duty to cooperate "means, in practical terms, that if, for any reason whatsoever, the elements provided by an applicant for international protection are not complete, up to date or relevant, it is necessary for the Member State concerned to cooperate actively with the applicant, at that stage of the procedure, so that all the elements needed to substantiate the application may be assembled. A Member State may also be better placed than an applicant to gain access to certain types of documents."[7]

---

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)*, Explanatory Memorandum, Brussels, 4.5.2016 COM(2016) 270 final, p. 10.

2 ICFI, *Evaluation of the Implementation of the Dublin III Regulation*, Final Report, March 2016, p. 31.

3 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)*, Explanatory Memorandum, Brussels, 4.5.2016 COM(2016) 270 final, p. 9. ICFI, *Evaluation of the Implementation of the Dublin III Regulating*, Final Report, March 2016, p. 31.

4 ECtHR, *Osman v. Denmark*, No. 38058/09, 14 June 2011, para. 53.

5 ECtHR, *Senigo Longue and Others v. France*, No. 19113/09, 10 July 2014, paras. 63 and 68.

6 See Committee on the Rights of the Child, General Comment No. 6, para. 13.

7 CJEU, Case C-277/11, *M.M. v. Minister for Justice, Equality and Law Reform*, 22 November 2012, para. 66.

FRA Opinion 11

Ensuring that Member States cooperate in gathering evidence

The onus of providing evidence regarding the presence of family members, relatives or any other family relations in a Member State should not lie only on the applicant, but also on the Member States, which should cooperate in gathering the necessary information.

The duty for an applicant to substantiate his or her claim should be accompanied by the obligation of a Member State to cooperate with the applicant in gathering all the information required for a correct assessment of the criteria set out in the Dublin Regulation. This could be achieved by inserting a recital reflecting this obligation in the proposed recast of the Dublin Regulation, inspired by the relevant provisions of the Commission Implementing Regulation No. 1560/2003 as amended by Regulation (EU) No. 118/2014).

3.4. Ensuring effective guardianship

The need for a guardian to support an unaccompanied child during administrative procedures including the Dublin procedure derives from the obligation included in Article 24 of the Charter to give primary consideration to the best interests of the child. The Committee on the Rights of the Child, the supervisory body of the CRC underlined that Articles 18 (2) and 20 (1) of the CRC require the appointment of guardian or adviser and legal representative.[1]

As pointed out in the handbook on guardianship jointly produced by FRA and the European Commission, where the child's parents are not present to guide and support the child through the procedure, the appointment of a qualified person to support the child is needed not only to complement the child's limited legal capacity but also to ensure that the child's best interests are duly considered within the legal procedure at stake.[2]

[1] UN Committee on the Rights of the Child, General Comment No. 6 (2005), Treatment of unaccompanied and separated children outside their country of origin, para. 33.

[2] FRA-European Commission, *Guardianship for children deprived of parental care – A handbook to reinforce guardianship systems to cater for the specific needs of child victims of trafficking*, June 2014.

Contrary to the proposed amendments to the Reception Conditions Directive (Article 23) and Asylum Procedures Directive (Article 22), which require the appointment of a "guardian", the proposed recast Dublin Regulation continues to refer to a "legal representative" in Article 8 (2). The role of the guardian is broader and extends beyond pure legal representation, including the promotion of the best interests of the child.

Furthermore, the amended wording of Article 8 (2) of the proposed recast Dublin Regulation limits the duty to support an unaccompanied child with a legal representative. It requires the appointment of a legal representative only in the Member State "where an unaccompanied minor is obliged to be present".

The proposal would essentially result in punishing unaccompanied children who move on to another Member State without being authorised to do so. They will not anymore be entitled to a person who represents their best interests. This seems to run contrary to the plan to strengthen the protection of unaccompanied children in Article 22 (1) of the proposed Asylum Procedure Regulation which suggests that "The responsible authorities shall, as soon as possible and not later than five working days from the moment when an unaccompanied minor makes an application, appoint a person or an organisation as a guardian."[1]

Depriving an unaccompanied child of the support of a legal representative or guardian as a sanction for unauthorised onward movement raises serious compatibility issues with the Charter. The child's needs to be supported and assisted do not diminish as a result of his or her onward movement. On the contrary, they may increase, for example, when, a formal best interests assessment needs to be carried out to determine the responsible Member State.

The absence of a legal representative also affects the exercise of the right to an effective remedy guaranteed by Article 47 of the Charter, for example, if they wish to appeal a transfer decision which does not adequately consider their best interests. In some Member States, unaccompanied children do not have the legal capacity to file an appeal and need a legal representative to do so.[2]

---

[1] European Commission, *Proposal for a regulation establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU*, Brussels, 13.7.2016 COM(2016) 467 final. See also European Commission, *Proposal for a directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast)*, Brussels, 13 July 2016, COM(2016) 465 final, Article 23.

[2] See, for example, Austria, BFA Procedure Law (*BFA-Verfahrensgesetz*), Section 10, Federal Law Gazette (FLG) I No. 87/2012, as amended by FLG No. 86/2013; Hungary, Section 84 (1) c) of the Child Protection Act (Act. No. 31 of 1997, amendment entered into force on 1 January 2014); Slovakia, Code of Civil Procedure 99/1963 Coll. (Code of Civil Procedure) of 4 December 1963 (*Občiansky súdny poriadok - Zákon č. 99/1963 Zb. - úplné znenie (aktualizované úplné znenie - stav k 30. 06. 2016)*), Section 180 (3).

FRA Opinion 12

Ensuring effective guardianship

The UN Convention on the Rights of the Child (CRC) stipulates that a guardian must support an unaccompanied child complementing the child's limited legal capacity and ensure that the child's best interests are duly considered within the legal procedure at stake. The EU legislator should consider requiring Member States to appoint a 'guardian' and not a legal representative to assist an unaccompanied child in the asylum procedure. In doing so, the legislator would bring the wording of the proposed recast of the Dublin Regulation in line with the proposed amendments to other EU instruments on asylum.

The right of unaccompanied children to be assisted by a person who promotes his or her best interests does not end when a child moves to another Member State. The proposed amendment in Article 8 (2) of the Dublin Regulation that would require the appointment of a legal representative only in the Member State where an unaccompanied child is obliged to be present raises serious compatibility issues with Articles 24 (the rights of the child) and 47 (right to an effective remedy and a fair trial) of the Charter and should be removed from the text.

3.5. Respecting the right to an effective remedy

The right to an effective remedy, as laid down in Article 47 of the Charter covers also administrative decisions, including those taken in the Dublin procedure. The CJEU underlined that Article 47 of the Charter constitutes a reaffirmation of the principle of effective judicial protection and that the characteristics of a remedy must be determined in a manner that is consistent with this principle.[1]

Under the proposed new Dublin system, applicants will be allowed to lodge an appeal against all transfer decisions, including those carried out on the basis of the corrective allocation mechanism. Under Article 28 (5) of the proposed recast Dublin Regulation an effective remedy will also be provided in situations when no transfer decision is taken but the applicant claims that another Member State is responsible, although in this case it is not clear from which moment applicants may submit an appeal. In addition, the right to appeal a detention decision in Article 29 (4) of the proposal remain untouched.

The proposed reform of the Dublin system introduces important changes which affect the exercise of this right in different ways, impacting also on children.

Establishing standardised deadlines and impact on children

First, Article 28 of the proposal standardises the deadlines to appeal across the Member States, establishing that an appeal must be submitted within 7 days from the notification of the transfer decision. The court or tribunal is required to decide on the appeal within a period of 15 days. Meanwhile, the applicant has a right to stay in the Member State.

In principle, a swift Dublin decision is in the interests of all applicants. For children, protracted situations of legal limbo do not promote their right to development as set forth in Article 6 of the CRC.

[1] CJEU, C-432/05, *Unibet (London) Ltd, Unibet (International) Ltd v. Justitiekanslern*, 13 March 2007, para. 37; CJEU, C-93/12, *ET Agrokonsulting-04-Velko Stoyanov v. Izpalnitelen direktor na Darzhaven fond 'Zemedelie' – Razplashtatelna agentsia*, 27 June 2013, para. 59; CJEU, C-562/13, *Centre public d'action sociale d'Ottignies-Louvain-la-Neuve v. Moussa Abdida*, 18 December 2014, para. 45.

However, a remedy must be "effective" in law as well as in practice.[1] Deadlines must not be so short to undermine the fairness of the procedure. According to the ECtHR "speed should not go so far as to constitute an obstacle or unjustified hindrance to making use of [a remedy], or take priority over its practical effectiveness".[2] This means also that an asylum seeker must be afforded sufficient time to file an appeal. Although not concerning Dublin procedures, the Czech Constitutional Court has found a 7-day deadline to appeal an asylum decision too short.[3] On 23 February 2016, Austrian Constitutional Court declared unconstitutional a 7-day appeal period for Dublin transfer.[4] The court acknowledged that the procedure for granting asylum has specificities which may require deviations from the general rules, but only if these are indispensable, which was not the case here. The argument that shorter time limit is necessary in order to prevent abuse (lodging application with the aim only to prolong stay in Austria) was not considered sufficient to shorten the time limit for all applicants. The Court stressed that appeals sometimes require clarification of difficult facts and the discussion of difficult legal questions and that needs time. Conversely, in *Diouf*[5] the CJEU found that a 15-day time limit to appeal in an accelerated procedure "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".

Existing timelines to appeal a Dublin decision vary considerable across EU Member States. As illustrated in Figure x, out of 21 EU Member States, only five apply a 7-day deadline or lower and 16 EU Member States have more favourable rules.

---

1 ECtHR, *Kudła v. Poland* [GC], No. 30210/96, 26 October 2000, para. 157. ECtHR, *M.S.S. v. Belgium and Greece* [GC], No. 30696/09, 21 January 2011, para. 288; ECtHR, *I.M. v. France*, No. 9152/09, 2 February 2012, para. 128.

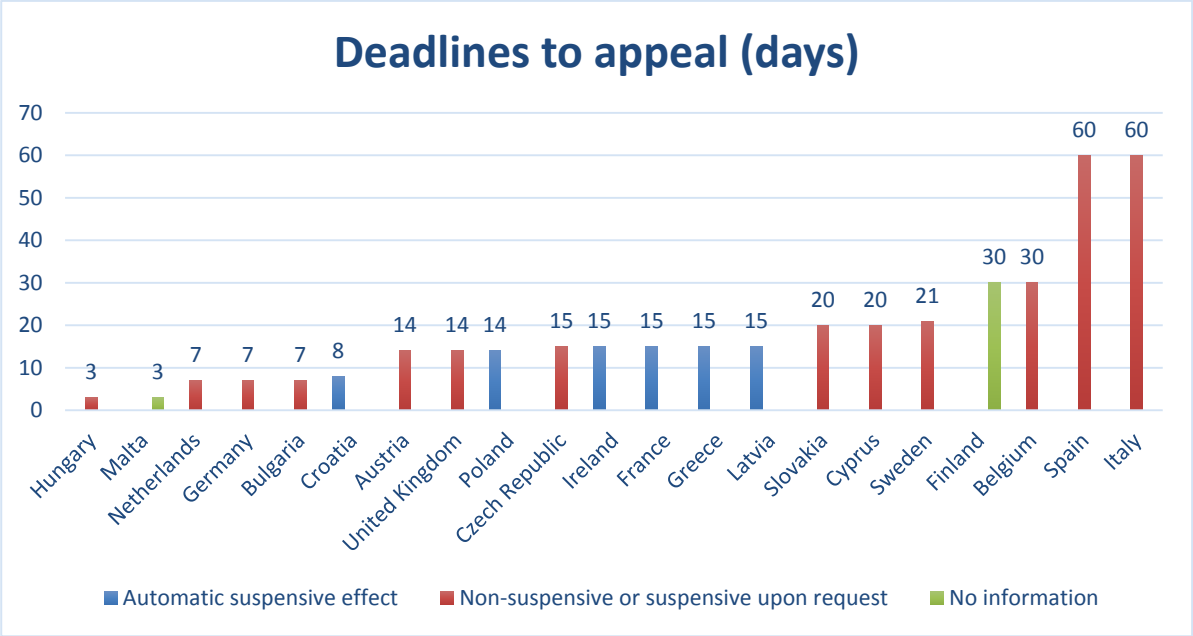
2 ECtHR, *De Souza Ribeiro v. France*, No. 22689/07, 28 July 2011, para. 95.

3 The Czech Constitutional Court stated that 7-day period was disproportionately short and thus contrary to the right to effective remedy. Deadlines should be examined also in the context of other circumstances, in particular the specific situation of asylum seekers being foreigners not familiar with Czech legal system, without the proper knowledge of Czech language and contacts in Czech Republic. The Constitutional Court further emphasized that the fact that the appeal has a suspensory effect does not *per se* compensate the shortness of the deadline. Czech Republic, Czech Constitutional Court (*Ústavní soud Ceské republiky*), Decision No. 9/2010, Coll. which came into effect in January 2010.

4 Austrian Constitutional Court, Decision no. G 574/2015-7, 23 February 2016.

5 CJEU, C-69/10, *Samba Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration*, 28 July 2011, para. 67.

Figure: Time limits for appealing a Dublin transfer, days, 21 EU Member States



Sources: See Annex

Whether a seven-day time limit to appeal undermines the exercise of the right to an effective remedy will largely depend on whether it is sufficient "in practical terms to prepare and bring an effective action".[1] In practice, substantial obstacles seem to exist. For example, only half of the asylum seekers interviewed for a study on Dublin carried out by the Jesuit Refugee Service knew that they could appeal a Dublin decision and one out of three told the interviewers that he/she had no contacts with a lawyer.[2]

Taking into account language barriers and the complexity of the procedure, to prepare and submit an appeal, applicants must be provided with adequate information; timely access to the file; appropriate linguistic support,[3] access to free legal support and, for unaccompanied children, adequate legal representation. These requirements must also be in place when applicants are deprived of liberty, as detained persons may face additional obstacles in contacting the outside world. [4]

1 CJEU, C-69/10, *Samba Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration*, 28 July 2011, paras. 66 and 67.
2 Jesuit Refugee Service, *Protection Interrupted: The Dublin Regulation's Impact on Asylum seekers' Protection (The DIASP project)*, 5 June 2013, pp. 31ff.
3 ECtHR, *I.M. v. France*, No. 9152/09, 2 February 2012, para. 144-145.
4 ECtHR, *Mohamad v. Greece*, No. 70586/11, 11 December 2014.

Moreover, particularly vulnerable applicants, including unaccompanied children but also other traumatised people (for example a child who lost her mother during a shipwreck) will require targeted psychological support to enable them, for example, to understand the importance of providing evidence on the presence of family members in another Member State. Without such targeted support, the submission of an appeal would be excessively difficult for them.

Member States have different practical arrangements concerning provision of information, the time and place to lodge an appeal, the notification and the access to individual files, the provision of free legal support and of interpretation services to enable adequate communication between the applicant and his/her lawyer.[1] Furthermore, the modalities to access the necessary support in practice may depend on whether, for example, applicants are hosted in a reception facility or detained. These differences would call for a more flexible approach to enable Member States to adjust the timelines to appeal to reflect such national differences. Furthermore, in light of difficulties to proof the existence of family links resulting from the evaluation of the implementation of the Dublin Regulation,[2] the seven-day deadline may not be sufficient to prepare more complex cases.

Limiting the scope of the review and risks for children

Second, the proposed recast of the Dublin Regulation limits the scope of the appeal. If adopted, Article 28 (4) of the proposal would restrict the right to an effective remedy to an assessment of whether:

- the unaccompanied children, family and dependency criteria in Articles 11 to 13 and 18 of the proposed recast Dublin Regulation are met;
- there are "substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants […], 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".[3]

[1] For an overview of national differences regarding access to the right to appeal in practice see UNHCR, *Improving Asylum Procedures, Comparative Analysis and Recommendations for Law and Practice*, March 2010, pp. 84ff.

[2] 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)*, Explanatory Memorandum, Brussels, 4.5.2016 COM(2016) 270 final, p. 10.

[3] Article 28 (4) read in conjunction with Article 3 (2) of the proposed recast Dublin Regulation.

As indicated in Recital (24) of the proposal, the review would be limited to assessing if the applicant's right to respect of family life, the rights of the child or the prohibition of inhuman and degrading treatment as set forth in Articles 4, 7 and 24 of the Charter are infringed upon. This would exclude, for example, claims against transfers to a serious risk of trafficking as prohibited by Article 5 of the Charter. Surprisingly, an appeal against a return to a Member State in violation of the principle of *non-refoulement* in Article 19 of the Charter is also not envisaged, unless based on systemic flaws. Three examples are presented to show the impact of the proposed changes on the rights of the child.

First, contrary to the requirements of Article 19 of the Charter and in contradiction with the case law of the ECtHR,[1] the proposed amendments to the Dublin Regulation will not allow an individual to appeal a transfer to another Member State in case of a real risk of loss of life or of torture, inhuman or degrading treatment or punishment. As the case of *Tarakhel v. Switzerland* illustrates, this limitation may affect children in particular. The case concerned a married couple from Afghanistan and their six minor children, for whom Switzerland planned a Dublin transfer to Italy. The ECtHR underlined the need to assess the individual situation of the applicant and concluded that in light of the deficiencies in the reception conditions in Italy, the Swiss authorities are required to obtain assurances from Italy that on their arrival the applicants would be received in facilities and in conditions adapted to the age of the children, and that the family would be kept together.[2]

Second, the proposal would exclude appeals which concern aspects of the right to respect for family life which are not covered in Articles 11-13 and 18 of the proposed recast Dublin Regulation. For example, Article 18 of the proposal which is intended to bring together family members in situations of dependency, is only applicable provided that "family ties existed in the country of origin" as, for this Article, it is not proposed to change the family definition so as to include families formed on the way to the EU, as done elsewhere in the proposal. Furthermore, the family definition in Article 2 (g) of the Dublin Regulation does not adopt the broad definition of family used by the ECtHR.[3] It does not cover, for example, married minors or children who reached 18 years of age and the coverage of unmarried couples depends on the way they are treated in national law.

---

1 ECtHR, *Tarakhel v. Switzerland* [GC], No. 29217/12, 4 November 2014; ECtHR, *V.M. and others v. Belgium*, No. 60125/11, 7 July 2015.

2 ECtHR, *Tarakhel v. Switzerland* [GC], No. 29217/12, 4 November 2014.

3 The ECtHR stated, for example, that unmarried couples fall within the scope of family life emphasizing stable nature of relationship and the fact that it was otherwise indistinguishable from the family based on marriage (ECtHR, *Johnston and others v. Ireland*, No. 9697/82, 18 December 1986). Furthermore, it was accepted in a number of cases by the ECtHR that in case of young adults who had not yet founded a family of their own, their relationship with their parents and other close family members also constituted "family life" (see e.g. ECtHR, *Maslov v. Austria*, No. 1638/03, 23 June 2008).

A Dublin transfer may also impact on other rights which derive from the Charter. One could image, for example, a situation in which a child who is traumatised for having lost one of his parents and is under longer-term medical treatment in a Member State which is not the one responsible to examine his or her application under Dublin. In exceptional circumstances, the right to healthcare in Article 35 of the Charter combined with Article 24 may require the Member State of physical presence to examine the asylum application, when a transfer of the family would mean that the child would be deprived of the specialised psychological healthcare services he or she needs.

Article 47 of the Charter applies whenever its rights or freedoms are violated. The right to appeal a decision in case of a claimed violation of Charter rights does not depend on whether it is formally envisaged by secondary EU law. Already in 2009, in its first decision on the Dublin Regulation, the CJEU noted that the EU did not intend to sacrifice the judicial protection enjoyed by asylum seekers to expedite the processing of asylum applications.[1] Recently, the CJEU has confirmed that applicants are entitled to submit an appeal against a wrong application of the visa criteria in Article 12 of the Dublin Regulation[2] as well as against a wrongful application of Article 19 (2) which provides for the cessation of responsibilities when an applicant has left the Member State responsible for at least three months.[3]

The right to an effective remedy against Dublin transfers is particularly important taking into account that realities on the ground differ significantly between Member States. The CJEU noted that the harmonisation of EU rules applicable to asylum applications "cannot, in itself, result in an interpretation that limits the scope of the remedy" provided for in the Dublin Regulation.[4]

1 CJEU, C- 19/08, *Migrationsverket v. Petrosian*, 29 January 2009, para. 48.
2 CJEU, C- 63/15, *Mehrdad Ghezelbash v. Staatssecretaris van Veiligheid en Justitie*, 7 June 2016.
3 CJEU, C- 155/15, *George Karim v. Migrationsverket*, 7 June 2016.
4 CJEU, C- 63/15, *Mehrdad Ghezelbash v. Staatssecretaris van Veiligheid en Justitie*, 7 June 2016, para. 60.

FRA Opinion 13

Respecting the right to an effective remedy

Time limits must not render the submission of an appeal impossible or excessively difficult. Whether a 7-day deadline to appeal transfer decisions, as envisaged in Article 28 of the proposed recast Dublin Regulation, meets the requirements of an effective remedy under Article 47 of the Charter needs to be examined. The effectiveness of the remedy depends, among other things, on the availability of social, linguistic and legal support which is provided to asylum applicants. Practical arrangements concerning the provision of information, legal and linguistic support to asylum seekers significantly differ between Member States. The wording of Article 28 of the proposed recast Dublin Regulation should be adjusted to provide Member States a certain degree of flexibility in determining the deadline to appeal; as otherwise the right to an effective remedy may not be considered effective.

The right to an effective remedy applies any time the rights and freedoms under the Charter are violated. Restricting the possibility to appeal an administrative decision only if it violates some Charter articles but not others would not be compatible with its Article 47. Article 28 (4) of the proposed recast Dublin Regulation should either be deleted or brought in line with Article 47 of the Charter.

4. BEST INTERESTS OF THE CHILD

Article 8 of the proposed amendments to the Dublin Regulation underlines that the "best interests of the child shall be a primary consideration for Member States" with respect to all Dublin-related procedures. The best interests of the child principle applies to unaccompanied as well as children accompanied by their parents.

To give primary consideration to the best interests, they need first to be assessed. The best interests of the child depend on the degree to which the child can enjoy the rights set forth in the Convention on the Rights of the Child. This includes, but is not limited to the child's safety (see Articles 19, 32, 33, 34, 35, 36, 37 and 38 of the CRC), family unity (Articles 9, 10 and 18 of the CRC) and the physical, mental, spiritual, moral, and social development of the child (e.g. Articles 23, 24, 27, 28 and 31 of the CRC). The Committee on the Rights of the Child underlined that there is no hierarchy of rights in the Convention and that all the rights provided for therein are in the "child's best interests".[1] In addition, the assessment must give due weight to the views of the child in accordance with his/her age and maturity.

This section examines different aspects of the proposed changes that relate directly to the best interests of the child. It examines the following aspects: the rules to allocate responsibility for unaccompanied children; the procedure for the formal best interests assessment; the operation of the corrective allocation system on unaccompanied children; the fundamental rights implications of disallowing late evidence on the presence of family members; and the restrictions to the discretionary power of Member States.

4.1. Respecting the best interests of unaccompanied children who do not have family members in the Dublin area

One of the underlying principles of the Dublin system is to promote the reunification of unaccompanied children with their families. Therefore, the basic rule is that applications submitted by unaccompanied children must be assessed by the Member State where family members are legally residing, unless this is not in the best interests of the child. The proposed changes to the Dublin Regulation further strengthen this basic rule by expanding the definition of family members to include also siblings and to cover families which were formed while the applicant was on the way to the EU.

In the absence of any family members, responsibility to examine an asylum application of an unaccompanied child lies with the Member State where the child submitted the application, provided that it is in the best interests of the child.[2]

Under the current system, in those situations where an unaccompanied child with no member of his/her family legally present in the territory of a Member State has lodged asylum applications in more than one Member State, the CJEU clarified that "the Member State in which that minor is present after having lodged an asylum application there is to be designated the 'Member State responsible'".[3] Referring to Article 24 (2) of the Charter and to the best interests of the child principle, the CJEU considers it important "not to prolong unnecessarily the procedure for

---

1 UN Committee on the Right of the Child, General Comment No. 14 (2013), para. 4.

2 Dublin Regulation (EU) No. 604/2013, Article 8 (4). This rule remains unchanged, see proposed amendments to Article 10 (5).

3 CJEU, C-648/11, *MA and Others v. Secretary of State for the Home Department*, 6 June 2013.

determining the Member State responsible, and to ensure that unaccompanied minors have prompt access to the procedures for determining refugee status."[1]

Article 10 (5) of the proposed recast Dublin Regulation departs from this position and provides that in the absence of family members or relatives, the responsibility to examine the asylum application lies with the Member State where the applicant *first* lodged his or her claim (and not the Member State where the applicant is physically present), "*unless it is demonstrated* that this is not in the best interests of the minor."

To comply with Article 3 of the CRC and Article 24 of the Charter, the responsibility to examine applications submitted by unaccompanied children who have no family or relatives in any of the Member States must be determined giving a primary consideration to what is in the best interests of the child. The expression "primary consideration" means that the child's best interests may not be dealt with on the same level as all other considerations but must be given greater weight.[2] It is in this line of reasoning, that the Dublin Regulation makes the allocation of responsibility to examine an asylum claim subject to "the best interests of the minor".

In light of the importance of the time factor for children, it will normally be in the best interests of the child to have his or her application decided as swiftly as possible, provided the procedural safeguards required to ensure a fair procedure are respected. As the Committee on the Rights of the Child has underlined, delays in or prolonged decision-making have particularly adverse effects on children recommending that procedures or processes concerning children be completed in the shortest time possible.[3] Therefore, delays to the assessment of the claim in its merits which are caused by Dublin transfers would normally weigh against considering a transfer of the child to the Member State where he or she first applied for asylum.

Taking into account the vulnerability of unaccompanied children, it is difficult to imagine how transfers back to the country of first application could be in the best interests of the child, apart from situations in which the child would face protection risks and gaps which are substantially higher in the Member State of physical presence.

A rationale for keeping the responsibility with the Member State where the unaccompanied child first applied for international protection could be to discourage unaccompanied children to expose themselves to the risks of moving to another Member States in an irregular manner. However, such objective should be pursued by enhancing reception conditions of unaccompanied children in Member States of first arrival and by ensuring effective guardianship systems there. The ECtHR has pointed out that the "child's extreme vulnerability is the decisive factor and takes precedence over considerations relating to the child's irregular migration status".[4]

---

1 CJEU, C-648/11, *MA and Others v. Secretary of State for the Home Department*, 6 June 2013, paras. 55-61.
2 UN Committee on the Right of the Child, General Comment No. 14 (2013), para. 37.
3 UN Committee on the Right of the Child, General Comment No. 14 (2013), para. 93.
4 ECtHR, *Tarakhel v. Switzerland,* No. 29217/12, 4 November 2014, para. 99.

FRA Opinion 14

Respecting the best interests of unaccompanied children without family members in the Dublin area

Unaccompanied children are a particularly vulnerable category of asylum applicants in need of special protection. To comply with Article 24 (the rights of the child) of the Charter and with the requirements of the UN Convention on the Rights of the Child (CRC), asylum applications submitted by unaccompanied children without family members or relatives in any of the Member States should be examined in the country where it is in the best interests of the child. In most cases, this will be in the Member State where the child is physically present to avoid any delay in the status determination process caused by a transfer according to the Dublin Regulation. Only exceptionally would such transfer be in the child's best interests. This would be the case, where the child's protection situation in the first Member State of application enables the child to better enjoy the rights enshrined in the CRC.

Building on the case law by the Court of Justice of the European Union (CJEU), the EU legislator should not add the word 'first' in Article 10 (5) of the proposed recast Dublin Regulation. In the same article of the proposal, the wording 'unless it is demonstrated' could be changed to 'unless it is determined/assessed', thereby aligning it with the formal best interests assessment in Article 8 (4) of the proposal.

4.2. Applying fair procedures to best interests assessment

Article 8 of the proposed recast Dublin Regulation requires a formal assessments of the best interests of the child before transferring an unaccompanied child. Such assessment must be carried out swiftly by staff with the necessary child protection qualifications and expertise. This is an important child protection safeguard to prevent that unaccompanied children may be transferred to situations in which they are exposed to protection risks. Article 8 (3) includes an inclusive list of factors to consider when assessing the best interests which are based on the rights included in the CRC.

Understanding what weight to give to the different factors to consider during the assessment requires different types of expertise.[1] Nevertheless, the proposed wording does not exclude that the assessment could be carried out by one single person. In addition, it does not define the role of the guardian in this assessment.

FRA Opinion 15

Applying fair procedures to best interests assessment

The formal assessment of the best interests of the child envisaged in Article 8 (4) of the proposed recast Dublin Regulation is an important child protection safeguard which derives from Article 3 of the UN Convention on the Rights of the Child (CRC).

To ensure an adequate assessment of the child's best interests, the future regulation should provide that a multi-disciplinary team undertakes these assessments and that the child's guardian be heard.

4.3. Verifying family links of unaccompanied children before allocating them to another Member State

Article 34 of the proposed recast Dublin Regulation envisages a corrective allocation mechanism in support of Member States confronted with a disproportionate number of applications for international protection. The recast proposes a system to determine the amount of asylum applications for each Member State. When this amount is exceeded by 150 %, new applicants are distributed among other Member States based on the allocation mechanism. The Member State of allocation is determined automatically by a computer.

The allocation mechanism will cover all applications, except those which are declared inadmissible or examined in an accelerated procedure in accordance with Article 3 (3) of the proposed recast Dublin Regulation. The allocation mechanism covers also unaccompanied children.

Unaccompanied children are at heightened risk of abuse and exploitation and may go missing. For them, the Member State of allocation should only be determined after having verified possible family reunification possibilities in other Member States. This is important also to avoid repeated transfers of unaccompanied children.

[1] UN Committee on the Right of the Child (2013), General Comment No. 14, paras. 46 and 94. See also UN High Commissioner for Refugees (UNHCR) and UNICEF, *Safe & Sound: what States can do to ensure respect for the best interests of unaccompanied and separated children in Europe*, October 2014.

FRA Opinion 16

Verifying family links of unaccompanied children before allocating them to another Member State

To reduce the risk of abuse and exploitation of unaccompanied children or of them going missing, a special scheme should be established for the transfer of unaccompanied children to Member States based on the proposed corrective allocation mechanism (Chapter VII of the proposed recast Dublin Regulation). In line with Articles 7 (the right to respect for private and family life) and 24 (the rights of the child) of the Charter, such scheme should consist first in assessing the possibility of family reunification in another Member State before transferring the child to the Member State of allocation.

4.4. Allowing a change of responsible Member State in case of new information on family members

Under the proposed new Dublin system, the Dublin criteria to allocate responsibility will be applied only once (Article 9 of the proposed recast Dublin Regulation) and a Member State will remain responsible also for future applications, even when the applicant left or was removed from the EU (Article 3 (5) of the proposed recast Dublin Regulation). This means that as soon as the responsible Member State is determined, no further changes are possible. Furthermore, the proposal establishes strict deadlines that need to be complied with to complete the Dublin procedure.

A definitive determination of the responsible Member State will avoid protracted procedures. At the same time, when family members are found after the moment where a Member State has been determined as responsible to examine an asylum claim, such definitive allocation of responsibility will pre-empt family reunification possibilities. During the evaluation of the Dublin Regulation some Member States noted that there is too little time for family tracing, with Germany saying that five weeks are needed.[1] The requirement under Article 24 (1) of the proposal to submit a Dublin take charge request within one month (or two weeks in case of a database hit) further exacerbates the effects of a definitive allocation of responsibility. The evaluation report of the Dublin Regulation concluded that efforts to trace family members are only done when there is hard evidence,[2] which indicates that more time is necessary for applicants to be able to collect and submit such evidence.

A blanket deprivation of family reunification possibilities for all cases where the responsible Member State has already been determined may be difficult to reconcile with the right to respect of family life and the rights of the child as laid down in Articles 7 and 24 of the Charter. Such impact can be disproportionate particularly in relation to unaccompanied children for whom there is a strong obligation deriving from the principle of the best interests of the child included in Article 24 of the Charter to trace the family and swiftly reunite the child with his or her parents.

1 ICFI, *Evaluation of the implementation of the Dublin III Regulation*, Final Report, March 2016, p. 29.
2 ICFI, *Evaluation of the implementation of the Dublin III Regulation*, Final Report, March 2016, p. 27.

FRA Opinion 17

Allowing a change of responsible Member State in case of new information on family members

The right to respect for private and family life enshrined in Article 7 of the Charter and Article 8 of the European Convention on Human Rights (ECHR) encompasses the right of family members to live together. Any definitive allocation of a Member State responsible for the asylum claim under the Dublin system, which remains binding for the future (and thus risks a blanket deprivation of family reunification possibilities), should allow for exceptions to bring family members together. In light of the rights of the child as laid down in Article 24 of the Charter, this is particularly important for unaccompanied children and children whose parents are in two different Member States. Articles 3 (5) and 9 of the proposed recast Dublin Regulation should be adjusted to oblige a Member State to examine and give priority to the criteria set out in Articles 10 to 13 of the proposal.

4.5. Keeping Member State's discretion in case of humanitarian considerations not linked to family life

Under Article 17 of the current wording of the Dublin Regulation a Member State can accept the responsibility to examine an asylum application also if according to the Dublin criteria another Member State would be responsible (sovereignty clause). Similarly, a Member State may ask another to take charge of the applicant "in order to bring together any family relations, on humanitarian grounds based in particular on family or cultural considerations" even where that other Member State would otherwise not be responsible (humanitarian clause).

In Article 19 of the proposed recast Dublin Regulation, the proposal limits such discretionary clause in different ways. First, its use will be allowed only as long as no Member State has been determined as responsible to examine the application. Second, it allows Member States to use this discretionary clause themselves or to request another Member State to agree to take responsibility only to keep or to bring wider family members together.

There may be other rights-based reasons than family grounds that warrant a departure from the standard Dublin criteria, some of which contribute to avoid hardship cases affecting children. Member States should have the possibility to declare themselves responsible to examine applications on medical grounds, when the mobility of applicants is seriously limited or where a transfer to another Member State would mean an interruption in healthcare services which could put the applicant at risk (for example, if a successful psychological therapy of a traumatised child needs to be interrupted).

While humanitarian considerations can be relevant for all applicants, they impact on children more than on others leading to possible violations of their CRC rights. Under Article 24 of the Charter, Member States are under an obligation to fulfil the right of a child to such protection and care as is necessary for his or her well-being and to give primary consideration to the best interests of the child. This principle equally applies to children who are accompanied by their families. Member States should therefore not be put in a position which would prevent them to take responsibility when this would be in the best interests of the child.

Finally, Article 3 (5) of the proposed recast Dublin Regulation, discussed in the previous point, would make the Member State who has examined a past asylum application responsible also for future applications ("further representations or a subsequent application") submitted by applicants who returned to the EU after having been removed following a negative decision. One could imagine a case where a family is removed from one Member State to their home country after a negative asylum decision and subsequently one parent together with a child obtains a visa to study in another Member State. In case of changes in the country of origin which require them to apply for asylum in the EU, on the basis of Article 3 (5) of the proposal such application would need to be examined by the Member State who removed the family and not by the one where the child and his/her parent are currently living. Article 3 (5) of the proposal would not allow the Member State of application to trigger the Dublin criteria in Chapter III preventing it to take into account the best interests of the child.

The CJEU noted that Member States' discretionary power "forms an integral part of the Common European Asylum System provided for by the [TFEU]".[1] Against this background, Member States should retain the flexibility to declare themselves responsible also on grounds other than family unity considerations.

FRA Opinion 18

Keeping Member State's discretion in case of humanitarian considerations not linked to family life

Article 24 of the Charter requires flexibility by Member States to adjust their actions to respect the rights of the child and to let their best interests prevail. The current discretionary clauses of the Dublin Regulation allow Member States to avoid hardship cases, including cases affecting particularly vulnerable children. The discretionary clauses in Article 19 (and Recital (21)) of the proposed recast Dublin Regulation should enable Member States not only to bring together family relations, but also to assume responsibility for compelling humanitarian reasons. The rules in force should thus remain unchanged. To avoid hardship cases, the discretionary clauses should remain applicable also after a Member State has been declared as responsible for the asylum claim.

[1] CJEU, Joined Cases C-411/10 and C-493/10, *N.S. v. Secretary of State for the Home Department and M.E. and Others v. Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, 21 December 2011, para. 65.

5. CORRECTIVE ALLOCATION MECHANISM AND FUNDAMENTAL RIGHTS

The proposed changes to the Dublin Regulation envisage the creation of a new EU-level database which will store selected personal data of each asylum applicant (see Section 5.1). It establishes a centralised registration and monitoring system, where all asylum applications lodged in the Dublin area are registered under a unique identification number. The database serves to monitor the share of asylum applications in each Member State and trigger the corrective allocation mechanism to support Member States when they reach 150 % of their share.

The processing of personal data must comply with the requirements of Articles 8 and 52 (1) of the Charter. This includes that personal data must be processed fairly for specific purposes. The processing is only allowed if it respects necessity and proportionality requirements, and everyone has the right to access the data collected on him or her and to have it rectified. The database to manage the corrective allocation mechanism – referred to as automated system – covers all applicants including children.

This section looks at data protection issues linked to the establishment of the automated system as well as with the impact of security checks by the Member State of allocation on children. It complements the opinion by the European Data Protection Supervisor issued in September 2016, which FRA fully supports.[1]

5.1. Reducing the risk of information leaks to persecutors

Under the proposed changes to the Dublin Regulation, each Member State in which an asylum application is lodged must enter selected personal data in the automated system (Article 22). Such data include a unique identification number for each applicant, a link to the application of family members and relatives traveling together, the Eurodac reference number, the existence of a security or public order alert as well as other information needed to determine the Member State responsible, such as hits in the Visa Information System or past Eurodac hits (Article 23 (2)). The European Data Protection Supervisor found that the exhaustive list of data stored in the electronic file "appears *prima facie* proportionate" to the purpose of the Dublin Regulation; he also highlighted, however, that it could be used for profiling purposes, which should not be allowed as it would run against the principle of purpose limitation in Article 8 (protection of personal data) of the Charter.[2]

[1] European Data Protection Supervisor, *Opinion 07/2016, EDPS Opinion on the First reform package on the Common European Asylum System (Eurodac, EASO and Dublin regulations)*, 21 September 2016.

[2] European Data Protection Supervisor, *Opinion 07/2016, EDPS Opinion on the First reform package on the Common European Asylum System (Eurodac, EASO and Dublin regulations)*, 21 September 2016.

In addition to the centralised registration and monitoring system, an asylum seeker's biometric and personal data, including name, nationality, sex, place and date of birth and travel document details will in future be stored in Eurodac, which currently only includes fingerprints.[1] Taken together, the data stored in Eurodac and in the centralised registration and monitoring system set up by the proposed recast of the Dublin Regulation will allow to obtain a comprehensive picture of who and where one applied for asylum during the last 10 years.

The Snowden revelations in the spring of 2013 marked a turning point in discussions on data protection. The existence of a central place where personal data of all asylum seekers are stored can be extremely attractive to countries of origin who may be looking, for example, for the whereabouts of their political dissidents.

FRA Opinion 19

Reducing the risk of information leaks to persecutors

Abusive access to personal data stored in the centralised registration and monitoring system as well as Eurodac by the country of origin would undermine the right to asylum enshrined in Article 18 of the Charter. It may expose family members, including children, who remained in the country of origin to acts of retaliation to force dissidents to come back home.

The EU legislator should carefully assess whether the proposed safeguards concerning data security, data sharing and data retention included in the proposed recast of the Dublin and Eurodac regulations (e.g. Articles 23, 47 and 50 of the proposal as well as corresponding Articles of the Eurodac proposal) are sufficient to protect asylum applicants and their families in their countries of origin. The centralised registration and monitoring system, as well as the Eurodac database, need to be immunised against unlawful access to personal data stored therein by countries of origin.

5.2. Not retaining data on children longer than necessary

According to Article 23 (4) of the proposed recast Dublin Regulation read together with Article 17 (1) of the amendments to the Eurodac Regulation, an asylum seeker's personal data included in the automated system will be stored for 10 years, the same period as for data stored in Eurodac. Given that the purpose of the automated system is to manage and monitor the allocation of responsibility to examine asylum applications, a shorter retention period would appear sufficient – also in light of the fact that there is already a tool to establish if an applicant has submitted an application for international protection in the past, namely Eurodac.

[1] European Commission, *Proposal for a Regulation of the European Parliament and of the Council on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of [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], for identifying an illegally staying third-country national or stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes (recast)*, Brussels, 4 May 2016, COM(2016) 272 final, Article 14 (2) of the proposal.

The information stored in the automated system will be accessible also to authorities other than asylum agencies, as these are responsible for fulfilling the obligations arising under the Regulation. The list of responsible authorities under Article 35 (2) of the existing Dublin Regulation includes, for example, police, border guards or aliens police in some Member States.[1] For example, data stored on children will therefore be visible to these authorities for a period of 10 years, including a possible security flag stored in the automated system when the applicant applied for asylum as an unaccompanied child.

In the field of criminal law, standards have been developed to give children with criminal records a realistic opportunity of rehabilitation and social reintegration by keeping their criminal records strictly confidential and/or avoiding that they be used in adult proceedings in subsequent cases involving the same offender.[2] In conformity with these principles, many Member States erase or mask the records of previous convictions upon reaching the age of maturity.[3] The same protective approach should be followed with regard to security alerts stored in the automated system as they can negatively affect the child's future.[4] As soon as the Member State responsible to examine the application is defined, there seems to be no clear need to keep this data, which under Article 52 (1) of the Charter can only be stored if it is necessary to meet a genuine objective of general interest.

FRA Opinion 20

Not retaining data on children longer than necessary

The storage of data in the automated system for 10 years in Article 23 (4) of the proposed recast Dublin Regulation appears too long and lacks flexibility, especially with regard to children's data, and may raise serious issues of necessity and proportionality. Once the responsible Member State has been determined, security alerts entered into the system against children should be revisited as soon as the child reaches majority, and deleted if no longer relevant.

---

1 See the authorities responsible for fulfilling the obligations arising under Regulation (EU) No. 604/2013, OJ C 55, 14.2.2015, pp. 5–9.

2 Council of Europe (1984), Committee of Ministers, *Recommendation on the Criminal Record and Rehabilitation of Convicted Persons*, No. R(84)10, 21 June 1984, Section I. (5); United Nations (1985), *Standard Minimum Rules for the Administration of Juvenile Justice ('The Beijing Rules')*, General Assembly resolution 40/33 of 29 November 1985, Rule 21; UN Committee on the Right of the Child (2013), General Comment No. 10: Children's Rights in Juvenile Justice.

3 See FRA, *Opinion of the European Union Agency for Fundamental Rights concerning the exchange of information on third-country nationals under a possible future system complementing the European Criminal Records Information System*, December 2015, p. 21.

4 See ECtHR, *S. and Marper v. the UK* [GC], Nos. 30562/04 and 30566/04, 4 December 2008, para. 124.

5.3. Requiring rejections by Member States of allocation to be individually justified

Under the corrective allocation mechanism, the Member State of allocation can undertake a security check and refuse applicants who for serious reasons are considered to be a danger to the national security or public order (Article 40 of the proposed recast Dublin Regulation). The proposal does not require that such serious reasons be specific to the individual concerned. One can imagine, for example, the situation where a Member State is confronted with law enforcement issues affecting a particular profile of third-country nationals and therefore rejects on public order reasons asylum applicants matching this profile. Policies that would result in rejecting applicants solely or predominantly on the basis of their country of origin, religion, sex or age group, for example, would run against the non-discrimination provision contained in Article 21 of the Charter and Article 3 of the UN 1951 Geneva Convention.[1]

Furthermore, there is no obligation for the Member State to put on record the reasons for rejecting an asylum applicant, which the system would have allocated. This makes it difficult to establish whether the rejection was based on grounds that would be contrary to the principle of non-discrimination.

FRA Opinion 21

Requiring rejections of allocation by Member States to be individually justified

To reduce the risk of a discriminatory application of the national security and public order exception, its application should be limited to cases where there are individualised reasons for considering the applicant to be a danger to the national security and public order. Member States could be required to record the reasons for refusing to accept an asylum applicant and make such records available to the future EU Agency for Asylum. The future EU agency should be given the authority to monitor whether the justifications given comply with the Dublin Regulation requirements, as interpreted in light of the Charter.

[1] See FRA (2010), *Towards More Effective Policing, Understanding and preventing discriminatory ethnic profiling: A guide*; FRA and European Court of Human Rights (2011*), Handbook on European non-discrimination law*, Luxembourg, Publications Office of the European Union.

5.4. Preserving family life when applying the corrective mechanism

Article 8 of the Charter provides that "everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified." Under Article 6 (1) (h) of the proposed recast Dublin Regulation, applicants must be informed of their right to access their personal data and that it be corrected, if inaccurate. Article 6 is included in Chapter II (General Principles and Safeguards) and hence applies to all personal data processed under the Dublin Regulation, including through the automated system. Inaccurate data could concern different aspects, such as incorrect unique identification number, incorrect data on past visas or Eurodac hits or on family links.

Incorrect data on family relationships stored in the automated system may lead to a split of the family, with family members being allocated to different Member States. Putting in place an effective way to rectify incorrect data is therefore of utmost importance, not only to comply with Article 8 of the Charter but also to avoid unjustified interferences in the right to respect for family life.

Applications submitted by *family members and relatives who travel together* will be linked in the automated system as in Article 22 (1) of the proposed recast Dublin Regulation. Article 41 (2) of the proposal requires that *family members* subject to the allocation mechanism must be allocated to the same Member State. These provisions implement into the corrective allocation system the right to respect for family life guaranteed by Article 7 of the Charter.

There is, however, a distinction between *family members and relatives* used in Article 22 (1) and *family members* used in Article 41 (2) of the proposal. The ECtHR uses a broad definition of family which also encompasses other relatives than those listed under Article 2 (g) of the proposed recast Dublin Regulation.[1] Designing a system that would assign family members not covered by the family definition used in the Dublin Regulation randomly without a valid justification would raise issues under the Article 7 of the Charter. It may also undermine the aim of facilitating the integration of people granted international protection, as reflected in the Qualification Directive.[2]

Finally, the proposed automated system does not envisage a duty to link the applications of family members who do not travel together. Asylum seekers' families may be split during the travel. Boats in distress at sea may be saved by different rescue vessels and brought to different locations, which could result in family members not being together when they apply for asylum. Where information about other family members applying for asylum is known, the automated system should be updated to reflect family links and facilitate the allocation of the family members to the same Member State.

---

1 See footnote 3.

2 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, OJ 2011 L 337, pp. 9-26, Article 34 read in conjunction with Recital (41).

FRA Opinion 22

Preserving family life when applying the corrective mechanism

Taking into account that the right to respect for family life as enshrined in Article 7 of the Charter also applies to extended family members, the duty to allocate family members to the same Member State under Article 41 (2) of the proposed recast Dublin Regulation should also cover 'relatives' as reflected in Article 22 (1) of the proposal.

The obligation to allocate family members to the same Member State should also apply to family members who are in the same Member State but did not travel together. This could be done by requiring Member States to record such family links by updating the automated system. Consideration could be given to including a special alert for applicants who indicate that they have family members in another Member State, as this could enable the Member State of allocation to follow up immediately.

2. ANNEX: TIME LIMITS FOR APPEALING A DUBLIN TRANSFER IN 21 EU MEMBER STATES (SOURCES)

Note: Time limits expressed in domestic legislation in weeks or months have been translated into days. Not all details are reflected (for example whether it refers to working or effective days). In case two different appeals are possible according to national legislation, only one was chosen for the table.

Sources (starting with the shortest deadline):

- **Hungary** (1 Nov 2015) Section 49(7) Asylum Act, http://njt.hu/cgi_bin/njt_doc.cgi?docid=110729.259725;
- **Malta** (31 August 2015) Article 25A (7) Immigration Act, http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8722&l=1;
- **the Netherlands** (30 Sept 2015) Article 69 Aliens Act, http://www.legislationline.org/documents/id/4680;
- **Germany** (16 Nov 2015) Section 34a of the Asylum Act, http://www.gesetze-im-internet.de/asylvfg_1992/index.html;
- **Bulgaria** (30 Sept 2015) Article 84 of the Law on Asylum and Refugees, http://www.aref.government.bg/?cat=25;
- **Croatia** (November 2015) Article 60(6) Law on Asylum, https://www.mup.hr/UserDocsImages/engleska%20verzija/2014/Asylum_Act_13.pdf;
- **Austria** (1 October 2016) Article 16 of the Federal Office Procedure Act Federal Law Gazette (FLG) I No. 87/2012, as amended by FLG No. 86/2013, http://www.unhcr.at/no_cache/english/austrian-asylum- l egislation.html?cid=4731&did=10676&sechash=e8039f8c;
- **United Kingdom** (30 September 2015): no appeal on asylum grounds; Asylum and Immigration (Treatment of Claimants, etc.) Act (AITOCA) 2004 Schedule 3 Part 2, http://www.legislation.gov.uk/ukpga/2004/19/contents; only human rights appeal 14 (in-country)/28 (out-of-country) calendar days, Rule 19 (2) The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 (S.I. 2014 No.2604 (L.31)), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/367129/immigration-asylum-chamber-tribunal-procedure-rules.pdf;
- **Poland** (13 Nov 2015) Article 129/2 of the Code of Administrative Procedure of 14 June 1960, https://ec.europa.eu/digital-single-market/printpdf/60967;
- **Czech Republic** (1 October 2016) Section 32 paragraph 1 of the Asylum Act, http://www.mvcr.cz/mvcren/article/asylum-migration-integration-asylum.aspx?q=Y2hudW09NA%3d%3d.;
- **Ireland** (October 2015) Section 6 of S.I. No. 525 of 2014, http://www.irishstatutebook.ie/eli/2014/si/525/made/en/print;
- **France** (27 Nov 2015) Article L.742-4 Code of Entry and Residence of Foreigners and of the Right to Asylum, as modified by Law n. 2015-925 of 29 July 2015 on the reform of asylum law, as amended by the Law of 29 July 2015, https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070158&dateTexte=20130416);
- **Greece** (30 September 2015) Article 25(1)(b) PD 113/2013, http://www.refworld.org/docid/525e84ae4.html);

- **Latvia** (1 October 2016) Art. 48 para. 4 subsection 1 of the Asylum Law of 19 January 2016, http://www.vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/Asylum_Law.pdf;
- **Slovakia** (1 October 2016) Section 211 paragraph 2 of the Law no.162/2015, http://www.zakonypreludi.sk/zz/2015-162#cast3);
- **Cyprus** (27 November 2015) Article 28ΣΤ(2) Refugee Law, http://www.cylaw.org/nomoi/enop/non-ind/2000_1_6/full.html;
- **Sweden** (5 December 2015) Section 23 Administrative Law (*Förvaltningslagen*), https://www.kriminalvarden.se/globalassets/om_oss/lagar/forvaltningslagen-engelska.pdf);
- **Finland** (1 October 2016) Section 22 of the Administrative Judicial Procedure Act, http://www.finlex.fi/en/laki/kaannokset/1996/en19960586.pdf);
- **Belgium** (18 Nov 2015) Article 39/57-para 1 Aliens Act, https://dofi.ibz.be/sites/dvzoe/FR/Documents/19801215_F.pdf);
- **Spain** (18 April 2016) administrative appeal 1 month (*Article 117 Ley 30/1992, de 26 de noviembre, de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común* https://www.boe.es/buscar/act.php?id=BOE-A-1992-26318) and judicial appeal on the merits of the claim 2 months (*Article 46 (1) Ley 29/1998, de 13 de julio, reguladora de la Jurisdicción Contencioso-administrativa*), http://noticias.juridicas.com/base_datos/Admin/l29-1998.t4.html#a46);
- **Italy**, (1 October 2016) Article 29 *Codice del Processo Amministrativo*, *Decreto legislativo No. 104*, 2 July 2010, Official Gazette, 7 July 2010.