



Analysis

The revised 'Dublin' rules on responsibility for asylum-seekers: a missed opportunity

Steve Peers
Professor of Law, Law School, University of Essex

Introduction

As part of the project to create a 'Common European Asylum System', the EU adopted legislation between 2003 and 2005 on four key issues: the definition (ie, 'qualification') for refugee status; asylum procedures; reception conditions for asylum-seekers (dealing with issues like their welfare and employment); and the allocation of responsibility for asylum-seekers between Member States (known as the 'Dublin' rules). The Dublin rules in principle require asylum-seekers to apply in one Member State only; that Member State is determined by those rules.

These measures were considered to form the 'first phase' of the Common European Asylum System, and the EU's Hague Programme, which set out an agenda for the development of EU Justice and Home Affairs Law from 2005-2010, set the objective of adopting legislation establishing the second phase of the Common European Asylum System by 2010. This deadline was later extended to 2012, but obviously even this later deadline will soon expire.

The European Commission then tabled in 2008 and 2009 proposals to revise all of the four key measures referred to above. All are subject to the 'ordinary legislative procedure' of the EU, which gives the European Parliament (EP) and the Council equal powers over the adoption of the legislation. The EP and the Council agreed in mid-2011 on the revision of the Qualification Directive, which was then officially adopted in November 2011. Subsequently, in March and May 2012 respectively, the Member States' representatives to the EU (known as 'Coreper') agreed in principle on the texts of the revised Directive on reception conditions, and on the revised asylum procedures Directive. The final text of the former Directive is currently being negotiated between the Council and the EP, and

negotiations between the Council and EP on the text of the latter Directive will start shortly.

Shortly before Easter, Coreper also agreed on the proposed 'Dublin III' Regulation, which sets out a revised set of rules on responsibility for asylum-seekers' applications. The final text of this Regulation has now apparently been negotiated between the Council and the EP, although the issue of 'comitology', ie the procedural rules for the adoption of measures implementing the Regulation, still has to be negotiated. To what extent will this text change the current rules on this issue, which have frequently been highly criticised?

Background

The EU's Member States first agreed on rules regulating responsibility for asylum-seekers in 1990 in the form of an international treaty, known in practice as the 'Dublin Convention'. That Convention entered into force on 1 September 1997. It was replaced by Regulation 343/2003 (known in practice as the 'Dublin II' Regulation), as from 1 September 2003. The 2012 Regulation will replace the 2003 Dublin II Regulation six months after its formal adoption. So if the new Regulation is adopted officially in autumn 2012, it will apply from sometime in spring 2013.

The Dublin rules are closely linked to a system known as 'Eurodac', operational since 2003, which Member States' authorities use (among other things) to compare the fingerprints of asylum-seekers. That system was set up by a Regulation adopted in 2000. The Commission also proposed to amend the Eurodac Regulation in 2008, and amended that proposal in 2009, 2010 and 2012. Discussions have now restarted in the Council following the most recent proposal.

Also, the Dublin (and Eurodac) rules have a wider geographical scope than other EU asylum law measures. They apply not only to all Member States, including the UK, Ireland and Denmark (by virtue of a treaty between the EU and Denmark), but also to the four non-EU States associated with the EU's 'Schengen' rules on abolition of border controls: Norway, Iceland, Switzerland and Liechtenstein. So 31 States will be bound by the new rules. They will also apply immediately to Croatia once that State joins the EU (its intended accession date is 30 June 2013, which is probably just after the 2012 Regulation will become applicable).

Substance

As noted in the previous Statewatch analysis of the Member States' preferred text of the revised Dublin rules, the Member States agreed to extend the scope of these rules to applications for 'subsidiary protection' (ie protection outside the scope of the UN's 'Geneva' Convention on refugees), and to most of the improvements in the 'efficiency' of the system proposed by the Commission. However, the Member States only accepted the Commission's proposal as regards protection-related issues to a very limited extent. In particular, they watered down the proposed improvements as regards legal safeguards, family reunion, and vulnerable persons. They also completely rejected the idea of a mechanism to suspend transfers to those Member States which were unable (largely due to the Dublin rules

themselves) to manage the influx of asylum-seekers into their territory - even though both the European Court of Human Rights and the EU's Court of Justice ruled in 2011 (in, respectively, the cases of *MSS v Belgium and Greece* and *NS and ME*) that Greece has systematically failed to observe its obligations as regards the reception conditions and procedural rights as set out in EU law, the European Convention of Human Rights (ECHR) and the Geneva Convention on Refugee Status. The result of these rulings have been the suspension of transfers of asylum-seekers to Greece from other Member States. Instead, Member States could only agree on an 'early warning mechanism' which would not affect the application of the Regulation as such (Article 31 of the final text). To what extent was the EP able to improve this situation?

First of all, the Member States wanted to weaken the **legal safeguards** proposed by the Commission (compare Articles 4-5 and 25-27 of the proposal to the Council's text, in the third column of the latest document; also the Council had dropped recital 17 in the preamble of the proposal) by: reducing the requirements to give information to asylum-seekers, and to notify them of a transfer decision; providing for possible exceptions from the right to a personal interview; removing some provisions requiring Member States to give asylum-seekers sufficient time to appeal; removing the suspensive effect of a request to suspend a transfer, as well as the obligation to state reasons for refusing such a request; weakening the legal aid provisions; and removing any specific obligations relating to detention conditions and related guarantees.

On these points, the EP convinced the Council to agree that asylum-seekers should be provided with information on the right to request suspension of transfers, and the possibility that the responsibility criteria might be trumped by human rights concerns (see Article 4(1) of the agreed text). The rules on appeal rights (Article 26) were strengthened, to specify that there must be some minimum degree of suspensive effect of an appeal against a transfer; also there must be a reasonable period to request an appeal, sufficient scrutiny of an application and reasons if a request is turned down. On the other hand, the EP has accepted most of the Council text weakening the legal aid provisions proposed by the Commission; only a clause which provided for possibly limiting the legal aid right to cases where the interests of justice so require was dropped.

As for detention (Article 27), while the Council's text only made a general reference to international and EU law as regards these issues, the EP convinced the Council to add a precise obligation to comply with the detention standards in the EU's reception conditions Directive (see also the final versions of recitals 9 and 18 in the preamble to the Regulation). The final text therefore confirms that the other Directive applies generally to persons subject to the Dublin rules - an issue which will soon be addressed by the EU's Court of Justice (see the pending Case C-179/11 *CIMADE and GISTI*; an Advocate-General's opinion in May confirmed that the Directive does apply to Dublin cases). Indeed, the reference to the detention rules in that Directive in the main text of this Regulation appears to subject the UK, Ireland and Denmark, along with the Schengen associates, to those rules - even though the Schengen associates and two Member States (Ireland and Denmark) are not subject to the current reception conditions Directive (and the UK will not be subject to the revised Directive). Furthermore, the EP convinced the Council to

add detailed time limits on detention in Dublin cases, and tightened up the grounds for detention a little (specifying that a risk of an asylum-seeker absconding must be 'established', and re-inserting the definition of 'risk of absconding' proposed by the Commission).

Next, as regards the rules on **family reunion**, the EP accepted the Council's weakening of the proposed new wider definition of 'family members', ie married minor children and siblings remain outside the scope of the definition. Also, the EP accepted that Council's rejection of the proposal that the *most recent* application for asylum should be decisive as regards the operation of the family reunion clauses, stating instead that the most recent application should be 'take[n] into consideration', moreover in fewer cases than the Commission had proposed (Article 7(3)).

Next, the Council's text had weakened the proposed rules on **vulnerable persons** by: reducing the number of new protections for children; cutting back the scope of the proposed changes on unaccompanied minors; pushing the new clause on responsibility for dependent family members from near the top of the hierarchy of responsibility criteria to the very bottom (compare Art. 11 of the proposal to Art. 16A of the Council's text); weakening the remaining humanitarian clause; and dropping a proposed ban on transferring asylum-seekers who are not fit to travel.

The EP convinced the Council to improve these provisions by changing the rules in the Council's text as regards: unaccompanied minors who are married and whose spouses are not legally present (Article 8(1)); unaccompanied minors who can be looked after by aunts, uncles or grand-parents (Article 8(2)); the default rule for responsibility for unaccompanied minors who do not have family members or relatives who can take care of them (Article 8(4)); and the rules on dependent family members (Article 16A) would form a separate rule (as at present), rather than be listed at the bottom of the list of criteria for allocating responsibility (as in the Council's text).

However, in two respects, the EP may have signed up to a text that worsens the current standards. First of all, the new Article 8(4), in conjunction with the new Article 7(3), does not clearly specify that only the unaccompanied minor's *latest* application for asylum is taken into account, whereas a case pending before the Court of Justice - Case C-648/11 *MA* - asks whether the first or latest application by such persons is decisive under the current rules.

Secondly, the humanitarian clause in Article 15(2) of the current Regulation is arguably wider in scope and effect than Article 16A of the 2012 Regulation as agreed between the EP and the Council, because the new provision would only apply specifically to children, siblings and parents, not to relatives more generally, and because the relevant child, sibling or parent must be legally resident under the 2012 rules, whereas no such requirement applies under the 2003 Regulation. The 2012 rules would also require the family member to be able to take care of person concerned, and impose a requirement of consent of the individuals involved, but this is less problematic. Moreover, the new rules also include a clause allocating responsibility on this basis (Article 16A(2)), whereas the current rules do not. Again, the interpretation of the current rules on this issue will soon

be clarified by the Court of Justice (Case C-245/11 *K*, pending; opinion due on 27 June 2012).

Finally, as regards the suspension of transfers, the EP convinced the Council to insert text into the Regulation that reflects exactly the Court of Justice's ruling in the *NS and ME* cases (Article 3(2)). But there will not be a formal procedure for suspending transfers as the Commission had proposed, although the EP did obtain some changes in the rules for an early warning procedure (Article 31), as regards stronger obligations for Member States, an express reference to human rights and a bigger role for the EP.

Conclusion

The EP has had successes as regards the rules on legal safeguards other than legal aid (although this reflects the established case law in the *MSS* judgment), detention (dependent in part upon the final text of the reception conditions Directive), the application of the reception conditions Directive generally to Dublin cases (although this probably simply confirms the status quo), certain categories of unaccompanied minors, and references to the suspension of transfers (although again these rules reflect established case law). On two points (the default rule for unaccompanied minors, and the rules for dependent family members) the current rules have arguably been weakened - although this depends on forthcoming judgments of the Court of Justice.

Taking into account the case law, the overall impact of the 2012 Regulation upon the practical application of the current Dublin rules is likely to be modest. Indeed so much of the agreed changes simply reflect (or try to anticipate) the established case law and likely further case law developments that one can only conclude that the evolution of the Dublin system will continue to depend more on the role of the courts than upon the Council and the EP. Any hope for a more substantial change of this highly criticised system will therefore continue to rest with the judiciary, given that none of the EU institutions were willing to consider a radical reform of the system and the EP could only wrest limited changes from the Council as regards any significant improvement of the rules relating to family members and vulnerable persons.

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