



Analysis

Revising the 'Dublin' rules on responsibility for asylum-seekers: Further developments

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Introduction

As pointed out in previous Statewatch analyses, the EU is in the midst of developing a 'second phase' of its Common European Asylum System. This has involved the adoption of a revised 'Qualification Directive' (on the definition of 'refugee status' and 'subsidiary protection' status in 2011, as well as agreement in principle between the European Parliament (EP) and the Council (of Member States' home affairs ministers) on a revision of the 'reception conditions Directive' (on the treatment of asylum-seekers) in July 2012.

The EP and Council also reached a tentative deal on the revision of the 'Dublin Regulation', which allocates responsibility for asylum-seekers to a single Member State, in June 2012. This was the subject of a detailed Statewatch analysis at the time, which concluded that it was a 'missed opportunity' to reform these flawed rules more fundamentally (see links).

However, for the Member States' permanent representatives to the EU (known as 'Coreper'), this deal was too generous: they objected to the change in rules relating to unaccompanied minor asylum-seekers and to the rules intended to limit the time period of detention of asylum-seekers subject to the Dublin process. Following further talks, the EP and the Council have reached a revised tentative deal, although this is subject to some 'technical' amendments by the Council and further discussions on the procedure for adopting measures implementing the Regulation (known as 'comitology').

Analysis of the revised deal on the Regulation

On unaccompanied minors, the deal reverts (as the Council wished) to the current text of the Regulation: responsibility rests in most cases with the Member State where the unaccompanied minor applied for asylum. However, the current (and future) Regulation does not specify how this rule applies where the unaccompanied minor has applied for asylum in more than one Member State: does the State where the minor first applied for asylum have responsibility, or the State where the minor most recently applied for asylum have responsibility? The point is relevant to cases, for instance, where the minor was first detected crossing a border of or on the territory of a first Member State without authorisation, and felt obliged to apply for asylum there in order to enter or remain in EU territory, but where the minor's real intention (which he or she subsequently acted on) was to apply in another Member State, where he or she believed that there was a greater chance of a successful application or a more welcoming environment.

This part of the deal is accompanied by a declaration which commits the Commission to make a proposal to amend the rules on this point following the judgment of the Court of Justice in a pending case (Case C-648/11 MA) where the English Court of Appeal has asked the Court to rule on exactly this issue. This judgment will most likely be handed down in the first half of 2013. But the Council has only committed itself to consider the possible amendment to the rules, not to adopt it. It should be noted that according to the Commission's report on the application of the Dublin rules, unaccompanied minors make up only 1-2% of the asylum-seekers subject to those rules. Nonetheless, the Council refused to give way on this point. This ball is now (quite literally) in the Court.

On the second issue (detention), the original agreement on the text of the recast Regulation (Article 27) stated that a person could be detained if there was an 'established' risk of absconding. If a person was detained, the Member State detaining the person had one month to ask another Member State to take charge or take back that person, and the requested State would have at most two weeks to reply. The transfer then had to be carried out within one month of the acceptance of that request. If either Member State did not respect these deadlines, the detainee had to be released.

The Council wanted to amend this deal to specify that a 'significant' risk of absconding could justify detention; that there would be two months to carry out a transfer request, rather than one; and that only a breach of the deadlines by the requesting State would lead to release from detention. The revised deal includes the first and third points, and splits the difference on the second point (a six-week deadline to carry out a transfer request), with the added proviso that a failure to answer within its two-week deadline period obliges the requested State to take responsibility. This extra proviso creates an incentive for the requested State to observe its deadline but the breach of that deadline no longer means that the asylum-seeker has to be released from detention. In that case, the detainee will spend an extra

period of up to six weeks in detention (depending on if and when the transfer is then carried out), as compared to the prior deal.

Case law developments

The problematic nature of the Dublin rules is amply illustrated by a recent case considered by the Court of Justice (Case C-245/11 K), where an Advocate-General delivered an opinion in June. (This advisory opinion does not bind the Court of Justice, which has not yet ruled in this case). In this case, a Chechen family obtained asylum in Austria, and the mother-in-law of one of these refugees seeks to join them and apply for asylum herself. Moreover, this case is particularly tragic: the daughter-in-law in question was raped, contracted HIV, has suffered post-traumatic disorder and kidney disease, and is unable to look after her three children, who were taken into care as a result. The mother-in-law not only offers emotional support to the daughter-in-law, but as a trained teacher and child psychiatrist, can look after the children, so they do not have to go into care.

However, the mother-in-law entered the EU via Poland, which makes that country *prima facie* responsible for her claim. Nothing in the EU rules prevents Austria from considering the mother-in-law's asylum claim regardless; that country could invoke a 'humanitarian' exception that was intended to deal with cases like these, but has instead insisted on a strict application of the rules.

The Advocate-General's opinion concludes that despite the facts of the case, Austria is not obliged to consider the asylum claim of the mother-in-law. Her analysis of the legal rules contains some good points, but with great respect, is unconvincing on three issues. First, she fails to consider that Poland might be obliged, as a consequence of the EU's Charter of Fundamental Rights, to request that Austria takes responsibility for this case. Secondly, she misinterprets both the literal wording and (undoubtedly) the underlying intention of the humanitarian rules in the legislation, when she argues that these rules can only apply where a family member is dependent upon an asylum-seeker, but not the other way around. Thirdly, she considers the right of freedom from torture and the right to family life, but fails to consider the rights of the child. Admittedly the national court did not raise the last point, but in a case like this one, the Court of Justice should consider it of its own motion.

Of course, this case should never have arisen at all, because the Austrian officials concerned should have seen the obvious human problems at stake in this case and applied the humanitarian clauses in the law as they were always intended to be used. Even in purely economic terms, ignoring the human misery involved entirely, the cost of dealing with the mother-in-law's asylum application is probably less than the cost of putting three children in care! The underlying problem is that the Dublin rules themselves allow this to happen in the first place and the revised Regulation will still not prevent further cases like these from happening in future.

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Sources

June 2012 Statewatch analysis (with further references):
<http://www.statewatch.org/analyses/no-181-dublin.pdf>

June version of agreed text:
<http://www.statewatch.org/news/2012/jun/eu-council-dublin-II-compromise-11467-12.pdf>

New version of agreed text:
<http://www.statewatch.org/news/2012/jul/eu-council-dublinII-12202-12.pdf>

Exchange of letters between EP and Council:
<http://www.statewatch.org/news/2012/jul/eu-councildublinII-state-of-play-12168-12.pdf>

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