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**SUMMARY REPORT ON THE APPLICATION OF THE
DUBLIN II REGULATION IN EUROPE**

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EUROPEAN LEGAL NETWORK ON ASYLUM

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INTRODUCTION

On 18 February 2003, the European Council adopted the Dublin II Regulation 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.¹ It is a mechanism for allocating responsibility to a single Member State for processing an asylum claim. Similar to its predecessor, the Dublin Convention,² it establishes a hierarchy of criteria for identifying the responsible Member State and aims at ensuring that every asylum claim within the EU is examined by a Member State, as well as preventing multiple asylum claims and secondary movements of asylum seekers within European Union (EU) territory. In order to assist with the identification of third country nationals having lodged claims in other Member States, it was agreed to set up the EURODAC Regulation.³ This requires Member States to record the fingerprints of all individuals having lodged an asylum claim or having irregularly entered their territories, and to forward these to a central database in order to enable comparison.

This report provides a comparative overview of the application of the Dublin II Regulation in 20 Member States. It reveals a number of disturbing trends concerning intrinsic flaws in the Regulation as well as a failure by states to properly implement it. There is evidence that many applicants transferred under Dublin are being denied access to an asylum procedure in the responsible state. At the same time some states are increasingly using detention in order to enforce transfer under the Dublin system. The report also demonstrates the harsh impact of Dublin on separated children and on families by preventing people from joining their relatives. Many states are not opting to use the sovereignty and humanitarian clauses in the Regulation to alleviate these problems, but instead are applying these clauses inconsistently or not at all. States are failing to inform applicants about how the Regulation works or to fully share information with other states, thereby frustrating the effective operation of the Dublin system as a whole. Finally, it has become apparent that many applicants are being denied an effective opportunity to appeal against transfer under Dublin where effected in error or where it would result in violation of states' obligations under international law.

A major motivation for undertaking the report was to provide a coherent analysis in order to inform the Commission's review of the Dublin system, required by March 2006 under Article 28 of the Regulation. This empowers the Commission to propose necessary amendments to the Regulation to the European Council and the European

¹ 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, Official Journal of the European Union, 25 February 2003, L50/1 ('Dublin II'). See ECRE: Comments from the European Council on Refugees and Exiles on the Proposal for a Council Regulation 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, December 2001

² Convention determining the state responsible for examining applications for asylum lodged in one of the Member States of the European Communities of 15 June 1990, Official Journal of the European Union C 254, 19 August 1997.

³ Council Regulation (EC) No 2725/2000 of December 11 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention, Official Journal of the European Union, 15 December 2000, L316/1.

Parliament. This report makes recommendations for immediate action to address the serious shortcomings identified with current arrangements under the Dublin system. In the longer term, ECRE has called for the Dublin II Regulation to be abolished and replaced with an alternative system that ensures genuine responsibility-sharing and fully respects the protection needs of refugees.⁴ ECRE has consistently stressed that no system of allocation of responsibility can work properly or safely without real harmonisation of European asylum systems. While large differences remain in the quality of national asylum systems, recognition rates, and integration capacities from one Member State to another, a ‘protection lottery’ will exist for asylum seekers within Europe. Therefore ECRE’s recommendations on the future of the Dublin system represent one element of a package of proposals related to the future development of a Common European Asylum System as envisaged under the EU’s Hague Programme.⁵

The information contained in the report has been provided by the European Legal Network on Asylum (ELENA)⁶ and other national contributors through written questionnaires. Additionally, the questionnaires were complemented with information from the ECRE Country Reports 2004⁷ and other sources where appropriate. An extended report including individual country tables with more detailed information on the particular application of the Regulation by each individual state is available on the ECRE website.⁸ The extended version also includes more background on the development of the Dublin system, detailed statistical information on certain countries and other additional annexes. The extended report is intended to act as a reference tool for legal practitioners with clients facing transfer under the Dublin system.

⁴ For further information see ECRE, *The Way Forward. Europe’s role in the global refugee protection system. Towards Fair and Efficient Asylum Systems in Europe*, September 2005, Section 3.1, pp. 29.

⁵ The Hague Programme, *Strengthening freedom, security and justice in the European Union*, Annex 1 to the Presidency Conclusions, European Council, 4/5 November 2004. The Hague programme is a five-year programme for closer co-operation in justice and home affairs at EU level from 2005 to 2010. It aims to make Europe an area of freedom, security and justice. The programme’s main focus is on setting up a common immigration and asylum policy for the 25 EU Member States.

⁶ ELENA, the European Legal Network on Asylum, is a forum for legal practitioners who aim to promote the highest human rights standards for the treatment of refugees, asylum seekers and other persons in need of international protection in their daily counselling and advocacy work. The ELENA network extends across most European states and involves some 2,000 lawyers and legal counsellors.

⁷ ECRE Country Report 2004 at www.ecre.org

⁸ www.ecre.org

SUMMARY OF FINDINGS

Section 1 of the report addresses access to an asylum procedure within the Dublin II system. The application of selected provisions of the Regulation by Member States is explored in Section 2. Section 3 considers the practice of detention within the Dublin II procedure. Cooperation and exchange of information between Member States in applying the Regulation is analysed in Section 4. Section 5 focuses on the possibility to appeal against a Dublin II decision to transfer, whilst Section 6 illustrates the experience of Chechen asylum seekers in the Dublin II procedure. The report ends with some concluding comments.

1. ACCESS TO AN ASYLUM PROCEDURE

The Dublin II system is premised on the assumption that a single Member State will take responsibility for the substantive examination of an asylum application. In the Tampere Conclusions⁹ it was emphasised that such a system of allocating responsibility should guarantee effective access to the procedure for determining refugee status in a single Member State and reaffirmed the absolute respect of the right to seek asylum. However, this survey indicates that in reality some Dublin returnees are being denied access to an asylum procedure in the responsible state, the result being that many individuals transferred do not have their asylum claims properly considered. Some may even be denied access to a determination procedure altogether, as is most strikingly evident in the Greek practice of ‘interrupting’ claims. Such state practice is not consistent with the Regulation’s aim and is in conflict with the objective of ensuring full observance of the right to asylum guaranteed by Article 18 of the Charter of Fundamental Rights.¹⁰

1.1 The Practice in Greece

Since early 2004 the Greek authorities have been interrupting the examination of asylum applications for persons who have been returned to *Greece* under the Dublin II procedure.¹¹ The basis of these interruption decisions is Article 2(8) of the Presidential Decree 61/99,¹² which allows the Ministry of Public Order to interrupt the examination of an asylum claim when the applicant ‘arbitrarily leaves his/her stated place of residence’. In practice, the Greek authorities use this provision to ‘interrupt’ the asylum claims of individuals having transited illegally to other Member States and subsequently use this as a justification for denying these individuals access to an asylum procedure when returned to *Greece* under Dublin. The most striking aspect of this practice is that even when Greek authorities have accepted

⁹ European Council, Tampere Presidency Conclusions, 15/16 October 1999, para. 13/14; See also 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 Member State by a third-country national, Preamble, para. 2/3.

¹⁰ Charter of Fundamental Rights of the European Union 2000/C 364/01) Official Journal of the European Communities, C364/1; Dublin II Regulation, Preamble, para. 15.

¹¹ For a full description and analysis of this practice see P.N. Papadimitriou & I.F. Papageorgiou, *The New ‘Dubliners’: Implementation of European Council Regulation 343/2003 (Dublin II) by the Greek Authorities*, Journal of Refugee Studies Vol. 18, No. 3 2005.

¹² For further information on this Article see UNHCR note on access to the asylum procedure of asylum seekers returned to Greece, *inter alia*, under the arrangements to transfer responsibility with respect to determining an asylum claim or pursuant to application of the safe third country concept, November 2004.

responsibility for the asylum claim following a request by another state, an interruption decision is subsequently issued prior to transfer to *Greece*. Thus, when the applicant is returned to *Greece*, upon arrival they are informed of the interruption decision, issued with a deportation order and are detained prior to expulsion.

This practice by the Greek authorities has led to concerns from UNHCR,¹³ NGOs¹⁴ and academics¹⁵ regarding its legality in light of international human rights law and the international obligation of *non-refoulement*. On the basis that *Greece* does not constitute a safe third country, there have been successful challenges to returns to Greece in a number of Member States including *Austria, Finland, France, Italy, the Netherlands, Norway* and *Sweden*.

1.2 The Practice in Other Member States

Similar to the Greek practice, a number of other Member States restrict or deny access to a procedure to individuals returned under Dublin II. Particularly affected are applicants ‘taken back’¹⁶ (having previously left the responsible state) depending on the stage of the procedure reached in the first Member State.¹⁷ This is in contrast to the situation for ‘take charge’¹⁸ cases where Member States appear to respect Article 16(1)(b) of the Regulation, which explicitly requires that the responsible Member State complete the examination of the application for asylum.

Applicants who left the responsible state may find it difficult or impossible to have their cases re-opened if a decision was made in their absence. Many states close a case if the applicant is deemed to have implicitly withdrawn or abandoned an asylum application.¹⁹ This happens in *Belgium, France, Ireland, Italy, the Netherlands* and *Slovenia* and *Spain*. Some states do not allow the re-opening of the case thus leaving the applicant with no option but to try to make a subsequent (second) application. This becomes problematic where a subsequent asylum application is only permitted subject to strict criteria, such as the establishment of new facts or circumstances, as is

¹³ UNHCR News Stories, How a man from Darfur cannot get his asylum claim heard in Europe today, 6 Dec 2005; UNHCR Position on Important Aspects of Refugee Protection in Greece, November 2004; UNHCR, the Dublin II Regulation: Updated Memorandum on the Law and Practice of Greece, 30 November 2005.

¹⁴ Greek Council for Refugees, *Greek authorities’ practice concerning the asylum seekers who are transferred to Greece from other EU countries under Article 13 of Council Regulation 343/2003*, by K. Migirou, Legal Assistance Unit.

¹⁵ P.N. Papadimitriou & I.F. Papageorgiou, *The New ‘Dubliners’: Implementation of European Council Regulation 343/2003 (Dublin II) by the Greek Authorities*, *Journal of Refugee Studies* Vol. 18, No. 3 2005; Skordas and Sitaropoulos, ‘*Why Greece is not a Safe Host Country for Refugees*’, *International Journal of Refugee Law* 2004; 16: 25-52.

¹⁶ This refers to asylum seekers whose application is under examination and who is in the territory of another Member State without permission, or an applicant who has withdrawn the application and made an application in another Member State or a third-country national whose application it has rejected and who is in the territory of another Member State without permission.

¹⁷ For example, pre-initial decision stage on the asylum claim, pre-appeal or following a final refusal decision.

¹⁸ This refers to Member States which are obliged to take charge of an asylum seeker who has lodged an application for asylum in a different Member State under the conditions laid down in Articles 17 to 19 of the Dublin II Regulation.

¹⁹ Actions that indicate abandonment of an asylum claim include not being present for registration at certain intervals of the procedure or at the assigned place of residence within a certain time period.

the situation in **Belgium, Hungary, the Netherlands, Slovenia, Sweden** and the **UK**.²⁰ In reality, most applicants will not have new circumstances since leaving the responsible (first) state, cannot fulfil these restrictive conditions and thus their cases are never substantively examined in breach of international law and the principle of *non refoulement*. In **Ireland** asylum claims are only re-opened at the discretion of the Minister for Justice. In practice this has led to some cases not being substantively examined.

Similar problems arise where applicants leave the first state after receiving an initial decision but without having had an appeal, for example **Sweden, Germany** (if the applicant does not return within three months) and **Lithuania** (if the applicant does not return within 7 days) will not usually allow the case to be re-opened unless there are new facts or circumstances. This can be contrasted with the practice of **Spain** which extends the time limits for submitting an appeal.

The survey has revealed that even where it is possible for the asylum seeker to make a subsequent (second) asylum application, a fair examination may be compromised by state practice such as the use of fast track procedures. In **France**, subsequent asylum applications are examined as manifestly unfounded in accelerated procedures with no suspensive appeal provision. In **Lithuania** applicants who received an initial refusal decision and did not appeal before leaving the territory are similarly subject to a fast track accelerated procedure on return unless they can show new facts or circumstances.

ECRE believes that upon return under the Dublin procedure, implicit withdrawal or abandonment of a previous claim should never prevent the re-opening of the file in order for an asylum seeker to receive a substantive examination of their asylum claim. Applicants who left before a final decision on their asylum claim should be re-admitted to the procedure at the stage they left and must be given the opportunity to have their case examined substantively, taking into account any new facts or circumstances. Where applicants have received an initial refusal decision then the time limits for lodging an appeal should be extended. ECRE believes that otherwise operation of the Dublin II system may put states in conflict with their obligations not to return a person to a situation where they face persecution, torture, inhuman or degrading treatment or punishment.

Asylum seekers who have previously received a final refusal decision are typically prevented from submitting a new claim and are placed in the expulsion procedure. While ECRE accepts that such cases should not automatically have their cases re-opened, in light of states' obligations to avoid *refoulement*, ECRE believes that such applicants should at least be given the opportunity to submit fresh claims based on any new information since the refusal of their original asylum claim, and should have access to higher courts to challenge removal where a real risk of *refoulement* can be demonstrated.

²⁰ In this context it is worth noting provisions under Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status ('the Procedures Directive'). While article 32 (3) of the Directive permits Member States to impose special procedures for subsequent applications including requirement on new facts/circumstances, article 34 (2) states that such conditions for subsequent applications should not render access to a new procedure impossible nor result in the severe curtailment of such access.

Recommendation 1

Article 16 should be amended to explicitly require that the responsible Member State complete a substantive examination of the asylum application when taking back an asylum seeker, if the applicant has not previously received a final decision on their claim.

Recommendation 2

Applicants who have received a previous final refusal decision should be given the opportunity to submit fresh claims if new information has arisen since the refusal of their original asylum claim, and should have access to higher courts to challenge removal if a real risk of *refoulement* can be demonstrated.

1.3 Procedural Safeguards

To ensure fundamental rights are safeguarded, a personal interview and free legal assistance should be available for all Dublin II applicants. Free legal assistance is not provided for Dublin cases in *Greece, Poland* and *Sweden*. In other Member States conditions or limitations may be placed upon receiving legal aid.²¹ In *Italy*, applicants do not receive an initial interview by the Dublin unit prior to determining the state responsible for the asylum application. This prevents claimants informing officials of the presence of family in other Member States. Access to a personal interview for returnees is clearly dependent on whether an applicant is able to access the asylum procedure at all in the responsible Member State. The opportunity for an interview may additionally be restricted in *Germany*. In *Finland*, a problem in practice is that the interview may not be substantive and be carried out by border officials.

1.4 Reception Conditions

Adequate reception conditions are essential if asylum seekers are to have a dignified standard of living during the procedure and not face destitution. This is necessary both for applicants facing transfer and those who have been returned. However, reception conditions are denied for returnees who are forced to make subsequent asylum applications - for example in the *Netherlands* (but only if new facts and circumstances have not been shown) - and for those channelled into accelerated procedures, for example in *France*.²² There may also be limitations in providing reception conditions for returnees in *Spain*²³ and the *UK*²⁴ depending on the applicant's status there. Prior to transfer to another Member State, applicants in *Belgium* and *France* are denied access to basic reception conditions except for urgent medical care.

Aside from the issue of total denial of reception conditions, also of concern is the wide divergence among Member States as to what applicants receive in the form of

²¹ For example in Norway legal aid for Dublin II returnees is provided at a reduced time rate compared to other asylum seekers.

²² Reception conditions in France are denied on the basis that asylum applicants are placed in an accelerated procedure on their second application for asylum.

²³ In Spain, reception conditions may be withdrawn if the applicant receives a refusal or inadmissibility decision.

²⁴ In the UK, if the returnee has had their asylum claim previously dismissed they will not be eligible for housing and income support until their claim has been accepted as new. Their ability to access secondary medical care may also be limited.

accommodation, material benefits and access to health care.²⁵ For example, there are currently no or extremely limited psychiatric health care facilities for torture/trauma survivors in the *Czech Republic*, *Hungary* and *Poland*. In this regard Member States are reminded of their obligation to abide by the provisions of the Reception Directive²⁶ in providing reception conditions for asylum seekers within the Dublin II procedure. However, the continuing unequal level of facilities highlights the flawed nature of the Regulation in failing to take proper account of these divergences, which has a severely detrimental effect on individuals who have already suffered highly traumatic experiences.

Recommendation 3

Member States in applying the Dublin II Regulation should recall their obligations under the Reception Directive to provide proper reception facilities for all asylum seekers.

2. SELECTED PROVISIONS

This section will focus on the application of the following provisions by Member States: the sovereignty clause (Article 3(2)), the provision for unaccompanied minors/separated children (Article 6), the family unification clauses (Articles 7 & 8) and the humanitarian clause (Article 15).

2.1 The Sovereignty Clause (Article 3 (2))

Article 3(2) of the Dublin II Regulation, commonly referred to as the ‘sovereignty’ or ‘opt-out’ clause enables Member States to examine an application for asylum lodged with it, even if it is not its responsibility under the Regulation’s criteria. Unlike the equivalent provision in the Dublin Convention, Article 3(2) does not require the explicit agreement of the asylum seeker if a state opts to examine the asylum application, hence Article 3(2) may be used both to the advantage and disadvantage of asylum seekers. *Germany*, *the Netherlands*, and *Norway* apply this clause even if it is against the applicant’s wishes.

The survey reveals that at present states apply this clause inconsistently and for a variety of reasons, including cases raising protection reasons, humanitarian reasons and family unity issues. However, some states take responsibility in order to put certain cases through accelerated and/or manifestly unfounded procedures.

2.1.1 Protection Reasons

Both *Norway* and *Sweden* have suspended Dublin II removals to *Greece* and assumed responsibility for the examination of such asylum applications under this clause.²⁷ In view of current divergences in the quality of determination systems and in particular the problems documented on granting access to a procedure in section 1 above, it is

²⁵ For further information on Reception Conditions in Europe see ECRE Report, *The EC Directive on the Reception of Asylum Seekers: Are asylum seekers in Europe receiving Material Support and Access to Employment in accordance with European legislation*, November 2005; Final Report by the Information and Cooperation Forum (ICF), published by Pro Asyl, 26 February 2005, (English).

²⁶ Council Directive 2003/9/EC of 27 January 2003, Laying down minimum standards for the reception of asylum seekers O.J. 6.2.2003 L 31/18.

²⁷ Finland and the Netherlands also previously suspended removals to Greece on the basis of protection concerns.

regrettable that more Member States do not apply the sovereignty clause. ECRE recommends that other Member States should follow the Norwegian and Swedish practice where there is a demonstrable risk of *refoulement* such as the Greek practice of ‘interrupting’ claims. In some states considerable jurisprudence has developed concerning court challenges to removal to *Greece* on protection grounds.²⁸ However, states voluntarily applying the sovereignty clause in such cases could usefully reduce resources expended in protracted legal proceedings.

Recommendation 4

Whilst protection gaps exist within Europe and there is a demonstrable risk of onward *refoulement* following return to the responsible Member State, ECRE recommends that Member States apply the sovereignty clause to prevent transfer in such cases.

2.1.2 Humanitarian/Compassionate Reasons

The sovereignty clause is also applied for a range of humanitarian reasons and to prevent the break-up of extended family members, as is the practice in *Austria, the Czech Republic, France, Italy, the Netherlands, Norway, Spain* and *Sweden*. Until very recently *Austria* applied the clause to take responsibility for traumatised asylum seekers suffering from psychological illnesses on the basis that transfer to another State under the Dublin II Regulation would constitute additional, inhumane strain.²⁹ ECRE regrets that since January 2006 this provision is no longer applied in *Austria*³⁰ as this practice should be adopted by all states where transfer would expose an applicant to inhumane strain, exacerbate an existing condition and/or result in denial of access to existing treatment. Member States should also suspend transfer where it would be incompatible with their obligations under Article 3 or Article 8 of the European Convention on Human Rights.³¹

Recommendation 5

Member States should use the sovereignty clause more widely to avoid removal where incompatible with their obligations under international law, including the European Convention on Human Rights.

Recommendation 6

The sovereignty clause should automatically be invoked to examine the asylum applications of traumatised asylum seekers where removal to the responsible Member State would exacerbate the condition and/or deny existing medical treatment.

2.1.3 Use in accelerated/manifently unfounded procedures

Some states apply Article 3(2) if it is viewed as more expedient and economic to process a claim designated as manifestly unfounded through an accelerated procedure in that state, rather than initiating a request under the Dublin II procedure, or waiting for a response once a request has been initiated. Such practice occurs in *Germany* and

²⁸ For example Austria, Finland, France, Italy, the Netherlands, Slovenia, and the UK.

²⁹ See final Report by the Information and Cooperation Forum (ICF), published by Pro Asyl, 26 February 2005, Austria p. 87. This provision is under the Austrian Asylum Amendment 2003.

³⁰ Austrian Asylum Act 2006 Article 30.

³¹ Council of Europe, European Convention on Human Rights and Fundamental Freedoms, 5 November, 1950.

*Norway*³² where the national authorities will examine an asylum claim in a fast-tracked procedure if designated as a ‘safe country of origin’ or ‘safe third country’. Additionally, *Austria* may also utilise the sovereignty clause in this manner if an application is considered manifestly unfounded by the national authorities. ECRE is concerned that such accelerated procedures often lack essential safeguards³³ and regrets the use of the sovereignty clause for this purpose.

2.1.4 Inconsistency and/or lack of application

Available information suggests that the national authorities in *Belgium, Greece, Lithuania*,³⁴ *Luxembourg, Poland, Portugal*, and *Slovenia* do not apply the sovereignty clause at all, or else very rarely. No clear guidance has been provided in the Regulation at the European level regarding the applicability of this clause and therefore it is being invoked inconsistently on a case-by-case basis.³⁵ Whilst positively noting the discretionary nature of the sovereignty clause, ECRE considers that more guidance is needed at the European level to ensure its more uniform and consistent application. The increased use of this clause is important to address the complex and varying situations in which many asylum applicants find themselves.

2.2 Separated Children (Article 6)

Article 6 of the Dublin II Regulation sets out the criteria for dealing with separated children whereby an application for asylum should be examined in the Member State where a member of his/her family is present, provided this is in the best interests of the minor, or in the absence of a family member, in the Member State where the application was first lodged. Member States are technically complying with this provision in transferring a child, in the absence of family members, to the Member State where he/she first applied for asylum. However, as demonstrated in case studies collected,³⁶ Article 6 in its current formulation creates hardship and sometimes fails to protect the best interests of the child within the Dublin II procedure. ECRE considers that Article 6 is intrinsically flawed, as the best interests of children will rarely be served by being uprooted and transferred back to a state where they have no ties or family members.

The survey illustrates that in applying Article 6, separated children need to be more clearly informed of the possibility of unification with family in other Member States. At present the amount of information provided to children varies greatly among Member States as shown in Section 2.5 below. However, there are some examples of good practice. For example, the Lithuanian authorities are very proactive in assisting separated children by requesting that the Lithuanian Red Cross trace other family members within the EU through the Red Cross network. A similar positive practice

³² The sovereignty clause is applied for 48 hour/category 1 cases, which is used for asylum seekers from certain safe countries (Safe Third Country and Safe Country of Origin), among other grounds.

³³ For further information on ECRE’s views of accelerated procedures see *The Way Forward, Europe’s role in the global refugee protection system, Towards Fair and Efficient Asylum Systems in Europe*, Sept 2005, p. 14.

³⁴ However, there was one case in Lithuania where the authorities applied the sovereignty clause to examine a manifestly unfounded application rather than transfer the applicant to Germany.

³⁵ *ILPA Scoreboard on the Proposal for a Council Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged on one of the Member States by a third country national*, February 2005, pp.4

³⁶ See Annex 3 of the extended ELENA Report on the application of the Dublin II Regulation in Europe.

also exists in *Poland* where the national authorities assist separated children in locating family members in other Member States. Due to the special vulnerability of children and the need for family support, it is recommended that all Member States follow these positive practices in assisting children to locate family members' whereabouts.

Recommendation 7

Member States should actively assist separated children in locating family members in other Member States in order that transfer can occur where this is in the best interests of the child.

2.2.1 UK Case Studies

In the extended ELENA/ECRE Dublin report, Annex 3 contains a series of case studies on separated children in the UK, which highlight the inherent problems of applying the Dublin system to children. Cases have been observed where children have been transferred to other Member States without being even aware they previously applied for asylum there, kept in detention for long periods and then deported back to their country of origin. The case studies from the *UK* also indicate several cases of separated children being detained in *Greece* for prolonged periods of time and being released from detention only on condition that they agree to leave *Greece* immediately. Additionally the UK national authorities have transferred age-disputed children to other Member States before an age assessment has been carried out to verify whether or not they are children. Such instances highlight both states' misapplication of Article 6 and the inherent flaws within the provision itself, which does not adequately consider the best interests of the child.

Recommendation 8

Member States should ensure that age disputes regarding children are resolved prior to transfer under Dublin II.

2.2.2 The Practice in other Member States

Bad practice in relation to children is not only occurring in the UK. The French authorities make no distinction between adults and children within the Dublin II procedure, therefore, they may be violating Article 6 by not reuniting minors with family members in other Member States. The survey has revealed a Dutch case, which indicates that Article 6 is not always respected by the Dutch authorities at first instance.³⁷ In addition, there is a recent German case where the court held that the German authorities must apply Article 6 before proceeding to assign responsibility under Article 13 as had been the practice in the case before the court.³⁸

However, there are some instances of positive practices notably in *Norway* and *Finland*, where Article 6 is only applied on the basis of family unification and the Dublin II procedure is not applied to children in transferring them to a Member State where they previously lodged an asylum application. ECRE urges all Member States to follow this practice.

³⁷ In the Netherlands there is jurisprudence (district court Zwolle AWB 03/22224, 2003) regarding a child who was to be transferred to Spain despite the presence of the child's mother in the Netherlands and hence Article 6 would have applied indicating the Netherlands' responsibility.

³⁸ Administrative Court Gießen of 23 February 2005, 2E 1131/04.A.

ECRE believes that the best interests of separated children must always be at the forefront of decision-making within the Dublin II procedure. Therefore, ECRE proposes that Article 6 should be amended to prevent children being removed to another Member State except on the basis of family unification, providing that it is in the best interest of the child. Such an amendment would prevent the trauma of minors being uprooted and removed to another Member State where they may feel isolated due to language or cultural differences. Furthermore, the narrow definition of family member in Article 2(i)(iii) of the Regulation fails to address the differing cultural associations of families and excludes extended and *de facto* family members such as siblings. In light of the unique vulnerability of separated children, ECRE believes a broader and more inclusive concept of the family unit needs to be adopted.³⁹

Recommendation 9

Article 6 should be amended to require that in considering the best interests of the separated child, the Member State responsible for examining the application shall be that where a member of his or her family is present, provided that the persons concerned so desire. In the absence of a family member, the Member State responsible for examining the application shall be that where the child has currently lodged his/her application for asylum.

Recommendation 10

ECRE calls for a more flexible and inclusive definition of family members for separated children enabling unification with siblings and other extended family members.

2.3 Family Unification (Articles 7 & 8)

The family unification provisions, (Articles 7 & 8)⁴⁰ seem to be broadly respected by Member States but ECRE is concerned that because of the way these articles are framed, they too often fail to facilitate family unification. Article 7 appears to be more readily invoked by Member States than Article 8. Whereas Article 7 permits reunification with a recognised refugee, Article 8 permits unification with a family member who is an asylum seeker in another Member State, who has not yet received an initial decision on his/her claim. In some states, such as the *Netherlands* and *Norway*,⁴¹ decisions are often taken extremely quickly, under accelerated procedures (48 hours), so the likelihood of qualifying for unification under Article 8 is minimal.

The survey has revealed instances where Member States do not appear to be properly applying Article 8. In particular, there is evidence that the Swedish authorities do not apply Article 8 leading to the separation of families in practice. Similarly, in *Ireland*, according to the limited information available, the right to family unity under the

³⁹ The amended definition of family in Article 2(i) should be similar in content to the definition of family provided for in Article 15(1) of the Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, Official Journal L 212, 07/08/2001 P, 0012-0023.

⁴⁰ Article 7 enables family unification with family members who have refugee status in a Member State, whilst Article 8 allows applicants to be united with family members whose asylum application has not yet been the subject of a first decision regarding substance.

⁴¹ In Norway, 48 hour/category 1 cases, are used for asylum seekers from certain safe countries (Safe Third Country and Safe Country of Origin), among other grounds.

Regulation is not always respected in practice and in *Luxembourg* the family unification clauses are rarely invoked.

According to Article 2(i)(i), unmarried partners may be treated as family members depending on national aliens legislation. Therefore, in *Finland, France, Ireland, Lithuania,*⁴² *Portugal, the Netherlands, Norway,* and *Sweden* unmarried couples may be united but not in the other countries surveyed.⁴³ ECRE recommends that more Member States exercise their discretion to unite unmarried partners within the Dublin II procedure, as this would accommodate the differing cultural associations with partnership and marriage. Some states interpret family unification restrictively by excluding naturalised persons who were formerly refugees. In a strikingly inhumane judgement, a Dutch court ruled that an Iraqi asylum seeker could not join her husband in Sweden who was a naturalised citizen there. It found that the Regulation did not apply to naturalised persons, as legally they were no longer refugees.⁴⁴ The survey revealed that family unification can be frustrated where states insist on excessively high standards of evidence such as DNA testing. For example, this is the case in *Ireland*.

The survey does reveal some examples of good practice. Extended family unification provisions are available in the *Netherlands* and *Norway*, where it is possible for applicants to be united with family members with subsidiary protection status and for siblings with legal residency respectively. A broader definition of family members exists also in *Portugal*⁴⁵ and *Italy*.⁴⁶ Additionally, *Belgium* enables unification under Article 8 with family members beyond first instance up to and including the appeal level. ECRE considers that the right to family unity should be extended in Article 8 to include all stages of the procedure for examining an asylum application until a final decision is taken, and urges all Member States to follow this practice.⁴⁷

Family unification is in the interest of both asylum seekers and Member States as it allows for consistent and thorough processing of asylum applications by national authorities, while reducing secondary movement incentives and ensuring asylum seekers receive family support which is key to their integration. It is welcome that the family unification clauses appear to be more readily applied than under the Dublin Convention where states did not often exercise their discretion to reunite families.⁴⁸

⁴² According to Article 2 of the Law on the Legal Status of Aliens, unmarried partners who have concluded a partnership agreement are treated similarly to married couples in Lithuania.

⁴³ In Germany only same sex partnerships and not heterosexual partnerships are treated similarly to married couples for the purposes of family unification.

⁴⁴ Dutch case AWB 05/13491 District Court Harlem 12 April 2005.

⁴⁵ Article 4 Asylum Law defines family members to include spouse, minor, adopted or disabled children, and in the case of minor refugees, father, mother and minor siblings of whom he/she is the sole supporter. No reference is made to the fact that the family had to already exist in the country of origin.

⁴⁶ Italy expands the family members' definition to include handicapped eldest child and dependent parents.

⁴⁷ This reiterates ECRE's previous recommendation in Comments on the Proposal for a Council Regulation 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, December 2001.

⁴⁸ ECRE Comments on the European Commission staff working paper revisiting the Dublin Convention: developing Community legislation for determining which Member State is responsible for considering an application for asylum submitted in one of the Member States, June 2000.

However, beyond the difficulty of strict criteria under Article 8, additional problems persist. For example, national authorities do not always inform applicants of the possibility of family unification and of the importance of providing information on family members.⁴⁹

The Dublin II Regulation contains a narrow definition of family insofar as the family already existed in the country of origin, which fails to take into account the differing cultural associations of family and the specific circumstances of refugees whose family life is disrupted through their reasons for seeking asylum. ECRE proposes not only that the right to family unification is extended to applicants with family members who are legally resident in Member States on other grounds than that which the present Dublin system provides for, including those granted subsidiary protection or naturalised refugees, but also that a more flexible and inclusive definition of family itself is provided for in the Regulation.⁵⁰

Recommendation 11

The right to family re-unification should be extended to those persons who have a family member who has been allowed to legally reside in a Member State on other protection grounds, or who otherwise is legally residing in that State. Article 7 should be amended accordingly.

Recommendation 12

ECRE recommends that the right to family unity in Article 8 be amended to permit family unification at any stage of the asylum procedure up to a final refusal decision.

Recommendation 13

The definition of family in Article 2(i) should be amended to include other close relatives who lived together as part of the family unit in the country of origin.

2.4 The Humanitarian Clause (Article 15)

The humanitarian clause enables the unification of extended family members on humanitarian grounds based, in particular, on family or cultural considerations.⁵¹ *Austria, the Czech Republic, Finland, Italy, the Netherlands* and *Spain* apply the humanitarian clause variously on the following grounds: if removal would be in violation of Article 8 ECHR; for unification of dependent extended family members and elderly or ill people for whom a transfer under the Dublin procedure would be detrimental to their health. Additionally, *Italy* applies this clause in relation to pregnant asylum seekers and those with newborn children. *Greece, Poland* and *Portugal* have requested other Member States to take over responsibility for asylum applications on the basis of the humanitarian clause but the requested states have usually rejected these requests. This is disappointing as it fails to reflect the spirit of

⁴⁹ This divergence in information received by applicants is further explored below in Section 2.5.

⁵⁰ The amended definition of family in Article 2(i) should be similar in content to the definition of family provided for in Article 15(1) of the Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, Official Journal L 212, 07/08/2001 P, 0012-0023.

⁵¹ Under this provision Member States can request one another to examine the application for asylum of the person concerned on those grounds with the person's consent.

solidarity envisaged in the preamble of the Regulation in light of the fact that *Greece* and *Poland* receive proportionately higher numbers of Dublin returnees than other Member State.⁵² Member States were reluctant to apply the provision and interpreted it in a restrictive manner in relation to the Regulations predecessor, the Dublin Convention.⁵³ Unfortunately the experience under the Dublin II Regulation is that this clause is still rarely applied in *Belgium, France, Germany, Ireland, Luxembourg, Norway*, and *Sweden*, and has yet to be applied in *Lithuania* and *Slovenia*. Given the harshness caused by the relatively strict criteria in the Regulation for mandatory family unification, it is regrettable that Member States do not apply this clause more frequently for keeping families together.

Recommendation 14

ECRE urges Member States to apply Article 15 in a humane, unrestrictive and flexible way that takes into account the various situations of asylum seekers and their best interests.

2.5 Provision of Information

For the Regulation to operate effectively, particularly in relation to application of the family reunification, humanitarian and sovereignty clauses, it is important that asylum seekers are properly informed of the need to divulge information about family members elsewhere in the EU. The amount and quality of information provided to asylum seekers varies significantly among Member States. *Finland, Greece, Lithuania, the Netherlands, Poland, Spain* and *Slovenia* ask about the existence of family members during the preliminary interview but do not explain the significance of such information. Insufficient emphasis is placed on the importance of providing information, which could justify the application of specific clauses. While the situation is partially remedied by the presence of refugee-assisting NGOs in a number of Member States,⁵⁴ this should not negate the importance of states providing this information directly. However, it is welcome that some Member States provide information leaflets on Dublin to all applicants as noted in *Austria, Germany, Ireland, Norway*, and *Poland*.⁵⁵ Unfortunately, the beneficial use of such leaflets is somewhat hindered by the use of complicated and sometimes misleading information as evidenced in *Austria, Germany* and *Ireland*. *Norway* meets the specific needs of illiterate asylum seekers by providing an information film in a number of languages. ECRE believes that all Member States should follow these examples of good practice while also catering for the specific needs of illiterate asylum seekers. Additionally, separated children should receive such information in an age-appropriate manner in a language that they clearly understand.

Recommendation 15

Applicants within the Dublin II procedure should receive information, including in the form of guidance leaflets, in a language they understand, containing clear

⁵² For further information see Annex 3 in this report regarding Member States Dublin II Regulation statistics.

⁵³ Danish Refugee Council: The Dublin Convention. Study on its Implementation in the 15 Member States of the European Union, January 2001, p. 83.

⁵⁴ Refugee assisting NGOs often provide or complement information in Finland, Greece, Italy, Luxembourg, the Netherlands, Portugal, Spain and Sweden.

⁵⁵ Similarly, previously in Belgium, applicants received an information leaflet which referred to the Dublin II procedure. However, this leaflet is no longer available and is being renewed.

and concise information on the Dublin procedure and the applicability of provisions such as family unification and the discretionary clause. Furthermore, separated children should receive such information in an age-appropriate manner in a language that they understand.

3. DETENTION

Though there is no specific provision for detention in the Dublin II Regulation, ECRE is concerned that a number of Member States have resorted to the increased use of this measure for the effective transfer of asylum seekers to the responsible Member State. This practice is evident in *Belgium*,⁵⁶ *the Czech Republic*, *Finland*, *Austria*,⁵⁷ *the Netherlands*, *UK* and *Luxembourg*. Detention may also be imposed upon returnees in a number of Member States including *Germany*⁵⁸, *the Czech Republic*⁵⁹, *Luxembourg*, *Belgium* and *Greece*.⁶⁰ Furthermore, applicants may also be detained if national legislation provides for criminal sanctions for illegal entry, as is the practice in *Lithuania*.⁶¹ It is particularly concerning that a number of Member States have recently announced legislative proposals for an increase in the detention of Dublin II applicants.⁶² This is worrying in that asylum seekers in detention frequently do not have access to essential procedural safeguards such as legal assistance or advice.⁶³ ECRE has always advocated that detention should only be used in exceptional cases, and full procedural safeguards should always be ensured.⁶⁴ Additionally, asylum seekers may have already suffered imprisonment and torture in the country from which they have fled. Therefore, the consequences of detention may be particularly serious, causing severe emotional and psychological stress and may amount to inhuman and degrading treatment.⁶⁵ Detention should therefore be avoided as much as possible, taking into consideration the needs of such applicants. Alternative, non-custodial measures such as reporting requirements should always be considered before resorting to detention and unaccompanied minors should never be detained under any circumstances.

Recommendation 16

Applicants under Dublin procedures should only ever be detained as a last resort where non-custodial measures have been demonstrated not to work on an individual basis. Detention must be subject to procedural safeguards, and limited

⁵⁶ NGOs have expressed concerns in Belgium that the maximum time limit for detention is not always adhered to by national authorities if there are delays in the transfer procedure.

⁵⁷ Final Report by the Information and Cooperation Forum (ICF), published by Pro Asyl, 26 February 2005, (English). Austria, p. 78.

⁵⁸ Ibid Germany, pp.52.

⁵⁹ Ibid Czech Republic, p. 116.

⁶⁰ Such detention may be imposed on a number of grounds: for example, submitting multiple asylum applications, previously absconding, receiving a previous refusal decision on an asylum claim and to assist in the effective deportation of the application to a third country.

⁶¹ Germany provides for criminal sanctions on similar grounds, however, in practice the asylum seeker is fined for illegal entry instead of being detained.

⁶² Austria, Germany and Belgium have recently proposed measures which will increase the grounds for detention of asylum seekers within the Dublin procedure.

⁶³ For further information on the detention of asylum seekers in Europe please see Jesuit Refugee Service – Europe, Caring for Detainees, *Detention in Europe, Administrative Detention of Asylum Seekers and Irregular Migrants*, 17 October 2005.

⁶⁴ For further information see ECRE's position paper on the Detention of Asylum Seekers, 1996.

⁶⁵ Ibid.

to the minimum time required to meet its lawful purpose. Separated children should never be detained under any circumstances.

4. CO-OPERATION BETWEEN MEMBER STATES

Co-operation between Member States is a necessary precondition for the efficient functioning of the Dublin II system. Co-operation is necessary both with respect to time limits set out in Articles 17-20 of the Regulation and the exchange of information between Member States as provided for in Article 21.

4.1 Time Limits

In conducting the survey the experience has been that it is very difficult for NGOs and legal representatives to know whether time limits are being complied with by Member States, as often it is an internal procedure between the national authorities.⁶⁶ According to the limited information available, time limits are broadly being respected by Member States though there are exceptions to this practice and time delays in a number of States including *Italy*,⁶⁷ *Poland*,⁶⁸ and *Sweden*.⁶⁹ The fact that some examples of non-compliance have been discovered suggests more comprehensive research needs to be undertaken concerning the average length of the Dublin II procedure and whether it can be said to meet the objective of efficiency identified in the Preamble to the Regulation.⁷⁰

4.2 Exchange of Information between Member States

Due to the overall lack of transparency in the Dublin II procedure it is difficult for lawyers and NGOs to comprehensively assess the information exchange between Member States, but there are examples in a number of states where authorities provided inaccurate or incomplete information, which would have resulted in a different Member State bearing responsibility for the asylum application. The Norwegian authorities have sent requests to other Member States, despite being aware that the applicants had been outside the territory of the Member States for more than three months, hence responsibility of the application had ceased according to Article 16(3). In addition, the Norwegian authorities have not always provided relevant information on the expiry date of visas, which would mean the other State's responsibility has ceased according to Article 9(4). In *Sweden* there have been cases where the national authorities send applicants to other Member States even if they have been in *Sweden* for up to three years, hence violating Article 19(4) of the Regulation.

A most striking example of state failure to provide all the relevant information for determining responsibility is evidenced in a recent case in *the Netherlands* involving a separated child being transferred to Spain on the basis of the Regulation's criteria,

⁶⁶ This lack of transparency also makes it problematic for lawyers to challenge Dublin II decisions on the basis of failure to adhere to the Regulation's time limits.

⁶⁷ Sometimes Italy fails to respond to requests in accordance with Article 18(1) of the Regulation and therefore assumes responsibility under Article 18(7).

⁶⁸ There have been instances where Member States do not reply to requests from the Polish authorities to take charge of applicants according to Article 18(1) and hence these Member States assume responsibility under Article 18(7).

⁶⁹ In Sweden, the national authorities may not always respect Article 19(4) by sending applicants to other Member States even if the applicants have been in Sweden for up to 2/3 years.

⁷⁰ Dublin II Regulation, Preamble, para. 4.

however *the Netherlands* failed to inform the Spanish authorities of the presence of the child's mother in the Netherlands which would have indicated its responsibility in accordance with Article 6. Additionally, the Italian authorities do not always provide information to other Member States on the health concerns of Dublin II transferees. States' failure to communicate is further shown in a case involving an asylum seeker who was transferred from the *UK* to *Italy* due to mistaken identity. Such examples highlight states' failure to correctly apply the Dublin II Regulation.

Recommendation 17

ECRE calls upon Member States to engage in a frank and full exchange of information enabling a clear determination of the Member State responsible for the examination of an asylum application.

4.3 Bilateral Agreements

Article 23 of the Dublin II Regulation allows for the establishment of bilateral agreements making it possible to simplify and accelerate Dublin procedures in certain circumstances. According to the limited information available, such agreements exist between *Austria* and a number of states including *Hungary*, *Slovenia* and the *Slovak Republic*.⁷¹ *Germany* also has established bilateral agreements according to Article 23 with *Austria*, *the Czech Republic* and *Sweden* and a diplomatic agreement exists between *Germany* and *Switzerland* regarding the Dublin II Regulation.⁷² Additionally, *Italy* has a number of agreements with other Member States. As accelerated time limits are often an integral part of such bilateral agreements, ECRE is concerned that applicants may not have full access to necessary legal aid and to their rights of appeal to the decision to transfer.

Recommendation 18

ECRE calls upon Member States to ensure that bilateral agreements do not infringe asylum applicants' procedural rights.

4.4 Use of readmission agreements/informal border procedures

There is also evidence of states returning asylum seekers to other Member States outside the context of the Dublin II Regulation through informal border procedures or readmission agreements. Such practice is evident at the German – Czech border, French and the Swiss/Italian borders, *Austria* and the *Czech Republic*, and between *Italy* and *Greece*. *Greece* also has readmission agreements with *France*, *Hungary*, *Italy*, *Lithuania*, *Latvia*, *Poland* and *Slovenia* outside of the Dublin system. The precedence of EC law and the direct effect of the Dublin II Regulation means that such informal procedures should never take place instead of determining the Member State responsible in accordance with the Dublin II criteria. As well as undermining the Dublin system as a whole, such accelerated procedures may deny applicants essential safeguards and place them at risk of *refoulement*. States should therefore desist from such practices.

Recommendation 19

ECRE reminds Member States of the primacy of the Dublin II Regulation when applying readmission agreements with other Member States. States should

⁷¹ ECRE Country Report 2004, Austria, p.40

⁷² Switzerland is currently in the process of joining the Dublin II Regulation in order for it to be operative there in 2007/2008.

ensure that all aspects of their asylum procedures fully respect fundamental human rights standards and safeguards.

5. THE APPEAL PROCEDURE

In view of the serious protection concerns and divergences between the asylum systems of different Member States, ECRE considers it crucial that individual claimants have the opportunity to challenge a Dublin II transfer. While there is a lack of harmonisation in the asylum systems among Member States and restrictions on access to asylum procedures and the availability of procedural safeguards in certain states, removal to another Member State may amount to *refoulement* of asylum applicants. Therefore, Member States must respect their international human rights obligations in applying the Dublin II Regulation. In the *TI* case the European Court of Human Rights emphasised that entering into international agreements may not absolve states from the requirement of observing their obligations under international human rights law, and more specifically, the application of the safe third country concept does not absolve Member States from the obligation of *non-refoulement* under Article 3 ECHR.⁷³ As the Dublin system does not address current divergences in protection standards in Member States, it is an essential safeguard that applicants have the opportunity to appeal a decision to transfer as provided for in Article 19(2) of the Regulation.

ECRE considers that a linked issue, which requires attention, is how to better enable individuals to themselves invoke the application of the Dublin II Regulation where another state is responsible under the hierarchy of criteria under the Regulation but the host state is failing to request or initiate transfer. For example, where an applicant in one state is entitled to be re-united with a family member in another state in accordance with Articles 7 or 8 of the Regulation. At present there is no mechanism available to an individual to enforce transfer in such circumstances or indeed in situations where it might be the responsible (requested) state that is frustrating removal. Such a safeguard is required in addition to a right of appeal against an actual decision to transfer where this has been made in error (for example in cases of mistaken identity or where the applicant in fact has family members in a third Member State which would instead indicate its responsibility under the provisions of the Regulation).

5.1 Successful challenges to Dublin II decisions

There is a significant amount of jurisprudence on challenges to Dublin II transfers based on the following grounds: protection concerns, humanitarian reasons, family unity (Article 8 ECHR) and in respect of time limits. Such challenges highlight concerns in both the way Member States are applying the Regulation⁷⁴ and also inherent flaws in the Regulation itself.⁷⁵

Regarding jurisprudence on protection grounds there have been successful challenges against decisions to transfer applicants to *Greece* due to the Greek practice of

⁷³ ECHR: *T.I. v U.K.*, Application No. 43844/98, Admissibility Decision of 7 March 2000.

⁷⁴ As shown in Member States failure to invoke the sovereignty and humanitarian clause where appropriate and failure to abide by the time limits in the Regulation for requests and transfers.

⁷⁵ Most notably the failure of the Regulation itself to address the divergence in protection and reception conditions among Member States.

‘interrupting decisions’ in *Austria, Finland, France,⁷⁶ the Netherlands,⁷⁷ Slovenia, Sweden* and the *UK* and in administrative challenges in *Italy* and *Norway*. Such case law highlights the failed assumption in the Dublin II system that all Member States offer equal protection for asylum seekers. Additionally, the fallibility of such an assumption is shown by the fact that a number of the new Member States were, prior to their accession, not considered safe third countries for asylum seekers.⁷⁸ However at present some states do not permit challenges on protection grounds such as *Germany, Greece, Hungary* and the *UK*. As demonstrated in the *TI* case⁷⁹ such practice may come into conflict with states’ obligation not to *chain-refoule* asylum seekers.

According to the information available, challenges based on humanitarian reasons often concern traumatised asylum seekers or applicants with severe health problems. This is shown in the case law of *Finland, Ireland,⁸⁰ Germany⁸¹ Norway,⁸² Sweden* and particularly the recent House of Lords decision in the case of *Razgar⁸³* in the *UK*. In considering such challenges courts consider states’ obligations under the ECHR in determining whether the transfer would be detrimental to the applicant’s physical and mental health. National courts have also considered the provisions of Article 8 ECHR in challenging decisions that have implications for family unity and have ordered the application of the sovereignty clause for certain situations where a violation would occur in *Austria⁸⁴* and *Belgium.⁸⁵* Additionally, there have been challenges in *France,⁸⁶ Luxembourg* and *Norway* on the basis of states not respecting the time limits in the Regulation for request and transfers.

5.1 Constraints on the Right to Appeal

The right of appeal is limited both through Member States actions and the intrinsic failure of the Regulation itself in not explicitly requiring suspensive effect. A suspensive right of appeal is vital to ensure that protection or other concerns are addressed prior to transfer otherwise the effect of an appeal is rendered meaningless. *Portugal* is the only Member State which automatically provides for a suspensive right of appeal for Dublin II applicants. The other Member States do not automatically guarantee suspensive effect. However in a large number of states including *Austria,*

⁷⁶ CE No 278805 24 March 2005, CE, 24 March 2003.

⁷⁷ Judgement of September 29, 2004 (AWB 04/30154); Judgement of February 10, 2005 (AWB 04/57933)

⁷⁸ For example in Austria, prior to May 2004, the Slovak Republic, the Czech Republic, Hungary and Slovenia were not considered safe third countries for asylum seekers. The Finnish authorities unofficially only considered Estonia and the Czech Republic safe prior to May 2004.

⁷⁹ *TI v the UK*, ECHR, admissibility decision, application no. 43844/98, 7 March 2000

⁸⁰ *M v Minister for Justice, Equality and Law Reform* [2005 No. 98 JR], (*unreported, 15 November 2005*).

⁸¹ Higher Administrative Court Meckelenburg-Vorpommern, decision of 29.11.2004.

⁸² The Alien Jury’s The Immigration Appeal Board’s Yearbook, 2003, published 10.06.04.

⁸³ *R (Razgar) v SSHD* [2004] UKHL 27, [2004] 3 WLR 58. This case involved an Iraqi asylum seeker who was to be transferred to Germany under the Dublin II procedure. The transfer was successfully challenged on the basis of Article 8 ECHR. It was held that the transfer would be detrimental to the applicant’s physical and mental health and that the possibility of suicide could not be ruled out.

⁸⁴ Independent Asylum Senate, 248.247/0-III/07/04, April 2004

⁸⁵ CE N° 100.572, 7th November 2001, CE N° 97.769, 12th July 2001 CE N° 101.547, 6 December 2001, CE N° 103.762, 20th February 2002, CE N° 105.432, 9th April 2002, CE N° 105.521, 16th April 2002, CE N° 109.650, 2nd August 2002. These cases concerned the Dublin Convention but the reasoning behind the court decision should be transferable.

⁸⁶ CE No 267360 14th May 2004.

Finland, France, Germany, Greece, Hungary, Ireland, Lithuania, Spain and the *UK* it is possible, subject to conditions, for applicants to suspend the decision to transfer through the granting of an injunction in court proceedings or under the general administrative law. ECRE recommends the amendment of Article 20(1)(e) to guarantee a suspensive right of appeal in relation to all Dublin transfers.

Member States also hinder access to appeal proceedings in a number of ways. Some Member States only inform asylum seekers of the decision to transfer them shortly or immediately prior to the actual transfer. This practice is demonstrated in *Austria*,⁸⁷ *the Czech Republic, Finland, Germany*,⁸⁸ *Hungary, Lithuania* and *Luxembourg*. The opportunity to access free legal assistance may also be curtailed in certain Member States, for example, in *France* and *Germany* free legal aid is only available if the challenge has a high chance of success. More concerning is the fact that legal aid is unavailable for appeals in *Austria, Greece* and *Sweden*. Procedural measures such as detention and airport fast-track procedures may also limit an applicant's opportunity to access legal aid/assistance in order to effectively challenge procedural errors or where removal would breach state obligations under international law.

Recommendation 20

All appeals against a transfer to another state should automatically suspend state action regarding the transfer until a final decision has been reached.

Recommendation 21

ECRE urges Member States to enable asylum seekers to effectively challenge a transfer decision by allowing applicants access to legal advice and sufficient time to raise all relevant grounds that would prevent transfer.

6. THE EXPERIENCE OF CHECHEN ASYLUM SEEKERS

A brief snapshot of the drastic consequences the Dublin system can have on asylum seekers is demonstrated by the experience of Chechens, one of the largest groups of asylum seekers in Europe.⁸⁹ The recognition rate for Chechen asylum seekers varies from one Member State to another resulting in a 'protection lottery'. High recognition rates exist in *Austria*,⁹⁰ *Belgium*⁹¹ and *France*,⁹² however it is more difficult for Chechens to be granted refugee status in *Finland, the Czech Republic*,⁹³ *Poland*,⁹⁴ *Sweden, Germany* and the *Slovak Republic*. The great differences in recognition rates

⁸⁷ Final Report by the Information and Cooperation Forum (ICF), published by Pro Asyl, 26 February 2005, (English). Austria, p 75.

⁸⁸ Asylum seekers are only informed in German of the decision to transfer them to another Member State.

⁸⁹ For further information see ECRE Guidelines on the Treatment of Chechen Internally Displaced Persons (IDPs), Asylum Seekers & Refugees in Europe, June 2005; Norwegian Refugee Council *Report on the Protection of Internally Displaced Persons, Asylum Seekers and Refugees from Chechnya*, April 2005.

⁹⁰ ECRE Country Report 2004, Austria, p. 37.

⁹¹ Ibid, Belgium, p. 51.

⁹² Note that this information is based on data in 2003: Norwegian Refugee Council *Report on the Protection of Internally Displaced Persons, Asylum Seekers and Refugees from Chechnya*, April 2005, p. 40.

⁹³ Final Report by the Information and Cooperation Forum (ICF), published by Pro Asyl, 26 February 2005, (English). Czech Republic, p. 109.

⁹⁴ Ibid Poland, p. 88.

show that for many Chechens, the outcome of their asylum application largely depends on the country in which their application is processed. The accession of the new Member States in May 2004 has led to a rise in the number of Chechens returned to these Eastern European Member States, particularly to **Poland** in accordance with the Dublin II Regulation. This is of concern in view of the variation in recognition rates and the generally less developed asylum systems, both in terms of determination procedures and the rights/facilities provided to recognised individuals. Also of major concern are allegations of Chechens being *chain-refouled* back to Russia via the **Slovak Republic**.⁹⁵ Chechen asylum seekers are routinely detained in **Belgium, Czech Republic**⁹⁶ and **Germany**⁹⁷ to prevent them absconding prior to Dublin II transfers to Poland. The lack of adequate reception facilities as well as a poor system of integration for recognised refugees, means that most Chechen asylum seekers prefer to leave Poland for other Member States where there are better support facilities.⁹⁸ ECRE therefore advocates the increased application of the sovereignty and humanitarian clauses to facilitate greater responsibility-sharing and respect for individual rights.⁹⁹

Recommendation 22

ECRE urges Member States to support new Member States receiving high numbers of refugees from Chechnya by using the sovereignty clause and humanitarian clause where appropriate to take over responsibility for asylum applications.

⁹⁵ Norwegian Refugee Council *Report on the Protection of Internally Displaced Persons, Asylum Seekers and Refugees from Chechnya*, April 2005, p. 57.

⁹⁶ *Ibid.*

⁹⁷ Final Report by the Information and Cooperation Forum (ICF), published by Pro Asyl, 26 February 2005, (English). Germany, p. 41.

⁹⁸ Esser, Barbara and Gladysch, Barbara: *Die Situation tschetschenischer Asylbewerber und Flüchtlinge in Polen und Auswirkungen der EU-Verordnung Dublin II*, February 2005, p. 3.

⁹⁹ ECRE Guidelines on the Treatment of Chechen Internally Displaced Persons (IDPs), Asylum Seekers & Refugees in Europe, June 2005.

CONCLUSION

The Dublin II Regulation is based on an erroneous presumption that an asylum seeker will receive equivalent access to protection in whichever Member State a claim is lodged. It is directly binding, unlike the other asylum directives forming the four 'building blocs' set out in the Tampere conclusions,¹⁰⁰ which were adopted on the basis of minimum standards allowing national derogations and periods of transition. It was therefore inevitable that the contradictions between European and national asylum rules would be most sharply apparent in the application of the Dublin system. Huge disparities remain in relation to the quality of protection provided across the EU. This fact along with measures adopted by certain Member States has led to the result that many individuals transferred under Dublin do not have their claims properly considered or may even be denied access to an asylum procedure altogether, as evidenced by the Greek practice of 'interrupting' claims. Even those individuals eventually recognised often face huge disparities in relation to the integration possibilities available in different Member States.

ECRE has consistently argued that linking entry controls with the allocation of responsibility under Article 10 (1) of the Dublin Regulation creates unequal burdens depending on a state's geographical location¹⁰¹. The logical consequence of the Dublin system is that increased numbers of asylum seekers will be returned to Member States on the periphery of the European Union.¹⁰² Although comprehensive up to date statistics are not yet available,¹⁰³ figures for 2004 suggest that Poland, Hungary, Italy and Greece are receiving high numbers of incoming requests for transfers under Dublin relative to the number of outgoing requests they are making,¹⁰⁴ albeit it in the context of a general drop in the number of asylum applications across the EU.¹⁰⁵ The Dublin system works as a disincentive for states on the EU's external borders to provide individuals seeking protection full access to fair asylum procedures or even to their territories. There is also evidence emerging to suggest that the Regulation acts as an incentive for states to resort to the increased use of detention in order to secure the transfer of Dublin cases.

ECRE considers that action is needed on three levels in order to correct current flaws and ultimately ensure the provision of a genuine responsibility-sharing system for asylum processing in the European Union. Firstly, states must more fully respect their existing obligations under the Regulation. Secondly, ECRE calls upon the Commission to propose amendments in its forthcoming review that would provide

¹⁰⁰ European Council, Tampere Presidency Conclusions, 15/16 October 1999.

¹⁰¹ ECRE: Comments from the European Council on Refugees and Exiles on the Proposal for a Council Regulation 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, December 2001.

¹⁰² Alternatively, individuals may simply choose not to lodge formal protection claims but instead resort to further onward and illegal transit after having entered EU territory.

¹⁰³ See Annex 3 for the limited statistical information collected as part of this report. It should be noted that these do not cover all states and are mainly limited to the period up until Dec 2004.

¹⁰⁴ It should be noted that not all of these requests have resulted in actual transfers. There is no empirical data available on the reasons for this but possible explanations include states taking responsibility after having originally requested transfer (e.g. on humanitarian grounds), states making multiple requests to other states, or applicants absconding.

¹⁰⁵ See UNHCR, *Asylum Levels and Trends in Industrialised Countries*, 2004 at <http://www.unhcr.ch>.

interim solutions for some of the intrinsic problems with the Regulation. Finally, ECRE advocates for the eventual abolition and replacement of the Regulation, as part of the development of a future Common European Asylum System, following the scheduled comprehensive analysis of all the first phase instruments envisaged under the Hague Programme.¹⁰⁶

This report has highlighted a number of areas where Member States are not properly applying existing provisions of the Regulation. For example, states are failing to fully co-operate or share information with each other thereby frustrating the objective of the Regulation to quickly and correctly determine the Member State responsible. The failure of some states to grant returnees access to an asylum procedure also undermines the workings of the system and is in conflict with its objectives as outlined in the Tampere Conclusions and the Preamble to the Regulation.¹⁰⁷ Additionally, there is a lack of consistency in the application of the discretionary provisions. The sovereignty and humanitarian clauses could be better used by states to alleviate some of the injustice and hardship caused by the Regulation. A related problem is the failure of states to adequately inform applicants about the workings of the Regulation or to proactively assist in correctly identifying the responsible state. This report sets out recommendations as to how Member States could improve their current practices in this regard.

Secondly, the report has addressed intrinsic failings with the Regulation that risk violating individual rights or prevent identification of the responsible state. The report therefore contains recommendations for amended or new provisions that better guarantee access to an asylum procedure on return and enable applicants to more effectively challenge removal where decisions to transfer are made in error or would result in breach of state obligations under international law. Further reforms are proposed to better ensure family unification and to protect the best interests of vulnerable groups such as separated children and torture survivors.

Such interim reforms will improve the application of the Dublin II Regulation in the short term. However, ECRE believes that ultimately the current Dublin system must be abolished altogether. By linking responsibility for asylum applications with responsibility for entry controls, the Dublin system is in conflict with the aim of burden-sharing as envisaged in the Amsterdam Treaty objectives¹⁰⁸ and does not provide a balanced way of addressing flows of asylum seekers. As well as placing individual asylum seekers at risk of *refoulement*, the Dublin system is inefficient and resource-intensive. ECRE has therefore proposed¹⁰⁹ an alternative system for allocating responsibility based on two criteria: 1) the Member State where the asylum seeker has a family member is responsible, provided he or she agrees with a transfer

¹⁰⁶ The Hague Programme, *Strengthening freedom, security and justice in the European Union*, Annex 1 to the Presidency Conclusions, European Council, 4/5 November 2004.

¹⁰⁷ European Council, Tampere Presidency Conclusions, 15/16 October 1999, para. 13/14; See also 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 Member State by a third-country national, Preamble, para. 2/3.

¹⁰⁸ Article 63(2)(b) promotes a balance of effort between Member States in receiving and bearing the consequences of receiving refugees and displaced persons.

¹⁰⁹ See ECRE, *The Way Forward. Europe's role in the global refugee protection system, Towards Fair and Efficient Asylum Systems in Europe*, September 2005. Section 3.1, pp 29-31.

to that state; or 2) the Member State where the asylum request was first lodged is responsible, unless there are compelling humanitarian considerations to preclude this.

ECRE recommends that its proposed system for allocating state responsibility for hearing an asylum claim should contain mechanisms to share responsibility by supporting those Member States that receive disproportionately high numbers of asylum seekers.¹¹⁰ A well-resourced financial burden sharing instrument based on the real costs of hosting and processing asylum claims could compensate Member States receiving higher numbers as well as helping states with less developed asylum systems to bring their infrastructure up to the level of more developed states. A well-resourced Integration Fund could promote the integration of refugees and a well-resourced Return Fund would help facilitate the efficient and sustainable return of those found not to be in need of international protection.

ECRE considers that a crucial, linked reform would be the adoption of EC legislation granting freedom of movement within the Union to all persons recognised as being in need of international protection.¹¹¹ As a result of their escape from persecution, refugees, unlike other third-country nationals, often have been forced to migrate and have had very little choice about where they reside in Europe. There is a natural logic that refugees will integrate more easily and most naturally into those countries where they have extended family members, social networks, employment opportunities/good labour market conditions, and cultural or linguistic ties. In a market-based economy as within the European Union, where the mobility and flexibility of labour is increasingly important, there is much to be said for giving persons granted protection status freedom of choice as to where to reside.

ECRE acknowledges that some of these proposals will require incremental development and be dependent on progress in securing commitment to achieve greater harmonisation and approximation of national asylum systems as envisaged under the Hague Programme. Notwithstanding this, it is hoped that the forthcoming review of the Dublin II Regulation by the Commission will provide an opportunity to start debate on these and other proposals aimed at achieving genuine responsibility-sharing among EU Member States in a future Common European Asylum System. However, in addition to considering longer-term perspectives, there remains an urgent need for immediate reform of the Regulation in order to address the major injustices caused by its current application.

¹¹⁰ Ibid. Section 3.2, pp 31-34.

¹¹¹ Ibid. Section 3.3, pp 34-37.

ANNEXES

ANNEX 1 List of Recommendations

Recommendation 1

Article 16 should be amended to explicitly require that the responsible Member State complete a substantive examination of the asylum application when taking back an asylum seeker, if the applicant has not previously received a final decision on their claim.

Recommendation 2

Applicants who have received a previous final refusal decision should be given the opportunity to submit fresh claims if new information has arisen since the refusal of their original asylum claim, and should have access to higher courts to challenge removal if a real risk of *refoulement* can be demonstrated.

Recommendation 3

Member States in applying the Dublin II Regulation should recall their obligations under the Reception Directive to provide proper reception facilities for all asylum seekers.

Recommendation 4

Whilst protection gaps exist within Europe and there is a demonstrable risk of onward *refoulement* following return to the responsible Member State, ECRE recommends that Member States apply the sovereignty clause to prevent transfer in such cases.

Recommendation 5

Member States should use the sovereignty clause more widely to avoid removal where incompatible with their obligations under international law, including the European Convention on Human Rights.

Recommendation 6

The sovereignty clause should automatically be invoked to examine the asylum applications of traumatised asylum seekers where removal to the responsible Member State would exacerbate the condition and/or deny existing medical treatment.

Recommendation 7

Member States should actively assist separated children in locating family members in other Member States in order that transfer can occur where this is in the best interests of the child.

Recommendation 8

Member States should ensure that age-disputes regarding children are resolved prior to transfer under Dublin II.

Recommendation 9

Article 6 should be amended to require that in considering the best interests of the separated child, the Member State responsible for examining the application shall be that where a member of his or her family is present, provided that the persons concerned so desire. In the absence of a family member, the Member State

responsible for examining the application shall be that where the child has currently lodged his/her application for asylum.

Recommendation 10

ECRE calls for a more flexible and inclusive definition of family members for separated children enabling unification with siblings and other extended family members.

Recommendation 11

The right to family re-unification should be extended to those persons who have a family member who has been allowed to legally reside in a Member State on other protection grounds, or who otherwise is legally residing in that State. Article 7 should be amended accordingly.

Recommendation 12

ECRE recommends that the right to family unity in Article 8 be amended to permit family re-unification at any stage of the asylum procedure up to a final refusal decision.

Recommendation 13

The definition of family in Article 2(i) should be amended to include other close relatives who lived together as part of the family unit in the country of origin.

Recommendation 14

ECRE urges Member States to apply Article 15 in a humane, unrestrictive and flexible way that takes into account the various situations of asylum seekers and their best interests.

Recommendation 15

Applicants within the Dublin II procedure should receive information, including in the form of guidance leaflets, in a language they understand, containing clear and concise information on the Dublin procedure and the applicability of provisions such as family unification and the discretionary clause. Furthermore, separated children should receive such information in an age-appropriate manner in a language that they understand.

Recommendation 16

Applicants under Dublin procedures should only ever be detained as a last resort where non-custodial measures have been demonstrated not to work on an individual basis. Detention must be subject to procedural safeguards, and limited to the minimum time required to meet its lawful purpose. Separated children should never be detained under any circumstances.

Recommendation 17

ECRE calls upon Member States to engage in a frank and full exchange of information enabling a clear determination of the Member State responsible for the examination of an asylum application.

Recommendation 18

ECRE calls upon Member States to ensure that bilateral agreements do not infringe asylum applicants' procedural rights.

Recommendation 19

ECRE reminds Member States of the primacy of the Dublin II Regulation when applying readmission agreements with other Member States. States should ensure that all aspects of their asylum procedures fully respect fundamental human rights standards and safeguards.

Recommendation 20

All appeals against a transfer to another state should automatically suspend state action regarding the transfer until a final decision has been reached.

Recommendation 21

ECRE urges Member States to enable asylum seekers to effectively challenge a transfer decision by allowing applicants access to legal advice and sufficient time to raise all relevant grounds that would prevent transfer.

Recommendation 22

ECRE urges Member States to support new Member States receiving high numbers of refugees from Chechnya by using the sovereignty clause and humanitarian clause where appropriate to take over responsibility for asylum applications.

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ANNEX 3 Dublin II Regulation Statistics**Table 1: Incoming Requests for 2004**

STATISTICS					
Incoming Requests 2004					
Member State	A Total Number	B EURODAC	C Total No. Accepted	D Total No. Refused	E Total No. Transferred
Austria	1831	1066	1107	670	361
Cz. Republic	386				36
Finland	456				120
Germany	7463		6009	1517	2681
Greece	1351	787	1112	127	404
Hungary	392	143	303		71
Ireland	133	61	87	32	59
Italy	2701				
Lithuania	21				6
Luxembourg	182				63
Netherlands	3385				
Norway	2180				612
Poland	1320	1052	1182	104	356
Portugal	60		43	27	17
Slovenia	100	52			8
Spain	68				111
Sweden	3596		2642		

Comments:

- Statistical information was only available for the countries included above.
- The Austrian and Polish statistics are for the time period July-December 2004.
- The statistics for Slovenia and Hungary are for the time period May-December 2004.
- In Norway the Directorate of Immigration assumes that 60% of total numbers of requests are based upon hits in EURODAC. The high number of incoming requests is predominantly from Sweden, Finland and Germany.
- According to EURODAC information for Finland in 2004: 2701 fingerprints were registered into the EURODAC; 1507 of which were hits. Regarding the Finnish statistics the number of actual transfers is an approximate value.

Table 2: Outgoing Requests for 2004

STATISTICS					
Outgoing Requests 2004					
Member State	A Total Number	B EURODAC	C Total No. Accepted	D Total No. Refused	E Total No. Transferred
Austria	3212	2295	2283	693	324
Cz. Republic	325				159
Finland	1566				1500
Germany	6536		5110	1068	2765
Greece	18	3	10	5	5
Hungary	25		13		1
Ireland	292	247	261	27	74
Italy	616				
Lithuania	1				0
Luxembourg	475				370
Netherlands	1862				
Norway	3175				2099
Poland	54	12	22	13	10
Portugal	15		15	1	2
Slovenia	53	45			7
Spain	238				10
Sweden	6188		5242		4225

Comments:

- Statistical information was only available for the countries included above.
- The Austrian and Polish statistics are for the time period July-December 2004.
- The statistics for Slovenia and Hungary are for the time period May-December 2004.
- In relation to the Finnish statistics the number of actual transfers is an approximate value.

ANNEX 4 FURTHER ECRE READING

(for all ECRE publications visit www.ecre.org)

Broken Promises - Forgotten Principles. An ECRE Evaluation of the Development of EU Minimum Standards for Refugee Protection: *Tampere 1999 - Brussels 2004*, June 2004.

Comments on the Proposal for a Council Regulation 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, December 2001.

ECRE Comments on the Amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee Status, March 2005.

ECRE Comments on the European Commission staff working paper revisiting the Dublin Convention: developing Community legislation for determining which Member State is responsible for considering an application for asylum submitted in one of the Member States, June 2000.

ECRE Country Reports 2004.

ECRE Guidelines on the Treatment of Chechen Internally Displaced Persons (IDPs), Asylum Seekers & Refugees in Europe, June 2005.

ECRE Position on Refugee Family Reunification, July 2000.

ECRE Position on the Implementation of the Dublin Convention in the Light of the Lessons Learned from the Implementation of the Schengen Convention, December 1997.

ECRE Report, The EC Directive on the Reception of Asylum Seekers: Are asylum seekers in Europe receiving Material Support and Access to Employment in accordance with European legislation, November 2005.

ECRE *Safe Third Countries: Myths and Realities*, February 1995.

ECRE Way Forward Paper, Europe's role in the global refugee protection system, *Towards Fair and Efficient Asylum Procedures in Europe*, September 2005.

ECRE's position paper on the Detention of Asylum Seekers, 1996