



Asylum and the European Union The Dublin Regulations

Summary

1. A case in the Immigration and Asylum Tribunal has brought to public attention the Dublin Regulation which forms the basis for determining the EU Member State responsible for deciding applications for asylum from third country nationals. The UK has opted in to these regulations which are based, firstly, on the principle of family reunion in deciding which Member State is responsible for an application for asylum. The case concerned unaccompanied minors in Calais who wished their case to be heard in the UK on the basis that they already had relatives here. They won their case but the Home Secretary has been given permission to appeal on the underlying principles. At present it seems unlikely that there will be a large number of applicants who would benefit from the outcome of this case.

Introduction

2. The case concerned three unaccompanied minors and their dependent adult brother from Syria who had been living in the 'Jungle' camp in Calais, France and who had family members resident in the UK. The details of the case have now been made public. The Tribunal ruled that upon written application for asylum to the French Authorities the four individuals be allowed to travel to the UK to be reunited with their family where they would have their asylum claim processed in the UK. The case was extremely complex and is summarised below.

3. There has been much confusion as to why the UK has been deemed responsible for the applications and many have speculated that this represents a derogation from existing legislation.

4. In fact, this rule is contained in the Dublin III Regulation¹ to which the UK government opted in when it was first signed and has continued to opt in as it has been amended.

1 Regulation 604/2013 establishing criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member State by a third country national or a stateless person (recast). URL: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32013R0604&from=en>

Dublin Regulations

5. The Dublin Regulation, as it is known, are the rules governing which Member State of the EU is responsible for determining the asylum application of a third country national who has entered the EU.

6. The first agreement was signed in 1990 in Dublin and was known as the Dublin Convention. It first introduced the principle of family reunion in Article 4 of the Convention which stated:

Where the applicant for asylum has a member of his family who has been recognized as having refugee status within the meaning of the Geneva Convention, as amended by the New York Protocol, in a Member State and is legally resident there, that State shall be responsible for examining the application, provided that the persons concerned so desire.²

7. A family member was defined as the spouse of the applicant, the unmarried child of an applicant if that child is under 18 or the parent of the applicant if the applicant is under 18. The family reunion principle took priority over other considerations, such as which country the applicant first arrived, where appropriate.

8. The Dublin Convention was replaced in 2003 with Council Regulation 343/2003 which became known as the Dublin II Regulation.³ Dublin II contained the same 'hierarchy of criteria' as was contained in the 2000 Convention however there were additional amendments relating to unaccompanied minors.

9. Dublin II was replaced in 2013 with Regulation 604/2013 known as Dublin III, which is the Regulation currently in force.⁴ Again the Regulation contains a 'hierarchy of criteria' and thus the Articles are applied in the order that they appear in the text.

10. The criteria for determining the Member State responsible for an asylum application begin at Article 8 which deals with Minors, defined as a third country national or stateless person under the age of 18. An unaccompanied minor is a minor without an adult who is responsible for them. Article 8 requires the following to be applied:

- in the case of applicants who are unaccompanied minors, the Member State responsible for the application is the state where the *family member* (mother, father or adult legally responsible or sibling) is legally present.
- in the case of applicants who are married minors [whose spouse is not legally present in the EU], the Member State responsible for the application is the state where the *family member* (as above) is legally present.

2 Convention determining the State responsible for examining the applications for asylum lodged in one of the Member States of the European Communities, 97/C, URL: [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:41997A0819\(01\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:41997A0819(01)&from=EN)

3 Dublin II Regulation, URL: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32003R0343&from=EN>

4 Dublin III Regulation, URL: - <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:180:0031:0059:EN:PDF>

- in the case of applicants who are unaccompanied minors, the Member State responsible for the application is the state where a *relative* (adult uncle, aunt or grandparent) is legally present and who it has been confirmed can take care of the applicant.
- in the absence of family members or relatives, the Member State responsible for the asylum application of an unaccompanied minor is the state where the application was lodged.

11. The above Article therefore excludes children from being sent back to the EU country of first arrival.

12. What is not clear from the Regulation is the procedure in the case of age disputed asylum seekers. The transferring Member State must provide to the Member State responsible the details of the case including '*an assessment of the age of an applicant*' (Article 31(1)(d)), but there does not appear to be a procedure for cases where the age of an applicant is in dispute. This is not a trivial matter: in the nine years between 2006 and 2014 there were around 10,600 age disputes in the UK and of these 42% of those were found to be aged over 18.⁵

13. Articles 9 and 10 relate to asylum seekers who are aged 18 and over and require the following:

- in the case of applicants who have a *family member* (defined as spouse, unmarried partner and minor children) who is legally residing in a Member State as the beneficiary of refugee status or international protection, then the Member State responsible is that where the family member is residing (provided that the applicant expresses that desire in writing).
- in the case of applicants who have a *family member* (as above) who is awaiting a first decision on an application for international protection in another Member State, then the Member State where the family member resides is the responsible state (provided that the applicant expresses that desire in writing).

14. Article 11 seeks to ensure that where more than one application for asylum is submitted together or close together that families are not split up by the application of the Regulation. Article 12 states that where a Member State has issued a residence document, or visa then that Member State is responsible for the asylum application.

15. Finally, Article 13(1) states that "**where...an applicant has irregularly crossed the border into a Member State by land, sea or air having come from a third country, the Member State thus entered shall be responsible for examining the application for international protection**". The responsibility on the Member State where the applicant first entered to process the asylum claim continues for 12 months following the entry into the state. This is the Article most familiar to the public: that asylum seekers should apply in the first EU country that they enter. However, all of the Articles that come before it take priority.

16. The process of submitting a 'take charge request' (where a Member State considers that another Member State shall be responsible for an applicant) begins when an asylum application is lodged. Article 20 states: '*The process of determining the Member State responsible shall start as soon as an application for international protection is first lodged with a Member State.*' Therefore an individual must make an application for asylum before the responsible Member State can be determined.

5 Home Office, Immigration Statistics - Asylum Volume 3, Quarter 3 2015.

The Tribunal Case

17. The case was heard by the President of the Upper Tribunal Immigration and Asylum Chamber, Mr Justice McCloskey and Vice President Mark Ockleton. It was determined by the Tribunal under its judicial review jurisdiction created by Section 15 of the Tribunals, Courts and Enforcement Act 2007.

18. The case is unusual in that the Upper Tribunal had to examine a great deal of evidence about conditions in Calais, actions taken by the French authorities, the personal background and history of the applicants, their ages and family relationships and the working of the Dublin Regulation. New evidence is rarely called for in a judicial review hearing.

19. Evidence on the appalling squalor in the Calais 'Jungle' is summarised in paragraphs 13-16. By an order made in November 2015 the Tribunal Administratif de Lille instructed the Préfet of Pas de Calais to take certain urgent steps to improve conditions in the camp. These included provision of water access points, toilets and the introduction of a refuse collection service. Clearly public health concerns were dominant, and the Tribunal in its order stated that as a result of the conditions in which they were living there was a serious and **manifestly unlawful** breach of the right of the inhabitants of the 'Jungle' not to be subjected to inhuman and degrading treatment. This is a clear reference to Article 3 of the ECHR: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." This however fails to account for the fact that no one is compelling the inhabitants to live in these conditions, they live their by their own choice.

20. A summary of the family relationships of the applicants is given. The four individuals in Calais were three minors, two aged 16 and one aged 17 years old and their 26 year old dependent adult brother who had three family members living in the UK, who had been granted refugee status. It concludes that swift reunification is the central aim of the proceedings. Paragraph 18 notes that there are psychiatric reports that three of the four applicants are suffering from recognised stress disorders. In the case of the fourth applicant psychiatric disorder and post traumatic stress disorder have been diagnosed.

21. The Tribunal notes French policy in dealing with minor unaccompanied children and the Dublin Regulation in paragraphs 20-25. The following summary appears in paragraph 24:

"Clearly the attitude of the French State to unaccompanied minors is more benevolent than any Europe-wide legislation would require. The assumption that such individuals should be allowed to reside in French territory and should have the benefits of an interim right of residence until their eighteenth birthday gives more than they would obtain routinely in the United Kingdom or many other EU Member States, and the practice of not returning unaccompanied minors to other Member States in which they may have made a claim in transit to France is a generous one."

22. The stance of the Secretary of State is summarised in paragraph 27. The Secretary of State denies that she owes any legal duty to any of the applicants and relies on the Dublin Regulation, whereby it is incumbent on the applicants to lodge an application for international protection with the French authorities. It would then be for the French authorities to issue a “take charge” request to the British government and in due course to transfer the applicants to the United Kingdom for reunification with their siblings if this is feasible.

23. The Tribunal’s conclusions are set out in paragraphs 49-58, which make it clear that they had faced a very difficult balancing act between the application of the Dublin Regulation and Article 8 of the ECHR. Paragraph 52 states:

*“We consider that the Dublin Regulation, with its rationale and overarching aims and principles, has the status of a material consideration of undeniable potency in the proportionality balancing exercise. It follows that vindication of an Article 8 human rights challenge will require a strong and persuasive case on its merits. Judges will not lightly find that...Article 8 operates in a manner which permits circumvention of the Dublin Regulation procedures and mechanisms, whether in whole or in part. **We consider that such cases are likely to be rare.**”* [Emphasis added.]

24. The Tribunal’s formal order grants permission to apply for judicial review, the necessary starting point for the hearing, then states:

“Upon any of the applicants or their representatives sending to the French authorities a letter claiming asylum, and upon that applicant’s solicitors providing to the respondent [the Home Secretary] a copy of that letter and confirmation of it having been sent, the respondent shall admit that applicant to the United Kingdom with a view to determining their application under the Dublin Regulation”

25. The tribunal concludes that the above order ‘achieves an accommodation between the two legal regimes in play’. The Dublin Regulation is respected in that the applicants must have submitted an application for asylum before the process of transfer can begin and the requirements of Article 8 of the ECHR concerning the right to a family life are also met.

26. The Home Secretary has been granted leave to appeal and expedition is said to be desirable. This is a complex and important case and Tribunal members observed that such cases are likely to be rare.

Dublin IV?

27. There have been reports that the European Commission is drafting a new regulation to replace the existing Dublin framework outlined above. These reports suggest that the draft regulation could include a mechanism for redistributing asylum seekers across the EU similar to the temporary relocation scheme agreed by Member States in September 2015, from which the UK chose to opt out. (In September 2015 Member States agreed to relocate 160,000 asylum seekers from Italy and Greece to other Member States for their applications to be heard there. Only those with asylum recognition rates above 75% are eligible).

28. If a relocation mechanism were to be included in a draft regulation it is likely that it would follow Articles 8-11 on family reunion, in regard to the order of criteria to be applied in determining Member States responsibility for applications.

29. Were any relocation mechanism to feature in a future Dublin regulation it is likely that the UK would wish to opt out. Any opt out would apply only to the amended regulation so the Dublin III Regulation would still apply to the UK. This could create the perception that the UK would be having the best of both worlds since we would retain the right to send some applicants back to the EU country of first arrival. (Approximately one thousand are sent back every year).

30. It is possible that the Council could vote (by QMV) on a Commission proposal that Dublin III be inoperable for the UK in the event of an opt out of Dublin IV. In effect, the UK would be expelled from the Dublin Regulation. If this were to happen, the UK would no longer have responsibility for applicants in other EU Member States on the basis of family members in the UK, as in paragraph 9-13 above, but it would also lose the right to send back applicants to other Member States when it could be established that the applicant entered the EU in another that Member State.

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