

What does the refugee crisis mean for the future of the CEAS?

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Dear Editor,

One can hope that the recent wave of asylum seekers and refugees arriving in Europe from the Middle East and Afghanistan will have a positive impact on the operation and direction of the Common European Asylum System (CEAS) going forward.¹ The current crisis has provided the EU with various challenges. It has raised questions regarding the potential use of temporary protection and further questions regarding the Dublin system, as well as forcing Member States to tackle the issue of burden sharing and relocation on a scale not seen heretofore.

The Dublin system operates under the ‘Dublin III Regulation’.² It allows for a determination to be made regarding the Member State responsible for determining a

¹ EU Commission, ‘Common European Asylum System’ <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/index_en.htm> accessed 28 October 2015.

² Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast).

particular asylum claim – thus attempting to eliminate secondary movements of asylum seekers across the EU.

In recent years, the Dublin system has been subjected to operational restrictions from both the European Court of Human Rights (ECtHR) and the Court of the European Union (CJEU). In *MSS v Greece & Belgium*, the ECtHR held that there were ‘systemic deficiencies’ in the Greek system and, as such, the transfer of asylum seekers amounted to a violation of Articles 3 (right to freedom from torture, inhuman and degrading treatment) and 13 (right to an effective remedy).³ Shortly afterwards, in *NS and ME v United Kingdom and Ireland*, the CJEU upheld the ‘systemic deficiencies’ threshold and stated that the transfer of asylum seekers to Greece under the Dublin system breached Article 4 of the Charter of Fundamental Rights of the EU in that it amounted to inhuman and degrading treatment.⁴ In a departure from requiring ‘systemic deficiencies’, the ECtHR held in *Tarakhel v Switzerland* that individual circumstances must be taken into account, meaning that systemic deficiencies are no longer the sole deciding factor in suspending transfers.⁵

While the Dublin III Regulation forms part of the CEAS legislative package, major NGOs, such as the European Council on Refugees and Exiles (ECRE) have stated that ‘the Dublin system fails to ensure that refugees are protected, and wrongly assumes that there are equal standards of protection across Europe.’⁶ Furthermore, ECRE calls

³ *MSS v Greece and Belgium* App no 30696/09 (ECtHR, 21 January 2011).

⁴ Joined Cases C-411/10 and C-493/10 *NS v Secretary of State for the Home Department and ME v Refugee Applications Commissioner and the Minister for Justice, Equality and Law Reform* [2011] ECR I-13905. This threshold was subsequently upheld in Case C-394/12 *Abdullahi v Bundesasylamt* (ECJ, 10 December 2013).

⁵ *Tarakhel v Switzerland* App no 29217/12 (ECtHR, 4 November 2014).

⁶ ECRE, ‘Dublin Regulation’ <<http://www.ecre.org/topics/areas-of-work/protection-in-europe/10-dublin-regulation.html>> accessed 28 October 2015.

for the Dublin Regulation to be abolished and replaced with a ‘more humane and equitable system’.⁷

What effect has the refugee crisis had on the operation of the Dublin system? The crisis has created difficulties for the implementation of FRONTEX, the fingerprint system, important to the operation of the Dublin system, whereby each asylum seeker has their fingerprints taken as part of the registration process when they apply for asylum. The crisis has also highlighted further problems with reception conditions, as highlighted in judgments such as those mentioned above. Recently, questions have been asked of the Hungarian system, leading the German Administrative Court of Dusseldorf to suspend transfers of asylum seekers to Hungary⁸ and the Swiss Council for Refugees to call for transfers to Hungary to be similarly suspended.⁹ Earlier this month, the Belgian Council of Aliens Law Litigation also suspended transfers of single women asylum seekers to Italy.¹⁰

It is clear that it will not be possible to return all asylum seekers to the Member States where they first entered the EU, particularly Greece, Hungary and Italy, both in law and in practice. What this means for the Dublin system is unclear. The move towards greater burden sharing through relocation agreements could see the introduction of a more equitable system, as called for by ECRE.

⁷ *ibid.*

⁸ ECRE, ‘Weekly Legal Update – 2 October 2015: *Germany: Administrative Court of Dusseldorf suspends Dublin transfer to Hungary*’ <http://us1.campaign-archive1.com/?u=8e3ebd297b1510becc6d6d690&id=757f154092&e=1d7a568eac#Ger_hu> accessed 28 October 2015.

⁹ ECRE, ‘Weekly Legal Update – 2 October 2015: *Switzerland: Swiss Refugee Council calls for temporary suspension of Dublin transfers to Hungary*’ <<http://us1.campaign-archive1.com/?u=8e3ebd297b1510becc6d6d690&id=757f154092&e=1d7a568eac#Swit>> accessed 28 October 2015.

¹⁰ ECRE, ‘Weekly Legal Update – 9 October 2015: *Belgium: CALL annuls Dublin III transfer to Italy of single woman*’ <<http://www.ecre.org/topics/elena/elena-weekly-legal-update.html#5>> accessed 28 October 2015.

In the face of large increases in the numbers entering Europe to seek asylum, the EU has, so far, opted not to invoke the Temporary Protection Directive, the first asylum-related directive to be enacted under the CEAS in response to the influx of asylum seekers from the former Yugoslavia in the 1990s.¹¹ There have been calls to invoke the Temporary Protection Directive as a means of coping with the sharp increase in asylum seekers.¹² However, such a move would mean the EU – and refugees – would have to grapple with yet another status, ancillary to refugee status, most likely leading to differences in treatment, in terms of legal entitlements and protections afforded to those in need of international protection. Instead the EU has taken the preferable option of burden sharing and relocation. This route still provides for recognition, under the CEAS legislation. Two agreements, reached in September, provide for the distribution of asylum seekers across EU Member States, known as ‘relocation’. In order to be considered under this agreement, the asylum seeker’s nationality must have a recognition rate of 75% or greater in international protection (both refugee status and subsidiary protection) – based on Eurostat figures, this includes Syrians, Eritreans and Iraqis.¹³ While these agreements go some way towards easing the pressure on Italy and Greece as frontline states – the second agreement purports to take 43% of the Greece and Italy’s asylum seekers that arrived during the period of July and August – a sizeable number of asylum seekers in Hungary are not being included due to Hungary’s unwillingness to be seen as a frontline state.¹⁴ The agreements are temporary for now, operating within a framework of two years;

¹¹ 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.

¹² Meltem Ineli-Ciger, ‘The Missing Piece in the European Agenda on Migration: the Temporary Protection Directive’ (*EU Law Analysis*, 8 July 2015) <<http://eulawanalysis.blogspot.ie/2015/07/the-missing-piece-in-european-agenda-on.html>> accessed 28 October 2015.

¹³ Steve Peers, ‘Relocation of Asylum-Seekers in the EU: Law and Policy’ (*EU Law Analysis*, 24 September 2015) <<http://eulawanalysis.blogspot.ie/2015/09/relocation-of-asylum-seekers-in-eu-law.html>> accessed 28 October 2015.

¹⁴ *ibid.*

however, there is a proposal for a more permanent arrangement.¹⁵ This could mean that the Temporary Protection Directive might never be invoked.

In conclusion, it is hoped that some positives can come from the current refugee crisis. There is now the potential for increased integration in terms of asylum procedures across the EU as a result of the refugee crisis. The flow of asylum seekers arriving in Europe, traversing states such as Croatia, Hungary, Slovenia and Austria in order to gain access to Germany, Sweden and Finland has had clear impacts on existing structures, most notably the ability of Member States to partake in the Dublin system. While there are undoubtedly economic considerations in choosing a destination, and indeed it is the right of asylum seekers to choose where to apply for asylum, variations in recognition rates across the Union cannot be ignored. While, practically speaking, new measures to increase harmonisation of asylum procedures can be expected in the coming years, finding agreement at an EU level will be difficult. The recent agreements on burden sharing have served to highlight numerous differences on the issue between Member States.¹⁶ The CEAS will, as it has done, slowly move forward. Whether it can bring all Member States along is another question.

Is mise le meas,

Jeff Walsh

¹⁵ *ibid.*

¹⁶ *ibid.* The opt-outs for Ireland, the UK and Denmark are also to be considered – all three states have opted out of the majority of recast legislation under the CEAS.