



REVISITING THE DUBLIN CONVENTION

Some reflections by UNHCR in response to the Commission staff working paper

1. Introduction

In the context of the process of Community harmonization in the areas of freedom, security and justice mandated by the Treaty of Amsterdam, the European Commission has issued a working paper entitled *“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”*.¹ The purpose of this working paper is to facilitate the discussion of the instrument which, in conformity with the Treaty, needs to be adopted to replace the Dublin Convention.

At the time of its adoption, UNHCR welcomed the Dublin Convention because it established a mechanism among States Parties to the 1951 Convention relating to the Status of Refugees, whereby an asylum claim would be adjudicated, in principle, by one of them. Such a mechanism had the potential to remedy the situation of so-called “orbit cases”, in which no State would consider itself responsible for the determination of an asylum claim, resulting in considerable hardship for the asylum-seeker and in a serious challenge to the principle of responsibility sharing which underpins the international regime of refugee protection. While it is true that the operation of the Dublin Convention has significantly reduced the number of “orbit cases”, problems of interpretation and evidence relating to the established criteria have caused asylum-seekers to spend many months in uncertainty as to which Member State will eventually consider their claims. Furthermore, UNHCR remains concerned that any Member State retains, under the Dublin Convention, the possibility to shift responsibility for hearing the claim to another State outside the European Union, thus breaking the chain of commitments and mutually agreed safeguards that UNHCR can reasonably expect within the European space.

The working paper acknowledges that the Dublin Convention has not operated as well in practice as its authors hoped it would, and submits that it is sensible to use the opportunity provided by the Treaty of Amsterdam not only to take stock of practical experience of implementing the Dublin Convention to date, but also to reflect again on the principles on which the Convention is based, in the light of the objectives established by the Treaty in the field of asylum.

UNHCR welcomes the broad approach taken by the Commission in this regard, and wishes to contribute to the debate by advancing some reflections from the standpoint of its international protection mandate and responsibilities. The interest of the refugee to have his/her claim determined fairly and promptly, in an environment supportive of his/her psychological and social needs, must, in UNHCR’s view, remain a central

¹ Document SEC (2000) 522 final, of 21.3.2000.

consideration in any discussion of States' responsibility for processing asylum applications.

UNHCR considers that any analysis of the issue must be based on the understanding that the responsibility for examining an asylum request lies primarily with the State to which it has been submitted. While that State may be relieved from such responsibility if it ensures that another State will consider the request, it is essential that any arrangements that may be concluded to this end, be consistent with the imperatives of refugee protection.

In UNHCR's view, arrangements on transfer of responsibility should not be utilized as instruments of migration control, but rather should be aimed at ensuring that the most appropriate solution is identified in respect of those applicants who, after consideration of their claim, are found to be in need of protection as refugees. As the Executive Committee of UNHCR has pointed out, transfers of responsibility for considering asylum applications should only be explored in cases where the applicant already has a connection or close links with another State and, therefore, it appears fair and reasonable that he be called upon first to request asylum there.²

The analysis that follows proceeds from this perspective.

2. Criteria laid down in the Dublin Convention

The links or connections set out in the Dublin Convention as criteria for justifying the transfer of responsibility are:

(i) Family links

In accordance with Article 4, if any one of certain specified members of the close family of the applicant already enjoys asylum as a Convention refugee in another Member State, that State shall be responsible for examining the application, provided that the persons concerned so desire. The specified members of the applicant's family are his or her: spouse, unmarried minor children, and father or mother where the applicant is an unmarried minor child.

(ii) Other links or connections

A Member State other than the one with which the application has been lodged may agree for humanitarian reasons to consider it. Article 9 provides that any Member State, even when it is not responsible under the criteria laid out in this Convention, may, for humanitarian reasons, based in particular on family or cultural grounds, examine an application for asylum at the request of another Member State, provided that the applicant so desires.

(iii) Possession of a residence permit

Article 5(1) provides that where the applicant is in possession of a valid residence permit issued by a Member State, that Member State shall be responsible for examining the application. Detailed rules are given in connection with applicants who

² Conclusion No. 15 (XXX) of 1979.

are in possession of more than one valid residence permit issued by different Member States.

(iv) Possession of a visa

Article 5(2) provides that where the applicant is in possession of a valid visa issued by a Member State, that Member State shall be responsible for examining the application. Detailed rules are given in connection with applicants who are in possession of a transit visa, of a visa issued on the written authorization of another Member State, or of more than one visa issued by different Member States.

(v) Irregular entry into the territory

According to Article 6, if a person has managed to enter irregularly into the territory of one Member State, having come from a non-member State, that Member State shall be responsible for examining any application for asylum that such person may subsequently submit. That State shall cease to be responsible, however, if the applicant has been living at least for six months in the Member State where the application for asylum is made.

(vi) Regular entry into the territory

Article 7(1) provides that the responsibility for examining an application for asylum shall be incumbent upon the Member State responsible for controlling the entry of the alien into the territory of the Member States, except where, after legally entering a Member State in which the need for him or her to have a visa is waived, the alien lodges his or her application for asylum in another Member State in which the need for him or her to have a visa for entry into the territory is also waived. In this case, the latter State shall be responsible for examining the application for asylum.

3. Situations in which there is no transfer of responsibility

The Convention also identifies certain situations in which the rules on transfer of responsibility do not apply or may be departed from. These situations are:

(i) When no rule on the transfer of responsibility is applicable

Article 8 states the obvious when it provides that where no Member State responsible for examining the application can be designated on the basis of the criteria listed in this Convention, the first Member State with which the application for asylum is lodged shall be responsible for examining it.

(ii) When the member State with which the claim has been lodged, decides to consider it

Article 3(4) provides that each Member State shall have the right to examine an application for asylum submitted to it by an alien, even if such examination is not its responsibility under the criteria defined in the Convention, provided that the applicant for asylum agrees thereto.

(iii) When the applicant is in transit in an airport

Article 7(3) provides that where the application for asylum is made in transit in an airport of a Member State, that State shall be responsible for examination.

4. Assessment of the Dublin Convention's criteria from a protection perspective.

UNHCR wishes to offer the following assessment of the criteria for transfer of responsibility contained in the Dublin Convention, viewing them from a protection perspective and focusing in particular on the nature and strength of the link between the applicant and the State to which responsibility is to be transferred.

(i) Family links

The principle of family unity, and its corollary the principle of family reunion, are fundamental principles of human rights and of refugee protection. UNHCR, therefore, fully supports the inclusion of these principles among the criteria for transferring the responsibility for considering asylum claims.

UNHCR would, however, strongly recommend that a broader definition of family unity be included in the forthcoming instrument. Such definition could generally follow the lines proposed in the Commission's Proposal for a Council Directive on the right to family reunification.

(ii) Other links or connections

UNHCR agrees that the Member State to which an asylum request has been submitted can reasonably seek to transfer the responsibility for considering it to another Member State where the applicant has other links, including extended family links or cultural links, and believes that the latter should give favourable consideration to this request. Obviously, the applicant's own desire to preserve or restore the link(s) in question will be a key triggering factor in such procedure.

(iii) Possession of a residence permit

UNHCR also agrees with the criterion according which the responsibility for considering an asylum request submitted within the jurisdiction of a Member State may be transferred to a Member State of which the applicant possesses a valid residence permit. In UNHCR's view the possession of such permit can be taken as indicative of a sufficiently meaningful link between the person and the State, hence it may justify the transfer of responsibility.

(iv) Possession of a visa

Conversely, UNHCR considers that fact that the applicant has been issued a visa by a Member State should not, in and of itself, provide sufficient grounds for transferring to that State the responsibility for considering the application³.

(v) Entry into the territory

UNHCR considers it wholly inappropriate to derive any responsibility for considering an asylum application from the fact that the applicant has been merely present in the territory of a Member State. Mere presence in a territory is often the result of fortuitous circumstances, and does not necessarily imply the existence of any meaningful link or connection. This holds true irrespective of whether the entry of the person in the territory of a State was regular or not. Even a person who was regularly admitted to the territory of a State cannot be assumed to have established a meaningful link with that State if he/she has only remained there for a short period of time.⁴

In addition, this criterion places at a disadvantage countries bordering areas affected by refugee flows, and thus goes against the principles of responsibility sharing and solidarity which are at the basis of the Union's endeavours in the field of asylum.

5. Recommendations and final considerations

On the basis of the foregoing, UNHCR strongly recommends that the following fundamental principles be affirmed in the instrument that will be adopted in replacement of the Dublin Convention:

- (i) The principle that the responsibility for considering an asylum claim lies with the Member State with which and in whose jurisdiction the claim is lodged; and,
- (ii) The principle that the transfer from one Member State to another of the responsibility for considering an asylum application may only be justified in cases where the applicant has meaningful links or connections with the latter Member State. For this purpose, the notion of meaningful links or connections includes family and cultural links, as well as legal residence in the Member State, but does not include the possession of a visa, or mere previous presence in that State's territory.

Finally, UNHCR wishes to emphasise that the credibility of any mechanism for transfer of responsibility is contingent upon the existence of harmonised standards in several other substantive and procedural areas of asylum. These include: the

³ An exception is to be made where the visa in question was issued for the purpose of facilitating the lawful departure of a person at risk of persecution from his or her country of origin. The issuance of such a "humanitarian" visa can be considered as a prelude to full examination of the asylum claim on the territory, and by the competent authorities, of the issuing State.

⁴ It should be stressed that this position in no way diminishes the importance and usefulness of the Eurodac system for the computerised comparison of fingerprints, as one major objective of that system is to address the problem of repeat or multiple applications.

interpretation of the 1951 Convention refugee definition and the scope of complementary forms of protection; fair and expeditious asylum procedures; conditions for the reception of asylum-seekers; and the balance of effort among Member States (though, in this last area, progress has been achieved with the establishment of a European Refugee Fund). The disparity of national standards in these key areas challenges many of the assumptions on which the Dublin Convention is implicitly based. In practice, the use by a Member State of its discretionary power under Article 3(4) may, in some cases, provide the only effective safeguard against indirect *refoulement* or against denial of access to the benefits of the 1951 Convention.

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