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DER EINZELFALL ZÄHLT.

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Statement by PRO ASYL on the planned reform of the Dublin Regulation (Dublin IV, COM (2016) 270)

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I. The draft for Dublin IV: an unparalleled rollback in refugee protection

On 4 May 2016 the European Commission published the draft to reform the Dublin Regulation.[1] The Dublin system governs responsibility within the EU as to where and how refugees can apply for asylum. According to the existing system, those Member States in which the refugees first set foot on European territory, or were registered, are generally responsible for their reception and asylum procedures. The blocking of legal access by air and the geography of the main routes into the EU have meant that the states on the external borders have generally been responsible, e.g. Greece, Italy, Bulgaria, Hungary or Malta.

As late as on 7 October 2015 Chancellor Angela Merkel told the European Parliament that the Dublin system in its present form was obsolete. She was intervening in the ongoing debate about a definite EU distribution key, according to which every EU member state was to take a certain share of asylum seekers. In April 2016 the European Commission was still thinking about this proposal as a possible new distribution system. Yet the proposal of 4 May 2016 (COM (2016) 270) goes in another direction. Instead of introducing a permanent, binding distribution key – which would be problematic because of its obligatory character – the existing Dublin system is made stricter. A distribution of refugees from the EU border states is only to take place automatically – i.e. without the approval of the other Member States – if these states have already filled more than 150 percent of a purely arithmetical quota. The European Commission disregards the fact that for states like Italy or Greece even filling the purely arithmetical quota would mean overburdening their scarce reception structures. In addition, the mode of calculating the distribution key is questionable as it leaves out the host society's experience with immigration and existing migrant networks. The public debate about the distribution key has also meant that it has gone almost unnoticed that the present Dublin rules are to be made more restrictive. And yet the new Dublin IV Regulation will probably have serious consequences for the situation of refugees in Europe.

Steve Peers, a British expert on European law, calls the Commission's proposals – not without reason - an "Orbanisation of European asylum law: they copy and entrench across the EU the key elements of the Hungarian government's policy, which was initially criticised: refusing essentially all asylum seekers at the external border and treating them as harshly as possible so as to maintain the Schengen open borders system."[2]

PRO ASYL decisively rejects the European Commission's proposal. The existing Dublin system has already been strongly criticised by PRO ASYL and other actors from European civil society. Yet Dublin IV constitutes a distinct rollback. The reform proposal is an unparalleled attack on European refugee protection aimed at preventing most of the refugees from access to asylum procedures in Europe. New inadmissibility procedures entail a requirement to examine the possibility of returning them to allegedly safe third states or safe states of origin outside the EU. At the same time, the existing humanitarian clauses of the Dublin Regulation have been almost entirely abolished. These are, for example, the right of member states to take responsibility for the asylum procedure, and binding deadlines that prevent refugees being denied appropriate access to an asylum procedure for years. Refugees who still try to apply for asylum in the EU are likely to be forced to stay in EU states where they are exposed to inhumane conditions and cannot expect any lasting prospect of protection. Numerous new provisions will create gaps in legal protection, and thereby a risk that tens of thousands of refugees will no longer have access to refugee protection. This will undermine the idea underlying the EU's asylum system, that third-country nationals requiring international protection are offered appropriate status (Art. 78(1) TFEU). The Dublin IV

[1] European Commission, press release: Towards a fair and sustainable Common European Asylum System, Brussels, 4 May 2016 [http://europa.eu/rapid/press-release_IP-16-1620_en.htm, last access on 14.09.16].
[2] Steve Peers, The Orbanisation of EU asylum law: the latest EU asylum proposals, EU Law Analysis Blog of 6 May 2016 [http://eulawanalysis.blogspot.de/2016/05/the-orbanisation-of-eu-asylum-law.html, last access on 14.09.16].

proposal deliberately ignores the case law of the European courts, violates refugees' human rights and, what is more, lacks any political practicability for handling the current refugee movements.

The Dublin IV draft is based on the assumption of the European Commission that changing the other asylum law instruments can effect an approximation of the reception systems in the EU: then it would be legitimate to sanction all EU-internal onward migration of refugees. At the same time as Dublin IV, the approximation is to be achieved by recasting the Qualifications and Asylum Procedures Directives as Regulations, which can be immediately applied in the individual member states. The Commission assumes that by resorting to Regulations as legal instruments it can speed up the implementation of the Common European Asylum Systems (CEAS) and create a unified space of protection. However, the Directive laying down standards on the reception of refugees ("Reception Directive") is to remain in this legal form.

The Commission downplays precisely the problems that have contributed to the current crisis of the Dublin system. *Firstly,* the deficiencies in the treatment of asylum seekers in the Member States have largely been a problem of implementing EU law and not one of the binding nature of the individual Directives. *Secondly,* the Commission leaves out of account that the social systems, the economic strength and immigration traditions vary – in some cases greatly - between the EU member states. Consequently there can be no question of these societies having equal living conditions nor can this be automatically created by adopting a Regulation. The economic and financial crisis has been a major factor in exacerbating the sociopolitical imbalance in Europe. In addition, in some member states, e.g. Hungary, there is a sometimes racist sediment of unwillingness to take charge of refugees at all. Over against these social conditions within the EU, the Commission's considerations are purely technocratic. *Thirdly,* many of those seeking protection in the last few years have moved on, not just because of the poorer reception conditions in EU border states. Many wanted to go to other EU states because they had already built up contacts with migrant networks from their home countries. Germany is home to the biggest communities of Syrians (366,556), Iraqis (136,399) and Afghanis (131,454) in the whole of Europe.[3] The existence of migrant networks is very important for refugees on arrival in a new host society. Experience with the CEAS in the last few years has shown that any enforced asylum distribution system will fail if it does not consider the legitimate interests of refugees and their existing networks in the EU member states. This also corresponds to the findings of the majority of migration researchers.[4] *Fourthly*: many refugees have left the states responsible for them because they suffered serious human rights violations there. They suffered arbitrary detentions, sometimes even torture[5] or illegal deportation into states in which they were at risk of inhuman treatment.

The Commission's proposal deliberately disregards the societal realities. Comparing the planned Dublin IV Regulation with the reality of the Common European Asylum System shows that the reform will have dramatic consequences. The undignified situation in some member states, human rights violations committed there and a growing racism will force the refugees to keep moving in the EU. Tens of thousands of refugees will have no opportunity to present their grounds for fleeing and gain a chance of protection. The bulk of them will strand in illegality and the internal European deportation regime will be even more comprehensive than it has been so far.

PRO ASYL is particularly critical of the following changes contained in the Dublin IV reform proposal, and comments on them here in detail, not chronologically but in order of priority:[6]

1. The introduction of the **inadmissibility procedure** will deprive refugees of an opportunity to present their grounds for fleeing in an asylum procedure. Refugees are at risk of being transferred back to a "safe third state" outside Europe, in which there are actually no conditions for a human reception system and a fair asylum procedure; indeed, they may even be at risk of being sent back

[3] Status 2016.
[4] Rat für Migration, „Integration statt Abschreckung" – Die Europäische Asylpolitik steht am Scheideweg, press release of 29.04.16 [http://www.rat-fuer-migration.de/pdfs/RfM_Pressemitteilung_Asylpolitik_2015.pdf, last access on 01.08.2016].
[5] PRO ASYL, Humiliated, ill-treated, without protection. Refugees and asylum seekers in Bulgaria, Frankfurt/Main 2015 [https://www.proasyl.de/wp-content/uploads/2015/12/Bulgaria_Report_en_Dez_2015.pdf], last access 14.09.2016].
[6] A comment on the new automatic redistribution mode (Art. 34ff.) will follow in a separate paper.

to their persecutor state. This procedure does not consider whether the affected persons have family connections in the EU and consequently should be distributed to their relatives.

2. The abolition of **humanitarian mechanisms (expiry of binding deadlines, restriction of sovereignty clause)** restricts the discretion of the EU Member States to allow refugees to undergo their asylum procedures in the state in which they are actually staying. That thwarts any attempt to provide appropriate refugee protection in an individual case of humanitarian emergency. Asylum seekers are at risk of being transferred to EU states in which, e.g. in Hungary, they would receive no protection – and have no possibility of remedy.

If the deadline provision is completely abolished and if a Dublin transfer fails for practical reasons or because it is held up by courts, asylum seekers will remain without access to an asylum procedure in the Member State in which they are present and only have the humiliating status of a constantly renewed short-term visa *Duldung* (stay of deportation) or even illegality. They will be refused a procedure in the state in which they residing so will de facto become refugees in orbit. With ten thousand such refugees no state will declare itself willing to examine the actual grounds for fleeing in a detailed procedure.

3. To **impose the enforced distribution of asylum seekers** the European Commission is using the Dublin IV Regulation to threaten refugees with a loss of basic subsistence benefits. This change will produce social hardship that is completely incompatible with the principle of the modern welfare state and the judgments of European courts.

4. The **best interests of unaccompanied refugee minors** will be de facto undermined if they are to be deported to their first country of entry under Dublin IV. This proposal is an attack on child rights and in blatant contradiction with the case law of the European Court of Justice.

II. Detailed responses to the draft Dublin IV Regulation

1. Inadmissibility procedure (Article 3(3))

Dublin IV establishes an inadmissibility procedure that precedes the actual Dublin procedure and aims to ascertain who is responsible for dealing with the case. Under Article 3(3) the Member States are to give priority to checking whether the asylum seeker has entered via a safe third country, constitutes a threat to national security or public order, or comes from a safe country of origin. This classification will in future be decided solely by the European Union and includes Turkey, besides the western Balkan states (cf. the new Asylum Procedures Regulation, Articles 47 and 48). If one of these grounds fits the refugees concerned, they are to go through an accelerated procedure to ascertain the inadmissibility of the applications. While it was already possible under Dublin III to verify the inadmissibility of asylum applications, the priority of deportation to the third state will be binding under Dublin IV. This procedure does not consider whether the person concerned already has family ties in the EU and consequently should be distributed to their relatives. The refugees concerned are likewise excluded from a redistribution to another EU Member State (e.g. via the relocation programme). The underlying intention is explained in the new recital 17 of the Regulation: the inadmissibility procedure is intended to prevent the asylum seekers falling under its criteria being redistributed within the EU at all.

Only if people fulfil none of the criteria named in Article 3(3) will they come under the Dublin IV procedure of determining the state responsible for examining the asylum application. The actual asylum procedure is only to take place when this state is known. In all, refugees must go through three procedural steps on the way to international recognition as a refugee. For the states and refugees this is a very bureaucratic procedure raising several other questions, which Commission's proposal largely leaves out of account.

Overview: New asylum procedure under Dublin IV

Inadmissibility procedure

- Examination: Entry via safe third state; safe country of origin; asylum seeker is a possible risk to public safety and order.

Dublin IV procedure

- Examination of existing family ties in an EU member state; examination of the state responsible under Dublin IV

Asylum procedure

- Examination of protection status in a national asylum procedure

Assessment

The new inadmissibility procedure stems from the prototype of the EU-Turkey deal and is now to be applied to the whole European area. Not only the EU's border states are to check for the journey of refugees through a safe third state, but in principle every Member State. That will open the opportunity for the EU Member States to transfer asylum seekers directly to third states or even to "safe countries of origin". Admittedly, in each individual case checks must include a possible violation of the principle of *non-refoulement*, according to which refugees must not be deported to states in which they are at risk of persecution within the meaning of the Geneva Convention relating to the Status of Refugees (CSR51), or of torture or inhuman or degrading treatment (Art. 33(1) CSR51, Art. 3 ECHR). The refugees' actual grounds for fleeing are not checked during this inadmissibility procedure. They first have to survive the inadmissibility procedure and then the Dublin IV procedure, so that a very long time may pass before they are interviewed about their grounds for asylum. The principle of refugee protection will be undermined.

Behind the inadmissibility procedure lies the intention to outsource refugee protection outside the EU. On the model of the EU-Turkey deal and other cooperation agreements of the past, third states into which refugees can then be relocated are to be treated as "safe". Yet in the case of Turkey it is already clear that this country cannot guarantee any lasting protection for refugees. Turkey has not fully implemented the Geneva Convention and, according to documentation by human rights organisations, has violated the *non-refoulement* principle by turning e.g. Syrian refugees back to their country of origin.[7]

The new three-level procedure is very complex and would probably overburden EU member states like Greece in addition to their present situation. The difficulties of the inadmissibility procedure are already becoming clear under the terms of the EU-Turkey deal. PRO ASYL has documented the inhumane consequences of the deal, which was the first to use the inadmissibility procedure systematically.[8]

Article 3(4) of the new draft Dublin Regulation contains a provision that will completely undermine the aim of the Commission to distribute asylum seekers on a solidarity basis. Paragraph 4 provides that the Member State is responsible for all refugees who are not to be distributed during an inadmissibility procedure, for the reasons mentioned above. So these states alone are responsible for (provisionally) taking charge of and returning the asylum seekers. For the time of their procedure and even after the expiry of a successful legal procedure they will be permanently allocated to the country in which they are staying. A further distribution is only to be possible for those whose applications are not found to be inadmissible. The provision in Article 3(4) has nothing in common with a distribution of refugees on a

[7] Reinhard Marx, Legal Opinion on the admissibility under Union law of the European Council's plan to treat Turkey like a "safe third state", Frankfurt/Main, 2016 [https:// https://www.proasyl.de/wp-content/uploads/2015/12/PRO-ASYL_Legal_Opinion_by_Dr_Marx_Turkey_is_no_safe_third_state_14-March-2016.pdf, last access on 12.09.2016].

[8] PRO ASYL, The EU-Turkey Deal and its consequences, 2016 [source: https://www.proasyl.de/wp-content/uploads/2016/06/PA_Broschuere_EU-Tuerkei_Mai16_webEND.pdf, last access on 01.08.2016]; see also Nora Markard/Helene Heuser, Möglichkeiten und Grenzen einer menschenrechtskonformen Ausgestaltung von sogenannten „Hotspots" an den europäischen Außengrenzen, Gutachten vom 04.04.2016, p. 28ff. [https://www.jura.uni-hamburg.de/media/ueber-die-fakultaet/personen/markard-nora/markard-heuser-hotspots-2016.pdf, last access on 01.08.2016].

solidarity basis, as it will mainly continue to be EU border states who are responsible for carrying out the procedures and, finally, for returning the refugees.

2. Abolishing humanitarian clauses and deadlines (Articles 15, 19, 26 and 30)

The Dublin system presupposes that the state responsible for the asylum application of refugees is the one in which they first set foot on European soil. And yet in the existing Dublin III Regulation there are humanitarian clauses and deadlines that, under certain circumstances, enable the responsibility to go to the Member State in which the asylum seeker is actually residing. That occasionally enabled humane solutions in the past, e.g. the reception of refugees from Hungary in September 2015.

A key element of the Dublin IV Regulation is now to eliminate these mechanisms almost entirely. The single allocation decision is to be lastingly cemented. Instead of a Member State making a request to responsible Member States regarding transfers, in the case of take-back procedures it will only notify them of the transfers.

Besides the sovereignty clause and the expiry of deadlines in transfer procedures, the existing Dublin system provides for other ways in which a Member State can lose its responsibility for an asylum application due to expiry of a deadline. The present Article 13 allows responsibility to run out after twelve months for all refugees found to have irregularly crossed the border into a Member State by land, sea or air. Under Article 19, there is no responsibility for applications from persons for whom it can be proved that they left the EU for at least three months. Dublin IV has deleted the whole of Article 19 and likewise the provision in Article 13 that the deadline for responsibility runs out after twelve months.

Assessment

Abolition of binding deadlines (Articles 26, 30)

Member States have hitherto had to observe certain set periods – generally six to 18 months – for transferring the asylum seeker to the responsible Member State. The introduction of the Dublin procedure itself, i.e. the request to the Member State to which the transfer is to take place, has had to begin within two to three months. If the transfer is not carried out within the set period, the Member State in which the asylum seeker is actually living becomes responsible for the asylum procedure. The underlying idea has been to rapidly gain clarity on which country would conduct the asylum procedure and not to leave the asylum seeker stranded for years, with no prospects and outside of a regular procedure in a Member State. The European Court of Justice (CJEU) has noted that clarifying responsibility is also in the interests of the Member States in order to speed up asylum procedures.[9] Regarding the situation of the asylum seeker, the binding deadlines have the function of preventing a violation of fundamental rights by excessively long procedures. According to the CJEU, Member States are called upon to examine the asylum applications themselves, if necessary.[10]

The deadline arrangement with subsequent change of responsibility is now to be abandoned; the relevant provision will be deleted in Articles 26 and 30. Instead, the Member State is supposed to send a notification to the responsible Member State within two weeks of obtaining the Eurodac fingerprint hit and to transfer the asylum seeker without delay. The consent of the responsible Member State is taken for granted; it no longer needs to explicitly agree.

This arrangement leads to many unsolved questions, because the present Dublin system shows that some Member States are unwilling or unable to take back asylum seekers and take charge of them under decent conditions. If the deadline arrangement is dropped and a Dublin transfer fails for practical reasons, or because courts impede it, the asylum seekers will remain in the Member State in which they are actually living with the humiliating status of a constantly renewed short-stay visa (*Duldung*) and without access to an asylum procedure.

[9] CJEU, Abdullahi, C-394-12 of 10.12.2012, para. 53.
[10] CJEU, C -411/10 and C- 493/10 of 21.12.2011, para. 98.

In addition, there is the question of the conditions awaiting asylum seekers in the country responsible for them. If that country is only informed but no longer needs to agree to the transfer, refugees will be taken to certain countries and then left to themselves. In specific constellations this arrangement incompatible with the case law of the European Court of Human Rights (ECtHR). In its decision *Tarakhel v. Switzerland,* the ECtHR found that sending back families with children to Italy was a violation of Article 3 ECHR (prohibition of inhuman or degrading treatment) unless the requesting state guarantees that the receiving state takes charge of them in a manner suitable for families.[11] The decision has practically had the effect that Italy must provide individual guarantees of appropriate reception facilities. Under Dublin IV these guarantees would no longer be possible as the responsible Member State would only be informed and the transfer could take place without its consent. Also families and vulnerable asylum seekers could be taken to states which did not take charge of them under decent conditions.

Restriction of the sovereignty clause (Article 19)

So far Dublin III has enabled Member States to exercise discretion in taking responsibility themselves, i.e. to declare themselves willing to assume competence for asylum procedures. Such an example was, for example, the German government's readiness to take charge of Syrian refugees in September 2015 when a humanitarian emergency was brewing at Budapest's Keleti railway station. For certain states, e.g. Bulgaria, the Federal Office for Migration and Refugees has in the past regularly assumed responsibility for vulnerable refugees. This discretion will be limited so much that it can hardly be used in practice at all. Under Article 19(2) the sovereignty clause is only to be exercised in family situations. No other humanitarian emergency situation can then be dealt with via this mechanism. The European Commission is thereby deliberately creating a system that will prove completely inflexible in emergency situations. For those concerned, this may lead to severe human rights violations, if no state can procure them access to an asylum procedure on its own discretion and they have to remain permanently without protection. The arrangement will also prevent church communities finding a dignified solution for refugees in a difficult humanitarian situation. Despite their finding sanctuary in a church, the state in which they are actually residing will no longer ultimately assume responsibility for their asylum application.

Loss of responsibility due to expiry of deadline (Article 15 and 19)

The abolition of responsibility through expiry of a deadline is diametrically opposed to the Commission's aim to create a system based on solidarity. In the past, the EU border states have benefited from the arrangement, being greatly burdened due to the first entry criterion. Abolishing the deadlines will mean that they alone remain responsible for a very large share of asylum seekers. This may have the practical consequence that e.g. states like Italy will be hardly able to register all asylum seekers properly, as is already the case. Member states which rightly assess this procedure as lacking in solidarity may then refuse to conduct a proper registration and establish appropriate reception structures. Precisely this last circumstance would be to the detriment of the protection seekers. A race to the bottom by Member States regarding reception conditions would be the continued consequence of the unfair sharing of responsibility.

3. Transfers of unaccompanied refugee minors (Article 8(4) and (10))

Under the existing Dublin system, unaccompanied minors are particularly vulnerable and consequently, according to CJEU case law, are not to be transferred to another Member State, so that they can stay in the country in which they are actually living.[12] The new draft Regulation abolishes this provision. Under Article 10(5) the Member State in which the child first applied for asylum is to remain competent for him/her. The responsibility of the first state can only pass to the state where minors are actually living if it is proven that transferring them would be in the children's interest.

[11] ECtHR, Tarakhel v. Switzerland, Application No. 29217/12, judgment of 4.11.2012.
[12] CJEU, MA, C-648/11 of 06.06.2013, para. 55.

Assessment

The new arrangement is a considerable step backwards in the protection of minors. The Commission explains the intention behind it in recital 20 of the Regulation, according to which the secondary movements of unaccompanied minors are to be discouraged. At the same time, however, it explains that the Member State where the child actually lives must make sure that minors are taken charge of appropriately in the state to which they are to be transferred. This consideration contradicts the new rule that the state receiving the transferred person no longer has to agree, but is only informed by the requesting Member State. It therefore remains unclear how the latter can guarantee that the minor will be taken charge of appropriately in the receiving state.

The Commission's proposal is incompatible with the principle of *the minor's best interests*. In its judgment *MA* the CJEU stated, with reference to Article 24(2) Charter of Fundamental Rights of the European Union:

> "This taking into account of the child's best interests requires, in principle, that […], Article 6(2) of the Regulation No 343/2003 be interpreted as designating as responsible the Member State in which the minor is present after having lodged an application there."[13]

This is in the spirit of the "best interests of the child" as set out in Article 3(1) UN Convention on the Rights of the Child, since, under these conditions, access to the asylum procedure must be enabled in the state in which the child is actually present. If Dublin IV deviates from this provision in future it will no longer be guaranteed that the unaccompanied minor can, as quickly as possible, be guaranteed lasting prospects at the place of residence. The Commission assumes that the asylum responsibility under the new provisions of the CEAS will be established faster than before. Yet it is unclear why it adheres to transfers as being in the best interests of the child.

It may indeed be refuted that an asylum procedure in the first state in which the minor has applied for asylum corresponds to the child's best interests. Nevertheless, the onus of proof is on the minor and his/her legal representatives. This responsibility is incompatible with the goal of a rapid clarification of responsibility and makes the minor responsible for providing proof which will, in reality, hardly be possible in an appropriate period. The consequence will be that the procedures drag on and in the worst case the minors are transferred just when they have become used to their place of residence.

4. Obligations of asylum seekers (Articles 4 and 5)

Article 4(2) contains the obligation of the asylum seeker to present the information needed to determine the Member State responsible. This should happen as fast as possible, but at the latest during the interview. Article 5 then sets out the consequences of non-compliance with this obligation. If the applicant does not comply with the obligation set out in Article 4(1) the procedure is to be accelerated. Furthermore, under Article 5(3) asylum seekers who do not reside in the Member State in which they are "obliged to be present" are not to be entitled to claims for material benefits ("reception conditions") as set out in Articles 14–18 of the EU Reception Directive, with the exception of emergency health care (Article 19).

Assessment

The combination of Articles 4 and 5 in the proposed reform will lead to inadmissible social hardship and de facto undermine asylum seekers' right to protection.

Undermining the principle of ex officio investigations

Article 5(4) stipulates that only the information that the refugee has presented before, or at the latest during the interview, is to be considered for determining the responsible Member State. The authorities must not take information submitted later into account. This, however, undermines the principle of ex officio investigation to which every authority in Europe is bound. Independently of the statements of

[13] Ibid., para. 60.

those concerned, state authorities are also supposed to obtain the information required to conduct an administrative act. Article 41 of the Charter on Fundamental Rights of the European Union (CFREU) words this principle of good administration in primary law as a fundamental right.

Inhumane exclusion from social benefits

It is particularly serious to exclude asylum seekers from claiming material benefits under Article 5(3) Regulation if they do not reside in the Member State designated as responsible. The Commission proposal seeks to undermine the right to preserving a physical substance level. The provision is an unparalleled attack on the principle of the welfare state and human dignity.

According to the proposed Regulation, asylum seekers concerned are to be deprived of the claims from Article 14–18 of the existing Reception Directive. These claims comprise the schooling of minors (Art. 14), access to the labour market (Art. 15) and material benefits (Art. 17), including a living to protect physical and mental health and accommodation (Art. 18). True, new Article 17a(2) of the Reception Regulation states that Member States are to guarantee a decent subsistence level for all applicants. Yet it is quite unclear how this is to be possible if there is a simultaneous exclusion from material benefits. It is therefore to be feared that Member States really will exclude those concerned from material benefits when implementing Dublin IV Regulation and thereby deprive them of a physical subsistence level.

Article 17a(3) states that minors are to receive access to educational activities until the expiry of a transfer. They are thereby deprived of an equivalent right of access to a regular educational system under Article 14.

This complete exclusion from a physical subsistence level and the rights of the Reception Directive is incompatible with case law.

The European Court of justice found in its decision *CIMADE* that

> "a Member State in receipt of an application for asylum is obliged to grant the minimum conditions for reception of asylum seekers […] even to a asylum seeker in respect of whom it decides […] to call upon another Member State, as the Member State responsible for examining his application for asylum, to take charge of or take back that applicant."[14]

Further, the CJEU replied to the written questions of the French court that

> "the obligation on a Member State in receipt of an application for asylum to grant the minimum reception conditions […] ceases when the same applicant is actually transferred by the requesting Member State, and the financial burden of granting those minimum reception conditions is to be assumed by the requesting Member State, which is subject to that obligation."[15]

The CJEU therefore made clear that the EU can install a procedure in the framework of which the responsibility for an asylum application is assigned to only one Member State. However, while the responsible Member State is being decided and until the end of the actual transfer, the Member State in which the person concerned is staying is the one responsible for receiving and taking charge of the asylum seeker. According to the CJEU, this obligation follows from "the need to share responsibilities fairly between Member States as concerns the financial burden arising from the implementation of common asylum and migration policies."[16]

The CJEU referred in its decision to the provisions of the Reception Directive and noted that "the Directive aims in particular to ensure full respect for human dignity and to promote the application of Articles 1 and 18 of the Charter".[17] It is therefore clear that the planned reforms of the European asylum system must

[14] CJEU, CIMADE, C-179/11 of 27.09.2012, para. 50.
[15] Ibid, para. 61.
[16] Ibid, para. 60.
[17] Ibid, para. 42.

be measured against the CFREU, which guarantees the protection of human dignity and the right to asylum.

At the national level, a complete exclusion from receiving minimum physical subsistence is, at least in Germany, inadmissible in terms of basic rights. The Federal Constitutional Court ruled accordingly with reference to the Asylum Seeker Benefits Act.

> "Moreover, even a short stay or prospect of staying in Germany does not justify a restriction of the right to a guaranteed decent subsistence level to a bare minimum for life. Article 1(1) Basic Law (GG) in connection with Article 20(1) GG requires that the subsistence level must be guaranteed in every case and at all times (cf. BVerfGE 125, 175 <253>). Article 1(1) GG guarantees a decent subsistence level that must be safeguarded by benefits to be provided in the welfare state described in Article 20(1) GG, as a uniform basic law comprising a physical and sociocultural minimum."[18]

And further:

> "The human dignity guaranteed in Article 1(1) GG must not be rendered relative by migration policies."[19]

According to this case law, the bureaucratic wish to rapidly terminate a person's stay does not justify lowering the subsistence level. The Federal Constitutional Court states this regarding the socio-cultural minimum, which certainly covers the physical subsistence level.

The provision is likewise incompatible with the guarantees set out in the Return Directive (Directive 2008/115/EC). According to it, the Member States under Article 14(1c and d) of the Directive must guarantee minors access to basic schooling and consider the needs of vulnerable persons up until deportation. These guarantees, which are set out in Articles 14 and 19 of the Reception Directive are explicitly excluded by the Commission proposal. This is not compatible with the case law of the Federal Administrative Court.

5. Possibilities of appeal and legal protection (Article 28)

Article 28 of the Dublin IV Regulation provides for the right to an effective remedy against Dublin decisions. While Article 28(1) guarantees comprehensive review of the material and legal questions, paragraph 4 restricts legal protection to a narrow field. Accordingly, those concerned are only supposed to be able to appeal before a court against transfers to another Member State as long as their appeal is based on systemic defects in the destination state or on family grounds. That contradicts the recent decision by the CJEU that asylum seekers should be granted subjective rights also in the case of determining the responsible Member State. The possibility of legal protection is thus limited inadmissibly under European law.

Assessment:

With respect to the possibilities of legal protection, the Commission proposal clearly undermines the case law of the CJEU. The latter strengthened the legal protection of asylum seekers as recently as on 7 June 2016 in the *Ghezelbash* and *Karim* cases and affirmed subjective rights in the Dublin system.[20]

Rejecting the older *Abdullahi* decision,[21] that was still based on Dublin II, the CJEU was guided by recital 19 of the Dublin III Regulation, according to which the persons concerned are to be granted an effective legal remedy against transfer decisions. True, the Commission proposal has changed Art. 19 and in new

[18] BVerfG, - 1 BvL 10/10, 1 BvL 2/11, judgment of 18.07.2012, para. 120 [https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2012/07/ls20120718_1bvl001010.html, last access on 01.08.2016].
[19] Ibid, para. 121.
[20] CJEU, Ghezelbash, C-63/15; Karim, C-155/15 of 7.6.2016.
[21] CJEU, Abdullahi, C-394-12 of 10.12.2012.

Article 28 restricted legal protection, along the above lines, to systemic defects and family grounds. Nevertheless, it is noteworthy that the CJEU in its most recent decisions also referred to the purpose of recital 9, that outlines the principles and potential of the Dublin system. The CJEU comes to the following conclusion regarding the Dublin goals:

> "A restrictive interpretation of the scope of the remedy provided in Article 27(1) of Regulation No 604/2013 might thwart the attainment of that objective by depriving the other rights conferred on asylum seekers by that regulation of any practical effect."[22]

Even in the case of Dublin IV changes, this CJEU decision will also stand: "Only an effective judicial remedy will guarantee […] the rights granted the applicant in the CEAS. […] Asylum seekers are thereby granted comprehensive and actionable rights to the upholding of the procedural rules laid down [in Dublin]."[23] This corresponds to Article 47 CFREU, which guarantees an effective legal remedy. This is only the case in which a court or appeal board can comprehensively review the lawfulness of a Dublin decision.

Through restricting legal protection by means of secondary law, the Commission avoids not only the previous case law of the CJEU, but also undermines the human rights guarantee of an effective legal remedy under Article 47 CFREU and Article 13 ECHR.

6. Extending transfer to refugees entitled to international protection (Article 20(1e))

The Dublin system has hitherto only applied to asylum seekers. Dublin IV changes this, since under Article 20(1e) those entitled to international protection, i.e. refugees already recognised in a Member State, can be transferred in the context of Dublin.

Assessment

The new arrangement constitutes a change of system. After all, there has so far been no experience with transferrals of internationally recognised refugees in the context of Dublin. It is doubtful whether this is compatible with Article 6(2) of the Return Directive, according to which holders of a residence permit of an EU Member State must not be automatically transferred by force.

> "In addition, such restrictions on freedom of movement of persons who have received international protection is, in a space with open borders, paradoxical, if not absurd."[24]

It is crucial for recognised refugees that their rights are respected in a unified space of protection.

This was not the case in the past. The Hungarian state e.g. grants accommodation facilities at most to asylum seekers. Recognised refugees have no entitlement to accommodation.

> "Anyone who does not happen to have friends or acquaintances in Hungary is, from the airport, sent more or less sent directly into the street, where there are already thousands of homeless people with Hungarian nationality."[25]

The Commission proposal supplies no solution to these problems. Instead, the situation is exacerbated in that those recognised will not be able to settle in another state than that with designated responsibility for them for five years. The corresponding provision from the Directive on long-term residents has been changed in Article 44 of the new Qualifications Regulation: the 5-year deadline after the expiry of which

[22] CJEU (para. 20), para. 53.
[23] Heiko Habbe, Stärkung des Rechtsschutzes für Asylsuchende im Dublin-Verfahren, Asylmagazin 7/2016, pp. 206–212 [209].
[24] Constantin Hrschuka, Dublin ist tot – Lang lebe Dublin, refugee research blog of 28 June 2016 [http://fluechtlingsforschung.net/dublin-ist-tot-lang-lebe-dublin/, last accessed on 01.08.2016].
[25] PRO ASYL/bordermonitoring.eu, Gänzlich unerwünscht. Entrechtung, Kriminalisierung und Inhaftierung von Flüchtlingen in Ungarn, 2016, p. 28 [https://www.proasyl.de/wp-content/uploads/2016/07/PRO_ASYL_Ungarn_Unerwuenscht_Broschuere_Jul16_WEB.pdf, last accessed on 01.08.2016].

recognised refugees have thitherto been able to gain freedom of movement in Europe and settle in any EU state is in future always to start running when the person concerned is found in another state than that to which they were assigned. This will undermine even further the already slim right to freedom of movement for refugees in Europe. Instead of recognised refugees being subjected to the Dublin transfer regime, they should receive opportunities to enjoy freedom of movement in Europe after their recognition. This also covers the mutual recognition of the respective protection granted by EU Member States, so that refugees can claim the rights of their protective status in other EU states as well.

7. Treating those taken back as subsequent applicants (Article 20)

Article 20(1c) in connection with Article 20(4) of the draft Regulation provides that EU Member States must take back persons for whom they are responsible if they have made an application in another Member State or are staying there without a residence permit. The new element is that, an asylum application filed after transfer is to be treated only as a subsequent application. That means that the original grounds for fleeing will not be examined.

Assessment

This will probably affect a large number of asylum seekers who move on to another Member State and disregard the responsibility of their first country of entry. They will then have no access to an asylum procedure in the Member State in which they are actually staying, due to its Dublin responsibility, and in the state with responsible for them they can then only pursue a subsequent application. In the latter case, the original grounds for fleeing will no longer be considered; the only issue examined will be whether, after leaving their country of origin, there has been a change of situation that could lead to a new threat to the person concerned. With the Regulation now stipulating that asylum applications may only be treated as subsequent applications, there will be a great gap in protection for those concerned. They will not get a single opportunity to present their grounds for fleeing in a regular asylum procedure. They are therefore at risk of being excluded from the protection due to them. The aim of the Commission to prevent secondary movement through this provision is no justification for such a serious loss of protection for the refugees.

8. The right to information (Article 6)

Article 6 contains the rights of asylum seekers to information during the Dublin procedure. The rights to information have been newly included with reference to the repression mechanisms introduced during the Dublin IV reform.

Assessment

Under the conditions of the Dublin IV Regulation, we think that the Member States should be more strictly obliged to provide information. After all, for the Member State it is of no consequence whether asylum seekers are adequately informed about their rights and obligations or not. Furthermore, it has to be clear that the information must be provided in writing, or orally as appropriate, and in a way individually adapted to the asylum seekers' situations.

9. Examining the criteria (Article 9)

Article 9(1) of the Regulation stipulates that the criteria for determining the responsible Member State (e.g. family connections) shall be applied only once. If an asylum seeker has arrived in Italy, but has relatives in Sweden, this is examined in the context of Dublin. If the person moves on to Germany, family ties are examined there too. According to the new proposal, this examination is only to take place once, in this case only in Italy and not again in Germany. Through secondary movement, a refugee renounces the opportunity to be united with family members under the Dublin system.

Assessment

If a refugee moves onward several times to different Member States, the criterion of family reunification will only be examined once. It may happen that the person is transferred to one Member State although he/she has family ties in another state. This is not compatible with European primary law, since Article 7 CFREU places respect for private and family life under special protection. Likewise, the provision contradicts the principle of ex officio investigation by authorities. In the practice of asylum law it is perfectly possible that information about family connections of the asylum seeker turns up late in the proceedings. Simply ignoring it because an examination has already taken place with other facts of the case, would completely undermine the duty of administrations and courts to conduct their own investigations.

The provision constitutes a very severe restricting of the legal situation to date. So far the criteria for determining the responsible Member State according to Dublin have been regularly taken up in the procedure, even if the asylum seeker has moved on to another Member State and filed another asylum application. Recital 16 of the new Dublin IV Regulation likewise states that "respect for family life should be a primary consideration of Member States" when applying this Regulation.

10. Extending the concept of family (Article 2 (g))

The concept of family is to be extended. Under Article 2 (g) the concept of "family members" is in future also to cover the applicants' brothers and sisters, along with family connections arising after leaving the home country. At the same time, the range of application for family reunification under Dublin IV is opened for this group of persons if they have relatives in another EU Member State and want to be distributed there.

Assessment

The extension of the field of application of the concept of family is to be welcomed. However, it remains unclear how the situation of LGBT communities are to be organised in future. Member States are here granted a discretion that can lead to a very differing practice regarding non-heterosexual relations. Greater clarity on this point would be desirable in the draft Regulation.

Further, asylum practice shows that, for many refugees, family members alone are not the closest reference persons. For many refugee minors, neighbours or friends of the family may become their most important reference persons, e.g. because they have taken over their care and upbringing after the death of a family member. Hence close reference persons should also be drawn into the area of application of family reunification.

Despite the extension of the concept of family, this favourable provision in the Dublin IV Regulation could prove ineffective in practice. That is because, through the new inadmissibility procedures, the right to family reunification is no longer to be examined with priority in the procedure and even then, only once. Moreover, many Member States are already vehemently protesting against an extension of the concept of family. Hence this progressive change in the Dublin rules is in danger of deteriorating into a topic for negotiation and ultimately being overshadowed by repressive mechanisms.