

Returns under the Dublin Regulation & safe third countries for asylum seekers

People claiming asylum in the UK can, in certain circumstances, be sent to another country to have their asylum claim processed. This fact sheet provides guidance on this process and when it can happen, including why it should not normally happen to unaccompanied children.

If you have any questions about this issue relating to a refugee or migrant child, young person or family, you can call our Migrant Children's Project advice line on 0207 636 8505 or email mcp@coramclc.org.uk.

What is a 'safe third country'?

The Home Office considers a 'safe third country' to be a country:

- of which the individual seeking asylum is not a national or a citizen; and
- in which the person's life or liberty is not threatened by reason of race, religion, nationality, membership of a particular social group, or political opinion.

It is also a country from which a person will not be sent to another state in contravention of his or her rights under the Refugee Convention. Removal to a safe third country must also not breach the European Convention on Human Rights.

The Home Office has published guidance on how it processes and deals with safe third country cases. [1] This guidance should be treated with caution as it pre-dates the most recent European Union Regulation 604/2013, commonly known as 'Dublin III', which establishes a method for deciding which EU country should process a claim for asylum. [2]

When can an asylum seeker be sent to another country to have their asylum claim processed?

In certain circumstances, the Home Office may tell an asylum applicant that it considers that the UK is not the most appropriate country to consider their asylum

claim. Where evidence (such as the EU Eurodac fingerprint database) suggests that an asylum applicant has made a previous application for asylum or been issued with right of residence documents in a safe third country, their case is referred to the Third Country Unit in the Home Office.

The Third Country Unit is responsible for making all decisions on safe third country grounds. If the Home Office decides an asylum applicant can be returned to a safe third country, it will not substantively consider the asylum claim and will instead pursue the person's return to that country. [3]

Safe third country cases fall into two broad types:

- Cases that come under the Dublin Convention [4] and the Dublin Regulation [5]; and
- 'Non-Dublin' third country cases.

The Dublin Convention & Regulation

The majority of Home Office safe third country transfers take place under the Dublin Regulation. The Dublin Regulation is currently in its third incarnation - Dublin III became applicable in January 2014. This Regulation is the result from an agreement between member states of the European Union (as well as Iceland, Switzerland, Liechtenstein and Norway which also participate in the Dublin process under a parallel agreement). [6]

The Dublin Regulation contains criteria to determine which EU state is responsible for examining an asylum claim. It was made to prevent parallel or successive claims in different EU member states, as well as to determine which EU member state is responsible for an individual's asylum claim.

In general, the position under the Dublin Regulation is that the country responsible for processing an asylum claim is the EU country where the asylum seeker first entered and could have made a claim for asylum. However, Dublin III also contains opportunities for

family members to request that they are transferred to other countries that are signatories to the regulation in order to be together and have their asylum claims dealt with by the same authorities. For children, if it is not possible or appropriate to reunite them with family members they should not be transferred for any other reason, even if they have made an asylum application in another country.

Can children be returned to another European country under Dublin III?

The Dublin Regulation sets out a hierarchy of criteria to determine which country is responsible for the individual's asylum claim. If the applicant is a child, this trumps all other criteria.

In cases relating to unaccompanied minors, if there is a European country where a family member or sibling is legally present, that country shall be responsible. If the unaccompanied minor has a legally present relative who can care for them in a European country, they should have their claim considered in that country, providing it is in the child's best interests. A 'family member' is defined as a spouse, parent or guardian or child, as long as the family already existed in the country of origin.

If there are no family members or siblings, there may be relatives in a member state. A 'relative' is defined as an aunt, uncle or grandparent. If it is found that the relative can take care of the child, and it is in the child's best interests for them to do so, then the responsible country will be the country in which the relative legally resides.

In assessing the best interests of the child, states must, in particular, take due account of the following factors:

- Family reunification possibilities;
- the minor's well-being and social development;
- safety and security considerations, in particular where there is a risk of the minor being a victim of human trafficking;
- the views of the minor, in accordance with his or her age and maturity.

If there is no family member, sibling or relative, the country responsible is the one where the unaccompanied minor has lodged his or her application for international protection, provided that it is in the best interests of the minor.

The Court of Justice of the European Union (CJEU) has outlined that unaccompanied asylum-seeking children can no longer be returned to another European country under the Dublin Regulation on the basis that they previously claimed asylum there. [7] The Court stated that:

...where an unaccompanied minor with no member of his family legally present in the territory of a Member State has lodged asylum applications in more than one Member State, the Member State in which that minor is present after having lodged an asylum application there is to be designated the 'Member State responsible.'

This means that, for an unaccompanied minor who has no family members or relatives in a member state, the country that should determine his or her asylum claim would be the state where he or she is located and where his or her asylum claim was most recently lodged.

What should happen if a child is being returned to another European country?

It is important to note that the Dublin Regulation also states that a European country must take into account the best interests of a child when considering their decision. The Home Office must also treat the child's best interests as a primary consideration and have regard to the need to safeguard and promote the welfare of the child, in accordance with section 55 of the Borders, Citizenship and Immigration Act 2009. This is for all decisions concerning a child, including a safe third country decision to take charge or request a take back of a child.

There should not be many circumstances in which a child will be transferred to another EU country unless they have a family member or relative present in that EU country. The UK Government has confirmed it is applying the provisions of Dublin III to unaccompanied

minors that is consistent with the CJEU ruling noted in the paragraph above. [8] Again, it should be noted that the Home Office guidance does not adequately reflect how the Home Office should be applying the Dublin Regulation.

One issue of concern is if there is a child who has either been assessed or is considered to be over the age of 18. In summary, the Home Office will treat a child as an adult in the following circumstances:

- There is credible and clear documentary evidence that they are 18 years of age or over;
- A full 'Merton-compliant' age assessment by Social Services is available stating that they are 18 years of age or over; or
- Their physical appearance/demeanour very strongly indicates that they are significantly over 18 years of age and no other credible evidence exists to the contrary.

If you are working with a child who is age-disputed and subject to third country procedures, it is extremely important that they receive legal advice on both their age and third country issues as soon as possible.

For further information on age disputes and challenging an assessment or decision, please see our fact sheets on these issues at www.coramchildrenslegalcentre.com/resources.

Dublin Regulation – other criteria

As noted above, there is a hierarchy of criteria to determine which country is responsible. The criteria from point 2 onwards are relevant for adults (applicants who are over 18). The hierarchy is as follows:

1. Children

Please see above.

2. Individual who has a family member benefiting from international protection

Where the applicant has a family member who has been granted international protection in a European country, that country shall also be responsible for

examining the individual's application for international protection.

3. Individual who has a family member applying for international protection

If the individual has a family member who has made an application for international protection in another European country but has not had an initial decision, that country shall also be responsible for examining the individual's application for international protection.

4. Several family members

This section covers the issue where there are several family members, including children, who submit applications for international protection in the same country. The responsibility for the applications of all family members will lie with the European country which would be responsible for the majority of individuals under Dublin III, or if equal, the country responsible for the oldest family member.

5. Grant of residence permit/visa

If an individual has been previously granted a residence permit or visa in a European country then that country shall be responsible for the individual's application for international protection. However, the country where the protection claim is lodged shall be responsible if the residence permit expired over 2 years ago or the visa expired over 6 months ago.

The use of false/assumed identity or forged/fake documents to obtain the residence or visa document does not mean that the issuing country will not be responsible.

6. Entry and/or stay

If someone is proved to have irregularly crossed the border into the Dublin-regulated area by land, sea or air, the European country entered will be responsible for examining the application for international protection. This responsibility stops 12 months after the crossing took place.

7. Application in an international transit area of an airport

Where the application for international protection is made in the international transit area of an airport of a country, that country shall be responsible for examining the application.

Other important aspects of Dublin III

Discretion to consider application

The Regulation allows a country the discretion to examine an application for international protection, even if such examination is not its responsibility. A country can take responsibility in order to bring together any family relations on humanitarian grounds based in particular on family or cultural considerations.

In July 2015 Germany decided to suspend returns under the Dublin process of Syrian asylum seekers, using the discretionary clause to take responsibility for all Syrian asylum seekers in Germany, whether another European country was responsible or not.

Dependents

The Dublin Regulation also sets out how certain types of dependents shall be treated in specific circumstances. If an individual, due to pregnancy, a new-born child, serious illness, severe disability or old age, is dependent on the assistance of his or her child, sibling or parent who is legally resident in one of the Member States, then countries should normally keep or bring family members together. Family ties must have existed in the country of origin. The family member or relative must be able to take care of that dependent person.

Timescales

If the Home Office intends to return an individual to another EU country, it must make a request ('take charge') to that country within either two months (Eurodac match) or three months (other cases). The other country then has two months to reply, although if there is no reply the country will be deemed to have accepted the request. The same timescales apply if the UK is requested to accept responsibility ('take charge').

If someone is detained for the purposes of return, the timescale is reduced to one month from the lodging of the application for request and the reply should be made within 2 weeks. The transfer of the individual should take place within 6 weeks of response/deemed acceptance.

Exchange of Information

There are rules set out for the exchange of information, including for determining responsibility, considering the protection claim, health issues and other relevant information.

Remedies

The Dublin Regulation states that there should be an effective remedy for the individual against transfer for both conditions in the country and on who is responsible for the protection claim. However, challenging a Dublin process decision is complex and the timescales involved in challenging these decisions are short. If you are working with an individual who is involved in the Dublin process you should ensure they have access to legal advice and representation as soon as possible.

Case law arising from the Dublin Regulation

There have been a number of reported cases in relation to the Dublin Regulation. [9] In recent years, the European Court of Human Rights has determined that returns to Greece would breach an individual's human rights because of systematic deficiencies in the asylum system in Greece.

There have also been challenges made in relation to returns to Italy and Hungary, although the court has not declared that there are systemic deficiencies in those countries' asylum systems. The court has held that Switzerland could not send a family, with minor children, to Italy unless they obtained sufficient assurances that the children would be cared for in a manner suitable for their age.

The Dublin Regulation also now includes a clause stating that a country is not permitted to transfer a person under the Regulation if there is a risk that they

will be subjected to inhuman or degrading treatment in another country. This means that states are now obliged to undertake their own assessment of the situation.

Non-Dublin cases

Outside of the Dublin Regulation, asylum applicants are usually returned to the country where they embarked or, less frequently, to another third country where evidence suggests that they would be admitted. Such returns have taken place, for example, to the United States of America and Canada. The Third Country Unit at the Home Office assesses on a case by case basis as there are no binding arrangements with non-Dublin countries.

Future & leaving the EU

There has been criticism of the Dublin process and it can lead to significant delays in the consideration of a child or young person's asylum claim. There have been a number of changes since the Convention was introduced in 1990 and there are currently further amendments to the Dublin Regulation being considered. The amendments are to bring the Dublin Regulation in line with the case law decision of *MA and Others v UK*.

The Dublin Regulation III is one of the few asylum based EU laws that the UK has not opted-out of. Historically the UK has returned more asylum seekers under the Dublin Regulation than received from other EU countries. [10] At the time of writing, the Dublin Regulation continues to apply. However, it is unclear whether the UK will continue to be involved in the Dublin process once the UK has exited the EU.

NOTES

[1] Home Office, Safe Third Country Cases
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/257399/safethirdcountrycases.pdf

[2] 'I have asked for asylum in the EU- which country will handle my claim?' Information about the Dublin Regulation for applicants for international protection pursuant to article 4 of Regulation (EU) No 604/2013,

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/386955/dublin_a_en.pdf

[3] Provisions to allow for removals under the Dublin process are contained in the Immigration and Asylum Act 1999; the Nationality, Immigration and Asylum Act 2002; and Asylum and Immigration (Treatment of Claimants etc.) Act 2004

[4] EU Regulation No. 343/2003, Determining Responsibility for Asylum Applications) & Regulation (EC) No. 1560/2003, Detailed Rules for Determining Responsibility for Asylum Applications

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:050:0001:0010:EN:PDF>

[5] EU Regulation No 604/2013

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

[6] Member States: Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, The Netherlands, Malta, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and the UK

[7] *MA and Others v UK* (Case C-648/11)

<http://curia.europa.eu/juris/celex.jsf?celex=62011CJ0648&lang1=en&type=NOT&ancre>

[8] Commons Select Committee, Ninth Report - European Scrutiny Committee Contents

<http://www.publications.parliament.uk/pa/cm201415/cmselect/cmeuleg/219-ix/21923.htm>

[9] European Court of Human Rights, Factsheet – Dublin

http://www.echr.coe.int/Documents/FS_Dublin_ENG.pdf

[10] Eurostat, Dublin statistics on countries responsible for asylum application, March 2014

http://ec.europa.eu/eurostat/statistics-explained/index.php/Dublin_statistics_on_countries_responsible_for_asylum_application

This fact sheet should not be used to give legal advice and is for information and guidance only. For advice on individual cases, assistance should be sought from an independent regulated legal adviser.

For further assistance contact our advice line.
Call 0207 636 8505 or email
mcp@coramclc.org.uk