



BRIEFING PAPER

Number 9031, 21 December 2020

Brexit: the end of the Dublin III Regulation in the UK

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Summary

The Dublin III Regulation: a recap

The 'Dublin III Regulation' and all other aspects of the Common European Asylum System will no longer apply to the UK from January 2021.

The Regulation's purpose is to ensure that an asylum application is only considered by one of the participating states (the EU member states plus Iceland, Norway, Liechtenstein and Switzerland).

It sets a hierarchy for determining which state should be responsible for processing an asylum application. It gives greater importance to family reunion than which country an asylum seeker first entered. The Regulation also sets out transfer processes and timescales.

What future UK-EU co-operation did the Government want?

The Government did not want to replicate the provisions of the Dublin Regulation.

It proposed two draft agreements with the EU which related to certain specific aspects of the Dublin Regulation:

- an agreement on the transfer of unaccompanied asylum-seeking children for family reunion purposes
- a readmission agreement for accepting returns of irregularly residing UK/EU citizens and third country nationals.

The EU did not publish any comparable draft agreements.

Will there be a successor agreement with the EU or individual member states?

Neither the UK-EU Political Declaration, nor the EU's draft text for a new partnership agreement with the UK, specifically identified asylum, unaccompanied children, or readmissions as areas for future agreement or co-operation.

There were unconfirmed reports in September that the EU side had rejected the UK's proposed agreements because they were beyond the scope of their negotiating mandate.

The Government maintained throughout the negotiating period that EU negotiators did have flexibility to discuss the proposals, although it was reluctant to comment on the extent to which they were doing so.

The Government has said that it will pursue bilateral agreements with individual member states if it does not secure EU-wide agreements. It could not start bilateral discussions until the negotiations with the EU had finished. Some experts have suggested that bilateral arrangements could be restricted by the EU's areas of exclusive competence.

What practical difference will the end of the Regulations make?

- **The loss of a legal route for refugee family reunion**

The Dublin Regulation provides a legal route for reuniting people seeking asylum with separated family members in Europe, because it prioritises respect for family reunion above certain other considerations. Furthermore, the Regulation applies more generous eligibility criteria than the UK's comparable refugee family reunion Immigration Rules. Consequently, it gave some separated family members a legal route to reunion in the UK that they would not have otherwise had.

Campaigners wanted the UK Government to amend domestic legislation to fill the gaps left by the Dublin Regulation (at least in the absence of reaching a similar agreement as a non-member state). They argued that this would avoid asylum seekers in Europe losing a safe and legal means of reuniting with relatives in the UK at the end of the Brexit transition period.

The Government counter-argued that the UK's refugee family reunion rules are already sufficient, and that it would not be appropriate to replicate Dublin provisions after leaving the EU.

It also highlighted its proposed agreement to enable the transfer of unaccompanied asylum-seeking children who have family members in the UK/EU. But campaigners argued that those proposals were inadequate and that, in any case, were unlikely to be agreed before the end of the transition period looks unlikely.

The Government has made a statutory commitment to reviewing legal routes of entry to the UK for people seeking asylum and refugee family reunion, including the position of unaccompanied asylum-seeking children in EU member states seeking to join relatives in the UK.

- **Ability to return asylum seekers to European countries**

After this year, the UK will not be able to use the Dublin Regulation to return asylum seekers who travel from EU Member States.

The Government is hopeful that gaining the ability to negotiate new returns agreements will strengthen the UK's ability to return people seeking asylum to other European countries, although some external commentators disagree.

Controversial changes to the Immigration Rules due to take effect on 1 January 2021 give the Home Office greater scope to treat as inadmissible asylum claims from people who have passed through, or have a connection with, a safe third country. The Government has described them as paving the way for bilateral agreements with other countries.

Brexit: broader impact on the UK's asylum and immigration system

Leaving the EU does not change the UK's obligation to offer protection to refugees as a signatory to the 1951 Refugee Convention. The

Government reaffirmed its commitment to the Refugee Convention in October. It has also said that the UK's status as a 'world leader' in the field of asylum will not change once it is no longer subject to EU laws specifying minimum asylum standards.

It appears unlikely that the UK will be able to continue to rely on readmission agreements negotiated between the EU and third countries as a non-member state.

The UK is losing access to EU funding for asylum and immigration initiatives. This has been used, for example, to support Home Office activities related to asylum, refugee resettlement, immigration enforcement, and to provide funding for some NGO-led projects focusing on integration.

1. What is the Dublin III Regulation?

The 'Dublin III Regulation' ceases to apply to the UK at the end of the Brexit transition period on 31 December.¹

The purpose of the Regulation is to ensure that an asylum application is only considered by one of the participating ('Dublin') states (the EU member states plus Iceland, Norway, Liechtenstein and Switzerland).

The Regulation specifies a hierarchy for determining which state should be responsible for processing an asylum claim. It also sets out the process for handling requests to transfer responsibility for an asylum application between participating states.

The practical operation of the Dublin Regulation is facilitated by the Eurodac database (an EU-wide database used to store, transmit and cross-check fingerprints taken from asylum seekers and certain categories of irregular migrant). By cross-checking a person's fingerprints against the Eurodac database, Dublin states can ascertain whether a person has already irregularly entered or made an asylum application in another participating state.

The Dublin Regulation and Eurodac database (often collectively referred to as the 'Dublin system') were intended to prevent the phenomena of 'asylum shopping' (asylum seekers lodging multiple claims in several EU member states) and 'refugees in orbit' (no state taking responsibility for an asylum claim).

1.1 How did it affect asylum claims in the UK?

For many years the number of people transferred out of the UK under the Regulation was greater than the number of people sent to the UK. Since 2016, the opposite has been the case: the UK received more people than it successfully transferred to other participating states. Most transfers to the UK were due to the family reunion articles.

[Recent immigration statistics](#) (July 2020) give figures for incoming and outgoing transfer requests in 2019:

- The UK received 2,236 requests from EU member states to accept transfers of individuals to the UK, and 714 transfers took place. The majority of these (496) were from Greece.
- The UK made 3,259 transfer requests to EU member states, and 263 transfers took place. 40% (104) went to Germany and 20% (53) went to France.

¹ [Regulation \(EU\) 604/2013](#) *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.*

Box 1: Dublin III criteria: which state should take responsibility for a claim?

Chapter III of the Regulation sets out, in descending order, the hierarchy of criteria for determining which state is responsible for deciding a person's asylum claim.

Briefly, responsibility for considering an asylum application falls to:

The state **where the applicant has a family member** who has already been granted or has a pending application for asylum (Article 9, Article 10). Article 11 provides that, where several family members/siblings apply for asylum in the same state in a similar timeframe, but are the responsibility of different states, responsibility should fall to the state responsible for the most family members, or failing that, the state responsible for the oldest applicant's case.

- The state that **issued a visa or residence document** to the applicant (Article 12).
- The state **the person first irregularly entered** – this responsibility lasts for 12 months after the irregular border crossing. If an applicant has been living for at least five months at a time in other states, responsibility falls to the state where they have most recently been living (Article 13).
- The state **the person entered under a visa waiver**, or the state where the person applied for asylum, if they would also be subject to a visa waiver there (Article 14).

Responsibility for an unaccompanied child's case falls to the state where they have a family member/sibling/relative who is legally present (where this is in the child's best interests). If there are no known relations, the child's application will be processed in the state where they applied for asylum (Article 8). Article 6 of the Regulation provides certain guarantees for children which stem from a commitment that the best interests of the child shall be a primary consideration. These include provision of a suitably qualified representative for unaccompanied children, and an obligation to act to facilitate the tracing of an unaccompanied child's family members or relatives living in other Member states.

The 'discretionary clauses' (Article 17) give **scope for states to make exceptions to the above**. Specifically:

- The "sovereignty clause" (Article 17(1)) gives states discretion to take responsibility for considering an application it receives, even if it would not be responsible under the criteria outlined in the Regulation.
- The "humanitarian clause" (Article 17(2)) enables a state to request that another state take responsibility for an application "in order to bring together any family relations, on humanitarian grounds based in particular on family or cultural considerations."

2. Options for a successor agreement with the EU

2.1 Calls for continued UK access to the Dublin system

Some stakeholders called for the UK and EU to reach an agreement for continued UK participation in the Dublin system after the end of the Brexit transition period, or at least until successor arrangements were finalised.

The Lords EU Home Affairs Committee's October 2019 report on [Brexit: refugee protection and asylum policy](#) expressed support for such an approach.² But this was not an objective pursued by the UK (or EU) during the course of negotiations.

2.2 The Government's negotiating objectives An end to UK participation in the Dublin system

The Government did not seek continued UK participation in the Dublin Regulation as a 'third party', or a new agreement which simply replicated the Dublin provisions.³ Although the UK had originally expressed interest in continued access to Eurodac, or a similar alternative, it ceased to pursue this during the course of the negotiations.⁴

Historically, the UK had been a strong supporter of the Dublin system, considering that it delivered significant benefits to the UK.⁵ But in recent years its position has changed. Over the past 12 months or so, Ministers have been keen to highlight certain perceived bureaucratic "inflexibilities" within the system, such as the deadlines for processing transfer requests, and the legal challenges that attempted Dublin removals can generate.⁶

The family reunion provisions in the Regulation are available to a wider range of beneficiaries, and have some more favourable provisions, than the comparable arrangements in the UK's Immigration Rules. Successive recent governments have cited concerns that adopting the same criteria as the Dublin Regulation could create a "pull-factor" for claiming asylum in the UK and encourage unfounded claims. They have not agreed that children should be able to sponsor applications from other family members, or that it should be possible for asylum seekers in the UK to be joined by family members before their claim for asylum has been determined.

² Lords EU Committee, [Brexit: refugee protection and asylum policy](#), HL Paper 428, 11 October 2019

³ This is in line with the approach pursued by the May government.

⁴ Annex B – [Home Office response to the Lords EU Home Affairs Sub-Committee's Report on Brexit: refugee protection and asylum policy](#), 16 October 2020

⁵ See, for example, [HCWS219](#) [on EU opt-in decision], 23 January 2015

⁶ Home Affairs Committee, [oral evidence](#), HC 705, 3 September 2020, Q50

Proposed new agreements

The Johnson government expressed enthusiasm for an “ambitious new partnership” with the EU on asylum and illegal migration issues. But it is unclear to what extent active discussions took place on this during the future relationship negotiations. The UK-EU Political Declaration, and other future relationship negotiation documents, did not make detailed reference to an intention for future agreements on asylum and immigration issues.

The UK proposed two new draft agreements with the EU which were relevant to certain aspects of the Dublin Regulation:

- A UK-EU agreement on the transfer of unaccompanied asylum-seeking children in the UK/EU for family reunion purposes.
- A UK-EU readmission agreement, which set out the parameters for returning UK/EU citizens and third-country nationals who are residing in each other’s territories without legal status.

They are briefly summarised in the Annex to this briefing.

The Government has said that it will pursue bilateral agreements on these issues with European partners (prioritising the UK’s close neighbouring countries) if it doesn’t make an EU-wide agreement.

2.3 EU-UK future relationship negotiations

Did the EU have a mandate to negotiate UK proposals?

The [October 2019 Political Declaration](#) setting out the framework for the future relationship between the EU and UK included a pledge to “cooperate to tackle illegal migration, including its drivers and its consequences, whilst recognising the need to protect the most vulnerable.”⁷ But it did not identify future cooperation on asylum as a specific area for negotiations.

The Political Declaration is non-binding, and explicitly acknowledges the possibility of the future relationship extending to cooperation in other areas “Where the Parties consider it to be in their mutual interest during the negotiations.”

The [EU’s draft text for an Agreement on a New Partnership with the UK](#), published in March 2020, added little further detail to the Political Declaration, other than proposing “regular dialogues” between the Parties. The purpose of these would be “to prevent and combat irregular migration, migrant smuggling and trafficking in human beings in accordance with international law, ... while ensuring the protection of human rights, serving the interests of, and taking into account, the respective competence of the Parties and of the Member States.”⁸

⁷ HM Government, [Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom](#), 19 October 2019, para 114

⁸ European Commission, [Draft text of the Agreement on the New Partnership with the United Kingdom](#), 18 March 2020, Article IM.2

Expert witnesses suggested to the Lords EU Security and Justice Committee in July 2020 that the confines of the Political Declaration and EU negotiating team's mandate meant that the UK's proposals were unlikely to make much progress during the future relationship negotiations.⁹

In early September, *The Guardian* [reported](#) that an EU official had said that EU negotiators would not pursue the UK's proposal for an agreement on the transfer of unaccompanied children during the negotiations, because it wasn't covered by their mandate. Some media reports suggested that the UK's request for a readmission agreement with the EU had also been rejected.¹⁰ The EU side reportedly considered that the UK's proposals offered relatively little benefit to member states.

Throughout 2020, the Government maintained that EU negotiators did have flexibility to discuss the proposals.¹¹ Rejecting the suggestion that the UK's proposed agreement on the transfer of unaccompanied children was an "empty gesture", Chris Philp said that it would have been "an act of terrible omission, perhaps even negligence, and certainly bad faith" if the Government had not made a proposal, in light of the views previously expressed by Parliament (see Box 2 below).¹²

In the run-up to the end of the transition period Ministers consistently refused to be drawn on the status of negotiations on the UK's proposals, other than to emphasise that they were "still on the negotiating table".¹³

Box 2: Government commitments on family reunion for unaccompanied children

In 2018, Parliament imposed a statutory obligation on the Government to seek to negotiate a post-Brexit agreement with the EU to facilitate family reunion for unaccompanied children in the EU/UK (section 17, *European Union (Withdrawal) Act 2018*, as passed). This provision originated as a non-government amendment. It was championed by the Labour Peer Lord Dubs.

Section 37 of the *European Union (Withdrawal Agreement) Act 2020* subsequently amended the obligation. It replaced the requirement to seek to negotiate an agreement with an obligation on the Government to make a single policy statement to Parliament "in relation to any future arrangements" between the UK and EU about these unaccompanied children. The Government at the time insisted that, in spite of the changed wording, its policy intention [had not changed](#).

The Government signalled its interest in discussing such an agreement with the EU at an early stage of the future relationship negotiations and subsequently tabled a proposal for such an Agreement.

2.4 Bilateral agreements?

In late October 2020, amidst Parliamentary pressure on the issue, the Government affirmed its commitment to "pursue bilateral agreements

⁹ Lords Committee on the European Union, Security and Justice Sub-Committee, [Corrected oral evidence](#), 7 July 2020, Q14

¹⁰ The Guardian, [EU rejects British plan for post-Brexit return of asylum seekers](#), 20 August 2020

¹¹ Lords EU Security and Justice Committee, [Uncorrected oral evidence](#), 29 September 2020, Q27

¹² Lords EU Security and Justice Committee, [Uncorrected oral evidence](#), 29 September 2020, Q27

¹³ See, for example, [HL Deb 14 September 2020 c1077](#)

on post-transition migration issues with key countries” in the event of a non-negotiated agreement with the EU.¹⁴ Member states were not allowed to enter into bilateral discussions with the UK whilst the future relationship negotiations with the EU continued.

Again, some experts have cast doubt on how feasible that will be, because of the possibility that such agreements could infringe on areas of EU exclusive competence.¹⁵ Professor Elspeth Guild (Professor of Law at Queen Mary University and a leading practitioner in EU Justice and Home Affairs law), told the Lords EU Security and Justice Committee (in the context of the UK’s proposal on unaccompanied children):

(...). We cannot negotiate an agreement like this member state by member state, because this is a fully exercised competence of the European Union. It can be negotiated only with the EU. Member states cannot exercise a competence which they have mandated to the EU and which has been fully exercised by the European Union. (...).¹⁶

Chris Philp and senior Home Office officials told the Home Affairs Committee in early December that the Government is “very clear that, particularly if the EU choose not to enter into an agreement with us, even though we have tabled one in these areas, individual member states can do so and we would expect to do so.”¹⁷ They confirmed that the Government would be seeking to enter bilateral discussions with priority EU member states “very rapidly” after the end of the future relationship negotiations. They also said that the lack of any functioning bilateral agreements being in place by 1 January 2021 would not prevent co-operation on a case-by-case basis.¹⁸

Another consideration potentially relevant to the EU and member states’ capacity to enter detailed discussions with the UK, and the content and timing of any successor agreement(s) is the current uncertainty over the future of the Dublin system and broader asylum and migration management policies within the EU (see Box 3 below).

Box 3: The broader context: asylum reform proposals within the EU

In 2016 the European Commission proposed a recast ‘Dublin IV’ Regulation, as part of a bigger package of reforms (the ‘European Agenda for Migration’). But the process stalled because Member States were unable to reach agreement.

The European Commission unveiled a new package of proposals (the ‘[New Pact on Migration and Asylum](#)’) on 23 September 2020, in an attempt to break the deadlock. It is now proposing an [Asylum](#)

¹⁴ [HL Deb 21 October 2020 c1599](#)

¹⁵ EU Law Analysis Blog, ‘[Updated Qs and As on the legal issues of asylum-seekers crossing the Channel](#)’, 8 August 2020

¹⁶ Lords Committee on the European Union, Security and Justice Sub-Committee, [Corrected oral evidence](#), 7 July 2020, Q17

¹⁷ Home Affairs Committee, [Oral evidence: Channel crossings, migration and asylum-seeking routes through the EU](#), HC 705, 2 December 2020, Q590

¹⁸ Home Affairs Committee, [Oral evidence: Channel crossings, migration and asylum-seeking routes through the EU](#), HC 705, 2 December 2020, Q597

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[and Migration Management Regulation](#) to replace the Dublin III Regulation, alongside a recast Eurodac Regulation and broader reform of the Common European Asylum System.¹⁹

As with the 2016 proposals, the proposed new Regulation uses very similar criteria to Dublin for determining which Member State is responsible for an asylum application. Like the 2016 proposals, the new Regulation would also broaden the scope of relatives covered by the family reunion provisions. Furthermore, it would shorten timescales for making and responding to transfer requests.

The proposal also seeks to discourage people from failing to claim asylum in the first country of arrival/legal presence and making onward journeys within the EU. It would restrict a person's eligibility for support (accommodation, food, healthcare etc) to the responsible State.

The Commission's proposal also introduces various new 'solidarity mechanisms'. These would apply at normal times as well as when individual States were facing specific pressures. There would also be a system for securing solidarity commitments for managing people who arrive in the EU through search and rescue operations. Member States would have some choice over how to express their 'solidarity'. For example, a State that was unwilling to relocate asylum seekers or refugees to its territory would alternatively be able to 'sponsor' the removal of people with an irregular status from the other Member State, or contribute to capacity building in a Member State (or non-EU State) facing migratory pressures.

¹⁹ [COM\(2020\) 610 final](#), *Proposal for a Regulation on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed regulation (EU) XXX/XXX [Asylum and Migration Fund]*

3. January 2021: what will change?

3.1 Unresolved Dublin transfers

The UK and EU haven't agreed a common set of transitional arrangements for outstanding Dublin transfer cases at the end of the transition period.

The UK has unilaterally provided that unresolved requests for a transfer to the UK under the Regulation's family reunion provisions (i.e. requests based on Articles 8-11, 16 or 17(2)) which have entered the system prior to the end of the transition period) will continue to be processed beyond that date.²⁰ But it is not clear what approach EU member states will take.

There have been some criticisms that the UK's saving provisions do not go far enough. The British Red Cross has warned that they only cover cases already in the Dublin system, i.e. where a 'take charge' request has already been sent/received prior to exit day. They are concerned that people who encounter difficulties accessing the asylum system in other countries, or people who have claimed asylum but have not had a take charge request initiated, are excluded.²¹ The Covid-19 pandemic has had an additional impact on access to asylum systems and the timely processing of cases.

3.2 Availability of legal routes for family reunion

Although the Dublin Regulation is not primarily concerned with facilitating family reunion, it prioritises respect for family reunion above certain other considerations. As a result, it provides a legal route for reuniting people seeking asylum with separated family members in Europe.

The family reunion articles were particularly important in the UK context, because they have broader eligibility criteria than the UK's family reunion immigration rules. Consequently, the Regulation gave some separated family members a legal route to reunion in the UK that they would not have otherwise had. The Commons Library briefing paper [The UK's refugee family reunion rules: a comprehensive framework?](#), goes into greater detail about the differences between the Dublin Regulation and UK Immigration Rules.

Asylum rights campaigners want the UK's domestic provisions to be changed to fill the gaps left by the Dublin Regulation.

²⁰ [Immigration, Nationality and Asylum \(EU Exit\) Regulations 2019](#), SI 2019/745, Sch 2, Part 3, para 9

²¹ Lords EU Committee, [Brexit: refugee protection and asylum policy](#), HL Paper 428, 11 October 2019, para 82

Reflecting their concerns, Lord Dubs proposed an amendment during the passage of the *Immigration and Social Security Co-ordination (EU Withdrawal) Bill 2019-21* (as then was). It aimed to mitigate the loss of the Dublin provisions by establishing a legal route for people in Europe to apply for asylum in the UK and obtain permission to enter the UK as an asylum seeker. The eligibility criteria would have been similar to those specified in the Dublin Regulation. The amendment would have also obliged the Government to make a strategy for ensuring that unaccompanied children in EU member state continued to be relocated to the UK, if it was in the child's best interests.

The Government's position has been that the UK's Immigration Rules already provide a sufficient framework for refugee family reunion in the UK, and that "it is right that, as an independent, sovereign nation, we are no longer bound by EU regulation".²² Its arguments against accepting Lord Dubs' amendment included that:

- It did not want to pre-empt the prospect of securing a negotiated agreement with the EU, which would be a preferable outcome to relying on domestic rules.
- The UK's Immigration Rules already provide appropriate routes for refugee family reunion, and although they are not identical, there is flexibility within the rules for dealing with circumstances not expressly provided for within the rules.²³

Government review of legal routes to the UK

The Commons accepted a government-proposed amendment in lieu of Lord Dubs' amendment. This became [section 3](#) of the *Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020*.

It commits the Government to reviewing existing legal routes of entry to the UK for people seeking asylum and refugee family reunion.²⁴ This must include consideration of, and a public consultation on, the position of unaccompanied asylum seeking children in EU member states seeking to join relatives in the UK.

Section 3 requires the Government to lay a statement before Parliament setting out further details of the review and related public consultation within three months of the Act's Royal Assent (so, by mid-February 2021). The report on the outcome of the review must also be published and laid before Parliament, but the Act does not specify a timescale for this.

²² [HL Deb c502GC](#), 22 September 2020

²³ For details, see Home Affairs Committee, [Oral evidence: Channel crossings, migration and asylum-seeking routes through the EU](#), HC 705, 2 December 2020, Q607-612

²⁴ Contrary to the drafting of section 3, Ministers have confirmed that the scope of the review will not be limited to people in an EU Member State: [HC Deb 4 November 2020 c409](#)

3.3 UK's ability to return people to EU Member States

The Government expects that gaining the ability to negotiate new returns agreements will result in improved processes for returning people seeking asylum to other European countries, compared to the Dublin system.²⁵ Securing removals of people who have travelled through 'safe' third countries has been identified as one of the priorities for the Government's package of asylum reforms due to be introduced next year.²⁶

Some commentators have been more sceptical of the prospects for securing more advantageous agreements and whether ceasing to participate in the Dublin system will enhance the UK's scope to return asylum seekers to other European states.²⁷ By ceasing to participate in the Dublin Regulation and Eurodac system, the UK is losing access to established EU-wide systems for identifying and managing the removal of such cases.

If there are no agreements on 1 January 2021

The Home Affairs Committee recently pressed Chris Philp, Minister for Immigration Compliance and the Courts, to set out the legal grounds for returning people to EU member states, in the absence of EU-wide or bilateral agreements being in place. The Minister told the Committee "we will approach member states on a case-by-case basis, as we are entitled to do, and indeed as we did in the past before Dublin came into being."²⁸ Referring to the low numbers of people returned to other states under Dublin recently, the Minister made the point that "It is not as if we are losing something that has been hugely effective."²⁹

New Immigration Rules on inadmissibility grounds

On 10 December the Government laid a set of changes to the Immigration Rules which give it greater scope to treat as inadmissible asylum claims from people who have passed through, or have a connection with, a safe third country.³⁰ Inadmissible claims do not receive substantive consideration in the UK. The rules changes had been

²⁵ [HC Deb 16 December 2020 c281](#)

²⁶ See, for example, *The Telegraph*, 'Asylum seekers who enter the UK via Europe will have claims rejected', 30 September 2020; Conservatives.com, '[Priti Patel: Fixing our broken asylum system](#)', 4 October 2020

²⁷ See, for example, Lords EU Committee, *Brexit: refugee protection and asylum policy*, HL Paper 428, 11 October 2019, para 163; EU Law Analysis, '[Updated Qs and As on the legal issues of asylum-seekers crossing the Channel](#)', 8 August 2020 and UK in a Changing Europe, '[The Dublin regulation: an overview](#)', 13 August 2020

²⁸ Home Affairs Committee, *Oral evidence: Channel crossings, migration and asylum-seeking routes through the EU*, HC 705, 2 December 2020, Q.596

²⁹ Home Affairs Committee, *Oral evidence: Channel crossings, migration and asylum-seeking routes through the EU*, HC 705, 2 December 2020, q.596

³⁰ [HC1043 of 2019-21](#). Related policy guidance: Home Office, *Inadmissibility: EU grants of asylum, first country of asylum and safe third country concepts*, v4.0, 1 October 2019, p.12

trailed in an article in *The Telegraph* as being part of a post-Brexit “shake-up” of asylum law and policy.³¹

The new rules come into effect immediately at the end of the transition period.

The previous version of these rules gave some scope to treat a person’s asylum (but not human rights) claim as inadmissible, and for the person to be removed to a non-EU safe third-country if they could have sought protection there.³² But cases could not be refused on inadmissibility grounds if the person would not be readmitted to that country. It is unclear how widely the powers were used.³³

The new rules apply to asylum seekers who have a connection to or have travelled through any safe third country (including EU member states). They separate the grounds for treating a claim as inadmissible from considerations of whether the person can be readmitted to the country. Having passed through one or more safe countries is enough for the person’s asylum claim to be treated as inadmissible in the UK. The Home Office will be able to pursue the person’s removal “not only to the particular third countries through which the applicant has travelled, but to any safe third country that may agree to receive them.”³⁴

Inadmissible claims will receive a full consideration in the UK if removal to a safe third country is unlikely within a reasonable period, or if it is deemed inappropriate due to the particular circumstances of the case.

The Home Office has justified the changes on the basis that “A stronger approach to disincentivise individuals is needed to deter claimants leaving safe third countries such as EU Member States, from making unnecessary and dangerous journeys to the UK.”³⁵

Responding to an Urgent Question on 16 December, Chris Philp described the purpose of the new rules as to “lay the foundations for agreements that we may reach in the future, besides facilitating case-by-case action.”³⁶

The immigration barrister and commentator Colin Yeo has suggested that the new rules are “pointless” and unworkable in the absence of return agreements with other countries. He contends:

We could end up with nearly every refugee who arrives irregularly in the UK being stuck in limbo, with no decision on their asylum claim but also no possibility of being removed to a ‘safe’ third country with which we have no removal arrangement.³⁷

³¹ *The Telegraph*, ‘Asylum seekers who enter the UK via Europe will have claims rejected’, 30 September 2020

³² [Immigration Rules](#), HC 395 of 1993-4 as amended, paras 345A-D

³³ Home Affairs Committee, [oral evidence](#), HC 705, 3 September 2020 q.110; [PQ 14014](#) [on Asylum], answered on 30 June 2020

³⁴ [Explanatory Memorandum to HC 1043](#), para 7.4

³⁵ [Explanatory Memorandum to HC 1043](#), para 7.3

³⁶ [HC Deb 16 December 2020 c281](#)

³⁷ Free Movement Blog, ‘[New statement of changes to the Immigration Rules: HC 1043](#)’, 11 December 2020

There have also been suggestions that the new rules could breach the UK's obligations under the 1951 Refugee Convention and international human rights law, for example, by taking an overly-literal approach to assessing whether a person is "coming directly" from a territory where their life or freedom is threatened (as referenced in Article 31 of the Refugee Convention), and potentially denying people access to an asylum procedure.

The Home Office has not yet published policy guidance to its staff on how to apply the new rules.

4. Brexit: the broader impact on the UK asylum and immigration system

Asylum

The Dublin and Eurodac Regulations are not the only pieces of EU asylum law which will no longer apply to the UK at the end of the transition period.

The UK will no longer be bound by any aspect of the Common European Asylum System, including EU directives specifying minimum standards for processing asylum claims and the treatment of asylum seekers. To an extent, there has already been some divergence between UK and EU standards, because previous UK governments exercised the UK's special rights to opt-out of the recast versions of these directives introduced over 2011-13.

The Government has said that having the freedom to determine its own standards will not change the UK's status as a "world leader" in the field of asylum:

The UK already has high standards in how we operate our asylum system and we will continue to be a world leader in this area. The UK will of course continue to be subject to the ECHR.³⁸

Leaving the EU does not change the UK's obligation to offer protection to refugees. Various pieces of EU law commit member states to adhering to the terms specified in the 1951 Geneva Convention on the Status of Refugees and its 1967 Protocol. But the UK is a signatory to the 1951 Convention (and other related pieces of international law) in its own right. It will continue to be bound by these after leaving the EU, unless it actively chooses to withdraw.

The Government reaffirmed its commitment to the 1951 Refugee Convention in October 2020.³⁹

The UK is losing access to EU funding streams related to asylum and immigration. The UK received over £500m from the [EU's Asylum, Migration and Integration Fund](#) for 2014-2020 to support activities related to asylum, legal migration/integration, returns and resettlement. This money [has been distributed](#) between the Home Office and other stakeholders, notably NGOs and local public bodies.

The Home Office has used the funding to support a wide range of its activities related to the asylum system, including the provision of financial/accommodation support, refugee resettlement schemes, staff training and country of origin information research. The funds have also been used in connection with several immigration enforcement

³⁸ [Letter from Chris Philp MP to Lord Jay of Ewelme](#), 22 September 2020

³⁹ Annex B – [Home Office response to the Lords EU Home Affairs Sub-Committee's Report on Brexit: refugee protection and asylum policy](#), 16 October 2020

activities, such as voluntary returns schemes and measures to secure the removal of irregular migrants and foreign national offenders.

Projects led by NGOs and other external stakeholders have tended to focus on supporting the integration of migrants in the UK, such as through the provision of ESOL, employment support, and mentoring schemes.

The Government has said that it “recognises the important role of AMIF funded projects and is considering the implications of the funding ending in 2022/23”.⁴⁰

Non-EU immigration, irregular immigration and removals

During its membership of the EU, domestic legislation, rather than EU law, determined the UK’s approach to controlling non-European immigration. The UK decided against opting-in to EU measures facilitating legal migration of third-country migrants.

The UK did engage in some practical co-operation with member states on the removal of irregular migrants, such as through shared charter flights. It also opted-in to some of the EU’s readmission agreements with third countries. The Government said in 2019 that it was working to replace these with bilateral agreements.⁴¹

⁴⁰ [Letter from Chris Philp MP to Lord Jay of Ewelme](#), 22 September 2020

⁴¹ [HL Deb 18 March 2019 c1337](#)

Annex: Draft agreements proposed by the UK

Agreement on the transfer of unaccompanied children

The [full draft text](#) for the UK's proposed agreement on the transfer of unaccompanied asylum-seeking children was made publicly available in May 2020.

Who would be in scope?

Whereas the Dublin Regulation applies to all asylum seekers, the UK's proposal would only apply to unaccompanied children (aged under 18) who apply for asylum in the UK or in an EU member state.

Considerations

As with the Dublin Regulation, Article 3 of the draft agreement states that the child's best interests would be a primary consideration in all procedures (although it does not give the same level of detail about how that would be determined).

Definitions

The draft agreement uses the same definitions for "family member", "relative", and "legally present" as the Dublin Regulation.

Criteria for a request for a transfer a child to the UK/EU member state (Articles 4, 6)

Whereas the Dublin Regulation imposes a set of mandatory obligations on the Parties, under the UK's proposed text the consideration of cases and transfers would be at their discretion.

An EU member state would be able to request the transfer of an unaccompanied child to have their asylum claim considered in the UK if:

- The child has a "family member or a sibling legally present" in the UK; or
- The child has a "relative" who is legally present in the UK and who has been independently assessed as able to take care of the child.

The UK would be able to request the transfer of a child to an EU member state on identical grounds (Article 6).

The draft agreement suggested that, if the child has relations in both the UK and EU, "the United Kingdom and the member states shall cooperate to determine with which person the child should be reunited."

It was silent on the types of considerations that might inform such discussions, or any related timescales or deadlines for decisions on requests made under the Agreement (unlike the Dublin Regulation).

Nor did the draft agreement give rights which could be directly invoked in the Parties' domestic legal systems (Article 12), such as an individual's right to challenge a decision.

The Government said that such details could be specified in 'implementing protocols' with individual member states, which would underpin the UK-EU agreement. It envisaged that the wording of the implementing protocols would vary.⁴²

The UK's proposal gave responsibility for the implementation and application of the agreement to a new Joint Committee, comprising of representatives of the UK and member states, and co-chaired by a representative of the UK Government and a Member of the European Commission. The Committee would reach decisions, which would be binding on both parties, by mutual agreement (Article 12).

Either Party would be able to terminate the agreement by giving written notice (usually, six months') of their intention to do so. (Article 17).

Campaigners' criticisms

Safe Passage International (a charity that works with unaccompanied child refugees in Europe to help them reunite them with family members in the UK) said that, by reducing legal routes of entry to the UK, the draft agreement "gives a blank cheque for people smugglers".⁴³

Stuart MacDonald MP summarised many of the concerns during a related discussion in a Public Bill Committee:

Most fundamentally, the proposed text removes all mandatory requirements on the Government to facilitate family reunions and would make a child's right to join their relatives entirely discretionary. The text also intentionally avoids providing rights to children. It does not provide for appeals and attempts to put these issues beyond the reach of UK courts. Other categories of vulnerable refugees, including accompanied children and adults, would lose access to family reunion altogether. A series of other key safeguards are removed, including strict deadlines for responses and the responsibility for gathering information being on the state rather than the child.⁴⁴

Campaigners cited experience of a previous iteration of the Dublin Regulation, which was also more limited in scope, to illustrate the potential impact of the UK's proposals. In evidence to the Lords EU Committee, Safe Passage International's CEO said:

..., the right of appeal [in Dublin II] was extremely limited in scope; that was borne out in case law. Essentially, it remained largely an interstate mechanism. (...). When Dublin III came into effect, it set out enforceable, mandatory criteria under the regulation. This had an enormous impact. If you just look at the figures, under Dublin II, the UK accepted annually 11 people from the EU for family reunion on average. After Dublin III was

⁴² Lords EU Security and Justice Committee, [Uncorrected oral evidence](#), 29 September 2020, Q31, 33

⁴³ Safe Passage, [News, 'Government plans end of family reunion from Europe as we know it'](#), 24 May 2020

⁴⁴ [PBC 18 June 2020 cc300-1](#)

introduced, the average rate was around 547 people annually. So you can see what a big difference making those provisions legally enforceable made to the number of people arriving and able to access that route.⁴⁵

The Government said that the implementing protocols attached to the UK-EU Agreement, and related Home Office policy guidance, would set out the UK's obligations. Individuals would be able to challenge a failure to abide by those obligations through judicial review (the same form of redress that the UK provided under Dublin III).⁴⁶

UK-EU Readmission agreement

The UK proposed a [draft agreement on the readmission of persons residing without authorisation](#).

It had a broader scope and different purpose to the Dublin Regulation. Rather than being concerned with assigning responsibility for considering a person's asylum claim, it sought to establish

effective and swift procedures for the identification and safe and orderly return of persons who do not or who no longer, fulfil the conditions for entry to, presence in, or residence in the territories of the United Kingdom or one of the Member States of the Union, and to facilitate the transit of such persons

The provisions would have affected UK/EU citizens and some of their family members (regardless of nationality status), as well as third-country and stateless people in the UK/EU member state.

There was a recognition in the Preamble (but not the substantive Articles) that it did not override the Parties' responsibilities under international law, particularly the 1951 Refugee Convention. The Preamble also noted that the agreement would be without prejudice to the rights and procedural guarantees for asylum seekers as provided for in EU/UK legislation.

Unlike the draft agreement on the transfer of unaccompanied children, the draft readmission agreement specified a set of mandatory obligations on the Parties, and specific timescales for the processing of cases.

Briefly, as per Article 6 of the draft agreement, an EU member state would be obliged to readmit all third-country or stateless people who do not qualify for entry, presence or residence in the UK, if the person

- had a valid visa for the member state; or
- illegally and directly entered the UK after having stayed on, or transited through, the territory of the member state.

As exceptions to the above, the EU member state would not have to readmit third-country or stateless people who

⁴⁵ Lords Committee on the European Union, Security and Justice Sub-Committee, [Corrected oral evidence](#), 7 July 2020, Q10

⁴⁶ Lords EU Security and Justice Committee, [Uncorrected oral evidence](#), 29 September 2020, Q33-4, 41

- had only been in airside transit via an international airport of the member state; or
- had been issued with a UK visa or resident permit which they used in the UK (unless they also have a visa or residence permit issued by a member state, which has a longer period of validity); or
- were entitled to visa-free access to the UK.

Identical obligations for the UK to readmit third-country and stateless people from the EU were set out in Article 4.

Article 20 stated that the agreement would take precedence over any incompatible bilateral readmission agreements or arrangements made between the UK and individual member states. It also provided that “Nothing in this Agreement shall prevent the return of a person under other formal or informal arrangements.”

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