

DUBLIN II Regulation National Report

European network for technical
cooperation on the application
of the Dublin II Regulation



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Acronyms

AA: Asylum Act

AO: Asylum Ordinance

DAA: Dublin Association Agreements between the EU and Switzerland

ECHR: European Convention on Human Rights

ECRE: European Council on Refugees and Exiles

ECtHR: European Court of Human Rights

ELENA: European Legal Network on Asylum

FAC: Federal Administrative Court

FNA: Federal Act on Foreign Nationals

FOM: Federal Office for Migration

OSAR: Organisation suisse d'aide aux réfugiés – Swiss Refugee Council

UAM: Unaccompanied minor asylum seeker

Introduction **1**

1.1. The Dublin II System: Perspectives and Challenges at the European Level

The Dublin Regulation,¹ as its predecessor the Dublin Convention, was designed to ensure that one Member State is responsible for examining the asylum application of an asylum seeker and to avoid multiple asylum claims and secondary movement. It is confined to fixing uniform grounds for the allocation of Member State responsibility on the basis of a hierarchy of criteria binding on all EU Member States as well as Iceland, Norway, Switzerland and Liechtenstein. On the ten year anniversary of its entry into force this research provides a comparative overview of national practice in selected Member States on the application of this Regulation.

Our research shows that the operation of the Dublin system continues to act to the detriment of refugees, causing families to be separated and leading to an increasing use of detention. The Dublin procedure leads to serious delays in the examination of asylum claims and by doing so, effectively places peoples' lives on hold. The hierarchy of criteria is not

¹ Council Regulation (EC) No. 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, L 50/1 25.2.2003

always respected whilst Art. 10 is the predominant criterion used in connection with Eurodac. State practice demonstrates that asylum seekers subject to this system may be deprived of their fundamental rights *inter alia* the right to be heard, the right to an effective legal remedy and the very right to asylum itself as access to an asylum procedure is not always guaranteed. Reception conditions and services may also be severely limited for asylum seekers within the Dublin system in a number of Member States. There is an increasing use of bilateral administrative arrangements under Art. 23 and most States resort to informal communication channels to resolve disputes in the allocation of responsibility. Evidentiary requirements are very strict in some Member States, which in turn creates difficulties for asylum seekers in substantiating family links or showing time spent outside the territories of the Dublin system. A number of Member States also apply an excessively broad interpretation of absconding thereby extending the time limits for Dublin transfers further increasing delays in the examination of asylum claims. Furthermore the problems inherent in the Dublin system are also exacerbated by varied levels of protection, respect for refugee rights, reception conditions and asylum procedures in Member States creating an 'asylum lottery'.

The national reports provide an insight into the application of this Regulation at the national level whilst the comparative report outlines the main trends and developments at the European level. This research comes at a time when the Grand Chambers of both the European Court of Human Rights and the Court of Justice of the European Union have questioned the compatibility of the Dublin system with asylum seekers fundamental rights. In addition the EU institutions have recently reached a compromise agreement upon a recast Dublin III Regulation that introduces significant reforms including the creation of a mechanism for early warning, preparedness and crisis management. Despite these significant advances, the findings of this research demonstrates the continuous need to carefully evaluate the foundational principles of the Dublin system and its impact both with respect to asylum seekers' fundamental rights and Member States. It is hoped that this research will aid the Commission's review of the Dublin system within the forthcoming launch of a 'fitness

check' and for any future dialogue on the assignment of responsibility for the examination of asylum claims.²

1.2. Overview of the Dublin II Regulation in Switzerland

Switzerland is clearly a transferring state in the European context of the Dublin system. The vast majority of Dublin cases concern out-going transfers predominately to Italy. The Dublin procedure itself in Switzerland generally functions well, and the reception and detention conditions in Switzerland are acceptable compared to other European countries. However the sovereignty clause is applied in a restricted manner by the Swiss authorities. A general problem of the Swiss asylum procedure is that the examination of asylum applications takes too long. As an example to illustrate this in the years 2008 – 2010 on average the examination of an asylum application took 232 days in the first instance³ and 524 days in the second instance procedure⁴. The second instance, the Federal Administrative Court (predecessor: Asylum Appeals Commission) plays a crucial role in setting standards and shaping the Swiss asylum practice, as practice changes and clarifications are usually brought about by the Court rather than the administrative authority. The administrative authority is then bound by the standards set by the Court.

1.3. Practical challenges in Switzerland: brief overview

Main problematic aspects:

- It is problematic that even vulnerable persons like unaccompanied minors or families with small children are transferred to other Dublin

² European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on enhanced intra-EU solidarity in the field of asylum, *An EU agenda for better responsibility-sharing and more mutual trust*, COM 2011 (835), 2.11.2011 p.7.

³ Federal Department of Justice and Police, Report on Acceleration Measures in the Area of Asylum, March 2011, p. 13, <http://www.bfm.admin.ch/content/dam/data/migration/rechtsgrundlagen/gesetzgebung/asylg-aug/ersatz-nee/ber-beschleunig-asyl-f.pdf> (available in French, German, Italian).

⁴ Federal Department of Justice and Police, l.c., p. 16.

member states with insufficient reception conditions, e.g. Italy and Malta. Most cases concern Italy, which is in fact the most important Dublin-partner country for Switzerland, however the Swiss authorities only apply the sovereignty clause in very few, exceptional cases. This is problematic, as many persons end up on the street in Italy, including mothers with small children.

- Switzerland still transfers certain persons to Greece, even after the ECtHR judgment *M.S.S. v. Belgium and Greece*.
- For asylum seekers in detention, access to legal advisory services can be difficult.
- Free legal aid is hardly ever granted in asylum cases, and if it is granted then only at the appeal stage and in most cases retrospectively. Therefore asylum seekers have to rely on the services of NGOs with limited financial resources.⁵
- Often, Dublin asylum seekers transferred to Italy come back to Switzerland shortly after being transferred there, sometimes multiple times. The Swiss authorities now seek to discourage this by only offering them emergency assistance if they return multiple times.

⁵ See also ECRE/ELENA, Survey on Legal Aid for Asylum Seekers in Europe, October 2010, p. 32-33, p. 111-112, p. 123, p. 146.

The National Legal Framework and Procedures

2

2.1. Legal background

2.1.1. General legal framework

The asylum procedure is regulated in the Asylgesetz / Loi sur l'asile (Swiss Asylum Act) of 16 June 1998 (hereafter AA)⁶. Detention is regulated in the Ausländergesetz / Loi fédérale sur les étrangers (Federal Act on Foreign Nationals) of 16 December 2005 (FNA).⁷ The authority responsible for assessing asylum applications is the Federal Office for Migration (hereafter FOM). It registers the asylum application, conducts the interview and takes the first instance decision. The cantonal authorities are responsible for conducting expulsions and Dublin transfers. The cantonal authorities also are responsible for certain reception centres. The Swiss asylum procedure is planned to be reformed to a large degree. First proposals for amendments are expected to be presented at the end of 2012 so these forthcoming amendments should be taken into account in considering this report.

The Dublin Regulation is applicable in Switzerland based on the Dublin Association Agreements (hereafter DAA)⁸, and it has direct effect in Switzerland. Formally, the Dublin procedure in Switzerland is implemented as an inadmissibility procedure. Art. 34 al. 2 lit. d Asylum Act (AA) is the national legal basis for a Dublin inadmissibility decision. Art. 21.2 AA states that the FOM examines its responsibility for the asylum procedure

⁶ SR/RS 142.31.

⁷ SR/RS 142.20. Both laws are available in English online: www.admin.ch/ch/e/rs/1.html.

⁸ The DAA comprise the agreements between Switzerland and the EC, Iceland, Norway, Liechtenstein regarding the application of the Dublin Regulation. The DAA establish that the Dublin, Eurodac, Dublin Implementation and Eurodac Implementation Regulations are also applied by and regarding Switzerland. They are available here: <http://www.admin.ch/ch/d/sr/0.14.html#0.142.392>.

according to the provisions of the DAA, which are listed in Annex 1 of the AA. Art. 29a.1 of the Asylverordnung 1 / Ordonnance sur l'asile 1 (Asylum Ordinance 1, AO1)⁹ specifies that the FOM examines its responsibility according to the criteria laid down in the Dublin Regulation. Art. 99 AA regulates the taking, saving and keeping of fingerprints. Art. 1.1 Asylverordnung 3 / Ordonnance sur l'asile 3 (Asylum Ordinance 3 on the handling of personal data, AO3)¹⁰ establishes that this Ordinance applies as long as the DAA do not contain any divergent provisions. Art. 6 AO3 specifies the taking and analysis of biometrical data.

2.2. Procedural background

The Dublin Regulation can be triggered

- if a person asks for asylum and a Eurodac search or other indications—as identified in Regulation 1560/2003 of 2 September 2003 or other criteria under the Dublin II Regulation - establish that another member state is responsible for the asylum procedure (art. 34 al. 2 lit. d AA). Swiss asylum authorities will then transfer the person under the Dublin-regulation after consent of the other member state.
- if a person is staying in Switzerland illegally, and after a Eurodac search, another member state is identified as being responsible according to the Dublin Regulation. In this case, the person has not claimed asylum in Switzerland and is given an order to leave the territory. The person can appeal against this within 5 working days (art. 64a FNA). The transfer can then be carried out by the cantonal authorities under the Dublin procedure (if necessary by force).

⁹ Asylverordnung 1 über Verfahrensfragen (Asylverordnung 1, AsylV 1) / Ordonnance 1 sur l'asile relative à la procédure (Ordonnance 1 sur l'asile, OA 1), 11.08.1999, SR/RS 142.311.

¹⁰ Asylverordnung 3 über die Bearbeitung von Personendaten (Asylverordnung 3, AsylV 3) / Ordonnance 3 sur l'asile relative au traitement des données personnelles (Ordonnance 3 sur l'asile, OA 3), 11.08.1999, SR /RS 142.314.

Competent authorities

- **First instance:** two Dublin Units within the FOM (Dublin Office 1, Dublin Office 2).
- **Appeal:** Federal Administrative Court (independent judicial authority). Two chambers of this court deal exclusively with asylum cases.

Inadmissibility procedure

According to art. 34.2 d) AA, the Swiss authorities normally do not examine the merits of the case if another state is responsible for the asylum procedure according to the Dublin regulation. The asylum seeker receives only a short interview about their identity, travel route and the possibility that they may be sent to another European state. The Swiss authorities will ask the authorities of the responsible Dublin member state to take charge of or take back the applicant. If those authorities agree or do not answer within the required timeframe, the Federal Office for Migration takes an inadmissibility decision based on Art. 34.2 d AA (art. 29a.2 AO1). The procedure for taking charge or taking back an asylum seeker by the responsible state is done according to Regulation (EC) Nr. 1560/2003 (art. 29a.4 AO1) as well as Regulation 343/2003.

Sovereignty clause

The FOM can also examine the asylum application if it is not responsible according to the Dublin Regulation, for example for humanitarian reasons. Art. 29a.3 AO1 implements art. 3.2 Dublin Regulation into Swiss law. It says that the FOM can examine an application for humanitarian reasons, even if another state is responsible. Jurisprudence has clarified that art. 3.2 Dublin Regulation is not self-executing. Asylum seekers can therefore only rely on it in connection with another provision of federal law. This means that in addition to art. 3.2 Dublin Regulation, another provision of national law must be invoked, e.g. art. 29a.3 AO1 or art. 3 ECHR. Switzerland must apply the sovereignty clause if the transfer to another Dublin member state would violate one of its international obligations.

Notification

As of 1 January 2011, the law allows Dublin inadmissibility decisions to be notified directly to the asylum seeker, even if he/she has a legal

representative (art. 13 para. 5 AA). In such cases, if the person is represented, according to that provision the legal representative shall then be informed “immediately” afterwards.

There is not much practical experience with this yet, as most asylum seekers are not yet legally represented at this stage of the procedure. The direct notification to the asylum seeker could be problematic if the asylum seeker is in detention and the legal representative is not informed or cannot get in touch with him/her in time to discuss and submit an appeal. This is relevant as the deadlines for appealing start from the point of notifying the asylum seeker of the authorities’ decision.

Appeal

The asylum seeker can make an appeal against an inadmissibility or negative decision including Dublin transfer decisions to the Federal Administrative Court (FAC) within 5 working days of the notification of the decision (to the applicant if he is not represented or if the decision is notified directly to him, or to his/her legal representative if he is represented and the decision is notified to the representative). According to Art. 107a AA, an appeal against a Dublin inadmissibility decision does not have automatic suspensive effect. However, the asylum seeker can ask for suspensive effect within the deadline for the appeal (the same 5 working days (during which the appeal can be made, usually the request is made when the appeal is handed in so at the same time.)). The FAC decides on this request within another 5 days and removal is suspended pending this decision on suspensive effect. This means that during these periods of time (10 working days), the asylum seeker cannot be returned to the other Dublin member state. The FAC examines all appeals and requests in writing, there is no oral hearing. Both parties are given the opportunity to make written submissions. Court decisions are usually taken by a panel of three judges (one judge taking the decision and two endorsing it), or one single judge with a second one endorsing it in clear cases.

Detention

During the Dublin procedure the asylum seeker can be detained on the following grounds (detention grounds specific to the Dublin procedure):

- Before the Dublin decision, if the person has concealed having applied for asylum in another Member State or having a permit of stay/visa in a Dublin member state (maximum detention: 6 months). art. 75 para. 1bis FNA
- After notification of the Dublin decision at a federal reception center or in a canton if the enforcement of the removal is imminent (maximum detention: 30 days). art. 76 para. 1 litera b number 6 and para. 2 FNA

Asylum seekers under the Dublin procedure may also be detained for other grounds, if any other (general) detention grounds are applicable.¹¹

The total maximum detention period is 18 months. The maximum time limit for detaining minors including unaccompanied minors is 12 months. Only minors between the ages of 15-18 can be detained in Switzerland.

Transfer

The cantonal authorities are responsible for executing the transfer to the responsible Dublin member state. If the person makes an appeal and asks for suspensive effect (5 working days), and suspensive effect is not granted (additional 5 working days for the Court to decide this), then the cantonal authorities can enforce the removal after 10 working days. If the 5 working days' deadline for appeal lapses without the person making an appeal, then the removal can be enforced after these 5 working days. The order to leave is immediately executable, or a departure period of less than 7 days can be set for Dublin cases (art. 45.3 AA). The manner of transfer varies according to the different cantons and circumstances. Depending on the cooperation of the applicant, he/she is either taken to the airport by cantonal police, and accompanied onto the plane, or only given the date and time of the flight and he/she goes to the airport by him/herself. There are unaccompanied flights where applicants are given a laissez-passer and the instruction to contact the authorities of the other member state after arrival. There are also accompanied flights. If the

¹¹ See the different grounds for administrative detention in art. 75 – 78 FNA, http://www.admin.ch/ch/e/rs/142_20/index.html.

destination in the responsible member state is near the border with Switzerland (Germany, France, Austria), the applicant can also be driven to the border and handed over to the border officials. However, there are usually no voluntary departures in the sense that the applicant could choose the time when to leave, because the Swiss authorities have to inform the responsible member state of the place, date and time of arrival in advance. At the moment, Italy only accepts transfers via plane to Milano.¹² As the responsibility for enforcement of the transfer lies with the cantonal authorities, there are no comprehensive statistics regarding the numbers of enforced or voluntary transfers explicitly under the Dublin procedure.

Staff and administrative costs of Dublin

According to the FOM, the costs cannot be accounted for in detail.¹³

There have been several parliamentary enquiries regarding the costs of the Schengen and Dublin bilateral agreements between Switzerland and the EU since their entry into force in December 2008.

In one reply, the Federal Council states that the costs caused by the Schengen agreement and the Dublin agreement cannot be separated because the two projects are run together. Furthermore, certain investments would also have incurred without Schengen/Dublin (e.g. biometric passports, IT-renewals, foreigners' ID documents). In addition, the federation cannot give information as to the costs incurred in the cantons by the Schengen/Dublin association.¹⁴

Other parliamentary enquiries on this subject (available in French, German and Italian):

- 09.3817, 23/9/2009, Answer of the Federal Council of 18/11/2009: http://www.parlament.ch/f/suche/pages/geschaefte.aspx?gesch_id=20093817

¹² FOM, Dublin Office 1, information given orally, 22 February 2012.

¹³ FOM, Dublin Office 1, information given in writing, 29 March 2012.

¹⁴ Federal Department of Justice and Police, reply to interpellation no. 10.3561, 17 September 2010, <http://www.parlament.ch/f/dokumentation/curia-vista/vorstoesse-tabellen-grafiken/Documents/cv-10-3561-f.pdf>, annexed tables with costs: http://www.parlament.ch/f/suche/pages/geschaefte.aspx?gesch_id=20103561.

- 08.1112, Answer of the Federal Council of 19/11/2008:
http://www.parlament.ch/f/suche/pages/geschaefte.aspx?gesch_id=20081112
- 09.4276, 7.2.2010, question no. 5, Answer of the Federal Council of 17/2/2010:
http://www.parlament.ch/f/suche/pages/geschaefte.aspx?gesch_id=20094276

Dublin Liaison officers

In order to improve cooperation with Italy, Switzerland's most important Dublin partner, Switzerland has recently sent a liaison officer to Rome.¹⁵ According to the FOM, this liaison officer was sent to Rome in spring 2012 as a pilot project. This project has now been prolonged for a further four months. The aim of this project is to determine possible options for a closer cooperation with Italy. After the conclusion of the pilot project, the FOM will evaluate it and decide whether a liaison officer will be stationed in Rome permanently (this would of course require Italy's consent). The FOM will not give any further information about this before the end of the pilot project.¹⁶

According to the FOM no other Dublin liaison officers are employed in other member states, but whether this would be advisable in certain member states is being examined at the moment. There are no Dublin liaison officers from other Member States present in Switzerland.¹⁷

Bilateral cooperation agreements

According to the FOM, Switzerland has not concluded any bi- or multilateral cooperation agreements with other Dublin states. For this reason, no information can be given regarding the financial consequences. However, bilateral administrative arrangements in the sense of art. 23 Dublin Regulation have been concluded with two Dublin states (see 2.2.22)).¹⁸

¹⁵ Federal Department of Justice and Police, Press Release, 20 September 2011, <http://www.ejpd.admin.ch/content/ejpd/de/home/dokumentation/mi/2011/2011-09-200.html>.

¹⁶ FOM, Dublin Office 1, information given in writing, 31 August 2012.

¹⁷ FOM, Dublin Office 1, information given in writing, 29 March 2012.

¹⁸ FOM, Dublin Office 1, information given in writing, 29 March 2012.

2.3. Practical application of the Dublin regulation in Switzerland

2.2.1. Right to information

General information upon arrival:

To OSAR's knowledge, asylum seekers do not receive any information leaflets issued by the authorities upon arrival at the reception centre. The reception centres do display OSAR's information leaflets on the Swiss asylum procedure in several languages¹⁹, which contain some information about the Dublin procedure as well. Furthermore, we distributed the information brochures issued as part of the Transnational Dublin Project to the reception centres. However, they have not been displayed freely accessible in all the centres, sometimes only upon specific request. There are no specific information leaflets on Dublin issued by the authorities. The only government-issued leaflets displayed in the reception centres concern voluntary return assistance.

Individual information before a negative Dublin decision:

Asylum seekers are informed about the responsibility of another state according to the Dublin Regulation as part of the general information on the Swiss asylum procedure in a short hearing or in writing. The authorities explain which member state might be responsible for their asylum procedure. The asylum seeker then has the opportunity to make a statement regarding this, either in writing or orally. The Swiss Constitution guarantees the right to be heard. However, there is no general right to be heard orally. This is also the policy regarding inadmissibility issues concerning the asylum procedure.²⁰ In practice in the Dublin procedure the

¹⁹ See: http://www.fluechtlingshilfe.ch/aide/fiches-d-information/fiches-d-information-1?set_language=fr.

²⁰ See FOM, Handbook on the asylum procedure, Chapter C §6 The right to be heard, 1 January 2008, p. 5-6,

http://www.bfm.admin.ch/content/dam/data/migration/asyl_schutz_vor_verfolgung/asylverfahren/handbuch_asylverfahren/handbuch_franzoesisch/chap_c_6-0108.pdf (available in French and German).

right to be heard seems to be granted more often orally than in writing, but it is difficult to discern the situations where the Swiss authorities either arrange an interview or allow information to be provided in writing.

Dublin transfer decisions (inadmissibility decisions) are notified in writing in one of the Swiss official languages (German, French or Italian). The transfer decision is not issued in other languages which the asylum seeker may understand nor is there any interpretation provided to translate the decision orally. Usually a person from the reception center can translate the decision for the asylum seeker. If he/she cannot find anybody to translate, this can be problematic. The asylum seeker receives his/her records (including the transfer request to the other Dublin member state) with the inadmissibility decision.

2.2.2. Family unity and the definition of family members

After registering the asylum application, the asylum seeker has a first short interview mainly regarding his/her personal details and journey. This interview is applicable to all asylum seekers. During this interview, they are asked if they have any relatives in their home country, Switzerland or another country. Basically, spouses and minor unmarried children as in the Dublin II Regulation are regarded as family members. Registered gay partners (according to the Swiss Partnership Act²¹) have the same rights as spouses. Therefore, a registered same-sex partnership is treated the same way as a marriage also for the purposes of family reunion in the asylum context.²² This practice is applicable for the purposes of the Dublin II Regulation as well. Partners from stable unmarried relationships are considered family members as well, if they live in a continuing, marriage-like union. The Swiss Asylum Appeals Commission²³ decided this in the context of family asylum: It said that not only the spouse of a recognized

²¹ SR 211.231, http://www.admin.ch/ch/d/sr/c211_231.html.

²² See FOM, Handbook on the asylum procedure, Chapter D §6 Family reunion, 1 January 2008, p. 8, http://www.bfm.admin.ch/content/dam/data/migration/asyl_schutz_vor_verfolgung/asylverfahren/handbuch_asylverfahren/handbuch_franzoesisch/chap_d_6-0408.pdf (available in French and German).

²³ Predecessor of the Federal Administrative Court.

refugee, but also the partner with whom he/she lives in a durable, marriage-like union is included in the refugee status.²⁴ This definition of a marriage-like union is also applicable to same-sex partnerships and for the purposes of the Dublin II Regulation.²⁵

According to the FOM, if an unaccompanied minor claims that one or several family members (also outside of art. 2 (i) Dublin Regulation) is/are in another Dublin Member State these statements are examined in the context of an information request to that Member State. If the claims prove true, a take charge procedure is started based on art. 6 or art. 15 Dublin Regulation.²⁶

2.2.3. Vulnerable persons/medical cases

According to the FOM, if a person claims to be unfit for travel, they have to submit a corresponding medical report that proves this claim. However, the Swiss authorities do not arrange for such medical examinations.²⁷

No legal aid is provided for medical reports. Medical insurance companies usually do not want to cover these costs either. In that case, the asylum seeker has to pay for it him-/herself or rely on the goodwill of the doctor to write a report without being paid for it.

If a person needs medical care after the transfer to the responsible Dublin member state, the Swiss Dublin Office informs the authorities of that state accordingly.²⁸ In practice in one particular case it was reported that a

²⁴ EMARK 1993/24, available at: <http://www.ark-cra.ch/emark/index.htm>.

²⁵ See Federal Administrative Court, judgment D-2323/2010 of 20 April 2010, E. 3.4.5, <http://www.bvger.ch/publiws/download?decisionId=f362e5a1-f1fd-4fcd-bc20-a5fa4ef5ddb0> (French). The case is about a partnership between a man and a woman, and a marriage-like union is denied in this case. But it is a Dublin case, and the Court mentions the conditions for a marriage-like union which would allow the application of art. 7 Dublin II Regulation, adding that those are applicable to same-sex partnerships as well.

²⁶ FOM, Dublin Office 1, information given in writing, 29 March 2012.

²⁷ FOM, Dublin Office 1, information given in writing, 29 March 2012.

²⁸ FOM, Dublin Office 1, information given orally, 24 February 2012.

person was in very bad psychological state and the receiving authorities were not informed at all. If the transfer is conducted by way of a special flight which can include the application of physical force by police and restraining measures depending on the conduct of the person (manacles for example), the transfer has to be observed by a doctor. In the past this occurred in a few cases concerning transfers back to Greece or Italy. The term 'special flight' has special significance in Swiss return policy as it refers to the last level of expulsion where the person concerned has demonstrated themselves to be un-cooperative and has to be removed by force. A doctor must be present for every enforced transfer by way of 'special flights'.

2.2.4. Unaccompanied minors

Every unaccompanied minor receives a guardian, in the Dublin and any other asylum procedure. The guardian must have basic knowledge of the asylum procedure, but are often not lawyers. Their role is to assist the child in all matters, with the asylum procedure but also with social questions, school, accommodation etc. If the case is too complicated for their own legal knowledge, they should provide access to a legal advisor. However, the experience and effort of these guardians vary widely, as each canton organizes this differently. So in practice it is not guaranteed that every minor is provided with access to a legal advisor if necessary. A guardian is often responsible for many minors, and so it is questionable if he/she is sufficiently accessible for the child and has enough capacity to effectively deal with all the important issues concerning the child. Sometimes it is also questionable if the guardian is sufficiently independent, as it is sometimes an official of the migration office or another communal or cantonal authority.²⁹

²⁹ For more information about the Swiss guardian system for unaccompanied minor asylum seekers, please see ECRE, Save the Children, Comparative Study on Practices in the Field of Return of Minors, December 2011, <http://www.ecre.org/component/downloads/downloads/369.html>.

Regarding family members in other Dublin member states see the FOM's information under b).

If there are no family members in other Dublin member states, UAMs are usually transferred to the member state where they first asked for asylum. There is no special procedure for UAMs under Dublin. Therefore Article 6 is interpreted in such a way that the country responsible is the one where the unaccompanied minor first claimed asylum.

The FOM orders its own age examinations if it regards this as necessary (usually radiography of the wrist). According to the FOM, it is difficult to receive information about the other state's age assessment of the applicant in due time. Also, the age of the applicant is not visible in the Eurodac system. Therefore, the FOM often only learns at the stage of the organisation of transfer modalities whether the person is considered as a minor or adult in the responsible Dublin member state.³⁰

According to several Italian NGOs, unaccompanied minors arriving in Italy often pretend to be adults, hoping to be able to work instead of going to school and so as not to be separated from their travel companions / community and placed in special accommodation for children.³¹

2.2.5. Access to the asylum procedure/withdrawal of an asylum application

Submitting an asylum application is a strict personal right, so it is possible to withdraw an asylum application anytime. However, according to established case law, the withdrawal of an asylum application does not impact on a Dublin procedure, i.e. even if an asylum application is withdrawn, a Dublin procedure can be continued. The asylum procedure

³⁰ FOM, Information given orally during a workshop organized by OSAR on children's rights, 10 May 2011.

³¹ See OSAR, JussBuss, Asylum procedure and reception conditions in Italy, May 2011, p. 24, http://www.fluechtlingshilfe.ch/asylrecht/eu-international/schengen-dublin-und-die-schweiz/asylum-procedure-and-reception-conditions-in-italy/at_download/file.

and the Dublin procedure are independent of each other, according to an official from the Swiss Dublin office.³²

Access to the asylum procedure is generally granted. However, in order to discourage **repeated returns from the responsible member state after Dublin transfers**, the FOM has introduced a new practice which came into effect on 20 April 2012: If a person applies for asylum in Switzerland again within 6 months after having been transferred to the responsible Dublin member state, there will normally be no new asylum procedure. The asylum seeker will receive an information sheet stating that he/she had already asked for asylum in Switzerland before, had received an inadmissibility decision because another state is responsible according to the Dublin Regulation had been transferred to that state, and must therefore leave Switzerland. The order to leave is based on the previous inadmissibility decision under Dublin. For the execution of the expulsion, the same canton is responsible as during the first Dublin procedure. If that canton seeks to transfer the asylum seeker to the responsible Dublin member state again, it can ask the FOM to introduce another take back request to the responsible Dublin member state under the Dublin II Regulation. The canton then grants the asylum seeker the right to be heard with a short interview and executes the transfer. So the FOM only starts another take back procedure with the responsible Dublin member state upon request by the canton. The FOM decides whether or not the new application is to be treated as an application for re-examination of the applicability of the Dublin II Regulation with an according decision. This is the case if there are relevant new facts or evidence substantiating the need for second application for asylum in Switzerland (for example whether Switzerland should take over responsibility for the claim due to protection concerns in the other responsible member state).

This practice has only recently been introduced by the Swiss authorities so its impact is yet to be assessed. But there has already been one problematic case of a young Afghan man who asked for asylum in Switzerland a second time after having been transferred to Hungary. The

³² FOM, Dublin Office 1, information given in writing, 29 March 2012.

canton refused to forward his case to the FOM for new examination of whether Dublin is applicable, even though the asylum seeker claimed new grounds (having received an order to leave in Hungary after the transfer from Switzerland). An application for re-examination is pending with the FOM. Regarding accommodation problems in this case see 2.2.6 below.

Vulnerable persons are exempt from the new practice of not conducting another asylum Dublin procedure in case of repeated applications after Dublin transfers (elderly or sick persons, women in advanced pregnancy, single mothers with small children). Therefore, vulnerable persons will receive another asylum Dublin procedure and will be accommodated in the usual reception facilities for asylum seekers.³³

2.2.6. Reception conditions in Switzerland as a transferring state

The EU Reception Conditions Directive is not applicable in Switzerland as a non-EU-country.

First asylum application in Switzerland:

Asylum seekers in the Dublin procedure are mainly accommodated in the five federal reception centers near the borders (Basel, Vallorbe, Chiasso, Altstätten, Kreuzlingen). There they live in communal dorms separated according to gender and family dorms. Food is provided, and they are allowed to leave the center, respecting certain opening hours and signing out and in. With permission, they can leave the centre from 9am – 5pm during weekdays and from 9am – 7pm on weekends.³⁴ They can stay there for a maximum of 90 days. If the procedure is longer, they will then be assigned to a canton and transferred to a cantonal center. Those centres are generally smaller than the federal ones, and the asylum seekers often have the opportunity to cook for themselves. They can leave

³³ FOM, circular letter to cantonal authorities and border guard agency, 23 March 2012.

³⁴ Art. 11 Verordnung des EJPD zum Betrieb von Unterkünften des Bundes im Asylbereich / Ordonnance du DFJP relative à l'exploitation des logements de la Confédération dans le domaine de l'asile (Ordinance of the Federal Department of Justice and Police on the operation of Federal reception facilities in the area of asylum), SR/RS 142.311.23.

and come back with less restrictions than in the federal centers. Families are usually given a room to themselves. Conditions vary between the different centers.

Due to the rise in asylum applications at the end of 2011 / beginning of 2012³⁵, there has been a shortage of accommodation places. The federal centers are full, and there have been a few incidents where asylum seekers in Basel were turned away and had to spend a night in an emergency shelter or even outdoors. But after that an army bunker was opened as an emergency shelter to provide additional places during the shortage. This is supposed to be an interim measure for a few months but is not suitable accommodation for families and/or traumatized asylum seekers. Due to the ongoing shortage of accommodation places, more army facilities have been opened to house asylum seekers, usually temporarily for a duration of 6 months.³⁶

Repeated applications after Dublin transfers according to the new practice described under e) (starting 20 April 2012): These persons will not be accommodated in the regular reception centers anymore but will instead receive only emergency assistance (a very basic place to sleep, often in military bunkers and often only accessible during the night and

³⁵ 22'551 new asylum applications in 2011 compared to 15'567 in 2010, 7'150 new asylum applications in the first quarter of 2012 compared to 4'371 in the first quarter of 2011, see yearly and quarterly asylum statistics by the FOM,

http://www.bfm.admin.ch/content/bfm/fr/home/dokumentation/zahlen_und_fakten/asylstatistik.html.

³⁶ See FOM, press releases of 02/03/2012:

http://www.bfm.admin.ch/content/bfm/fr/home/dokumentation/medienmitteilungen/2012/ref_2012-03-022.html, 02/04/2012:

<http://www.bfm.admin.ch/content/bfm/fr/home/dokumentation/medienmitteilungen/2012/2012-04-02.html>, 25/04/2012:

<http://www.bfm.admin.ch/content/bfm/fr/home/dokumentation/medienmitteilungen/2012/2012-04-25.html>, 11/06/2012:

<http://www.bfm.admin.ch/content/bfm/fr/home/dokumentation/medienmitteilungen/2012/2012-06-11.html>, 19/09/2012:

<http://www.bfm.admin.ch/content/bfm/fr/home/dokumentation/medienmitteilungen/2012/2012-09-190.html>, 01/10/2012:

<http://www.bfm.admin.ch/content/bfm/fr/home/dokumentation/medienmitteilungen/2012/2012-10-010.html> (available in French or German).

very minimal financial assistance for food or food vouchers).³⁷ In the Afghanistan/Hungary case mentioned under e) above, the federal reception centre where the asylum seeker arrived and made his second asylum application sent him to the canton which is responsible for him. However, the cantonal authorities repeatedly turned him away as well, refusing to accommodate him even under the minimal emergency assistance guaranteed by the constitution for all persons present in Switzerland. This led to the man sleeping in the forest for one night, and being accommodated by another federal reception centre for another night out of sheer pity. This case shows that the new practice regarding subsequent applications after Dublin transfers can be very problematic. It is not clear how the asylum seeker's rights can be safeguarded if the cantonal authorities refuse to grant the assistance which lies in their responsibility. Apart from the question of effective access to an asylum procedure, this leads to very practical problems on the spot such as "Where will this person sleep tonight?" In the meantime, the mentioned Afghan asylum seeker has been placed in administrative detention by the responsible canton.

Vulnerable persons do not fall under this new practice for repeat applications after Dublin transfers (elderly or sick persons, women in advanced pregnancy, single mothers with small children).³⁸ But e contrario, families with both parents could apparently also be affected by the new practice.

2.2.7. Reception conditions in the responsible Member State

³⁷ In some reception facilities there are cooking apparatus and utensils, in other reception facilities this is not available. As regards financial assistance, it is very low, approximately 10 Swiss Francs per day (=8.33 EUR). It varies from canton to canton, and amounts are sometimes a bit higher where there's no possibility to cook. It is very little money considering the high cost of living in Switzerland, and it must cover everything needed, so in addition to food, hygiene products etc. must also be covered by this allowance.

³⁸ FOM, circular letter to cantonal authorities and border guard agency, 23 March 2012.

In other Dublin member states: Decisions by Swiss authorities regarding reception conditions in other Dublin member states: see case summaries. Regarding transfers to Greece see 2.2.23.

2.2.8. Notion of absconding

If the competent authorities of the place of residence report officially that the asylum seeker has left without communication of an address, he/she is considered absconded.³⁹ After how much time the authorities consider somebody absconded varies between the cantons. There have been cases where the authorities considered the person as absconded after the police tried to visit or pick them up only once at the centre where they're staying and they were not there.

2.2.9. Detention

On grounds and duration see 2.2 Detention.

Effective remedy: For asylum seekers in detention, access to legal advisory services can be difficult. This is problematic especially in cases where the reception conditions in the responsible Dublin state are not sufficient (e.g. in Greece, Italy, Malta) or if there is a risk of indirect refoulement by the Dublin state to the country of origin without examination the merits of the asylum application (e.g. Greece). In this regard, it is also problematic that decisions can be notified to asylum seekers directly, even if they have a legal representative (see above 2.2 on notification). Example: In November 2011, an Afghan asylum seeker was detained right after receiving his Dublin transfer decision. He was transferred to Greece before having the opportunity to authorize a lawyer to make an appeal to the ECtHR.

³⁹ FOM, Dublin Office 1, information given in writing, 29 March 2012.

2.2.10. Application of the sovereignty clause, Article 3.2

According to an official in the Dublin Office, consent is not necessary for the application of art. 3.2 Dublin Regulation. Art. 3.2 Dublin Regulation does not contain criteria as to when to apply the sovereignty clause. But art. 29a Asylum Ordinance 1 gives Switzerland the possibility to apply the sovereignty clause for humanitarian reasons. According to jurisprudence, the concretization of these humanitarian reasons in the sense of Article 3(2) should be orientated on similar grounds to the criteria of art. 15 Dublin Regulation (case-by-case examination). If the circumstances in a Dublin state are difficult (for example Greece), the sovereignty clause is also applied for whole categories of asylum seekers.⁴⁰ Until the beginning of 2011, the FOM refrained from transferring vulnerable persons to Greece. Since then, they “largely” refrain from transferring persons to Greece in general, with some exceptions.

There are no general rules as to how art. 3.2 is implemented. It is only used in exceptional cases. Usually it is based on art. 29a.1 Asylum Ordinance 1 (see 2.2 above). The FOM is reluctant to transparently show its criteria for using the sovereignty clause. It is problematic that even vulnerable persons like unaccompanied minors or families with small children are transferred to Dublin states with insufficient reception conditions, e.g. Italy and Malta. It is often only stated in a very general manner that the other Dublin member state has ratified all the relevant human rights conventions and therefore respects its obligations. Especially with unaccompanied minors it is problematic that the Swiss authorities do not systematically and individually ascertain that they will be accommodated in adequate structures in the responsible Dublin state.

According to the Federal Council, Switzerland has applied the sovereignty clause in just over a dozen cases regarding Italy since Switzerland joined

⁴⁰ FOM, Dublin Office 1, information given in writing, 29 March 2012.

Dublin in December 2008.⁴¹ In contrast, there were 4'602 transfers to Italy in 2009 – 2011.⁴²

Returns to home country instead of Dublin member state:

The FOM has guidelines for cantonal authorities regarding the procedure if a person prefers to return to his/her home country instead of returning to the responsible Dublin member state. However these guidelines are not publicly available. According to those guidelines, the cantonal authorities can organize returns to the home country instead of the Dublin country until three months before the transfer deadline lapses. This is on the basis of a voluntary return to the country of origin and therefore the Dublin II Regulation is not applied.

There have also been cases where the FOM took a negative decision based on other grounds than Dublin with an order to return to the home country, even though there were Eurodac hits in other Dublin member states. In these cases the asylum seekers did not consent to being returned to their home countries rather than the responsible Dublin member state.

2.2.11. Application of the humanitarian clause, Article 15

Between 1 January 2009 and 29 February 2012, Switzerland made a take charge request based on art. 15 Dublin Regulation in 37 cases. In 10 cases Switzerland received a positive reply, 14 cases were rejected. In the remaining 13 cases, the reply is pending.⁴³

⁴¹ Federal Council, reply to a parliamentary enquiry of 23 December 2011, Nr. 11.4186, http://www.parlament.ch/d/suche/seiten/geschaefte.aspx?gesch_id=20114186.

⁴² See Federal Office for Migration, Yearly asylum statistics, http://www.bfm.admin.ch/content/bfm/de/home/dokumentation/zahlen_und_fakten/asylstatistik/jahresstatistiken.html.

⁴³ FOM, Dublin Office 1, information given in writing, 29 March 2012.

There are no general criteria publicly available as to when the humanitarian clause is implemented by the Swiss authorities.

2.2.12. Timeframes

According to the FOM, Switzerland complies with the deadlines set in the Dublin Regulation. If these deadlines lapse, Switzerland becomes responsible. Switzerland agrees with the interpretation of art. 20 Dublin Regulation established in *Petrosian*.⁴⁴

There have also been cases where the responsible member state still agreed to take back the applicant despite the lapsed transfer deadline. Jurisprudence confirmed that in this case, there was no obstacle against the transfer. This is an exception to the rule that the asylum seeker can normally rely directly on the provisions in the Dublin Regulation that establish deadlines to prevent transfer outside the deadlines. The Swiss Court confirmed in its leading case judgment of 29 June 2010, ATAF 2010/27 / E-6525/2009⁴⁵ that transfers can still be carried out if the Member State concerned agrees to take back the asylum seeker despite the lapsing of deadlines.

One Swiss particularity can be mentioned regarding *Petrosian*: If the Court grants an appeal against a negative Dublin decision by the FOM, it usually does not take a new decision itself, but sends the case back to the FOM. In that case, it is controversial in which moment the new six month transfer deadline starts: at the moment of the decision of the Court to send the case back to the FOM, or at the moment of the new FOM decision. Clarity on the correct practice according to the Dublin II Regulation is required on this matter. If it only starts from the new FOM decision, this can lead to overlong procedures (time for the FOM to take a new decision and in case of another appeal time for the Court to examine the case again). The Dublin Regulation operative rules do not seem to resolve this issue.

⁴⁴ FOM, Dublin Office 1, information given in writing, 29 March 2012.

⁴⁵ <http://www.bvger.ch/publiws/download?decisionId=3b504784-5ac7-456d-92f3-aa1a45048719>.

2.2.13. Exchange of information with other Member States

Regarding administrative arrangements with Austria and Germany see 2.2.22 below.

Switzerland is planning to improve cooperation with Italy, see 2.2 Dublin liaison officers above and 2.2.22 below.

2.2.14. Cooperation with other Member States

Regarding the interpretation of the Dublin Regulation, Switzerland applies the principle of reciprocity. There are personal contacts with some Dublin offices which have been established through visits, common trainings etc. These relations are used in disputed cases, i.e. the FOM officials try to find a solution in a personal conversation, which is usually successful.⁴⁶

At the moment, the Italian authorities only accept transfers by airplane via Milano. As a result of this restriction, asylum seekers who are in the Swiss canton of Ticino, mostly in the reception center in Chiasso (close to the Italian border), have to be brought to the airport in Zurich by train, and then flown to Milano from there, even though it would only be a very short distance by train from Ticino to Milano. Because it is such a short distance there are no flights from Lugano (Ticino) to Milano. this makes the practical organization of the transfers disproportionately complicated.

2.2.15. Effective Remedy

Regarding the appeal and suspensive effect see 2.2. An appeal can be based not only on human rights grounds, but also on questions such as lapsed deadlines or incorrect assessment of the responsible MS.

⁴⁶ FOM, Dublin Office 1, information given in writing, 29 March 2012.

The state currently does not provide any funds for legal advice services during the first instance procedure. Free legal assistance and representation is only granted in the appeal procedure in retrospect, if the appeal is successful. If the appeal is rejected, free legal representation is only granted if this is considered necessary for safeguarding the asylum seeker's rights (appeal is not futile, complicated questions of law and fact are involved). The same criteria are applicable for the Dublin procedure. In practice, free legal representation is only rarely granted, and even then the asylum seeker is only reimbursed in retrospect, at the end of the appeal procedure. This means that the asylum seeker must either advance the costs of a lawyer or rely on the services of legal advisory offices run by NGOs. These NGOs must rely on their private funds for the majority of their daily work, as they are only reimbursed for legal representation in rare individual cases. For asylum seekers in detention, access to those legal advisory offices can be difficult.⁴⁷

As mentioned under I), the Court usually does not take a new decision itself, despite having the power to do this and though it has the power to examine the application of the Dublin II Regulation in both points of law and facts but sends the case back to the FOM. It gives instructions to the FOM regarding the new examination: for example further examination on the family situation, or in some cases the clear instruction to apply art. 3.2 Dublin Regulation.

2.2.16. Application of the criterion related to the irregular border-crossing

If there is a Eurodac hit showing an irregular crossing of the external border or if the asylum seeker claims an irregular entry into the Dublin area, a take charge procedure is started based on art. 10 Dublin

⁴⁷ For more information on legal aid in Switzerland, please see ELENA/ELENA, Survey on legal aid for asylum seekers in Europe, October 2010, <http://www.ecre.org/component/downloads/downloads/268.html>.

Regulation. According to FOM, art. 10 Dublin II Regulation is used in 22.5% of the Dublin cases.⁴⁸

2.2.17. Stay outside the EU within the timeframe of Dublin

In one case the FOM did not find it credible that the applicant had been outside the EU for more than 3 months. This was contradicted by the Federal Administrative Court, saying the applicant had shown credibly with various elements of evidence that he had in fact returned to his home country for more than 3 months. Therefore Switzerland had become responsible for the asylum procedure.⁴⁹

2.2.18. Application of the Visa criterion within the Dublin Regulation

If the asylum seeker has a visa which was issued by another Dublin state, art. 9 Dublin Regulation is applied.⁵⁰

2.2.19. Application of the Residence Permit criterion within the Dublin Regulation

If the asylum seeker has a residence permit which was issued by another Dublin member state, art. 9 Dublin Regulation is applied.⁵¹

⁴⁸ FOM, Dublin Office 1, information given in writing, 29 March 2012.

⁴⁹ Federal Administrative Court (Bundesverwaltungsgericht), judgment no. D-1276/2010 of 6 December 2010.

⁵⁰ FOM, Dublin Office 1, information given in writing, 29 March 2012.

⁵¹ FOM, Dublin Office 1, information given in writing, 29 March 2012.

2.2.20. Circumstantial Evidence (Article 18(3)(b))

In the context of the Dublin procedure, all indications which could lead to the responsibility of another Dublin state are taken into account.⁵²

2.2.21. Transfer of responsibility in case of non-respect of deadlines (Articles 19(4) and 20(2))

See information under 2.2.12.

2.2.22. Member State Administrative Arrangements under Article 23

Switzerland has concluded bilateral administrative arrangements with Austria and Germany which facilitate the practical application of the Dublin procedure.⁵³

In the agreement with Austria, both states agree to abide by shorter processing times in Dublin cases as well as simplified procedures. Direct transfers by land are regulated, which allows for more efficiency and cost reduction on both sides.⁵⁴ Switzerland is currently also seeking to conclude bilateral agreements with Italy and France.⁵⁵

⁵² FOM, Dublin Office 1, information given in writing, 29 March 2012.

⁵³ FOM, Dublin Office 1, information given in writing, 29 March 2012.

⁵⁴ Federal Department of Justice and Police, Press Release, 21 June 2010,

<http://www.ejpd.admin.ch/content/ejpd/de/home/dokumentation/mi/2010/2010-06-21.html>. The

Agreement is available here: http://www.admin.ch/ch/d/sr/0_142_392_681_163/index.html.

⁵⁵ Answer of 11 May 2011 of the Federal Council to Interpellation no. 11.3096, para. 8,

http://www.parlament.ch/d/suche/seiten/geschaefte.aspx?gesch_id=20113096.

2.2.23. *Suspension of Transfers to Greece*

Switzerland already decided on 19 February 2009 not to conduct a Dublin procedure in relation to Greece in case of especially vulnerable persons, because the reception of this category of foreign persons is only insufficiently ensured. Elderly persons, families with minor children, unaccompanied minors and persons in need of significant medical assistance were considered especially vulnerable persons.

Given the continuing unsatisfactory situation in the field of asylum in Greece, the FOM introduced a practice change on 26 January 2011 following the judgment of the European Court for Human Rights in Strasbourg (*M.S.S. v. Belgium and Greece*): The FOM examines the asylum applications on its own until Greece can comply with its obligations as a Dublin state. In case of persons who had access to the asylum procedure in Greece and had accommodation there, the Dublin procedure with Greece was still conducted.

On 16 August 2011 the Federal Administrative Court (FAC) took a leading case decision regarding this practice by the FOM, which further restricted the preconditions for conducting a Dublin procedure with Greece. In light of this leading case decision, the FOM now only conducts Dublin procedures with Greece if the mentioned criteria are met and if the asylum seeker has a residence status (not only a status during the asylum procedure) in Greece and therefore does not face detention after the transfer.⁵⁶

In practice, the FOM applies the sovereignty clause in most cases concerning Greece. But Switzerland still transfers persons to Greece, even after the ECHR judgment *MSS v. Belgium and Greece*. The Swiss authorities argue that in certain cases a transfer can still be lawful and reasonable in few individual cases, for example if the asylum seeker had lived in Greece for a long time, up to several years, and had been working there for the same length of time or has a lasting right of stay in Greece.

⁵⁶ FOM, Dublin Office 1, information given in writing, 29 March 2012.

The FOM argues that those persons often come to Switzerland with economic instead of asylum relevant motives.⁵⁷ This had been assumed in cases where the person had a permit of stay in Greece, had spent a long time there, and had worked before and had a place to stay (even if only temporarily). In some cases the Swiss authorities also interpreted having had a pink card as a permit of stay which allowed for a transfer. Neither the practice of the FOM nor the FAC seems consistent in itself.

It is also problematic that the FOM sometimes tries to ask another transfer state to take over responsibility for the application because it is not possible to transfer him to Greece, so e.g. Hungary or Italy. If those states then do not answer within the time limit, they become responsible. This has happened both before and after the ECJ-judgment N.S. and M.E.

There were 14 transfers from Switzerland to Greece from February 2011 until February 2012,⁵⁸ so post-MSS.

There is no general policy regarding other Dublin member states.

2.2.24. Observance of the hierarchy of criteria

Switzerland complies with the order of responsibility criteria according to the Dublin Regulation. According to the public FOM statistics, in the large majority of Dublin cases the persons ask for asylum in Switzerland and therefore receive a negative Dublin decision based on the Asylum Act (7'099 decisions in 2011). Cases where persons do not ask for asylum in Switzerland and receive a Dublin order to leave based on the Foreign Nationals Act are clearly fewer (142 decisions in 2011).⁵⁹ This contrasts

⁵⁷ FOM, letter to the Swiss Refugee Council, 24 January 2012.

⁵⁸ See asylum statistics by the Federal Office for Migration, 2011 and 2012, by year:

http://www.bfm.admin.ch/content/bfm/de/home/dokumentation/zahlen_und_fakten/asylstatistik/jahresstatistiken.html and by month:

http://www.bfm.admin.ch/content/bfm/de/home/dokumentation/zahlen_und_fakten/asylstatistik/monatstatistiken.html.

⁵⁹ See asylum statistics by the Federal Office for Migration, 2011,

<http://www.bfm.admin.ch/content/dam/data/migration/statistik/asylstatistik/jahr/2011/stat-jahr-2011-f.pdf>.

with the information given by a FOM official that Switzerland has most often used art. 16.1 letter c Dublin Regulation: in 45% of all Dublin procedures.⁶⁰

2.2.25. Heterogeneity of application within the country

No geographical heterogeneity, as the FOM as a federal authority is responsible for all Dublin procedures. However, there can be heterogeneity within the FOM depending on which official takes a decision. Furthermore, there is heterogeneity regarding the practice of carrying out a Dublin decision, because this is the responsibility of the cantons: detention, modality of transfer up until the airport or border.

2.2.26. Are those recognized with refugees status ever transferred to another Member State under the Dublin Regulation?

Normally, no. But this sometimes happens if the FOM is not aware of the refugee status of the person in the other Dublin member state. For example in the case of Italy, the recognition as refugee is not always recognizable from the Eurodac system, so when checking Eurodac, the person is still registered with a Eurodac 1 hit. This can lead to the FOM assuming that the person is still in the asylum procedure.

The legal basis for the transfer of persons who are recognized refugees in another European state is art. 34.2 a) AA⁶¹ (safe third country). The FOM then takes an inadmissibility decision on this basis. The modalities of the transfer are based on bilateral readmission agreements.⁶² This is common

⁶⁰ FOM, Dublin Office 1, information given in writing, 29 March 2012.

⁶¹ The Swiss Asylum Act.

⁶² For the list of readmission agreements see the website of the Federal Office for Migration: http://www.bfm.admin.ch/content/bfm/en/home/dokumentation/rechtsgrundlagen/internationale_rechtsguellen/internat_vertraege/rueckuebernahme.html.

in practice, especially regarding persons who are recognized refugees in Italy.

2.4. Identification of good practices

The Federal Administrative Court has issued several decisions⁶³ on the Dublin procedure that improved and clarified Swiss practice; for example:

- The clarification that asylum seekers must have an effective opportunity for appeal before being transferred to the other Dublin member state.⁶⁴
- They also made clear that the deadlines mentioned in the regulation are binding for the authorities. They are self-executing, so the asylum seeker can directly rely on them.⁶⁵
- The Court specified that in case of unaccompanied minor asylum seekers, they must be interviewed in the presence of an advisor (legal guardian). If the first interview was made without one, then there has to be another interview.⁶⁶
- The asylum seeker must be informed of the transfer decision in due time. The former practice of the FOM of waiting for months until informing the applicant of the decision (even though the decision was already finished and in the file) consists a violation of the right to be heard. In the concrete case the applicant had submitted additional medical reports which were not taken into account, even though the decision had not been notified yet.⁶⁷
- The asylum seeker can still have a current legitimate legal interest to make an appeal even if he has already been transferred to another member state.⁶⁸

⁶³ See also: case summaries.

⁶⁴ FAC, decision of 2 February 2010, E-5841/2009.

⁶⁵ FAC, 29 June 2010, BVGE 2010/27.

⁶⁶ FAC, decision of 21 September 2011, E-8648/2010.

⁶⁷ FAC, decision of 27 October 2009, D-6570/2009.

⁶⁸ FAC, decision of 2 February 2010, E-5841/2009.

Recommendations 3

- The FOM should refrain from transferring persons, especially vulnerable ones, to countries where adequate reception facilities and access to a fair and efficient asylum procedure are not guaranteed. In these cases, it should make use of the sovereignty clause.
- In particular, the FOM should refrain from transferring persons to countries where there are serious deficiencies in the asylum system such as Greece without exceptions.
- The FOM should take more regard to the circumstances of the individual case instead of stating generally that there are no reasons that speak against the transfer to a certain country. The Swiss authorities have an obligation to examine the facts *ex officio*, especially if the asylum seeker gives an indication that the transfer to another Dublin member state might be problematic.⁶⁹ This is especially important, as most asylum seekers are not yet assisted by a legal advisor or representative before the first instance decision. The FOM should make use of the sovereignty clause and the humanitarian clause more generously where appropriate,

⁶⁹ See also European Court of Justice, judgment in joined cases C-411/10 N. S. v. Secretary of State for the Home Department and C-493/10 M. E. and others v. Refugee Applications Commissioner und Minister for Justice, Equality and Law Reform Dublin, 21 December 2011.

e.g. if members of the family are present in Switzerland. The notion of family should be applied more widely in this context.

- The opportunity for voluntary departure should be given more often; detention should only be applied as a measure of last resort.
- No “chain transfers”: Switzerland should only ask the state responsible under the Dublin Regulation to take back or take charge of the asylum seeker. If return to that country is not reasonable, it must apply the sovereignty clause instead of making a take back/take charge request to a transit Dublin state (e.g. asking Hungary instead of Greece). Because the latter practice contravenes the idea of the Dublin system that only one state should be responsible for an asylum procedure, and asylum seekers should not be continually pushed around with no member state substantively examining their asylum claim.
- The legal aid system needs to be improved: The Swiss state should take more responsibility in order to guarantee that all asylum seekers who need it can have effective access to proper legal support.
- Repeatedly returning Dublin transferees should be accommodated in reception centers instead of being placed under emergency assistance.
- Swiss authorities should in cases of vulnerable asylum seekers make sure that they are received accordingly in the other member state and that there is a continuity of care.
- It is very problematic that transfers under the Dublin-system might include transport by special flights that could implicate the application of coercive measures. These measures have been applied even to parents with their children witnessing it, which is very problematic with regard of the protection of the rights of the child.

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- Federal Department of Justice and Police, Report on Acceleration Measures in the Area of Asylum, March 2011, <http://www.bfm.admin.ch/content/dam/data/migration/rechtsgrundlagen/gesetzgebung/asylg-aug/ersatz-nee/ber-beschleunig-asy-l-f.pdf> (available in French, German, Italian)
- Federal Department of Justice and Police, Press Release, 21 June 2010, <http://www.ejpd.admin.ch/content/ejpd/de/home/dokumentation/mi/2010/2010-06-21.html>

- Federal Department of Justice and Police, reply to interpellation no. 10.3561, 17 September 2010,
<http://www.parlament.ch/f/dokumentation/curia-vista/vorstoesse-tabellen-grafiken/Documents/cv-10-3561-f.pdf>, annexed tables with costs:
http://www.parlament.ch/f/suche/pages/geschaefte.aspx?gesch_id=20103561
- Federal Department of Justice and Police, Press Release, 20 September 2011,
<http://www.ejpd.admin.ch/content/ejpd/de/home/dokumentation/mi/2011/2011-09-200.html>
- Federal Office for Migration, Asylum statistics by year, quarter, month,
http://www.bfm.admin.ch/content/bfm/fr/home/dokumentation/zahlen_und_fakten/asylstatistik.html
- Federal Office for Migration, circular letter to cantonal authorities and border guard agency, 23 March 2012
- Federal Office for Migration, letter to the Swiss Refugee Council, 24 January 2012
- Federal Office for Migration, list of readmission agreements,
http://www.bfm.admin.ch/content/bfm/en/home/dokumentation/rechtsgrundlagen/internationale_rechtsquellen/internat_vertraege/rueckuebernahme.html
- Swissinfo, Dublin agreement comes under stress, 1 March 2012,
http://www.swissinfo.ch/eng/specials/asylum_in_switzerland/Dublin_agreement_comes_under_stress.html?cid=32180214

Negative Dublin decisions are registered as inadmissibility decisions, because that is what they are in the national context (inadmissibility decision according to art. 34.2 d) Asylum Act). In addition, there is a separate section at the end of the statistics regarding Dublin transfers. They show the number of inadmissibility decisions according to art. 34.2 d), the number of orders to leave according to art. 64a FNA (persons illegally staying in Switzerland, without applying for asylum), the number of out- and in-procedures,⁷⁰ the number of accepting replies and refusals by the responsible Dublin member state, as well as the numbers of actual transfers. These statistics are available by country of origin, by Dublin state and by canton.⁷¹

5.1. Dublin Statistics⁷²

⁷⁰ This refers to the number of requests from Switzerland and to Switzerland from other Member States to take responsibility for an asylum application as well as the number of actual transfers in practice.

⁷¹ Asylum statistics of the Federal Office for Migration, http://www.bfm.admin.ch/content/bfm/de/home/dokumentation/zahlen_und_fakten/asylstatistik.html.

⁷² Annual asylum statistics of the Federal Office for Migration, 2010, p. 18 and 58-63, <http://www.bfm.admin.ch/content/dam/data/migration/statistik/asylstatistik/jahr/2010/stat-jahr-2010-f.pdf>.

	2010	2011	2012
Outgoing requests (by Switzerland to other Dublin member states)	5994	9347	11'029
Incoming requests (by other Dublin member states to Switzerland)	1327	1611	2342
Accepting replies by other Dublin member states (out-procedure, including acceptance by default)	5095	7014	9328
Accepting replies by Switzerland (in-procedure, including acceptance by default)	797	907	1186
Dublin inadmissibility decisions (art. 34.2 d) Asylum Act)	6393	7099	9130
Outgoing transfers	2722	3621	4637
Incoming transfers	481	482	574

The vast majority of asylum seekers in the Dublin procedure were transferred to Italy: 2782 out-procedures and 1368 transfers in 2010, 5986 out-procedures and 2365 transfers in 2011, 6605 out-procedures and 2981 transfers in 2012. Other important countries for out-procedures were Austria, Germany, France and Spain.

5.2. Dublin provisions

According to the FOM, Switzerland used the following provisions of the Dublin Regulation most often:

- art. 16.1 letter c: 45%

- art. 16.1 letter e: 24.5%
- art. 10: 22.5%
- art. 9: 6%
- other provisions: 2%⁷³

5.3. *Eurodac*

According to the FOM, in 75% of all Dublin out-procedures, a Eurodac hit was used as an element of proof. 85% of these Dublin procedures were take back requests to other Member States.⁷⁴

5.4. *Detention*

According to the FOM, no statistical information can be given regarding the question of how many asylum seeker are detained in the context of a Dublin procedure in Switzerland or in the responsible Dublin state. Detention orders in Switzerland are in the competence of the cantons.⁷⁵

⁷³ FOM, Dublin Office 1, information given in writing, 29 March 2012.

⁷⁴ FOM, Dublin Office 1, information given in writing, 29 March 2012.

⁷⁵ FOM, Dublin Office 1, information given in writing, 29 March 2012.