

SAFE THIRD COUNTRY CASES

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1. Introduction

This Asylum Instruction (AI) sets out policy guidance on handling asylum claims in circumstances where the UK may not be the appropriate country for considering those claims. It covers:

- The Dublin Convention;
- The Dublin II Regulation;
- The European Fingerprint Database – Eurodac;
- Safe Third Country considerations outside the Dublin arrangements.

This instruction sets out policy guidance on considering asylum applications from nationals who have made a previous asylum application in a safe third country or have been issued with documents which confer a right of residence for a limited or indefinite period of time. It discusses the Dublin Convention and Dublin II Regulation as well as the European Fingerprint Database – Eurodac.

Asylum claims may be refused without substantive consideration of the application if the applicant can be returned to a safe third country. A safe third country is one of which the applicant is not a national or citizen and in which a person's life or liberty is not threatened by reason of race, religion, nationality, membership of a particular social group or political opinion. It is also one from which a person would not be sent to another State in contravention of his rights under the 1951 Convention relating to the Status of Refugees and the 1967 New York Protocol.

As with other types of removal, the removal to a safe third country must not breach the United Kingdom's obligations under the European Convention on Human Rights (ECHR).

Third Country Unit (TCU) is responsible for making all decisions on safe third country grounds.

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1.1 Application of this Instruction in Respect of Children and those with Children

Section 55 of the Borders, Citizenship and Immigration Act 2009 requires the UK Border Agency to carry out its existing functions in a way that takes into account the need to safeguard and promote the welfare of children in the UK. It does not impose any new functions, or override existing functions.

Officers must not apply the actions set out in this instruction either to children or to those with children without having due regard to Section 55. The UK Border Agency instruction 'Arrangements to Safeguard and Promote Children's Welfare in the United Kingdom Border Agency' sets out the key principles to take into account in all Agency activities.

Our statutory duty to children includes the need to demonstrate:

- Fair treatment which meets the same standard a British child would receive;
- The child's interests being made a primary, although not the only consideration;
- No discrimination of any kind;
- Asylum applications are dealt with in a timely fashion;

- Identification of those that might be at risk from harm.

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2. The Dublin Arrangements

The Third Country Unit considers two broad types of asylum cases. Most are those which come under the arrangements provided by the Dublin Convention or the Dublin II Regulation (the “Dublin arrangements”). Some are third country removals outside of those arrangements (further information on the non-Dublin cases can be found in Section 7 of this instruction).

The objectives of the Dublin arrangements are the avoidance of the successive transfer of applicants between Member States without any single state taking responsibility for determining the claim (“refugees in orbit”) and the prevention of multiple parallel or successive claims in different Member States and related secondary movements (“asylum shopping”). In order to achieve these aims both Dublin mechanisms contain a number of specific criteria in descending order of importance used to identify the competent Member State, enabling the transfer of an asylum seeker once responsibility has been agreed.

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3. The Dublin Convention

The Dublin Convention was replaced in September 2003 by the Dublin II regulation (see Section 4) and its terms do not apply to new cases arising since that date. There will, however, be some legacy cases still in the system – for example, where the transfer was agreed under the terms of the Convention but could not be implemented immediately e.g. the individuals have absconded or transfer was prevented by a suspensive legal challenge. Caseworkers should seek advice from senior managers in TCU if in doubt about case-handling when dealing with Dublin Convention cases.

3.1 History

On 15 June 1990 the European Community Member States agreed upon a Convention determining the State responsible for examining Applications for Asylum lodged in one of the Member States of the European Communities. As the agreement was concluded in Dublin the Convention became known as the Dublin Convention. The provisions of the Dublin Convention entered into force on 1 September 1997 between the 12 original signatory states. It entered into force one month later on 1 October 1997 for Austria and Sweden and 1 January 1998 for the last state, Finland.

The Convention laid down a set of criteria for determining Member States consideration of asylum applications. The hierarchical approach was based on the basic principle that the Member State most responsible for the applicant's presence in the territory of the EU should be responsible for dealing with any asylum claim.

Within the Dublin Convention Article 4 concerned asylum applicants with a family member already recognised as a refugee and legally resident as such in another Member State. Article 4 provided that the State where the refugee family member was legally resident should be responsible for examining the asylum application, providing that the persons concerned gave their consent.

Article 5 determined responsibility on the basis of the previous issue of a residence permit or a visa to the individual asylum applicant.

Article 6 provided that where an applicant for asylum entered the territories of the EU illegally across the external border then the Member State in which this happened would be responsible for determining any subsequent asylum claim, unless the person had been living in the Member State where the asylum application had been lodged for six months, in which case the latter would be responsible.

Article 7 provided that the Member State responsible for controlling the lawful entry of the asylum applicant into EU territory would be responsible, unless the individual concerned was not a visa national for that particular Member State. However, if the individual then moved on to another Member State where he or she did not require a visa and lodged an asylum claim, then the latter State would be responsible for the asylum claim. Article 7 also provided that where an application for asylum was lodged in transit in an airport of a Member State that Member State would be responsible.

Where no Member State could be identified as responsible on the basis of any of the preceding criteria Article 8 provided that the responsible Member State should be the first one with which the application had been lodged.

Finally Article 9 permitted any Member State, even where not responsible under the criteria, to exercise discretion to take responsibility for an applicant for humanitarian reasons.

4. The Dublin II Regulation

The Treaty of Amsterdam called for a replacement mechanism to determine responsibility for asylum applicants within the EU. As a result an enhanced measure in the form of a Community Regulation was adopted on 18 February 2003.

This instrument is Council Regulation (EC) No 343/2003 “Dublin II” 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. Subject to certain transitional arrangements the provisions of the Dublin II Regulation entered into force on 1 September 2003 for all European Union (EU) Member States except Denmark, (see below at Section 5 “The Dublin States”). The Dublin Regulation applied to all new Member States when they acceded to the EU on 1 May 2004. Additional rules on practical implementation are set out in Commission regulation (EC) No. 1560/2003 “Dublin II Implementation regulation”. The majority of UK Border Agency transfers to safe third countries take place under the “Dublin II” arrangements.

Like the Dublin Convention, the Dublin II Regulation establishes a set of hierarchical criteria for determining the EU Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national. The provisions of the Dublin II Regulation replaced the 1990 Dublin Convention from 1 September 2003 subject to certain transitional provisions.

In the Dublin II Regulation the basic criteria designate as responsible (in descending order of priority):

- Article 6 of Dublin II provides that where an applicant for asylum is an unaccompanied minor the responsible Member State will be that where a member of his or her family is legally present, provided that this is in the best interests of the minor. The definition of “family members” is in Article 2(i) of Dublin II. It is limited to the nuclear family insofar as this existed in the country of origin. It refers to the spouse or the unmarried partner in a stable relationship, the minor children of the couple on condition that they are unmarried and dependant (without distinction to whether they were born in or out of wedlock or adopted) or the parents or guardian of an unmarried minor. In the absence of such a family member the responsible state is the one where the minor had lodged his or her application for asylum. This means that the provisions of Article 16 of Dublin II may, where otherwise appropriate, be applied and that it is possible to request the Member State where an earlier application for asylum had been lodged to take back the unaccompanied child.
- The State, in which a family member of the applicant has been allowed to reside as a refugee (Article 7), provided that the persons concerned so desire. This provision (unlike other on family unity) applies whether or not the family was previously formed in the country of origin.
- The State in which a family member of the applicant has an asylum application which is not subject of a first decision (i.e. no decision has been served by the UK Border Agency), provided that the persons concerned so desire (Article 8).
- The State that granted the applicant a visa or residence permit (Article 9) (This Article contains detailed clarification for situations where there is more than one visa or residence permit and/or where such documents may no longer be valid);

- The State where the applicant first entered the EU illegally, responsibility ceasing after 12 months (Article 10.1);
- The State where the applicant has been previously living (“illegally present”) for a continuous period of at least 5 months (Article 10.2);
- The State the applicant entered without the need to hold a visa (Article 11);
- The State in which the application for asylum was made when in an international transit zone of an airport (Article 12);
- The first State where the applicant has made an application for asylum (Article 13).

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4.1 Humanitarian Clause

In addition to the criteria within the “responsibility hierarchy” set out above the Dublin II Regulation also specifically includes provision allowing Member States to accept responsibility for cases in the interests of wider family reunion or for other humanitarian reasons, provided the persons concerned agree (Article 15).

The humanitarian provision in Article 15 is discretionary. Caseworkers should consider the evidence put forward in these cases, taking into account relevant human rights case law (the most up-to-date case law can be obtained from TCU Judicial Review section).

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5. The Dublin States

The present Member States of the European Union are:

Austria, Belgium, Bulgaria*, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, The Netherlands, Malta, Poland, Portugal, Romania*, Slovakia, Slovenia, Spain, Sweden and the United Kingdom.

The Dublin II and Eurodac Regulations (see Section 6 “Eurodac below”) could not immediately apply to Denmark due to the terms of a Protocol on the position of Denmark annexed to the Treaty establishing the European Community (TEC) and the Treaty on European Union (TEU) by the Treaty of Amsterdam. Denmark’s Protocol meant that separate legal steps were needed to secure Denmark’s participation. As a result Denmark’s participation is with effect from 1 April 2006. Between 1 September 2003 and 31 March 2006 the transfer of asylum seekers to and from Denmark continued to be subject to the Dublin Convention.

The UK (like Ireland) was not bound to participate in the Dublin II and Eurodac Regulations, due to the terms of a Protocol on the position of the UK and Ireland, also annexed to the TEC and TEU by the Treaty of Amsterdam. However, both the UK and Ireland decided to participate (“opt-in”) as provided for by the terms of the Protocol.

Since 1 April 2001 Iceland and Norway have also operated under the terms of the Dublin arrangements by virtue of a separate Agreement between those countries and the Member States of the EU. The need to conclude this “Parallel Agreement” was linked to the removal of internal frontier controls between Norway, Iceland and the Schengen States.

Any citizen of a ‘Dublin State’ who seeks asylum in another participating state cannot be considered for transfer under the Dublin arrangements. Similarly their fingerprints must not be sent to the Eurodac fingerprint database (see below at Section 6). If it appears that this could have happened in error then TCU caseworkers should immediately refer the papers to senior managers so that the Immigration Fingerprint Bureau (IFB) can be informed and the necessary checks or amendments be made in compliance with the Eurodac Regulation.

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*Acceded to the EU on 1st January 2007

6. EURODAC

On 15 January 2003 the EU-wide fingerprint database of asylum applicants and certain other third country nationals, established by the Eurodac Regulation EC No. 2725/2000 went live. Additional rules on Eurodac Implementation are set out in Council regulation (EC) No. 407/2002 “Eurodac Implementing Rules”. Eurodac allows for the computerised exchange of fingerprints solely in order to support the application of the Dublin arrangements by identifying those applicants already known to other participating states. The Eurodac database cannot be accessed for the purposes of law enforcement reasons nor can its data be used to support prosecutions. The following are the fingerprint categories under which prints are taken for purposes of Eurodac.

6.1 Category 1

Fingerprints of every applicant for asylum of at least 14 years of age are to be taken and transmitted to the Eurodac Central Unit database promptly (Article 4(1) of the Regulation). This is a mandatory category for the collection and transmission of fingerprints. This data is to be stored for 10 years from the date on which the fingerprints were taken and will be automatically erased from the database at this point (Article 6). However, the data will be erased in advance if the person concerned obtains citizenship of any Member State (Article 7). Finally the data will be blocked within the database if the person is recognised as a refugee in a Member State. The position on data blocking will be reviewed by Member States after 5 years of Eurodac operations i.e. January 2008 (Article 12).

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6.2 Category 2

Fingerprints of every third country national of at least 14 years of age who is apprehended in connection with the irregular crossing (“illegal entry”) by land, sea or air of the external border of that Member State, having come from a (third) country outside the EU, Norway or Iceland and who is not turned back are to be taken and transmitted to the Central Unit database promptly (Article 8 of the Regulation). This is a mandatory category for the collection and transmission of fingerprints. The data is to be stored for 2 years from the date on which the fingerprints were taken and will be automatically erased at this point (Article 9). However, the data will be erased in advance if the person concerned has been issued with a residence permit, has left the territory of the Member States or has obtained citizenship of any Member State (Article 10).

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6.3 Category 3

A Member State may transmit to the Central Unit database any fingerprint data which it may have taken of any third country national of at least 14 years of age who is found illegally present within its territory in order to check whether the person concerned has previously lodged an application for asylum in another Member State. This is a discretionary category for transmissions. The data transmitted under this category is checked only against that already stored for asylum seekers (Category 1) and is not stored (Article 11 of the Regulation).

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7. Non-Dublin Safe Third Country Cases

Outside the Dublin arrangements applicants are generally returned either to the safe third country of embarkation or, more rarely, to another safe third country if evidence exists that the applicant would be admitted to that state. Examples of countries to which such returns have taken place are the United States of America, Canada and Switzerland. There are no binding agreements between these countries and at present all decisions whether to apply safe third country provisions should be considered on a case by case basis.

In all safe third country cases TCU caseworkers must be satisfied that:

- The applicant is not a national or citizen of the country of destination;
- The applicant's life and liberty would not be threatened in that country by reason of race, religion, nationality, membership of a particular social group or political opinion; and the government of that country would not send the applicant to another country other than in accordance with the 1951 Convention (the concept of 'non-refoulement').

As with other types of removal, the removal to a safe third country must not breach the United Kingdom obligations under the ECHR. Consideration should be given to any human rights challenge against removal from the UK including whether it is "clearly unfounded" in accordance with the relevant legislation (see Section 8 "Safe Third Country Legislation").

In non-Dublin cases TCU caseworkers must also be satisfied in each case that an applicant:

- Had an opportunity at the border or within the territory of a safe third country to make contact with that country's authorities in order to seek protection; or
- That there is other clear evidence of the applicant's admissibility to a safe third country.

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8. Safe Third Country Legislation

Provisions in section 33 and Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 entered into force on 1 October 2004 replacing provisions in sections 11 and 12 of the 1999 Act. Schedule 3 recognises the particular status of European countries that are subject to Dublin II requirements including Eurodac. Schedule 3 has four categories:

8.1 First Category (at Part 2)

If removal is to one of the States listed on the face of the Act (all participants in the Dublin arrangements, including those States acceding to the EU on 1 May 2004), there is no scope for any applicant to challenge removal on Refugee Convention grounds. In addition the listed countries are deemed safe in the sense they would not remove an asylum seeker in contravention of the ECHR (see separate AI on Considering Human Rights Claims).

For this group any other ECHR challenge to removal from the UK will be certified unless the Secretary of State is satisfied that the claim is not clearly unfounded. Such challenges could be based on Article 3 in that the individual applicant alleges (s) he would face inhuman or degrading treatment in the safe third country, or on Article 8 that removal from the UK would interfere with his or her private or family life. When considering any ECHR challenge made on these grounds TCU caseworkers should consider recent court rulings (up-to-date details of which can be obtained from the Judicial Review section within TCU). TCU caseworkers should also bear in mind when assessing whether the human rights claim is not clearly unfounded that Article 8 is a qualified right. Even if such a right is established, paragraph 8(2) ECHR permits a state to interfere with this right in defined circumstances, for example where the action is proportionate, is necessary in a democratic society and is in pursuit of a legitimate aim, such as the maintenance of immigration control. In the majority of new cases being considered for the first time by TCU caseworkers the applicant will have only remained in the UK for a relatively short time and so the likelihood of engaging Article 8 will be reduced. See also the AI on Article 8 of the ECHR.

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8.2 Second Category (at Part 3)

If removal is to be to a safe third country in this group there would be no scope for any applicant to challenge removal on Refugee Convention grounds, as above. However, as States on this list are not party to the Dublin arrangements, there is no automatic (“deemed”) safety provision relating to onward removal in breach of Article 3 ECHR. Instead all human rights challenges to removal from the UK will be certified as clearly unfounded unless the Secretary of State was satisfied they are not clearly unfounded in line with the guidance for Part 2 above. TCU caseworkers should consider the human rights claim with reference to recent court rulings (details from TCU Judicial Review section as above). If relevant to the basis of the claim against removal, TCU caseworkers should also consider information about the third country. If in doubt TCU caseworkers should seek advice from senior management. [No states are listed under this provision at present]

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8.3 Third Category (at Part 4)

If removal is to be to a country in this group then again there is no scope for any applicant to challenge removal on Refugee Convention grounds (as described above for Parts 2 and

3). Any ECHR challenge to removal is to be considered to determine whether it is appropriate to certify as “clearly unfounded” for this particular applicant. TCU caseworkers should consider the human rights claim with reference to recent court rulings (up-to-date details of which can be obtained from the Judicial Review section within TCU). If relevant to the basis of the claim TCU caseworkers should also consider information about the third country. If in doubt TCU caseworkers should seek advice from senior management. No states are listed under this provision at present.

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8.4 Fourth Group (at Part 5)

This category does not apply to specific countries but provides scope for a case to be considered on an individual basis. It provides additional flexibility to certify cases for example where the applicant arrives from a third country which is not a regular point of embarkation. As for Part 4 above, any ECHR challenge to removal is considered to determine whether it is appropriate to certify as “clearly unfounded” in the individual case. If a case is referred to TCU for possible certification under this provision TCU caseworkers should seek advice from senior management in the first instance.

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8.5 The Immigration Rules - HC 1112, with effect from 25 October 2004

The Immigration Rules were revised to complement the provisions in the 2004 Act, as set out below.

For paragraph 345 (of HC 395) substitute:

(1) In a case where the Secretary of State is satisfied that the conditions set out in Paragraphs 4 and 5(1), 9 and 10(1), 14 and 15(1) or 17 of Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 are fulfilled, he will normally decline to examine the asylum application substantively and issue a certificate under Part 2, 3, 4 or 5 of Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 as appropriate.

(2) The Secretary of State shall not issue a certificate under Part 2, 3, 4 or 5 of Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 unless:

(i) the asylum applicant has not arrived in the United Kingdom directly from the country in which he claims to fear persecution and has had an opportunity at the border or within the third country or territory to make contact with the authorities of that third country or territory in order to seek their protection; or

(ii) there is other clear evidence of his admissibility to a third country or territory. Provided that he is satisfied that a case meets these criteria, the Secretary of State is under no obligation to consult the authorities of the third country or territory before the removal of an asylum applicant to that country or territory

(3) Where a certificate is issued under Part 2, 3, 4 or 5 of Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 in relation to the asylum claim and the person is seeking leave to enter the Immigration Officer will consider whether or not he is in a position to decide to give or refuse leave to enter without interviewing the person further.

If the Immigration Officer decides that a further interview is not required he may serve the notice giving or refusing leave to enter by post. If the Immigration Officer decides that a further interview is required, he will then resume his examination to determine whether or not to grant the person leave to enter under any other provision of these Rules. If the person fails at any time to comply with a requirement to report to an Immigration Officer for examination, the Immigration Officer may direct that the person's examination shall be treated as concluded at that time. The Immigration Officer will then consider any outstanding applications for entry on the basis of any evidence before him.

(4) Where a certificate is issued under Part 2, 3, 4 or 5 of Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 the person may, if liable to removal as an illegal entrant, removal under section 10 of the Immigration and Asylum Act 1999 or to deportation, at the same time be notified of removal directions, served with a notice of intention to make a deportation order, or served with a deportation order, as appropriate.

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9. Certification and Appeal Rights

The Nationality, Immigration and Asylum Act 2002 provides that immigration decisions such as those that apply to persons whose asylum claims are to be considered for certification on safe third country grounds i.e. refusal of leave to enter or a decision to remove as an illegal entrant, attract a right of appeal on a range of possible grounds.

In these circumstances where an asylum or human rights claim has been made, a person can stay in the UK while the appeal to the Asylum and Immigration Tribunal (AIT) is pending, unless the legislation provides that an exception applies e.g. the non-suspensive appeal (NSA) provisions in section 94 of the Nationality, Immigration and Asylum Act 2002 apply. Safe third country certificates made under Schedule 3 to the 2004 Act provide another exception. Any appeal right against the decision to refuse leave to enter or treat as an illegal entrant where an asylum or human rights claim has been made will be non-suspensive if the claim(s) are certified under Schedule 3 to the 2004 Act.

Any human rights claims certified as “clearly unfounded” under Schedule 3 (paragraph 5(4) in relation to Dublin countries at Part 2 or paragraphs 10(4) in Part 3, 15(4) in Part 4, or 19(c) in Part 5, as appropriate in other cases) maintain non-suspensivity. An appellant is not entitled to remain in the UK while a race discrimination appeal is heard, unless another ground of the appeal is suspensive. In TCU cases any appeal on race grounds will only be suspensive if there is also a human rights claim which is not certified as “clearly unfounded” i.e. where a safe third country certificate has been issued the appeal against removal is non-suspensive unless there is a related human rights claim that is not certified as “clearly unfounded”.

All appeals (or rights of appeal) will be to the Asylum and Immigration Tribunal. Any challenges by judicial review to a certificate will be to the civil administrative courts. If an appeal against a safe third country certification is brought before the AIT the Presenting Officer should advise the TCU Judicial Review team in the first instance and seek their advice as required

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Document Control

Change Record

Version	Authors	Date	Change Reference
1.0	SP	27/02/07	New web style implemented.
2.0	GL	01/10/09	Children's Duty Update
3.0	GL	23/10/09	Further Update To Children's Duty

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