



Analysis

Was Hungary the first EU country of arrival?

Legal responsibility before human rights: a short story on Dublin

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The Austrian Asylum court has been requested to ask the European Court of Justice (ECJ) whether the removal of an asylum-seeker to Hungary in application of the Dublin Regulation should be suspended. The request was lodged on 27 August 2012. Despite serious concerns expressed by the Helsinki Committee in Hungary and the UNHCR based on well-documented evidence that the rights of asylum-seekers, refugees and migrants are violated in Hungary, no mention was made of the risk of the claimant being mistreated upon return to Hungary. The decision of the constitutional court remained purely technical: was Hungary the first EU country to be entered or not?

The Dublin II Regulation

The Dublin Regulation (343/2003) “establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by third-country nationals” was adopted in February 2003. The Regulation replaced the 1990 Dublin Convention which established the principle that people seeking international protection in the European Union (EU) should lodge their asylum application in the first Member State they enter. It is now known as the “Dublin II Regulation.”

The application of the Regulation means that countries located at the EU’s external borders are more likely to be held responsible for the claims of asylum-seekers arriving by land or by sea.

Suspension of removals to Greece

Member States are not obliged to send asylum-seeker back to the first EU country they entered. Article 3.2, known as “the sovereignty clause”, states that:

*“By way of derogation from paragraph 1, each Member State may examine an application for asylum lodged with it by a third-country national, **even if such examination is not its responsibility under the criteria laid down in this Regulation.** In such an event, that Member*

*State shall become the Member State responsible within the meaning of this Regulation and shall assume the obligations associated with that responsibility”.[emphasis added]*¹

This clause was, for example, used in France in May 2010 to suspend the removal of a two Palestinians to Greece since the Council of State (*Conseil d’Etat*) established that a transfer to Greece would constitute a serious violation of their right to seek asylum, based on documented evidence of the ill-treatment they were subjected to when in Greece (medical certificates; reports).²

However, this article is generally not used unless the asylum-seekers are provided with appropriate legal advice to challenge a Dublin II removal decision. Article 3.2 is hardly used in the first instance by the authorities despite many reports documenting the shortcoming of some Member States’ asylum mechanisms, including Greece’s.

In January 2011, a landmark ruling by the European Court of Human Rights found Belgium and Greece guilty of breaching Article 3 (prohibition of letting someone be subject to inhumane and degrading treatment):³ Belgium refused to consider an Afghan asylum-seeker’s appeal not to be sent back to Greece, his first EU country of arrival, where he was detained and then released and left in destitution without any information or support regarding the possibility of lodging an asylum claim. The court found Belgium guilty of not providing an asylum appeal and received a €6,000 fine. Greece was fined €30,000.

Yet, the reception conditions and the asylum procedure in Greece didn’t change, mostly because of Greece’s lack of capacity and unwillingness to open access to the asylum procedure for migrants seeking international protection. Many reports continue to denounce the violation of the rights of asylum-seekers, not least the principle of non-refoulement.⁴

On 21 December 2011 the European Court of Justice gave its opinion in joint cases involving the UK and the Netherlands with respect to Dublin II transfers to Greece.⁵ Referring to the ECHR ruling, the ECJ highlighted that Member States respecting fundamental rights could not be taken for granted and that claims of human rights violations in a Member State should be examined as a result. The court also ruled that asylum-seekers should not be sent to a Member State suffering from systematic deficiencies in the asylum procedure and the reception conditions of asylum-seekers, as was the case in Greece.

¹ Council Regulation (EC) 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 nationals, 343/2003, 18 February 2003, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003R0343:EN:NOT>

² Conseil d’Etat, *Ordonnance du 20 mai 2010*, Nos. 339478 & 339479 <http://arianeinternet.conseil-etat.fr/arianeinternet/ViewRoot.asp?View=Html&DMode=Html&PushDirectUrl=1&Item=1&fond=DCE&text=Othman&Page=1&querytype=simple&NbEltsPerPages=4&Pluriels=True>

³ European Court of Human Rights, Grand Chamber ruling, *M.S.S. v Belgium and Greece* (Application No. 30696/09), 21 January 2011 <http://www.statewatch.org/news/2011/jan/echr-judgment-mss-v-belgium-greece.pdf>

⁴ Human Rights Watch, *The EU’s dirty hands: Frontex’s involvement in ill-treatment of migrant detainees in Greece*, September 2011, http://www.hrw.org/sites/default/files/reports/greece0911webwcover_0.pdf

⁵ Court of Justice of the European Union, *Opinions of the Advocate General 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 and Minister for Justice, Equality and Law Reform*, Press Release No 96/11, 22 September 2011, <http://www.statewatch.org/news/2011/sep/ecj-n-s-case-advocate-general-prel.pdf>

“If there is a serious risk that the fundamental rights, under the Charter of Fundamental Rights, of the asylum seeker to be transferred may be breached in the Member State having primary responsibility, the other Member States may not transfer an asylum seeker to that Member State. Rather, the other Member States are, in principle, obliged to exercise the right to assume responsibility under Regulation No 343/2003 and must themselves examine the asylum application”.

Hungary: another Greece?

The January 2011 ECHR decision led to the temporary suspension of 531 Dublin II transfers to Greece by the court,⁶ while both the ECHR and the ECJ decision resulted in all Member States, officially or tacitly suspending transfers to Greece until the asylum system improves.

Mounting concern has been expressed by NGOs regarding the asylum system in Hungary. In September 2011, Hungary was condemned by the European Court of Human Rights for the illegal detention of two Ivorian asylum-seekers in a case brought to the court by the Hungarian Helsinki Committee.⁷ In December 2011, the human rights organisation used its field expertise to release a note on the treatment of Dublin returnees in Hungary where it was argued that:

*“In the Hungarian Helsinki Committee’s opinion, Hungary currently does not provide appropriate reception conditions and access to protection to asylum-seekers returned under the Dublin procedure”.*⁸

In April 2012, the UNHCR published a highly critical report where the Commissioner strongly denounced Hungary’s treatment of asylum-seekers and refugees. [A] One particular section of the report was dedicated to Dublin II returnees who, according to the UNHCR, do not have access to the asylum procedure or if so, not in a fair manner; are automatically detained upon return to Hungary; can be sent back to unsafe third countries in breach of the non-refoulement principle as asylum applications lodged by Dublin II returnees do not have a suspensive effect on the deportation order they are issued.⁹

⁶ ‘Greek asylum system in disarray’, European Voice, 27 January 2011,

<http://www.europeanvoice.com/article/imported/greek-asylum-system-in-disarray/70044.aspx>

⁷ European Court of Human Rights, *Lokpo and Touré v Hungary* (Application no. 10816/10), 20 September 2011 (final judgment 8 March 2012),

<http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#%7B%22respondent%22:%5B%22HUN%22%5D,%22documentcollectionid%22:%5B%22COMMITTEE%22,%22DECISIONS%22,%22COMMUNICATEDCASES%22,%22CLIN%22,%22ADVISORYOPINIONS%22,%22REPORTS%22,%22RESOLUTIONS%22%5D,%22itemid%22:%5B%22001-106272%22%5D%7D>

⁸ Hungarian Helsinki Committee, *Access to protection jeopardised - Information note on the treatment of Dublin returnees in Hungary*, December 2011 <http://helsinki.hu/wp-content/uploads/HHC-Access-to-protection-jeopardised.pdf>

⁹ UNHCR, *Hungary as a country of asylum. Observations on the situation of asylum-seekers and refugees in Hungary*, 24 April 2012, <http://www.unhcr.org/refworld/docid/4f9167db2.html>

Many asylum-seekers who entered the EU in Hungary try to find protection in Austria but were sent back to Hungary in application of the Dublin II Regulation. One removal was suspended in January 2012 by the European Court of Human Rights pursuant to Rule 39 of the rules of the Court.¹⁰

In June 2012, the Dublin II transfer from Italy to Hungary of an Afghan asylum-seeker was suspended by the Lazio Tribunale Amministrativo Regionale (TAR, Regional Administrative Court) based on evidence that he was victim of illegal detention and mistreatment in Hungary.¹¹ The court based its findings on the ECJ ruling whereby Member States should refrain from sending back asylum-seekers to countries where there is a risk that the rights safeguarded by the EU Charter of Fundamental Rights may be breached.

The technicalities of Dublin II beyond human rights considerations

In a recent case in June 2012, a Dublin II transfer decision was taken by Austria to send a Pakistani asylum-seeker back to Hungary which was deemed by the Austrian asylum court to be the first EU Member State he entered and where he lodged an asylum claim. Therefore his [asylum] claim was to be examined by Hungary. However, the person had entered the EU earlier through Greece, without claiming asylum there, and he had then travelled through Macedonia and Serbia before he entered Hungary, and finally Austria, where another application was lodged.

However, as identified by the Austrian constitutional court, the asylum-seeker's journey in the EU started in Greece, although the "Dublin chain was quasi disrupted" between Greece and Hungary, when the man crossed Macedonia and Serbia. It was thus unclear which EU country was first entered under the Dublin II Regulation: Greece or Hungary. The Austrian constitutional court thus ruled that the asylum court should not have decided to send the asylum-seeker back to Hungary as Hungary's responsibility was not yet established. The transfer was suspended as a result and the asylum court was requested to ask the ECJ's opinion on the matter. The application was lodged on 27 August 2012.¹²

If Greece were found competent to examine the case, it is likely that the asylum-seeker would have the possibility of seeking protection in Austria. Indeed, the constitutional court made a clear reference to the above mentioned ECHR and the ECJ jurisprudence and that the situation in Greece is of too much concern to allow for a Dublin II transfer. However, despite different reports, and the temporary suspension in January 2012 of the transfer of a Sudanese asylum-seeker to Hungary by the ECHR (Rule 39 interim measure),¹³ it is still uncertain what conclusions Austria would reach after the ECJ gives its decision on the issue.

Indeed, no mention was made in the Austrian constitutional court's decision of the human rights situation in Hungary and the violation of the rights of migrants and refugees, or even to the ECJ's

¹⁰ European Court of Human Rights, *ECHR interim measure suspending the expulsion of the applicant to Hungary* (Application no. 2283/12), 11 January 2012 <http://www.dublin-project.eu/dublin/Files/ECHR-Interim-measure-against-the-transfer-of-an-asylum-seeker-from-Austria-to-Hungary>

¹¹ Statewatch news, Court annuls Afghan's Dublin II return to Hungary, 28 June 2012, <http://www.statewatch.org/news/2012/jun/18italy-hungary-dublin.htm>

¹² Verfassungsgerichtshof, U330/12, 27 June 2012, <http://www.asylanwalt.at/doc.php?doc=1372>

European Court of Justice, Abdullahi, Case C-394/12, case still in process as of (August 2012)

¹³ Ibid at 10

jurisprudence, contrary to the decision made by Italy in June 2012. Besides, the transfer to Hungary was initially approved by the Austrian asylum court despite the existing evidence on human rights violations.

The sustainability of Dublin II

Many discrepancies exist among Member States and the criteria applied to grant international protection to asylum-seekers. The pressure which many EU countries are facing, coupled with the incapacity of many of them to cope with the number of asylum claims (lack of reception capacities, trained staff) coupled with the economic crisis which directly impacts on the resources available to support the asylum effort, means that many countries of arrival for asylum-seekers are unable to provide decent reception standards for asylum-seekers.

In April 2011, Malta, Greece, Italy and Cyprus released a joint communiqué calling for the revision of the Dublin II Regulation to include “a mechanism to suspend the transfers to Member States facing particular pressure on their national asylum systems” and a sharing of responsibility amongst Member States to relocate people granted protection within the EU.¹⁴

In the absence of fully harmonised criteria where claims will be examined in the same way across the EU, asylum-seekers will be likely to try and reach Member States where they believe they will have more chance to be granted protection, what Member States call “secondary movements”, if not “asylum shopping.”

The European Asylum Support Office (EASO) was established in 2010 to support the harmonisation of asylum practices in Europe. The EASO will publish Country of Origin Information reports and will provide support to Member States facing particular challenges with their asylum system (training; temporary support with experts to alleviate backlog). Meanwhile, the European Union is hoping to complete the Common European Asylum System (CEAS) by the end of 2012, once the asylum related legislation has been revised in order to address shortcomings. The CEAS comprises the newly revised 2004/83/EC Qualification directive¹⁵ (who qualifies as a person in need of international protection), the 2003/9/EC Reception directive¹⁶, the Dublin II Regulation and the 2005/85/EC Procedure directive¹⁷.

However, despite obvious shortcomings in the Dublin system and the need for more solidarity and harmonised criteria in asylum procedures amongst Member States, the ongoing revision of the Dublin Regulation¹⁸ has already been criticised (see *Statewatch* analyses by Steve Peers¹⁹) and is unlikely to resolve the issues at stake.

¹⁴ Malta, Cyprus, Greece and Italy, Joint Communiqué II (developments in the Southern Mediterranean region), 19 April 2011, http://www.doi.gov.mt/EN/press_releases/2011/04/DOI%20-%20pr0785A.asp

¹⁵ <http://www.statewatch.org/analyses/no-141-qualification-directive.pdf>

¹⁶ <http://www.statewatch.org/analyses/no-170-reception-directive.pdf>

¹⁷ <http://www.statewatch.org/analyses/no-178-asylum-procedures.pdf>

¹⁸ Coreper, Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (Recast) [First reading], 12746/1/2012, 27 July 2012 <http://www.statewatch.org/news/2012/jul/eu-council-dublin-III-12746-rev-2-12.pdf>

As long as asylum-seekers are not treated equally across the EU – which, judging by the state of play of the CEAS negotiations will not happen, and that no genuine relocation mechanism will exist between EU countries (the draft revised Dublin II Regulation does not foresee such possibility), the Dublin system will be doomed to fail and Member States under pressure will remain reticent to open access to asylum procedures to those who seek protection.

In these circumstances, because systemic issues are not addressed, the responsibility for asylum applications will probably shift from one country to another depending on how “competent” countries will be found after judicial rulings, despite well-documented evidence of human rights violations available elsewhere.

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¹⁹ Statewatch Analysis, *The revised 'Dublin' rules on responsibility for asylum-seekers: a missed opportunity*, Steve Peers, Professor of Law at Essex University, June 2012, <http://www.statewatch.org/analyses/no-181-dublin.pdf>

Statewatch Analysis, *Revising the 'Dublin' rules on responsibility for asylum seekers: Further developments*, July 2012, <http://www.statewatch.org/analyses/no-186-dublin.pdf>