



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 (the 'Dublin II Regulation') :
Updated UNHCR memorandum on the law and practice of Greece

This memorandum updates a UNHCR analysis of 19 November 2004 concerning Greece's practice of treating as 'interrupted' all asylum applications from people absent from its territory for more than three months (in effect, many among those returned to Greece under Dublin II). UNHCR concluded that this practice created a 'real risk that asylum-seekers who are returned to Greece may be sent back to possible persecution in violation of the *non-refoulement* principle in article 33(1) of the 1951 Convention'. Greece has since responded to UNHCR, in a letter of 19 March 2005. Following that reply, a number of questions warrant further clarification.

1. Proposed Asylum Procedures Directive

Greece has referred to Article 2, paragraph 8, of its Presidential Decree 61/1999, under which departure of an asylum-seeker from Greece without notice is equivalent to 'resignation' [withdrawal] from the asylum procedure, and as a consequence, its interruption. It maintains that this provision is consistent with provisions of the proposal for a Council Directive on minimum standards of procedures in Member States for granting and withdrawing refugee status (the draft 'Asylum Procedures Directive', on which political agreement was reached in the Council on 9 November 2004, but which awaits formal adoption), particularly articles 9A(2) , 20(1)(b) and 23(4)(k).

Briefly summarized, Article 9A(2) provides, among other things, that Member States may require applicants for asylum to inform competent authorities of their current place of residence and any changes thereof. Article 20(1)(b) states that where there is reasonable cause to consider that an applicant has 'implicitly withdrawn or abandoned' his or her application, Member States shall ensure that determining authorities take the decision either to discontinue the examination or to reject the application on the grounds that no entitlement to refugee status has been established. Under this paragraph, States may also 'assume that the applicant has implicitly withdrawn or abandoned his/her application' where s/he has absconded or left without authorization the place of residence without informing the authorities within a reasonable time. Article 23(4)(k) permits accelerated examination of claims if applicants fail, without good reason, to comply with the obligations in Articles 9A(2) or 20(1).

UNHCR, in its Provisional Comments on the Asylum Procedures Directive, had predicted the risks that the narrow application of these provisions would create for persons in

need of international protection. The Office had expressed its concerns, in particular on Article 20(1), as follows:

“In UNHCR’s view, a claim may be explicitly or implicitly withdrawn for a variety of reasons which are not necessarily related to a lack of protection needs. A time limitation on the reopening of a claim, or a rejection of a claim in such circumstances, carries the risk that existing protection needs are not examined and recognized.

Both time limitations and rejections are particularly problematic in cases where applicants are sent to another country, for example, under the Dublin II Regulation, or where the ‘safe third country’ concept has been applied. Often, the asylum-seeker is not aware of the details and consequences of such arrangements. If an asylum-seeker is sent back to another Member State where he or she had already submitted an application, the deadline for reopening a claim will generally have passed, or the asylum application will meanwhile have been rejected, and the applicant will have missed all deadlines for filing an appeal.

Moreover, the reopening of a claim is often cumbersome and practically very difficult in some countries, for example where rejected asylum-seekers are subject to immediate deportation. Where a claim has been rejected, the submission of a subsequent application may be possible, but is often subject to similar obstacles and may only result in an examination of cases where new facts have arisen since the rejection of the first application”.

UNHCR therefore recommends that a withdrawal should result in a discontinuation of the procedure only and the closing of the file. A reopening of the application should be possible without time limits.

These concerns are not addressed in the Greek practice or provisions. As explained in UNHCR’s note attached to its letter of 24 November 2004, applications which are treated as interrupted upon return to Greece under Dublin II may not necessarily receive any substantive consideration before the claimant is removed from the country. Consequently, there is a danger that such claimants may be removed in direct or indirect violation of the principle of *non-refoulement*.

2. Stay of deportation

Greece has maintained that *non-refoulement* is respected in practice through the asylum procedure and the possibility of a stay of enforcement of removal orders. In its letter, the Greek Ministry states that deportation can be stayed by the General Secretary of the Region, upon appeal or by his own motion, where there are ‘humanitarian reasons concerning the life or health of the third country national’. This possibility is not, in UNHCR’s view, sufficient to safeguard against the risk of persecution. The limited scope of this power to stay deportation on ‘humanitarian’ grounds appears to be restricted to cases where immediate practical obstacles to return emerge, such as illness. The process of considering stay requests does not allow for a comprehensive analysis of the risk of persecution or exposure to torture, inhuman or degrading treatment on return, which are questions more appropriately considered as part of a substantive asylum claim examination. Furthermore, even if the deportation is not carried out, the person concerned is not admitted into the asylum procedure and remains in Greece under unclear legal circumstances.

3. Dublin II: Right of other States to examine claims under article 3(2), and definition of ‘examination’ of a claim

The Ministry has also pointed out that on receipt of Dublin II requests, Greece systematically informs the requesting State authority that the process will be considered ‘interrupted’ in Greece. This provides the requesting State with the opportunity to decide to examine the claim itself, under Article 3(2) of the Dublin II Regulation.

The implication of this argument is that it is the responsibility of other participating States, and not of Greece, to ensure that claims receive substantive examination - if those States consider it appropriate to exercise their discretion under Article 3(2). However, the Dublin II Regulation does not appear to permit States unilaterally to divest themselves of their obligations to provide international protection to those entitled to it, with no clear legal guarantee that the applicant can receive it in another State.

The Preamble of the Regulation suggests that such narrow interpretations of participating States’ obligations are not consistent with the Regulation’s aim. In paragraph 4, the Preamble provides that the Regulation should ‘make it possible to determine rapidly the State responsible, so as to guarantee effective access to the procedures for determining refugee status...’ (underlining added), and reiterates that States are bound by obligations under instruments of international law to which they are party (paragraph 12). The Regulation also enshrines the objective to ‘ensure full observance of the right to asylum guaranteed by article 18’ of the Charter of Fundamental Rights (paragraph 15, Preamble).

These objectives cannot effectively be met if participating States are entitled to decline any substantive examination of a claim, on grounds unrelated to the applicant’s potential need for international protection. Absence from the territory, or failure to stay at a particular place of residence or to notify a change of residence, are formal aspects of the applicant’s circumstances which do not affect or diminish the potential risk of persecution or serious harm which she or he might face.

The Regulation is moreover intended as a means of determining the State which is responsible for examining an asylum application (Regulation, Article 3). If the Greek interpretation is correct, it would in theory be open for all participating States to adopt similar national laws, which would in turn divest them of responsibility for examining an asylum claim in substance, after it had been ‘interrupted’ in a Dublin II procedure. This would not serve the aim of determining the State responsible, but would consign thousands of asylum claims to uncertainty. It would add greatly to the negative human impact of the system, as asylum-seekers would face the prospect of waiting in limbo as disagreement about their futures continued, their claims left undetermined. Moreover, they would face the threat of expulsion to countries where their safety might not be guaranteed. It is thus regretted that UNHCR’s comments on Article 20(1) of the Asylum Procedures Directive have not been taken into account to date by the Greek authorities.

These points highlight the need for authoritative clarification and guidance on both the Dublin II system and the Asylum Procedures Directive, particularly where provisions of the two interact.

The Ministry additionally refers to the wide definition of ‘examination’ in Article 2(e) of the Regulation. UNHCR does not believe, however, that the decision to interrupt the asylum procedure satisfies the requirement to ‘examine’ an asylum application under the Dublin II

Regulation. UNHCR continues to believe that a decision to interrupt an asylum procedure on formal grounds does not safeguard asylum-seekers from *refoulement* and cannot be interpreted as an ‘examination’ of the content of a claim.

4. Objectives of the Dublin II Regulation and Amsterdam Treaty

If the Ministry’s interpretation of the Dublin II provisions were correct and were a similar approach to be adopted by other States, the purpose and successful operation of the Dublin II Regulation – and the goal of identifying the State responsible for determining an asylum claim – would appear to be defeated. However, basic principles of legislative interpretation would dictate that an interpretation which would deprive an instrument of meaning and defeat its objectives cannot be maintained.

The Amsterdam Treaty provides that Community measures on asylum shall be in line with the 1951 Convention relating to the Status of Refugees. This means that an interpretation of the Dublin II Regulation and the Asylum Procedures Directive which creates the risk of *refoulement* contrary to Article 33(1) would raise serious legal concerns, not only as a matter of Community law, but also under international law.

UNHCR therefore urges the Commission to pursue this matter expeditiously with Greece, with a view to ensuring that claimants returned under the Dublin II Regulation are assured of a substantive application of their claims, both in practice and under the law. Given its regular contacts with the relevant Ministry, UNHCR would be pleased to provide constructive input to or take part in any discussions with the Greek authorities which may be appropriate.

In addition, UNHCR would be interested in the Commission’s authoritative interpretation of the provisions of the Dublin II Regulation and the draft Asylum Procedures Directive which are cited by Greece in support of its position. It would appear that other participating governments would also be very interested in the Commission’s guidance in this respect, especially as concerns Article 20 (1) of the Asylum Procedures Directive and any formal legal steps planned by the Commission.

Finally, UNHCR notes that Greece, like a number of other Member States at the Union’s external borders, receives a significant number of asylum applicants under the Dublin II Regulation. This is borne out by the statistics gathered as part of the monitoring process for Dublin II. Measures to encourage greater responsibility-sharing among Member States may assist in reducing the pressures on Greece and other States in similar positions, including the impact of returns of asylum-seekers under the Dublin II Regulation.

UNHCR, 30 November 2005