

## Practice Problems Concerning the Decision to Grant Access to Asylum in Romania under the "Dublin II" Regulation

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**Abstract:** The transfer of responsibility between the States Parties to the Dublin Convention as amended by Regulation no. 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the EU Member States by a citizen of a third country, plays an important role in stopping the phenomenon of "asylum shopping". However there are situations in which states should assume responsibility, under the sovereignty clause, governed by this community legislation. In some cases the authorities responsible for examining an asylum application in administrative phase should suspend the transfers, to the State believed to be responsible, until the reforms are implemented in that state, ensuring that appropriate levels of protection of human rights are met for the asylum seekers subjects of the transfer of responsibility between Member States.

**Keywords:** sovereignty clause; asylum seeker; "Dublin" procedure; member state responsible

### 1 Introduction

Due to problems arising in practice about a particular aspect of challenging the decision to grant access to the asylum procedure in Romania we decided to examine this issue in order to find a possible solution or to discuss possible legislative changes in this area. In practice there are frequent the cases where an applicant has asked for recognition of a form of protection in Romania, but after the statements, the fingerprinting and photographing resulted that the person has applied for protection in another EU member state or had the opportunity to seek protection in such a state.

Dublin II Regulation<sup>1</sup> applies to asylum seekers, illegally staying foreigner detained who previously filed an asylum application in another Member State or an foreigner who illegally entered the Dublin territory and has submitted an application for asylum in another Member State than that which he entered.

Because of this fact the person concerned may be subject to the 'Dublin II' governed by Regulation 343/2003 of the Council of 18 February 2003, which establishes the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the member states of the European Union by a citizen of a third country<sup>2</sup>.

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<sup>1</sup> This Regulation specifies the rules for determining the State responsible for examining an asylum application, applicable in the Member States of the European Union, Norway, Iceland and Switzerland.

<sup>2</sup> The Regulation replaced the Dublin Convention of 1990 that talked about the transfer of responsibility, but could not be applied. Also, the applicability of the Convention depended on the adoption of other Community instruments such as, for example the Council Regulation EC no. 2725 of 2000 on the establishment of the 'Eurodac' system for the comparison of fingerprints for the effective application of the Dublin Convention and the Commission Regulation 1560/2003 laying down detailed rules for implementing the EC Regulation. 343/2003 establishing the criteria and mechanisms for determining the

Since the entry into force of the Treaty of Accession to the European Union, Romania has started using Eurodac database, also Law 122/2006 on asylum in Romania includes in Chapter VII Section 2 of the provisions relating to the procedure to determinate the responsible Member State, in case there are proofs or circumstantial arguments which lead to the establishment of responsibility of another State in accordance with Community law. In this case Romania may suspend the national asylum procedure to ask the State held liable under community's aquisu.

Romanian Administrative authority responsible for examining an asylum application<sup>1</sup> will give a decision that either will reject access to national asylum procedure<sup>2</sup> and it will have the foreigner transferred to the Member State responsible ir it will give a decision that will be given access to the asylum procedure in Romania.

The decision of the responsible administrative authorities can be appealed within two days from the date of receipt of the proof of communication or the document stating that the asylum seeker is no longer in the last residence declared<sup>3</sup>. We can also lead a discussion about the possibility of knowledge by the applicant of the things specified in the communicated decision and that because only the communication is translated<sup>4</sup> and not the content of the decision where are mentioned the reasons for such a decision.

Going forward, although the practice has faced many problems from the exposed above ground, according to article 121 paragraph 4 of the law on asylum in Romania, the court may issue a reasoned decision which either rejects the complaint and maintains the decision of the Romanian Immigration Office - Asylum and Integration Division (RIO-AID) or allows the complaint, cancels the transfer in the State responsible and disposes access to the asylum procedure in Romania.

It was considered, at the time the law was adopted, that its regulation is plentiful, that covered all situations that may be encountered in practice. Unfortunately, the practice has met with a third case which is not regulated but, due to changes in society, has emerged, which needed to be resolved.

In the following we intend to examine this issue and could top a proposal to amend the current legislation, or just to seek answers that can be used by practitioners.

## **2 Problems Encountered in Practice on Challenging the Decision to Grant Access to the Asylum Procedure**

The situation which we will analyze refers exclusively to Greece as a Member State held responsible under Regulation 343/2003, which establishes the criteria and mechanisms for determining the

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Member State responsible for examining an asylum application lodged in one of the EU Member States by a citizen of a third country

<sup>1</sup> That is the Romanian Immigration Office - Asylum and Integration Department, which has five subordinate Regional Reception and Acomodation Centres for Asylum Seekers (open centers) in Bucharest, Timisoara, Soncuta Mare, Galati and Radauti; and two other detention centers in Otopeni and Arad.

<sup>2</sup> The decision for rejection will contain reasons why the access to the asylum procedure in Romania is denied and the transfer disposition into the Member State responsible for examining the asylum application. This decision will be communicated in writing to the applicant, depending on the case by direct communication, by mail or by posting.

<sup>3</sup> According to art. 19 letter "c" of Law 122/2006 on Asylum in Romania the asylum seeker has to inform authorities of any change of residence.

<sup>4</sup> Translation is in a language that the applicant "shall be reasonably assumed that he knows" - although on this issue can be put into question whether the applicant understands that language because it is even possible that there is more than one official language in the country of origin and the language "is reasonably assumed that he knows" is not even known by the applicant. See here for example the situation of Pakistan and the Democratic Republic of Congo.

Member State responsible for examining an asylum application lodged in one of the Member States of the European Union by a citizen of a third country. We bent over Greece because there is a special situation, in practice we are meeting with cases of asylum applications lodged by asylum seekers in Romania which could be subject to the 'Dublin' procedure, and the country held responsible, is the Greek State – taking into account the community provisions incidents.

As I mentioned at the beginning, the asylum procedure is suspended when Romania, actually the responsible administrative authority in this respect, decided to ask Greece if he wants to take responsibility for examining the asylum application in question. As is known, there is no obligation on the receiving State of a request, to ask another state, but Regulation 343/2003 leaves each state to decide what it wants to do.

However, to stop the "asylum shooing" phenomenon<sup>1</sup> it should, in all cases, that the Member State believed to be responsible, to be asked about their willingness to review an application for asylum. It is also well known that the requested state must respond to the requesting State within a determined period of time<sup>2</sup>. If the requested State does not respond within the prescribed time it is considered to have tacitly agreed to assume responsibility for examining the asylum application in question. Also, the requested State may accept or refuse the application examination.

Returning to the situation we want to analyze, the practice has experienced some cases where an applicant has applied for international protection in Romania, but after the statements made by him, or after fingerprinting, it results that the Greek State is the one considered to be responsible for examining the asylum application, in accordance with European legislation in force.

In the case analyzed the administrative authorities responsible for examining the applications for asylum in Romania have decided the suspension of the procedure in order to ask Greece if it wants to assume responsibility for examining the asylum application. The Greek State did not respond within the time specified, and if we consider the provisions of Regulation 343/2003 we talk about a tacit acceptance.

However after considering the existing situation in Greece, the Romanian State decide to allow access to the asylum procedure in Romania, after an earlier suspension, communicates the decision to the person concerned, while giving him the opportunity to challenge the decision within two days. The applicant disputes the decision to grant access to the asylum procedure in Romania wanting the Greek State to consider the request.

If we consider the provisions of Law 122/2006 on asylum in Romania, talking about the decision that can be rendered by the national court, we conclude that in this situation are not talking about an effective appeal because the decision given by the judge may not have as result also a favorable decision because:

- a) the court may reject the complaint and remains committed to RIO - DAI (Art. 123, paragraph 4, lit. a of Law 122/2006 on asylum in Romania) - that is, in our situation, gives access to the asylum procedure in Romania, the conclusion is not the desired situation of the asylum seeker;

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<sup>1</sup> Phenomenon in which the applicant seeks, as a country for asylum, besides international protection also a host country where social and economic conditions to be high. United Nations High Commissioner for Refugees has always campaigned for the provision of decent living conditions in the country of asylum, but of course these decent conditions depending on the development of each country.

<sup>2</sup> For the detailiation of this period, depending on various situations that may exist see Regulation 343/2003, which establishes the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States of the European Union by a citizen of a third country.

- b) allows the complaint, cancels the transfer to the responsible state and grants access to the asylum procedure in Romania (art. 123, paragraph 4, lit. b of Law 122/2006 on asylum in Romania) - or in this case we are not in the situation desired by the applicant for asylum.

We face a situation that we can find hilarious because it gives the right to challenge a decision of an authority responsible for examining applications for asylum in Romania, but what the court decides can not be, under any circumstances, in accordance with the applicant's request which, in this case, wants to transfer in Greece.

We believe that in such case we are talking about the impossibility of exercising an effective appeal, as it should, if we consider the constitutional provisions and those contained in the European Convention on Human Rights.

It is true that the situation in the Greek State is difficult, which is why since 2008 the United Nations High Commissioner for Refugees (UNHCR), European Council on Refugees and Exiles and Amnesty International have taken a stand on the existing situation in Greece requesting the suspension of transfers to the Greek State, transfers made under Council Regulation 343/2003 and takeover the responsibility under the sovereignty clause prescribed by the same regulation. Also UNHCR issued, in December 2009, a report stating the circumstances in which the Greek State gives access to the asylum procedure, to ensure the rights of the asylum seekers and the quality of the asylum procedure<sup>1</sup>.

Amnesty International also published a report in March 2010 which stated that persons transferred under 'Dublin' Regulation are facing a multitude of risks on human rights in Greece, the worst being the risk of return due to malfunction in the Asylum system at both procedural and background level<sup>2</sup>. The deficiencies of the procedure include the elimination of a substantive appeal, lack of legal advice, translation and information about the asylum procedure. In addition to these systemic deficiencies, the expulsions of asylum seekers to Turkey, create a risk of indirect or chain return.

Moreover many asylum seekers transferred under Council Regulation 343/2003 are automatically held in inadequate conditions at the airport upon arrival in Greece. Amnesty International has repeatedly called on the States parts of "Dublin" Regulation to immediately suspend all transfers to Greece until the reforms will be implemented, ensuring that the required levels of protection of the human rights for the asylum seekers are respected.

On October 24, 2010 the Greek Government sent an urgent appeal to Brussels in order to provide assistance to protect the external borders to Turkey. Twenty-six Member States have decided to help this country, among them Austria, Bulgaria, Denmark, Germany, Romania, Slovakia and Hungary. Also, the Greek State has adopted on 22 November 2010 the Presidential Decree no. 114/2010, published in the Government paper no. 195, designed to repair all the deficiencies existing at this time<sup>3</sup>.

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<sup>1</sup> In the report in question UNHCR recommends to the Dublin Convention States Parties not to transfer to Greece any asylum seekers and to take responsibility for considering asylum applications where the Greek State would be responsible, in this way not to infringe the asylum seekers rights, to ensure their access to asylum procedures and a fair analysis of the persecution, action that it is not possible at this time in Greece.

<sup>2</sup> These deficiencies relate to the difficulties encountered in accessing the asylum system and filing an application, incorrect examination of asylum applications, a lack of procedural safeguards as required by international law to ensure a correct identification of those who need international protection and for the application of the non-refoulement principle.

<sup>3</sup> For a detailed study see Sergio Carrera and Elspeth Guild, Centre for European Policy Studies, Liberty and Security in Europe, "Joint Operation RABIT 2010 - Frontex Assistance to Greece's Border with Turkey: Revealing the Deficiencies of Europe's Dublin Asylum System", November 2010 or on site [www.ceps.eu](http://www.ceps.eu).

After examining the above we might ask, quite rightly, why was suspended, however, the asylum process knowing the situation in Greece, more than that in cases where asylum seekers want this transfer to the Greek State we consider that it should be given an effective opportunity to challenge the decision of the administrative authority responsible for examining the asylum application.

However the situation could be avoided if the asylum procedure was not suspended for asking a state facing a difficult situation, more than that organizations specialized in this issue have recommended to member not to transfer people to this state. In this case there is a possibility for Romania to be sentenced to the European Court of Human Rights<sup>1</sup>, something that we should be aware.

Therefore the existing situation leads us to the conclusion that the asylum law in Romania needs to be modified, as soon as possible, so as to be provided also the examined situation or, to avoid these causes, to be taken measures by national authorities so that when there are reports, as mentioned above, Romania to assume responsibility for examining an asylum application under the sovereignty clause.

### **3 Conclusions**

On adoption the normative acts there can not be provided all the situations that can arise in a society. Due to the large number of asylum seekers trying to choose the country of asylum there was adopted Regulation 343/2003 which aims to trigger the Dublin Convention of 1990. Eurodac database was the mechanism by which persons could be detected with an application for asylum in another State Party to the Regulation or which were found staying illegally in a State Party.

National legislation transposed the regulations contained in the Dublin Convention to facilitate its implementation.

The problems encountered in practice on challenging the decision to grant access to the asylum procedure in Romania under 'Dublin' Regulation draw our attention to the fact that we must change the law so that will give the person an effective right to challenge a decision of the administrative authority, or in situations such as those existing at this time in Greece, the national authorities to assume responsibility under the sovereignty clause without to suspend the proceedings in order to ask the state believed to be responsible under Regulation 343/2003.

Or, another solution to avoid transfers to states that at some point may go through similar situations as Greece, the responsible authorities to immediately suspend all transfers to that State, until the reforms are implemented in the State concerned, ensuring that the required levels of protection of the human rights for the asylum seekers are respected.

A proposal to amend art.123 par. 4 could consist in introducing a new article providing for the possibility of being transferred to a state be held liable, although the Romanian authorities, after the suspension have decided that they also have to consider the application for asylum; or changing of lit. b of the same article by regulating only the possibility of the admission of the complaint without being mentioned the cancellation of the transfer provision in the Member State responsible.

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<sup>1</sup> In 21 January 2011 the Grand Chamber of the Human Rights ruled that returning asylum seekers to Greece violates the European Convention on Human Rights (ECHR) - to more information see: "The European Court of Human Rights condemns Belgium and Greece - A major blow to the Dublin System: Returning asylum seekers to Greece violates the European Convention on Human Rights - cause of M.S.S. v Belgium & Greece" / [www.echr.org](http://www.echr.org).

In the latter possibility of change we could face another problem such as in which the court has not acted on the cancellation of the transfer provision that could trigger, by law of foreigners in Romania, other problems that initially were not in mind. Since the initial complaint against the decision to transfer to a Member State responsible did not suspend the order to leave the territory, until the Constitutional Court ruled on this issue, the law be amended so that in the complaint may also be required to suspend the provision to leave the Romanian territory pending resolution of the main claim.

Will see what will be the answer given by the court in such cases and if the law will be amended to eliminate such a situation.

## 6 References

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