

## European Chapter Conference Lisbon

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Problems encountered by national courts in application of the Dublin II Regulations

Country reports - **Germany**

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### I. Procedural Aspects

Dublin appeals to an Administrative Court of first instance are dealt with mandatorily by a single judge when an intermediate ruling is sought. This follows the general procedural rule for all refugee law court procedures in the federal Asylum Procedures Act (Asylverfahrensgesetz – AsylVfG -) when temporary action is required. In Dublin II – cases this is deemed necessary to halt forcible removal to the country that has asserted to take charge of the decision regarding the asylum/refugee claim. An appeal for a review of the executive federal authority's - "Bundesamt for migrational and refugee matters" - decision that the applicant's request to be granted refugee status/protection has to be dealt with in one of the other member states by reason of Chapter III of the Dublin II regulation (no. 343/2003) and thus he/she is to be deported to this other member state renders no suspensive effect.

The administrative courts of first instance in the onset of "Dublin II" passed a whole scope of varying decisions in regard of the particular procedural treatment given these actions by federal law:

In Germany the decision of the Bundesamt on removal to the member state considered and declared responsible for assessment and decision regarding the refugee claim (and in suit the decision that German authorities are not responsible to deal with it as it is inadmissible in Germany) is rendered immediately effective, with – by procedural regulation - no judicial opportunity to render an opposing intermediate injunction to the effect that the deportation order provided with the inadmissibility decision is suspended

*-- § 34 a sec. 2 AsylVfG - federal asylum procedures act -.*

This legal provision relies on Art. 19 para 2 of regulation 343/2003 which leaves it up to national discretion whether judicial action to gain suspensive effect is provided for. German legislation in 'Dublin II' cases renders merely a

main suit to follow upon a claim that the federal authority's decision had falsely considered another member state in charge and subsequently the deportation to that state should be revised. Such a ruling will either affirm the inadmissibility decision or declare it void, in which case the court could also order the federal authorities to let the applicant return to Germany for consideration of the claim.

Some 1<sup>st</sup> instance administrative courts in the past held the opinion that - as the Federal Republic in all cases where another member state has confirmed taking charge of an applicant's claim the claim for refugee status in Germany is inadmissible

§ 27 a AsylVfG -

the administrative court of 1<sup>st</sup> instance itself had no jurisdiction as to the question of forcible removal of an applicant to that member state. In such cases the request for intermediate court action against the deportation order was declined.

Other adjudication voiced the opinion that intermediate action was indeed possible but restricted to the question whether national authorities were obliged in view of the possibility to derogate from the responsibility laid down in chapter II, art. 3 para 1 of council regulation no. 343/2003 to step in and assume responsibility in the specific case, thus halting procedures of deportation to assure a possible requirement to do so in the future after further consideration in a main proceeding. This reflected primarily the provision of Art. 19 para 4 of the German Federal Constitution (Grundgesetz – GG -) where court revision of any administrative act of an executive body capable of infringing on an individual's legal rights is guaranteed.

In the former cases applicants had to resort to the Federal Constitutional Court – Bundesverfassungsgericht -BVerfG-- in regard of deportation orders about to be carried out to gain intermediate injunctions in their favor.

## II. Decisions on Greece as “responsible member state”

The Bundesverfassungsgericht has issued a couple of intermediate decisions halting deportation to Greece under Dublin II regulation,

*See e.g. BVerfG, 08.09.2009 - 2 BvQ 56/09, NVWZ 2009, p. 1281;*

*BVerfG, 22.12.2009 - 2 BvR 2879/09, NVWZ 2009, p. 318*

which has now led to administrative restraint regarding Dublin II – decision in view of Greece as the assumedly responsible member state. The “Bundesamt” will not carry out decisions to this effect and is – as far as can be observed – coached into exercising the derogation based on Art. 3 para 2 of the regulation in “greek cases”.

The main legal action before the Constitutional Court by way of a constitutional complaint is based on the issues of Federal Constitutional provisions in

*Art. 16 a para 1, 2 and 5 GG.*

Art. 16 a GG – Federal Constitution – (para 1 providing the guarantee of political asylum in the Federal Republic, para 2 and 5 denominating exemptions as in the case that another member state of the EU is responsible to examine an application) provides the basis for the procedural regulations in the Asylum Procedures Act as referred to above.

The BVerfG had announced earlier that a decision on the pending constitutional complaint might be expected within summer of this year, however no such decision has been publicized yet.

The intermediate injunctions of BVerfG are primarily based on the assessment of risks to the parties concerned should they – in case of the applicant – be deported as opposed to – in case of the Federal institution – suffer the obligation to exercise the derogation and consider the merit of the asylum claim/refugee claim itself with the applicant remaining in Germany.

Questions of violation of ECHR and/or Art. 33 GC are not expressly addressed in the scope of the reasoning so far (this due to the fact that the German Constitution itself provides the ground for refugee protection).

Instead the BVerfG considered the risk of the applicants' infringement of (German constitutional or similar protective) rights – incorporating other provisions - when deported to Greece too severe so in these cases the injunctions in their favor were issued.

### III. Further legal framework in Dublin II cases

All member states of EU are as such defined as “secure countries”

*§ 26 a para 2 AsylVfG.*

Applications for asylum/refugee status by a person that passed through the territory of a defined “secure country” may be considered in Germany but the applicant cannot be granted the status as such, he/she may be provided with subsidiary protection status in Germany,

*See § 26 a para 1 AsylVfG.*