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Problems encountered by national courts in application of the Dublin II Regulation
*Country Report-**AUSTRIA***

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I. Facts

1.) Since July 2008 “Dublin appeals” are decided upon by specialised judges (around 20) of the Asylum Court. In this period around 5.000 rulings concerning Dublin II Regulation have been rendered by single judges in an average time of 2 weeks per case; around 2/3 of the decisions by the administrative first instance authorities have been confirmed, whereas 1/3 of the appeals have been granted.[1]

2.) Austrian law provides the possibility of a full judicial review of all the first instance’s (“Bundesasylamt”) Dublin decisions. After an appeal for judicial review is lodged with the Asylum Court, the Court has 7 days to grant suspensive effect to the appeal on the ground that a risk of violation of art. 3 and 8 ECHR is deemed to be possible when the transfer decision is executed. If no suspensive effect is granted in this period of time, the transfer can take place before the Court hands down its decision on the merits of the appeal. [2]

3.) The ruling will either confirm (possibly after own evidentiary proceedings by the Court, including the possibility of an oral hearing, although this rarely happens) the legality of the inadmissibility decision on asylum (because another EU MS is competent for dealing with the asylum-claim according to the Dublin II Regulation) and therefore the expulsion order to the other Member State or it will declare void the decision of the administration. This will mean, depending on the ruling, either that the case will be sent back to the administration for further research or interviews or checks with the possibility of handing down another Dublin decision later or that the administration must begin the material asylum-procedure immediately because Austria is seen to be the competent Member State for doing this according to the Dublin regulation. All rulings, according to the Austrian “ legal tradition”, have to be reasoned extensively, so that the facts of the case and the evidentiary and legal assessment are transparent.[3] These rulings cannot be appealed against in the normal (administrative) court system, but only with the Constitutional Court, for example on the (potentially wide-ranging ground) of manifest unreasonableness or violation of the ECHR (seen as part of the Austrian constitution). Although there are a lot of such further appeals from the Asylum Court to the Constitutional Court, up to now, only in about 5 cases or so the Constitutional Court has ruled that a judgement by the Asylum Court concerning the Dublin Regulation was in fact unconstitutional.

4.) Due to geographic and other factors Austrian asylum authorities have used the Dublin regulation extensively, especially since 2004. There also has been a consistently high rate of appeals. Austrian jurisprudence has therefore been confronted with various legal questions related to the Dublin II Regulation quite early

[1] See statistical information by the Austrian „Asylgerichtshof” (AsylGH), August 2010
[2] §§ 36, 37 AsylG 2005 idgF
[3] All rulings by the AsylGH are accessible in the German language under www.ris.bka.gv.at

and has, by large, developed a flexible approach in order to deal with the large number of cases swiftly while upholding legal guarantees. As early as 2001 the Constitutional Court has made it clear that whenever a transfer to the competent Member State endangers art. 3 or art. 8 ECHR, art. 3/2 Dublin II regulation must be exercised by the administrative authority and this represents a judicially enforceable right.[4] The same is true, according to later rulings by the Asylum Court, if in the administrative process between Member States leading to a Dublin acceptance, the regulation has been breached in a substantial way (that amounts to "Willkür"; manifest unreasonableness; for example breach of time-limit, incomplete information is given to other MS in the request to take charge).[5] These principles go further than the mainstream of jurisprudence in other MS up to know and have been used extensively. Another substantial part of the relevant jurisprudence has been dealing with specific questions of national law (which has been changed several times over the last years, creating complex detail questions of little relevance in a EU-context), including lack of proper procedure by the administrative authority (bad quality at the level of the administrative first instance authority consistently remains a problem).

5.) At the moment most cases concern either Russian/Chechen asylum-seekers to be taken back by Poland who claim medical reasons or problems with criminals/fellow asylum-seekers there and Afghan asylum-seekers in relation to Greece and Hungary. In relation to Greece, the Asylum Court (so far supported by the Constitutional Court) has developed a case by case approach with special emphasis on the vulnerability of the individuals in question.[6] Changes are possible depending on latest judicial and factual developments.

II. Decisions on three selected topics

-) In "Greek cases" (however, the legal issues in questions by no means being restricted to Greece) it has been argued that a Dublin transfer can only be legal (otherwise art. 3/2 Dublin II Regulation has to be used just like situations in which ECHR would be breached) when the Charter of Fundamental Rights and/or the Reception, Procedural and Status Directive are adhered to in every detail by the responsible MS in their "asylum-system." So far this line of argument has been rejected by the Asylum Court stating that deficiencies in the asylum-procedures or reception conditions that fall below the threshold of a direct violation of the European Convention of Human Rights should be addressed to in the respective national asylum-system of the responsible MS by the asylum-seeker after the transfer (with the possibility to go to the ECHR and the ECJ from there). Another outcome may be possible when the deficiencies in the receiving state in their entirety amount to a systemic breach of fundamental principles of Union Law, including those of the Charter of Fundamental law, however this still need some clarification. In this context another issue, however, has already become quite clear: Whenever a MS is seen by actors in the European field of asylum as manifestly falling behind the requirements of a proper asylum-system as defined by instruments of current international and European asylum law, this, in essence, is a serious political problem that should not, in essence, be transferred to judges by national or European Union administrators.

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[4] VfGH 11.06.2001, B 1541/00

[5] See *Filzwieser, Subjektiver Rechtsschutz und Vollziehung der Dublin II VO-Gemeinschaftsrecht und Menschenrechte, migraLex 01/2007, 18-25.*

[6] AsylGH 16.01.2009, S1 402.025-1/2008/13E

--) Following the ECJ's *Petrosian*-ruling the Asylum Court has been confronted by numerous cases concerning time-limits. One issue was whether or when the time-limit to transfer of art. 19/3 Dublin II Regulation will start anew in the following situation: An appeal was given suspensive effect by the Asylum-Court at first. Then the court granted the appeal and sent the case back to the first instance for new proceedings (possibly to make a new – better reasoned – Dublin decision.)[7] Another issue in this context has been whether the time-limits to transfer will start anew when (after a first Dublin decision including an expulsion has been made) a follow-up application for asylum is made by the applicant.

---) There has been a debate in the Asylum-Court recently whether art. 15 of the Regulation can, under certain circumstances (see art. 15/2 Dublin II Regulation) be seen as legally enforceable vis-à-vis Member States and whether it takes precedence over art. 3/2. It has already been decided that in particular circumstances (eg. a mentally sick person relying on help of her sister/mother in Austria for this sickness) must not be transferred.[8] There is, on the other hand, no general rule that a claimant who has married a recognised refugee in Austria during their Dublin-procedure here or "in absentia" is not to be separated, this depends on the particular case.[9]

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[7] VwGH 16.04.2009, Zl. 2007/19/0730-0733; *Filzwieser/Sprung*, Dublin II-Verordnung³, K30.ad Art. 19.
[8] AsylGH 26.02.2010, S3 401.089-2/2009/4E.
[9] AsylGH 09.02.2010, S10 408.204-2/2009/4E.