

On the current situation of refugees in Greece –The legal implications with regard to returns from Germany

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On the current situation of refugees in Greece – The legal implications with regard to returns from Germany

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Hohenheimer Tage zum Migrationsrecht

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Structure

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II. Living conditions in Greece (Nikolaia Triantafyllou ?)

1. Asylum seekers
2. Beneficiaries of international protection

III. Returns from Germany to Greece?

1. Asylum seekers (Robert)
2. Beneficiaries of international protection (Catharina)

IV. Discussion

Introduction

- Asylum system in Greece – systemic deficiencies?
 - fundamental reform 2016
 - EU support (financial and operational)
 - still: systemic deficiencies?
 - diff: asylum seekers vs recognized beneficiaries of IP
- EU Turkey Deal and EU Hotspots
 - mainland vs island procedure (Aegean)
 - main effect: decrease in numbers of arrivals
- Other issues
 - pushbacks (Evros)
 - detention
 - police violence
 - unaccompanied minors

Living Conditions – Asylum seekers



Living Conditions – Asylum seekers



Living Conditions – Asylum seekers



Living Conditions – Asylum seekers



Living Conditions – Asylum seekers



Living Conditions – Asylum seekers



Living Conditions – Asylum seekers



Living Conditions – Asylum seekers



Living Conditions – Asylum seekers



Living Conditions – Asylum seekers



Living Conditions – Asylum seekers



Living Conditions – Asylum seekers



Living Conditions – Asylum seekers



Living Conditions – Asylum seekers



Living Conditions – Asylum seekers

- Cf. Recent reports on hotspots
 - GCR May 2018
 - EP Briefing and EP Greens June 2018
 - Hemono et al research Health Syrian ref on islands June 2018
 - HRW Access to education July 2018
 - Oxfam Vulnerables January 2019

Living Conditions – Beneficiaries of international protection

- Cf recent RSA reports on living conditions of recognized beneficiaries of IP in Greece
 - Original report 23 June 2017 (German)
 - Update 30 August 2018 (English and German)
 - Case Study 4 January 2019

Returns from Germany – Asylum seekers

Dublin procedure = admissibility procedure

- § 29 (1) No. 1 .lit a Asylum Act: asylum applications are inadmissible in case another MS is responsible for the asylum application of the respective asylum seeker
- Procedure to determine the MS responsible = Dublin procedure
- Art. 3 (1) Dublin-III-Regulation
„Member States shall examine any application for international protection by a third-country national or a stateless person who applies on the territory of any one of them, including at the border or in the transit zones. The application shall be examined by a single Member State, which shall be the one which the criteria set out in Chapter III indicate is responsible.”
- Asylum Seeker and already having been in Greece?
 - Art. 13/ Art. 18 (1) lit. a/b
 - Take-charge / take-back-request

Returns from Germany – Asylum seekers

Procedure for take charge requests (e.g. Art. 13, Art. 18 (1) lit. a): Art. 21 et seq.

1. Take charge request: deadline – 3 months (2 months with EURODAC hit)
2. Acceptance/Rejection: deadline – 2 months
3. Persons have to be notified
4. Transfer – deadline 6 months

Procedure for take back requests (e.g. Art. 18 (1) lit. b): Art. 23 et seq.

1. Take back request: deadline – 3 months (2 months with EURODAC hit)
2. Acceptance/rejection: deadline – 1 months (4 weeks with EURODAC hit)
3. Persons have to be notified
4. Transfer – deadline – 6 months

Returns from Germany – Beneficiaries of international protection

- Take charge/back requests from Germany: > 7000
- Readmissions: 6

Why so few returns?

Art. 3(2) Dublin III Regulation:

“Where it is impossible to transfer an applicant to the Member State primarily designated as responsible **because there are substantial grounds for believing** that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union, the determining Member State shall continue to examine the criteria set out in Chapter III in order to establish whether another Member State can be designated as responsible.”

Returns from Germany – Asylum seekers

Prohibition of return of asylum seekers?

criterion systemic deficiencies – what does this mean?

„ Where it is impossible to transfer an applicant to the Member State primarily designated as responsible **because there are substantial grounds for believing** that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State”

- It cannot be overlooked that systemic flaws exist in the asylum system and the reception conditions of the respective MS
- At least yes, if threshold of the MSS – judgement (ECHR) are reached – Art 3 ECHR (= Art. 4 Charter of Fundamental Rights)
- violation of the minimum standards of the Reception Directive on shelter and adequate material conditions for asylum seekers living in "extreme poverty", "not satisfying their basic needs", "not being able to eat, not being washed", being homeless and living in constant fear of "being attacked or robbed“

- But also flaws in the procedure: no remedy, no basic procedural rights [...]

Returns from Germany – Asylum seekers

Real risk of inhuman or degrading treatment?

- ECJ NS (C-411 & 493/10) – Art 4 ChFR
 - mutual trust
 - “it must be assumed that the treatment of asylum seekers in all Member States complies with the requirements of the Charter, the Geneva Convention and the ECHR” (§ 80)
 - Just non compliance with Directives is not enough
 - „An asylum seeker can only oppose transfer to the Member State responsible for him under the Dublin II Regulation on the grounds of systemic deficiencies in the asylum procedure and reception conditions for asylum seekers. On the other hand, it does not matter whether, in individual cases, inhuman or degrading treatment within the meaning of Art. 4 Charter of Fundamental Rights or Art. 3 ECHR may occur below the threshold of systemic deficiencies.” (Federal Administrative Court Germany, 10 B 6/14)
 - High threshold
- Can be seen differently – at least differentiation between different groups needed – systematic flaws for UAM, women [...]
- In exceptional cases also obligation to use sovereignty clause (17 (1) Dublin III Reg)

Returns from Germany – Asylum seekers

Practice:

- COM Recommendations addressed to Greece of 10 Feb, 15 June, 28 Sept 2016
- COM Recommendation addressed to MS of 8 Dec 2016: resumption of transfers to Greece regarding persons who arrived after 15 March 2017 to Greece
- Implementation by MS – e.g. German Ministry of Interior 15 March 2017

Again:

- Take charge/back requests from Germany: > 7000
- Readmissions: 6
- Greece rejects 99,7 % of the requests

Returns from Germany – Asylum seekers

Recent issue: Administrative Agreement – circumvention of Dublin III Regulation and return without procedure?

Administrative Arrangement

between

the Ministry of Migration Policy of the Hellenic Republic

and

**the Federal Ministry of the Interior, Building and Community of the Federal
Republic of Germany**

on cooperation when refusing entry to persons seeking protection in the context

**Part I: Cooperation when refusing entry to persons seeking protection in the
context of temporary checks at the border between the Federal Republic of
Germany and the Republic of Austria**

1. Content and scope
 - i. This Administrative Arrangement covers the refusal of entry of persons in the framework of applicable national law if the following conditions are

Returns from Germany – Asylum seekers

Recent issue: Administrative Agreement – circumvention of Dublin III Regulation and return without procedure?

met:

- a) The person has been identified during a check at the border between the Federal Republic of Germany and the Republic of Austria and is to be refused entry.
 - b) The person is not an unaccompanied minor at the time of identification.
 - c) The person has expressed a desire for international protection.
 - d) An entry in the Eurodac system (Category I Eurodac hit) indicates that the person has already requested protection in Greece, and such entry in the Eurodac system is dated from 1 July 2017 onwards.
- ii. In the cases of subsection (i), the Greek Side will readmit the person after being notified that the German Side has refused entry.

How?

What legal basis?

Remedy?

European Law?

Returns from Germany – Asylum seekers

Practice: Legal Basis § 18 (2) No. 2 Asylum Act

The foreigner shall be refused entry if

[...]

2. there are indications that another country is responsible for processing the asylum application based on European Community law or an international treaty and proceedings to admit or re-admit have been initiated [...]

- Legal precedence of European Law (Art 23 GG, Art. 78 TFEU)
- Art. 3 (1) Dublin-III-Regulation
„Member States shall examine any application for international protection by a third-country national or a stateless person who applies on the territory of any one of them, **including at the border or in the transit zones** [...]"
- Dublin procedure also at the border (Problem: border controls and Art. 22 Schengen)
- ECJ, C-467/16 – Hassan
 - Iraqi national had applied for international protection in Germany and then travelled to France. The French authorities asked the Germans to take him back and decided on the same day to transfer him to Germany.
 - ECJ: it is clear from the wording, history and aim of the Dublin III Regulation that a transfer decision may be taken only after the requested Member State has tacitly or expressly agreed to its readmission (§ 75)
 - (at the border: transfer decision automatically)

Returns from Germany – Asylum seekers

- A procedure must always be carried out, even if persons have already been deported
- Example: ECJ, C-360/16 – Hasan

A Syrian had applied for international protection in Italy and then travelled on to Germany. The German authorities requested Italy to take back the Syrian. The answer failed to appear - as was usual at that time for inquiries to the Italians. The German authorities had therefore faked the consent (possible according to Art. 22 para. 7 Dublin III VO). The Syrian's asylum application was rejected, the man was transferred to Italy, but he returned illegally to Germany in the same month

ECJ

- It is incompatible with the Dublin III Regulation to transfer an applicant who has re-entered another Member State without a retrial having taken place (§ 55)

Summary

“In that context, a Member State with which an asylum application has been lodged is required to follow the procedures laid down in Chapter VI of that regulation for the purposes of determining the Member State responsible for examining that application, to call upon that Member State to take charge of the applicant concerned and, once that request has been accepted, to transfer that person to the Member State.” (ECJ, C-578-16, § 58).

Returns from Germany – Asylum seekers

Why and how Dublin procedures?

- Several criteria laid down in the Dublin III Regulation
 - Principle of first entry (Art. 13)
 - Family Unit (Art. 8-11)

- Art. 7 (1):

The criteria for determining the Member State responsible shall be applied in the order in which they are set out in this Chapter.

→ Family Unit takes precedence

- Procedure needed because: lodging an application or having been elsewhere does not automatically mean, that the other is responsible
- Transfer only in responsible MS possible

Returns from Germany – Asylum seekers

Procedural Rights within a Dublin Procedure

- Right to information (Art. 4)
- Personal conversation (Art. 5)
- Special guarantees for minors (Art. 6)
- Notification of transfer decision (Art. 26)
- Effective remedy against the transfer decision (Art. 27 (deadline: 1 week, § 34a Asylum Act)
 - Individual Right of correct application of the Dublin-III-Regulation (C-155/15; C-63/15; C-670/16)
 - Non-refoulement? (Art. 33 Geneva Convention, Art. 3 ECHR)

Returns from Germany – Asylum seekers

- Art. 20 (4) Dublin III Regulation?
- § 18 (2) Nr. 2 Asylum Act?
 - Only to Austria, not to Greece
- 72 TFEU? (state of exception)

Returns from Germany – Beneficiaries of international protection

Prohibition of return due to sub-standard living conditions for recognized beneficiaries of IP in Greece?

- principle: application inadmissible if IP in other MS
 - § 29 para 2 AsylG, cf Art 33 para 2 lit a Procedures Directive
 - i.e. also if „only“ subsidiary protection in other MS – but not: other status (cf Jawo, Dublin case)
 - § 35 AsylG (Abschiebungsandrohung)
- **exception based on sub-standard living conditions? two questions**
 - prohibition of deportation acc § 60 para 5 AufenthG (cf. VG Stuttgart, decision of 09/02/2017 – asyl.net: M25107)
 - application for IP admissible i.e. exception § 29 para 2 AsylG (cf. VGH Hessen, decision of 04/11/2016 – asyl.net: M24415; VG Göttingen, decision of 05/04/2017 – 2 A 386/16 – asyl.net: M24921: but § 37 para 1 sent 2 AsylG)
 - Relation between prohibition of deportation and admissibility of application for IP cf. § 37 para 1 sent 2 AsylG
- living conditions for ben of IP
 - standard equal treatment with nationals, cf. Art. 20ff Qual Dir, Art 17ff GCR
 - employment, education, social welfare, health care – as nationals
 - accommodation – as third country nationals legally present
 - i.e. different standards in diff MS
 - but: particular situation of ben of IP (cf Wathelet, Jawo para 113 vgl. VGH B-W)

Returns from Germany – Beneficiaries of international protection

Prohibition of deportation acc § 60 para 5 AufenthG?

- Art 3 ECHR standard?
 - MSS, Tarakhel, JR, Khlaifia – regarding asylum seekers
 - „particularly serious situation“ – what does that mean?
 - „situation of extreme material poverty“ (cf MSS para 254)
 - not necessarily sufficient: no accommodation, no financial assistance (cf MSS para 249)
 - sufficient: „living on the street, with no resources or access to sanitary facilities, and without any means of providing for his essential needs (...) showing a lack of respect for his dignity“ (cf MSS para 263ff)
 - diff: vulnerable groups (cf Wathelet, Jawo, para 134)
 - issue: inconsistent standard / „special“ standard for asylum seekers?
 - arg: diff Art 3 ECHR standard regarding deportation to countries e.g. Iraq, Afghanistan? → but: consensus regarding asylum seekers (cf MSS para 251, Tarakhel para 97) → same for beneficiaries of IP?
 - arg: diff standard for recognized beneficiaries of IP than for citizens? → but: a „particularly underprivileged and vulnerable population group in need of special protection“ (cf MSS para 251) → same for beneficiaries of IP?
 - lack of integration measures + fundamental deficiencies regarding Art 20ff QualRL sufficient according to VGH Hessen, decision of 04/11/2016 – 3 A 1292/16.A (Bulgaria)
- Other ECHR rights?
 - not taken into account by jurisprudence since non-refoulement only based on Art 3 ECHR
 - but wording § 60 para 5 AufenthG

Returns from Germany – Beneficiaries of international protection

Prohibition of deportation acc § 60 para 5 AufenthG?

- „Situation of extreme material poverty“ for ben of IP in Greece?
 - German Administrative Courts (+/-)
 - no real risk of violation of Art 3 ECHR for recognized ben of IP (not-vulnerable)
 - VG Hamburg, decision of 11/05/2017 – 9 AE 2728/17: de lege same rights as nationals, therefore no violation of Art 3 ECHR for non-vulnerable groups
 - VG Ansbach, decision of 29/09/2018 – AN 14 S 18.50697 – asyl.net M26698: reference to support by NGOs and local communities, therefore Art 3 ECHR violation only possible for vulnerable groups
 - VG Berlin, decision of 06/12/2018 – 9 L 703.18 A – reference to letter by Greek Migration Ministry of 08/01/2018 confirming implementation of Art 20 ff Qual Dir (de lege)
 - ...
 - real risk of violation of Art 3 ECHR
 - VG Aachen, decision of 03/07/2017, 4 L 782/17.A: reference to ProAsyl report, de facto no access to rights under Art 20 ff Qual Dir
 - VG Düsseldorf decision of 17/05/2017 – 12 L 1978/17.A: reg vulnerable groups (family small children) because of lack of social network
 - VG Berlin, decision of 30/11/2017 – 23 K 463.17 A: „rights acc to Art 20ff Qual Dir only in theory“
 -

Returns from Germany – Beneficiaries of international protection

Prohibition of deportation acc § 60 para 5 AufenthG?

- crucial questions
 - law
 - de lege or de facto situation?
 - diff for vulnerable groups?
 - facts – decisive: situation in Greece
- Burden of proof?
 - BVerfG, decision of 08/05/2017 – 2 BvR 157/17: particular importance of the Court's obligation to investigate the facts with regard to violation of Art 3 ECHR i. e. Admin Court must take into account
 - de facto non-implementation of Art 20 ff Qual Dir
 - no integration measures Art 34 Qual Dir
 - ben of IP as „particularly vuln group“ (ECHR)
 - if necessary individual confirmation of other MS
 - if not possible in interim measures procedure → main proceedings
 - BVerfG, decision of 31/07/2018 – 2 BvR 714/18 – asyl.net: M26565 – if evidence regarding possible violation of Art 3 ECHR: it is not enough to refer to de lege implementation of Art 20ff Qual Dir

Returns from Germany – Beneficiaries of international protection

Application for IP admissible i.e. exception § 29 para 2 AsylG / Art 33 para 2 lit a Proced Dir?

- if § 60 para 5 AufenthG → application for IP admissible?
 - yes because otherwise „permanent ban of deportation“ which is incompatible with int ref law and CEAS cf. VGH Hessen, decision of 04/11/2016 – 3 A 1292/16.A (Bulgaria)
 - follows from § 37 para 1 sent 2 AsylG
- EU law perspective other way round: if application for IP admissible → no return
 - second application for IP admissible in CEAS?
 - principle: no because of mutual trust
 - exception only if presumption of mutual trust refuted
 - systemic deficiencies
 - which lead to violation Art 4 ChFR
 - ECJ, NS C-411/10 – analogy
 - applicability of Art 51 para 1 ChFR – yes because Art 33 para 2 lit a Proced Dir
 - preliminary questions pending
 - ECJ, Jawo C-163/17 (AG Wathelet 25/07/2018)
 - hum status in Italy → Dublin case („preventive secondary movement“)
 - no return if Art 4 violation in case IP is granted
 - „living conditions for ben of IP de lege and de facto“ (Wathelet, para 127)
 - relevant if no integration measures acc Art 34 Qual Dir
 - **ECJ, Ibrahim C-291/17 et al (AG Wathelet 25/07/2018)**
 - subsidiary protection in Bulgaria/Poland; application for ref status
 - former Proced Dir (2005/85): inadmissibility only if ref status
 - answer to questions only in case ECJ does not follow

Returns from Germany – Beneficiaries of international protection

Application for IP admissible i.e. exception § 29 para 2 AsylG / Art 33 para 2 lit a Proced Dir?

- AG Wathlet, Ibrahim
 - no second asylum procedure if only Art 20ff Qual Dir violation reg living conditions OR if „no or reduced access to support if the same for nationals“ - ? (Wathelet, para 101ff)
 - weakness of arg Wathelet – general reference to mutual trust – two questions
 - not only reg Art 4 ChFR but also reg Art 18 ChFR (Wathelet, para 113)
 - does Art 18 ChFR say something regarding content of IP? i.e. syst def regarding CEAS as whole incl content of IP?
 - „de facto simple deportation ban“ is not „international protection“ cf VGH Hessen, 04/11/2016: „only permanent deportation ban contradicts principles of international refugee law“
 - only reg ChFR? why not reg secondary law?
 - cf reasons for mutual trust - ?
 - only *de lege* implementation of Art 20 ff Qual Dir is not sufficient to exclude rebuttal of mutual trust
 - second asylum procedure (+) if Art 4 ChFR violation „due to syst def in asylum *procedure*“ in case of „upgrade application“ (Wathelet, para 120)
 - follows from ECJ, NS
 - same if situation application for same status?
- ECJ decision to be awaited

Discussion with participants

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