UNHCR
The UN Refugee Agency

Note on access to the asylum procedure of asylum-seekers returned to Greece, *inter alia*, under arrangements to transfer responsibility with respect to determining an asylum claim or pursuant to application of the safe third country concept

According to UNHCR's own findings and reports from various non-governmental organizations, asylum seekers who left the country after having lodged an asylum application and are subsequently returned to Greece, may be subject to immediate pre-removal detention and deportation, without necessarily having had a substantive examination of their claim. This applies both to returns under arrangements to transfer responsibility for determining the claim, such as the Dublin II Regulation, and pursuant to application of the safe third country concept.

The refusal to grant access to the asylum procedure is based on the following provision in the Presidential Decree no. 61/1999:

> Article 2 - Examination of asylum applications - Actions of the relevant services
> [...]
> 8. During the entire examining procedure, the asylum seeker is obliged to stay at the place of residence which has been stated by him or assigned to him. In case of arbitrary departure, the procedure for the examination of his asylum claim is interrupted following relevant decision issued by the Secretary General of the Ministry of Public Order, which is notified to the asylum seeker, considered as a person "of unknown residence". If, within reasonable time, which in any case cannot exceed the limit of three (3) months from the date of issuance of the relevant decision, the asylum seeker reappears before the Authorities and submits official documentation proving that his absence was due to "*force majeure*", the above mentioned decision is revoked and the asylum claim is examined on its merits. In both cases, the Representative of UNHCR in Greece is notified. The asylum seeker is entitled to asking for specific details with regard to the follow-up of the case and to stating his views, if any, to the relevant Authorities. [*unofficial translation*]

Asylum-seekers are thereby informed that their asylum procedure has been "interrupted" due to their unauthorized departure from Greece in accordance with Article 2(8) of the Presidential Decree 61/99. They are normally not able to reopen the case, as generally the permitted time period of three months for doing so has passed.

In other instances, the Greek authorities may have decided upon the merits of the case and rejected it, with the decision being issued following the disappearance of the asylum-seeker.

The deadline for an appeal, including to the Council of State, against decisions to interrupt the procedure or to reject the claim has generally lapsed when the asylum seeker is returned to Greece, thus barring the asylum seeker from lodging an appeal.

As a consequence, such asylum seekers are regularly placed in pre-removal detention at the airport directly upon return. They are informed at the airport about the decision on the interruption or rejection of the previous application. Where practically feasible, they may be deported, without a proper examination on the merits of the asylum claim by the competent authorities.

There may be exceptions to above practice in line with Article 5 of the same Presidential Decree. However, a possible re-examination is made dependent upon the submission of new facts and is subject to the discretion of the Secretary General of the Ministry of Public Order.

> Article 5 - Re-examination of an asylum application
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> An asylum application by a foreigner will not be examined if a previous one [by the same person] has been rejected by the administration at a final instance. Exceptionally, the Secretary General of the Ministry of Public Order, following relevant application by the claimant, can order the *ab initio* re-examination of the claim, if new and crucial evidence of proof is submitted by the applicant, which concern him or the members of his family and which, had they been known before the issuance of the final decision, would constitute a basic criterion for his recognition as a refugee. The *ab initio* re-examination of claims examined under the accelerated procedure according to article 4 of this decree is not allowed. [*unofficial translation*]

In most cases, such a "re-examination" is denied, as the interpretation of "new and crucial evidence" is restrictive.

Applicants may still be entitled to submit an appeal to the Council of State, against the decision to refuse re-examination of the case, to detain, and to deport. In practice, however, asylum-seekers under pre-removal detention at the airport have very little time to prepare a request for re-examination, on the basis of Art. 5 of the Presidential Decree, or an appeal to the Council of States. They have no access to legal counsel, including the specialized expertise required for submissions to the Council of State, or to translators or interpreters, and are not able to cover the high legal fees. Although the fees may be waived, such a waiver must be applied for separately and is not guaranteed. The fees must be paid in the meantime.

In view of the above, UNHCR is concerned that there is 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 i.a. enshrined in Art. 33 (1) of the 1951 Convention.

It should be noted that in many cases, applicants may have moved onwards based on the slim chance of success in their asylum claims. The overall recognition rate for any international protection needs was zero per cent in the first instance in 2003. Even on appeal, the recognition rate is about one per cent overall in 2003 (for both 1951 Convention and complementary protection needs). It is expected that the recognition rates are similar for 2004. Asylum seekers whose claims have been rejected or interrupted therefore may include persons of concern to UNHCR.

Additional reasons to move onwards are the severe shortage of reception capacity, and poor conditions in the existing facilities. Asylum-seekers are, moreover, not systematically informed that they do not have the possibility to request asylum again in another Member State.

In UNHCR's opinion, the asylum applicant should not be penalized for not knowing about arrangements on the determination of responsibilities for asylum claims. Explicit or implicit withdrawal, the latter for example through disappearance, while leading to the discontinuation of the procedure and the closing of the file (rather than a rejection), should always permit for reopening upon return. Claims that have been "interrupted" should therefore be reopened in all cases following return. Where a decision denying asylum following an examination on the merits was issued following departure, the applicant should equally be given the opportunity to appeal the decision if s/he can show valid reasons for review of the claim. In any case, an effective opportunity should be given to contest deportation on the basis of a possible violation of the non-*refoulement* principle. For this purposes, they should, *inter alia* be provided access to the specialized experts required to submit a claim to the Council of State.

In addition to asylum-seekers, persons who had been recognized to be in need of international protection by Greece may also be subject to pre-removal detention and deportation, following return to Greece from another State. In particular, UNHCR has received reports that persons who had been granted "humanitarian status" by Greece have this status removed sometimes without any reasoning being provided for the withdrawal of status. While this affects persons who remain in Greece and persons who departed alike, persons who are returned, as above, are particularly disadvantaged in submitting an appeal to the Council of State, the only available remedy.

UNHCR has expressed its concerns in relation to the above to the Greek Ministry of Public Order. The office has drawn attention to the possibility that such practices may result in *refoulement*, as claimants could be barred from a substantive examination of their protection needs. UNHCR has also expressed its concerns at the lack of reception capacity, and the conditions in some of the reception facilities, the low recognition rate overall, and the lack of independence of the appeal commission. It hopes to work with the new Greek Government in remedying some of these shortcomings, although this is likely to be a longer-term process.

UNHCR has welcomed the Dublin Convention and the Dublin II Regulation to the extent they represents a formal arrangements between States on transfer of responsibility with respect to asylum claims. This was based on the understanding that the implementation of such an agreement must adequately ensure that the protection needs of the persons concerned are met. Such arrangements do not, however, release the sending authorities from their responsibilities to ensure respect of the non-*refoulement* principle, *inter alia* under Article 33(1) of the 1951 Convention. Such an approach was also confirmed by the European Court of Human Rights in relation to Article 3 of the European Convention on Human Rights. Thus, in its decision T.I. v. United Kingdom (Decision of 7 March 2000, Appl. No. 43844/98), the court found that:

> indirect removal in this case to an intermediary country, which is also a Contracting State, does not affect the responsibility of the United Kingdom to ensure that the applicant is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention. Nor can the United Kingdom rely automatically in that context on the arrangements made in the Dublin Convention...

Given the current practice in Greece in relation to asylum-seekers returned to the country, and in line with the obligation on the part of the sending State to prevent indirect *refoulement*, UNHCR requests that the sending States will obtain assurances from the Greek authorities that such persons will be given access to a fair examination

of their claim on the merits before returning the asylum seeker to the country. As regards "interrupted" cases, asylum-seekers should be permitted to continue the procedure. Where the case was rejected on the merits, the asylum-seeker should be permitted to submit an appeal against the rejection if there are valid reasons justifying the appeal out of time. Alternatively, States could assume responsibility for determining such asylum claims as foreseen under Article 3(2) of the Dublin II Regulation until such time as the practice changes.

UNHCR
November 2004