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To Vice President Mr. Franco Frattini
Att. European Commission
B-1049 BRUSSELS

Reference CM06-11
Regarding Comments on Council Regulation (EC) No. 343/2003 (the Dublin II Regulation)

Date 12 July 2006

Dear Mr. Frattini,

According to article 28 of the Council Regulation (EC) No. 343/2003 (hereafter: the Dublin II Regulation), the European Commission shall report at the latest three years after the entering into force of the Regulation (i.e. at the latest by 17 March 2006) to the European Parliament and the Council on the application of this Regulation and, where appropriate, shall propose the necessary amendments. Whereas the Member States shall forward to the Commission all the relevant information at latest six months before that time limit expires, the Standing Committee of experts on international immigration, refugee and criminal law (hereafter: the Standing Committee) whishes to recall the following.

The Dublin II Regulation (and before it came into force, the so called "Dublin Convention") has been adopted in order to, *inter alia*, guarantee that at least one Member State is responsible for the asylum applications filed within the European Union. The 4th recital of the Preamble of the Regulation states that the Dublin mechanism should "(…) guarantee effective access to the procedure for determining refugee status (…)".

When the Dublin system was established, non-governmental organizations and lawyers expressed their concerns about the fact that there was no harmonization of the interpretation of the refugee definition, of the asylum procedures and reception conditions for asylum seekers within the EU. The consequences of this lack of harmonization would be that the perspectives and chances for recognition in the Member States would be dramatically different. Now that the Dublin II Regulation has come into effect before EC measures have achieved full harmonization of asylum procedures and the interpretation of the 1951 Geneva Convention, these concerns are still valid.

In light of the coming evaluation of the Dublin II Regulation, the Standing Committee wants to bring to your attention three issues of concern. The first is that of procedures concerning subsequent applications, which may lead to return of asylum applicants to their country of origin without any substantive examination of their asylum application. The second concerns suspensive effect of appeals lodged against the application of the Dublin II Regulation. The third concerns family unity.

1. Subsequent applications and the Dublin system
Reports of UNHCR and NGO's on the practices in the Member States show that there are currently serious concerns about the access to asylum procedures for applicants who have been transferred under the Dublin II Regulation, particularly with regard of those who have been transferred to Greece.[1] These problems already existed under the Dublin Convention. However, at present, the Dublin II Regulation falls under EC law and the Commissions has a specific role in monitoring and evaluating it. The general pattern which causes our concern is the following. An asylum seeker applies for asylum in Member State A, but does not await the decision upon that request and absconds. Because of this, Member State A rejects the asylum application; the asylum applicant does not appeal, because s/he is unaware of the decision. The applicant applies for asylum in Member State B, which returns the applicant to Member State A, which is responsible for the examination of the application on the basis of the Dublin II Regulation. Member State A considers the application which the applicant subsequently submits as a subsequent application, and rejects it because no new facts or

[1] UNHCR, Note on address 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", November 2004, p. 1; ECRE, Towards Fair and Efficient Asylum Systems in Europe, September 2005.

circumstances have been submitted since the first application. Because submission of new facts or circumstances is a requirement for a successful second asylum application, appeal against this rejection is useless, if possible at all. As a consequence of this implementation of the notion of subsequent application, it is possible that asylum seekers are returned to their country of origin without any substantive examination of their asylum application.

As a matter of fact, this way of dealing with subsequent applications is made possible by Article 33 paragraph 3 of the Draft Directive on Asylum Procedures.[2] Also, it is part of legal practice in several EU Member States.

The Standing Committee recalls that with regard to the Greek asylum legislation and system, UNHCR stated the following: "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".[3] Therefore "…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 seekers to the country. As regards "interrupted" cases, asylum-seekers should be permitted to continue the procedure…".[4]

The Dutch practice knows similar cases: it is known that at least in one case[5] the IND (Immigration and Naturalization Service) declared an asylum application unfounded because the applicant had left with an "unknown destination" while at the moment of this decision the Service was aware of the fact that the person was in another EU Member State because the authorities of that state had asked them to take that person back. The consequence of the declaration was that the asylum procedure was closed. According to the Dutch law, if a new application is made after an administrative decision has been made rejecting all or part of an application, the applicant shall state new facts that have emerged or circumstances that have altered.[6] In that case, a Somali national, was killed under unclear circumstances in Mogadishu several months after his expulsion.

German legislation allows for rejection of an asylum application if the asylum seeker is not present to support his claim before the authorities. This is always the case when the asylum seeker has left the country and has filed a claim in another EU Member State. Once the asylum seeker is sent back to Germany according to the Dublin II Regulation, he is allowed to apply in a "follow up procedure", which allows him only to come up with either new evidence or change of circumstances.[7] The result of this is that the authorities do not decide on the merits of the claim, while the applicant may be expelled to the country of origin.

The Standing Committee considers the above described practices in breach of international refugee and human rights law. In its Jabari decision, the European Court of Human Rights has ruled that states must subject asylum applications to a rigorous scrutiny, which may not be limited to procedural issues.[8] In the situation under consideration here, provisions on subsequent asylum applications limit access to a full and fair asylum procedure. This leads to serious protection deficits and even *refoulement*. These protection gaps need to be addressed urgently.

The upcoming evaluation of the Dublin II Regulation by the European Commission offers an opportunity to propose amendments which are necessary to address the protection concerns. The Standing Committee urges the Commission to ensure that the Dublin II Regulation will be amended in such a way as to ensure that, if the Member State responsible for the examination of an asylum application wants to return an applicant to the country of origin, this happens only after a substantive examination of the application which is not limited to purely procedural issues.

2. The suspensive effect of the appeal or review

The Standing Committee is also concerned about the fact that provisions 19 (2) and 20 (1) (e) of the Dublin II Regulation allow that the appeal or review concerning the decision to transfer an applicant shall not suspend the implementation of the transfer unless, on the basis of national law, the courts or competent bodies so decide on a case by case basis. The Standing Committee reminds that transfer from one Member State to another can amount to chain refoulement, i.e. result in expulsion of the applicant to the country of origin contrary to the concerned Member States'(interpretation of its) international obligations. Chain refoulement is prohibited by Article 33 of the Geneva Convention as well as by Article 3

[2] Amended proposal for a Council Directive on Minimum standards on procedures in Member States for granting and withdrawing refugees status (Asile 33, nr. 8771/04).
[3] See footnote nr. 1.
[4] Ibidem, p. 4.
[5] In the case of Mr. Abdilatif Ali, a Somali asylum seeker, the British authorities requested the IND to take him back according to the "Dublin Agreement". Once Mr. A. Ali was back in the Netherlands, the authorities rejected his new asylum claim assuming there were no new facts or circumstances which justified the examination of the claim. The result of this was that the IND did not decide on the merits of the claim. In October 2003 he was returned to Somalia. In June 2004 Mr. A. Ali was killed under unclear circumstances in Mogadishu (Frans-Willem Verbaas, Er is thans geen grond… Het Nederlandse asielbeleid van binnenuit, Uitgeverij De Arbeiderspers, 2005, pp. 89-90).
[6] The translation of article 4:6 of the General Administrative Law Act is done by the Ministry of Justice.
[7] Art. 51 (1) –(3) of the Administrative Procedures Act.
[8] Case of Jabari v. Turkey, 11th July 2000, nr. 40035/98.

ECHR. The Memorandum to the Dublin II Regulation states that suspensive effect is not "necessary" as "transfer to another Member State is not likely to cause the person concerned serious loss that is hard to make good". This is obviously not correct, because the Member States still do not have a uniform interpretation of the refugee definition and of Article 3 ECHR, notwithstanding the Definition Directive which only provides for minimum standards.[9] An appeals procedure which cannot have suspensive effect is contrary to Article 3 in conjunction with Article 13 ECHR.[10] Therefore, the Standing Committee recommends that the Dublin II Regulation is amended so as to provide that it must be possible for the courts or competent bodies to suspend expulsion during the appeal against the application of the Dublin II Regulation.

3. Article 7 of the Dublin II Regulation

This article provides that where an asylum seeker has a family member who has been allowed to reside as a refugee in a Member State, that Member State shall be responsible for examining the application for asylum, provided that the persons concerned so desire. The Standing Committee deplores that this provision takes into account the opportunity to reunify family members only if a refugee status has been granted. It is known that Member States prefer to grant a subsidiary form of protection to asylum seekers, even when there are clear grounds to recognize a person as a refugee in the sense of the Geneva Convention. In light of the importance of the right to family life, the Committee advocates that the scope of Article 7 so as to include aliens who have been granted subsidiary protection in the sense of the Definition Directive.[11]There is no reasonable justification for differentiating between aliens granted refugee status and aliens granted subsidiary protection, in this respect.

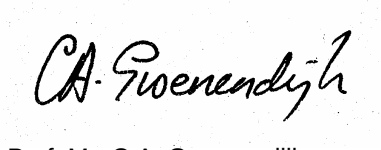
4. Conclusions

The upcoming evaluation of the Dublin II Regulation by the European Commission offers an opportunity to introduce amendments which are necessary from a point of view of international law.

1. The Member State responsible for the examination of an asylum application must examine the content of the claim, i.e. it should either apply a third country exception or examine the substance of the application. In particular, the Dublin II Regulation should provide that, where a first asylum application has been dismissed because the applicant has absconded, the Dublin system should not allow for a second application to be dismissed in a subsequent application procedure, as this allows for return to the country of origin or a third country without an examination of the question whether this country is safe for this applicant.
2. Where this is not ascertained, another paragraph should be added to Article 3 of the Dublin II Regulation, stipulating that other Member States shall not transfer an applicant to the responsible Member State, but will examine the application in substance itself.
3. The Standing Committee recommends that articles 19 and 20 be amended to the effect that the implementation of a transfer may be suspended by the competent court or body.
4. The Standing Committee recommends that Article 7 of the Dublin II Regulation is amended so as to provide that the Member State where a family member has been granted refugee status *or subsidiary protection* shall be responsible for the examination of the asylum application of the other family members.

Yours sincerely,

On behalf of the Standing Committee,



Prof. Mr. C.A. Groenendijk
Chairman

[9] Case of T.I. v. United Kingdom, 7th March 2000, nr. 43844/98.
[10] Case of Čonca v. Belgium, 5th February 2002, nr. 51564/99.
[11] Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.