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THE COUNCIL

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LIMITE

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ASIM 185

LEGAL SERVICE OPINION

Subject: Articles 8 and 10 of the Dublin Convention of 15 June 1990
– time limit for responding to a request for transfer under Article 8
– 5827/98 ASIM 22 and 5840/98 ASIM 23

1. At its meeting on 3 June 1998, the Asylum Working Party asked the Council Legal Service for its opinion on what time limit was applicable for responding to a request for the transfer of an asylum seeker under Article 8 of the Dublin Convention of 15 June 1990 determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities ([1]).

   This opinion aims to answer that question.

2. As a preliminary, the Legal Service would point out that the provisions of the Dublin Convention have the effect of placing responsibility for examining an asylum application in the hands of the State principally responsible for the presence of the asylum seeker on the territory of the Member States, in accordance with the criteria laid down in the Convention (for example, the fact that a Member State has issued a residence permit or visa to the applicant, or that the applicant has crossed the external border of a Member State in an irregular manner).

([1]) OJ C 254, 19.8.1997.

3. Article 8 of the Convention is a catch-all provision which stipulates that:

> "Where no Member State responsible for examining the application for asylum can be designated on the basis of the other criteria listed in this Convention, the first Member State with which the application for asylum is lodged shall be responsible for examining it."

Article 10(1) of the Convention states that:

> "1. The Member State responsible for examining an application for asylum according to the criteria set out in this Convention shall be obliged to:
>
> (a) take charge under the conditions laid down in Article 11 of an applicant who has lodged an application for asylum in a different Member State;
>
> (b) complete the examination of the application for asylum;
>
> (c) readmit or take back under the conditions laid down in Article 13 an applicant whose application is under examination and who is irregularly in another Member State;
>
> (d) take back, under the conditions laid down in Article 13, an applicant who has withdrawn the application under examination and lodged an application in another Member State;
>
> (e) take back, under the conditions laid down in Article 13, an alien whose application it has rejected and who is illegally in another Member State."

Article 11(4) of the Convention provides that:

> "The Member State shall pronounce judgment on the request **[that charge be taken]** within **three months** of receipt of the claim."

But Article 13(1)(b) provides that:

> "The State called upon **to take back the applicant** shall give an answer to the request within **eight days** of the matter being referred to it." ([2])

([2]) Our bold *passim*.

4. Where a person who has lodged an asylum application with a Member State subsequently lodges an application in another Member State, and where that other Member State requests under Article 8 of the Convention that the person be transferred to the first Member State, the question that arises is whether this amounts to a *request that charge be taken* within the meaning of Article 11 of the Convention, or a call upon the first State to *take back* the applicant within the meaning of Article 13. The same question can be asked in the case where a person who has lodged an asylum application with one Member State is subsequently present in another Member State, *without lodging an asylum application in that State.*

5. It should be noted in this regard that in all the cases of *taking back* referred to in Article 10(1), the Member State responsible for examining the asylum application has already been determined, and that State has begun or even completed examining the substance of the application. Thus, subparagraphs (c) and (d) refer respectively to cases where the application is or was "under examination" by the Member State responsible for examining the application; subparagraph (e) refers to the case where that Member State has rejected the application. ([3])

This explains why a short time limit has been set for responding to requests for the taking back of an applicant: in such cases, it is simply a matter of verifying whether the Member State called upon to take back the applicant has or has not already agreed to examine the asylum application.

([3]) Article 1(1)(d) stipulates that:

"For the purposes of this Convention:

... "Examination of an application for asylum" means: all the measures for examination, decisions or rulings given by the competent authorities on an application for asylum, **except for procedures to determine the State responsible for examining the application for asylum** pursuant to this Convention".

Cf. the Convention implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at common borders, concluded on 19 June 1990, Article 30(1)(f) and (g) of which provide that:

"(f) if an alien whose application for asylum **is already being processed** by one of the Contracting Parties lodges a new application the Contracting Party responsible shall be the one processing the first application.

(g) If an alien on whose previous application for asylum a Contracting Party **has already taken a final decision** lodges a new application, the Contracting Party responsible shall be the one that processed the previous application unless the asylum seeker has left the territory of the Contracting Parties."

6. On the other hand, where it is a case of *taking charge* of an applicant, the Member State called upon to do so has not yet agreed to examine the asylum application. This explains why a longer response time limit has been set in this case: the Member State called upon to take charge of the applicant must have enough time to check whether it is actually responsible for examining the asylum application on the basis of the criteria laid down in the Convention.

Thus, Article 11(2) states that:

> "The request that charge be taken shall contain indications enabling the authorities of that other State to ascertain whether it is responsible **on the basis of the criteria laid down in this Convention**." ([4])

The fact that the relevant criterion is the one set out in Article 8 is of little consequence in this respect, since it will always be necessary to check that no other criterion is applicable to the case in point, Article 8 being a catch-all provision.

7. The expression *take charge* thus refers to cases where the Member State called upon to do so has not yet agreed to examine the asylum application, whereas the expression *take back* refers to cases where the Member State called upon has already begun or even completed examination of the application. It is true that there is an exception to this in Article 3(7), which provides for the specific case of the taking back of an applicant when it has not yet been determined which Member State is responsible for examining the application. Under that provision:

> "An applicant for asylum who is present in another Member State and there lodges an application for asylum after withdrawing his or her application during the process of determining the State responsible shall be taken back, under the conditions laid down in Article 13, by the Member State with which that application for asylum was lodged, **with a view to completing the process of determining the State responsible for examining the application for asylum**."

([4]) Cf. Article 13(1)(a), which states that:

> "the request for the applicant to be taken back must provide indications enabling the State with which the request is lodged to ascertain that it is responsible **in accordance with Article 3(7) and with Article 10**."

Neither Article 3(7) nor Article 10 lays down criteria for establishing responsibility for examining an asylum application. Also, the fact that a Member State takes back an asylum seeker in the specific case referred to in Article 3(7) does not prejudge the question of which Member State is responsible for examining the application: see paragraph 7 of this opinion. By contrast, in the cases of taking back referred to in Article 10(1)(c), (d) and (e), it has already been determined which Member State is responsible for examining the application.

The fact that a State takes back an applicant under this provision does not prejudge the question of which Member State is responsible for examining the asylum application. This explains why it has been laid down that the Member State called on must respond to the request to take back the applicant within eight days, in accordance with Article 13(1)(b). In fact, the only purpose and effect of Article 3(7) is that of "completing the process of determining the State responsible for examining the application for asylum", with a view to avoiding the abuse mentioned in that same provision.

8. Consequently, where a person who has lodged an application for asylum with one Member State subsequently lodges an application with another Member State, and that other Member State requests that the person be transferred to the first Member State under Article 8 of the Convention, it must be concluded that this constitutes a request to *take charge*, inasmuch as the first Member State has not already begun examining the asylum application.

On the one hand, Article 10(1)(c) and (d), which concern the *taking back* of the applicant, are explicitly restricted solely to cases in which the asylum application is or was "under examination" by the Member State responsible; similarly, subparagraph (e) relates to the case where that Member State has rejected the application. On the other hand, the wording of Article 10(1)(a), which relates to the *taking charge* of the applicant, is broader, stipulating that:

> "The Member State responsible for examining an application for asylum ... shall be obliged to ... take charge ... of an applicant who has lodged an application for asylum in a different Member State."

Thus, the latter provision allows for the expression *take charge* to cover not only the case where a person lodges an asylum application in a Member State other than the Member State responsible for examining the application, but also the case where a person lodges an asylum application in both Member States. The wording of Article 11(1) also allows for both these cases, stipulating that:

> "If a Member State with which an application for asylum has been lodged considers that another Member State is responsible for examining the application, it may ... call upon the other Member State to take charge of the applicant ..."

9. In the case in which a person who has lodged an asylum application with one Member State is subsequently present in another Member State *but does not lodge an asylum application there*, Article 8 could still come into play: the responsibility criterion set out in that provision could be relevant in this case also. The wording of the provision allows not only for the case of a person who lodges an asylum application in more than one Member State, but also for the case of a person who lodges an application in a single Member State.

On the other hand, it must be acknowledged that the latter case is not covered by the wording of Article 10(1)(a), nor by Article 11(1), which relate to the taking charge of a person who has lodged an asylum application in a Member State other than the Member State responsible for examining the application. These provisions do not cover the case of a person who has not lodged an asylum application in that other Member State. It must therefore be assumed that the authors of the Convention did not consider it necessary to make provision for such a case, since it is obvious that the first Member State would be responsible for examining the application, in the absence of other relevant criteria.

But this does not take away from the fact that the latter case should be handled in the same way, by analogy, as the case referred to in paragraph 8 of this opinion, concerning a person who lodges an asylum application in more than one Member State.

10. In conclusion, the Legal Service is of the opinion that:

– where a person who has lodged an application for asylum with one Member State subsequently lodges an application for asylum in another Member State, and where that other State calls for the person to be transferred to the first Member State pursuant to Article 8 of the Dublin Convention, this constitutes a request to *take charge*, inasmuch as the first Member State has not yet begun to examine the asylum application;

– the Member State thus called upon has, in such case, three months to respond to the request that it take charge of the applicant, in accordance with Article 11(4) of the Convention;

– the case of a person who has lodged an asylum application with one Member State and is subsequently present in another Member State, but does not lodge an asylum application there, should be handled in the same manner.