

■ CONSTITUTIONAL DEVELOPMENTS IN AUSTRIA

Barbara Ramberger

Violation of equality rights by failing to conduct preliminary proceedings

Austrian Constitutional Court
Judgment of February 26th, 2007 (B1802/06 et al.)

Circumstances of the case

Coming through Italy, the two applicants, both Iranian nationals, entered Austria without a permit and filed applications for international protection. The Federal Asylum Agency (*Bundesasylamt*) rejected these applications subsequent the terms of Article 5, para (1) of the 1997 Asylum Act (*Asylgesetz 1997*) and stated that Italy was responsible for examining the claimants' application according to Article 6 of the Dublin Convention (*Dubliner Übereinkommen*).

The claimants subsequently appealed the rejection of their applications to the Independent Federal Asylum Review Board (*Unabhängiger Bundesasylsenat*) who dismissed the appeal.

Next, the claimants filed complaints against the decision of the Federal Asylum Review Board with the Austrian Constitutional Court, which finally repealed the contested rulings by pronouncing a violation of the claimants' right to the equal treatment of all people (see judgment of 26th November, 2001, B 902/01 et al.). In referring to an earlier judgment from 8th March, 2001 (G117/00 et al.) the Court observed, that an interpretation of Article 5, para (1) of the 1997 Asylum Act, which is in conformity to the Austrian Constitution, requires the consideration of Article 3, para (4) of the Dublin Convention. (Note: Article 3, para (4) the 1st sentence of the said convention provides that each Member State has the right to examine an application for asylum submitted to it by an alien, even if such examination is not its responsibility under the criteria defined in the Convention, provided that the applicant for asylum agrees thereto).

Consequently, the jurisdiction of a State according to Article 6 of the Dublin Convention does not *automatically* hinder another State to decide the merits of an application for international protection. On the contrary, under certain conditions, the right to examine an application according to Article 3, para (4) of the Dublin Convention may require the State to examine a claim for international protection, especially when the applicant alleges an infringement of the *prohibition of refoulement* (Note: *Non-refoulement* is a principle in international law, provided by Article 33, para (1) of the Refugee Convention, which is aimed at protecting

refugees from being deported to places where they might be subjected to persecution again).

The case was remanded to the Independent Federal Asylum Review Board, which had to decide again the applicants' appeals. On the 29th of September, 2006, the Review Board dismissed the appeals once again. The Review Board held that the expulsion of the claimants to Italy would not expose them to the risk of being tried contrary to the requirements of Article 13 of the European Convention on Human Rights (ECHR), which provides the right to an effective remedy before a national authority. Neither would they face a "real risk" of being subjected to treatment beyond the threshold set by Article 3 of the ECHR, which comprises the freedom from torture and other inhuman or degrading treatment or punishment. The Review Board did not find the existence of any personal ties of the applicants with Austria that are relevant under the terms of Article 8 of the ECHR (Right to respect for private and family life).

Eventually, the applicants lodged a complaint with the Austrian Constitutional Court. Once more, they relied on the constitutionally guaranteed right not to be discriminated among foreigners, emphasizing that they were completely integrated in the Austrian society.

Relevant Austrian Law

- Federal Act concerning the Granting of Asylum (1997 Asylum Act, Asylgesetz 1997)
Federal Law Gazette¹ (FLG) I No. 76/1997 as amended by FLG I No. 129/2004 (On January 1st 2006, the 1997 Asylum Act was displaced by the 2005 Asylum Act [FLG I No. 100/2005]. Yet, the transitional provisions of the latter provide that all procedures that were pending on December 31st 2005 should be completed in accordance with the provisions of the 1997 Asylum Act).

Inadmissibility of asylum applications by reason of absence of responsibility under treaty provisions or pursuant to a directly applicable act of the European Union

Article 5. (1) An application for asylum which has not been ruled on in accordance with article 4 shall be rejected as being inadmissible if, under treaty provisions or pursuant to Council Regulation (EC) No. 343/2003 of 18 February 2003, another country is responsible for examining the asylum application. When rendering the administrative decision rejecting the application, the asylum authority shall also specify which country is responsible.

(2) The procedure set out in paragraph (1) above shall also be followed if, under treaty provisions or pursuant to Council Regulation (EC) No. 343/2003 of 18 February 2003, another country is responsible for determining which country is responsible for examining the asylum application.

1 The Austrian Legal Information System (RIS, www.ris.bka.gv.at) comprises all issues of the Federal Law Gazette published from 1945.

- Federal Constitutional Act for the implementation of the International Convention on the Abolishment of all forms of racial Discrimination (Bundesverfassungsgesetz betreffend das Verbot rassischer Diskriminierung)
FLG No. 390/1973

The Austrian Federal Constitution comprises several regulations guaranteeing equality of treatment. Apart from the "general equal protection clause" (*allgemeiner Gleichheitssatz*, provided by article 7 para (1) of the Federal Constitution) whose scope is limited to Austrian nationals, the court has adopted the same level of protection of foreigners among themselves by implementing the International Covenant on the Abolishment of all forms of racial Discrimination:

Article I para. (1) provides as follows:

Any form of racial discrimination – also to the extent not already in contradiction with Article 7 of the Federal Constitutional Act as amended 1929 and Article 14 of the Convention for the Protection of Human Rights and Fundamental Liberties, Federal Law Gazette no. 210/1958 – is forbidden. Legislation and execution shall refrain from any discrimination for the sole reason of race, colour of skin, descent or national or ethnic origin.

- Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities (Dublin Convention)
FLG III, No. 165/1997

The Dublin Convention was aimed at establishing a system that determines which Member State of the European Communities was responsible for examining an application for asylum lodged in one of the contracting States. It was signed in Dublin on 15th June, 1990 and entered into force on the 1st of September in 1997 (for Austria on the 1st of October, 1997). In 2003 the Dublin Convention was replaced by the Council Regulation (EC) No. 343/2003 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Asylum Application Lodged in One of the Member States by a Third-Country National (the "Dublin-II-Regulation").

Article 3 No. 4 of the Convention states as follows:

Each Member State shall have the right to examine an application for asylum submitted to it by an alien, even if such examination is not its responsibility under the criteria defined in this Convention, provided that the applicant for asylum agrees thereto.

The Member State responsible under the above criteria is then relieved of its obligations, which are transferred to the Member State which expressed the wish to examine the application. The latter State shall inform the Member State responsible under the said criteria if the application has been referred to it.

Article 6 1st sentence:

When it can be proved that an applicant for asylum has irregularly crossed the border into a Member State by land, sea or air, having come from a non-member State of the European Communities, the Member State this entered shall be responsible for examining the application for asylum.

- European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)
FLG No. 210/1958 as amended by FLG III No. 30/1998

Article 8 – Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The Court's Assessment

According to the permanent jurisdiction of the Austrian Constitutional Court, an administrative authority violates the right to equal treatment of all people in terms of the Federal Constitutional Law on the abolishment of all forms of racial discrimination, when it acts arbitrarily. This may be the case, for instance, if the authority severely misjudges the legal position or issues a ruling without reason. Furthermore, an administrative authority acts arbitrarily, if it refrains from carrying out preliminary proceedings concerning an issue that is of importance for its ruling, or if the authority completely fails to conduct proper preliminary proceedings.

In the present case, the Constitutional Court observes, that the Independent Federal Asylum Review Board has not been dealing with the applicants' appeals for about five years.

Nor could the Court find any statement of the Review Board referring to the claimants' present living conditions.

In the Court's view, due to the mentioned omission concerning the preliminary proceedings, it was not possible for the Independent Federal Asylum Review Board to establish a just equilibrium between the applicants' interest in respecting their right to private and family life under terms of Article 8 of the ECHR, which might have been affected by the deportation of the claimants to Italy on one hand, and the interest of public order on the other hand.

In conclusion, the Court holds that the contested ruling of the Review Board can be regarded to have violated the applicants' right to equal treatment

according to the Federal Constitutional Law for the implementation of the International Convention on the Abolishment of all forms of racial Discrimination and, therefore, rescinded the decision.

- *Barbara Ramberger is researcher at the Vienna University of Economics and Business Administration, Institute for Austrian and European Public Law*