

■ CONSTITUTIONAL DEVELOPMENTS IN AUSTRIA

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Right to liberty and security and Detention pending deportation

Austrian Constitutional Court
Judgement 15th June 2007
(B1330/06-13 and B 1331/06-14)

The Circumstances of the case

The first applicant, a citizen of Serbia and Montenegro, entered Austria illegally together with his common-law wife and their underage daughter on 27th April 2007 and filed an application for asylum on the same day. On 3rd May 2006 the Federal Asylum Agency (*Bundesasylamt*) notified the applicant that it was intended to reject his application for international protection. Pursuant to article 27 paragraph (1) subparagraph 1 Asylum Act 2005 an expulsion procedure is deemed to be initiated, if during the admission procedure a notification in accordance with subparagraph 4 or 5 of article 29, paragraph (3) Asylum Act 2005 occurred. This letter was received by the applicant on 12th May 2006.

By administrative decision of 12th May 2006 the District Administration Authority (*Bezirkshauptmannschaft*) imposed orders for detention pending deportation (*Schubhaft*) on the applicant according to article 76 paragraph (2) subparagraph 2 Aliens' Police 2005 Act as a procedural security measure in connection with the imposition of an expulsion order pursuant to article 10 Asylum Act 2005. The applicant has been in detention pending deportation from 12th May 2006 to 20th July 2006.

By administrative decision of 28th June 2006 the Federal Asylum Agency dismissed the application for asylum according to article 3 and 8 Asylum Act 2005, both concerning the granting of asylum status and granting of subsidiary protection. With this decision the expulsion order was connected, according to article 10 paragraph (1) subparagraph 2 2005 Asylum Act. The appeal against the expulsion order was not disallowed to have suspensory effect (article 36 paragraph (2) Asylum Act 2005). On 4th July 2006 the Federal Asylum Agency informed the District Administration Authority that an appeal against the administrative asylum decision (*Asylbescheid*) was lodged on 3rd July 2006 and that according to article 51 Asylum Act 2005 a residence entitlement card was issued for the detained applicant on 4th July 2006.

The second applicant, as well a citizen of Serbia and Montenegro, entered Austria illegally on 16th April 2006 and filed an application for asylum on 17th April 2006. On 25th April 2006 the Federal Asylum Agency notified the applicant that it was intended to reject his application for international protection.

By administrative decision of 26th April 2006 the District Administration Authority imposed orders for detention pending deportation on the applicant according to article 76 paragraph (2) subparagraph 2 Aliens' Police Act 2005 as a procedural security measure in connection with the imposition of an expulsion order pursuant to article 10 2005 Asylum Act. The applicant has been in detention pending deportation from 26th April 2006 to 24th July 2006.

After negative consultations according the Dublin convention the Federal Asylum Agency dismissed the application for asylum by administrative decision of 20th June 2006 pursuant to article 3 and 8 Asylum Act 2005, both concerning the granting of asylum status and granting of subsidiary protection. With this decision the expulsion order was connected; according to article 10 paragraph (1) subparagraph 2 Asylum Act 2005. The appeal against the expulsion order was not disallowed to have suspensory effect (article 36 paragraph (2) Asylum Act 2005). On 29th June 2006 the Federal Asylum Agency informed the District Administration Authority that an appeal against the administrative asylum decision was lodged on 28th June 2006 and that according to article 51 Asylum Act 2005 a residence entitlement card was issued for the detained applicant on 4th July 2006.

Relevant Austrian Law

Federal Constitutional Law of 29 November 1988 on the Protection of Personal Freedom

Article 1

- (1) Everyone shall have the right to liberty and security (personal freedom).
- (2) No one may be arrested or detained on grounds other than as stated herein or in a manner other than as prescribed by law.
- (3) Deprivation of personal freedom may be provided for by law only if it is necessary in accordance with the purpose of the measure; any deprivation of personal freedom shall in all cases be permissible only if and insofar as it is not disproportionate to the purpose of the measure.
- (4) Anyone who is arrested or detained shall be treated with respect for his human dignity and with the greatest possible consideration and he shall be subject to only such restrictions as are reasonable for the purpose of the arrest or are necessary for maintaining safety and good order at the place of his arrest.

Article 2

- (1) A person may be deprived of personal freedom in the manner prescribed by law in the following cases:

1. to 6. ...
7. If required in order to guarantee an intended deportation or extradition.
(2) ...

Federal Law concerning the Granting of Asylum
(Asylum Act 2005 – AsylG 2005)

Article 27 – Initiation of expulsion procedures

(1) An expulsion procedure pursuant to the present federal law shall be deemed to be initiated:

1. if during the admission procedure, notification is effected in accordance with subparagraph 4 or 5 of article 29, paragraph (3), and
2. if the procedure before the independent Federal Asylum Review Board was to be discontinued (article 24, paragraph [2]) and the decision of the Federal Asylum Agency in that procedure has been issued in conjunction with an expulsion order (article 10).

(2) The authority shall also initiate an expulsion procedure if the inquiries to date justify the assumption that the application for international protection is to be dismissed or rejected in regard to the granting of both asylum status and subsidiary protection status and if there is a specific public interest in the accelerated conduct of the procedure. The initiation of the expulsion procedure shall be documented by means of a file note.

(3) A specific public interest in the accelerated conduct of the procedure shall exist in particular in the case of an alien:

1. who has been convicted, by final judgment, of an offence punishable by the courts which is prosecutable ex officio and was committed wilfully;
2. against whom charges have been brought by the Department of Public Prosecution by reason of an offence punishable by the courts which comes under lower-court jurisdiction and which has to be committed wilfully or
3. who has been caught in the act of committing an offence (article 17 of the Penal Code).

(4) An expulsion procedure initiated pursuant to subparagraph 1 of paragraph (1) above shall be discontinued if the procedure is admitted. An expulsion procedure initiated pursuant to subparagraph 2 of paragraph (1) above shall be discontinued if the inquiries to date justify the assumption that the application for international protection is not to be dismissed or rejected in regard to the granting of either asylum status or subsidiary protection status or if the asylum-seeker voluntarily notifies the independent Federal Asylum Review Board of his place of residence and it may not be assumed, on the basis of certain facts, that he will again evade the procedure.

(5) An expulsion procedure initiated by the authority pursuant to paragraph (2) above shall be discontinued if the conditions required for its initiation no longer exist.

(6) The discontinuation of any expulsion procedure shall not preclude its subsequent re-initiation.

(7) The initiation and discontinuation of any expulsion procedure shall be reported to the competent aliens' police authority.

(8) A procedure in which an expulsion procedure has been initiated shall be ruled on as quickly as possible and at the latest within three months from initiation of the expulsion procedure or from the lodging of an appeal which has suspensory effect.

Article 36 – Effect of appeals

(1) ...

(2) An appeal against other decisions and the expulsion order issued in conjunction therewith shall have suspensory effect unless it is disallowed.

(3) ...

(4) If an appeal against an expulsion order does not have suspensory effect, the expulsion order shall be enforceable. Execution of the deportation or return in implementation of such expulsion order shall be postponed until expiry of the time-limit for lodging appeals or, if an appeal is lodged, until midnight on the seventh day from submission of the appeal. The independent Federal Asylum Review Board shall notify the Federal Asylum Agency without delay of the receipt of the appeal submission and of the granting of suspensory effect.

(5) ...

Federal law concerning the execution of aliens' police operations,
the issue of documents to aliens and the granting of entry authorization
(Aliens' Police Act 2005 – "Fremdenpolizeigesetz" FPG)

Article 76 – Detention pending deportation

(1) ...

(2) In the case of an asylum-seeker or alien who has filed an application for international protection, the aliens' police authority having territorial jurisdiction may issue an order for that person to be detained pending deportation as a procedural security measure in connection with the imposition of an expulsion order pursuant to article 10 of the Asylum Act 2005 or as a deportation security measure:

1. If an enforceable expulsion order has been issued against him (article 10 of the Asylum Act 2005), even if that order is not final;
2. If an expulsion procedure has been initiated against him in accordance with the provisions of the Asylum Act 2005;
3. If an enforceable expulsion order (articles 53 or 54) or an enforceable residence ban (article 60) was imposed on him prior to the filing of the application for international protection or
4. If it may be assumed, on the basis of the outcome of the interrogation, search and photographing and fingerprinting procedures, that the alien's application for international protection will be rejected owing to the absence of responsibility of Austria for examining the application.

(3) – (7) ...

Article 80 – Duration of detention pending deportation

(1) The authority shall endeavour to ensure that the period of any detention pending deportation is as short as possible.

(2) A detention order shall be maintained in force until the reason for its imposition ceases to exist or until its objective can no longer be achieved. Except in the cases referred to in paragraphs (3) and (4) below, detention pending deportation shall be for a period not exceeding two months in all.

(3) If it is not permissible to deport an alien because a final decision has not yet been pronounced concerning an application filed pursuant to article 51, the detention order may be maintained in force until the expiry of the fourth week following pronouncement of the final decision but for a period not exceeding six months in all.

(4) If it is not possible or permissible to deport an alien because:

1. The establishment of his identity and nationality is not possible or
2. The necessary entry permit or transit permit from another State is not present or
3. He frustrates the deportation measure by resisting a measure of constraint (article 13),

the detention order may be maintained in force for not more than six months within a two-year period by reason of the same facts unless the non-execution of the deportation measure is attributable to the alien's conduct. In such cases, the alien may not be held in detention pending deportation for more than ten months within a two-year period by reason of the same facts. A detention order imposed pursuant to article 76, paragraph (2), may be maintained in force for more than six months within a two-year period but for not more than ten months within a two-year period.

(5) In cases where a detention order has been imposed pursuant to article 76, paragraph (2), such order may be maintained in force up to the expiry of the fourth week following pronouncement of a final negative decision on the application for international protection unless a situation as referred to in subparagraphs 1 to 3 of paragraph (4) above exists. If, in accordance with article 37 of the Asylum Act 2005, the suspensory effect of an appeal against an expulsion order issued in conjunction with a rejection ruling is allowed, the detention order may be maintained in force until a decision is pronounced by the Independent Federal Asylum Review Board. Furthermore, the detention order may be maintained in force only if the Independent Federal Asylum Review Board issues a rejection or dismissal ruling.

(6) – (7) ...

All Austrian law and rulings of all major Austrian courts can be viewed at <http://www.ris.bka.gv.at/auswahl/>, especially the decisions of the Austrian Constitutional Court: <http://www.ris.bka.gv.at/vfgh> (only available in German).

The Court's Assessment

Article 76 paragraph (2) Aliens' Police Act 2005 defines the requirements to issue an order for a person to be detained pending deportation and according to

article 80 paragraph (2) Aliens' Police Act 2005 a detention order shall be maintained in force until the reason for its imposition ceases to exist or until its objective can no longer be achieved.

In the recent cases the first applicant was notified by the Federal Asylum Agency on 3rd May 2006, the second applicant on 25th April 2006 that it was intended that the application for international protection is rejected. As an expulsion procedure is deemed to be initiated, if during the admission procedure a notification in accordance with subparagraph 4 or 5 of article 29, paragraph (3) AsylG occurred, the requirements of article 76 paragraph (2) subparagraph 2 Aliens' Police Act 2005 were fulfilled at the time of imposed detention pending deportation (*Schubhaftverhängung*), on 12th May 2006 and 26th April 2006.

Due to the fact that the appeal against the expulsion order had suspensory effect, the asylum procedure was regarded as admitted. The explanations to article 27 Asylum Act 2005 (RV 952 BlgNR 22. GP, 49)¹ accomplished that:

If an expulsion proceeding is stopped, a possible detention pending deportation is to be ended, as the premises are ceased to exist.

As a result the premises of article 76 paragraph (2) subparagraph 2 Aliens' Police Act 2005 are ceased to exist if an asylum proceeding is admitted. But the prosecuted authority assumed wrongly that article 76 paragraph (2) subparagraph 1 Aliens' Police Act 2005 is applicable while maintaining detention pending deportation. The reason for detention of article 76 paragraph (2) subparagraph 1 Aliens' Police Act 2005 is only applicable as legal basis for detention, if the expulsion order of the applicant is enforceable, even though not legally binding. But this does not apply in the recent cases, since the appeal against the expulsion order had suspensory effect. According to article 36 paragraph (4) Asylum Act 2005 an expulsion order is enforceable, if the suspensory effect is dismissed.

The authority – among mere advice, that the detention primarily was lawfully imposed – assumed a mistaken legal opinion, that in any case the maintaining detention is admissible for the specified period pursuant to article 80 paragraph (5) Asylum Act 2005. Thereby the right to liberty and security (personal freedom) has been violated and the administrative decisions were to be abolished.

Opinion

The authority has at any rate to interpret the provisions of the Aliens' Police Act 2005 in respect of detention pending deportation in a constitutionally compliant manner and therefore to balance the public interest of securing the proceedings on the one hand and the personal liberty of the asylum seeker on the other hand.

In the light of that the Court clarifies that article 80 paragraph (5) Aliens' Police Act 2005 allows the detention's maintenance provided that a reason for it subsists. Article 80 paragraph (5) Aliens' Police Act 2005 does not make up an

1 This is the general citation and abbreviation for explanations of government bills. Government bills are legislation drafts which are presented by the government.

independent provision laying down an additional reason for detention pending deportation. Instead it refers only to the duration of detention whilst its grounds continue to be assessed exclusively under article 76 paragraph (2) Aliens' Police Act 2005.

In the present cases, however, the reasons for detention pending deportation pursuant to article 76 paragraph (2) Aliens' Police Act 2005 were not met as from the lodging of the appeal against the negative asylum decision.

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