

■ CONSTITUTIONAL DEVELOPMENTS IN AUSTRIA

Valerie Leskovar

Expulsion orders and suspensory effect

Austrian Constitutional Court
Judgement of 27th June 2007 (B 1655, 1656/06)
and
Judgement of 1st October 2007 (G 179, 180/07)

In the judgement of 27th June 2007 the Constitutional Court made a decision to review the word orders "and such reasons are not long-lasting" and "simultaneously with the issue of the expulsion order" in article 10 paragraph (3) 2005 Asylum Act ex officio.

The judgement of 1st October is the adjudication of the law review process, in which the Constitutional Court decided to abolish the word order "simultaneously with the issue of the expulsion order" in article 10 paragraph (3) 2005 Asylum Act.

The Circumstances of the case

The first applicant, a Russian citizen who belongs to the ethnic group of Chechnya, filed an application for international protection on 22nd February 2006 after illegal entry to Austria together with his underage son, the second applicant, at the Federal Asylum Agency (*Bundesasylamt*). Together with the application a short psychotherapeutic report of the Association to support survivors of torture and war Hemayat was enclosed with the diagnosis that the first applicant suffers from a "serious post-traumatic stress disorder together with a serious continuous change in personality after extreme stress" and is without family members not viable.

By administrative decision in first instance of 29th June 2006 the Federal Asylum Agency rejected the applications pursuant article 5 paragraph (1) 2005 Asylum Act and expressed that Poland was responsible to consider the application for international protection according to article 16 paragraph (1) litera c Council Regulation (EC) Nr. 343/2003 (Dublin II Regulation); further the applicants were expelled pursuant article 10 paragraph (1) subparagraph 1 2005 Asylum Act from Austria to Poland, "as a result" the rejection or deportation to Poland according to article 10 paragraph (4) 2005 Asylum Act was admissible. The execution of deportation was suspended according to article 10 paragraph (3) 2005 Asylum Act until 2nd October 2006.

From a medical examination by a general practitioner, which took place before 29th June 2006, has resulted that a transfer to Poland opposes serious mental disorder of the first applicant, because a transfer would cause unreasonable deterioration in his state of health. The opinion announced improvement of the situation with appropriate therapy and recommended a new examination for ability to a transfer to Poland after a few months.

The appeal against the administrative decision in first instance was dismissed according to article 5 and 10 2005 Asylum Act. The independent Federal Asylum Review Board (*Unabhängiger Bundesasylsenat*) negated the requirements, which would led to responsibility of Austria to examine the application for asylum.

Against the decision of the independent Federal Asylum Review Board the constitutional complaint of the applicants was made, because the basic right of equal treatment and article 3 and 8 ECHR are violated.

In the administrative file (*Verwaltungsakt*) a medical statement of 26th September 2006 assumed that still serious mental disorder of the first applicant opposes a transfer to Poland and that improvement is not to be expected. Further in the administrative file a letter of the Federal Asylum Agency of 27th September 2006 was included in which the responsibility of Austria to examine the application for Asylum is avowed ("Asylum procedure will be carried out in our own responsibility"). The independent Federal Asylum Review Board informed the Constitutional Court that neither competence nor responsibility is given if the Federal Asylum Agency decides to examine the applications for asylum after valid closing of the asylum proceeding.

Relevant Austrian Law

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

Article 10

(1) A ruling pursuant to the present federal law shall be issued in conjunction with an expulsion order if:

1. an application for international protection is rejected;
2. an application for international protection is dismissed in regard to the granting of both asylum status and subsidiary protection status;
3. an alien's asylum status is withdrawn and the subsidiary protection status is not conferred or
4. an alien's subsidiary protection status is withdrawn.

(2) Expulsion as referred to in paragraph (1) above shall be inadmissible if:

1. in individual cases an alien is holding a right of residence that is not based on the present federal law or
2. expulsion would constitute a violation of article 8 of the European Convention on Human Rights.

(3) If execution of an expulsion order would constitute a violation of article 3 of the European Convention on Human Rights for reasons relating to the person

of the asylum-seeker *and such reasons are not long-lasting*, a pronouncement shall be made *simultaneously with the issue of the expulsion order* that the execution thereof shall be postponed for the necessary period.

(4) ...

Dublin II Council Regulation (EC) No 343/2003 of 18 February 2003

Article 3

1. Member States shall examine the application of any thirdcountry national who applies at the border or in their territory to any one of them for asylum. The application shall be examined by a single Member State, which shall be the one which the criteria set out in Chapter III indicate is responsible.

2. By way of derogation from paragraph 1, each Member State may examine an application for asylum lodged with it by a third-country national, even if such examination is not its responsibility under the criteria laid down in this Regulation. In such an event, that Member State shall become the Member State responsible within the meaning of this Regulation and shall assume the obligations associated with that responsibility. Where appropriate, it shall inform the Member State previously responsible, the Member State conducting a procedure for determining the Member State responsible or the Member State which has been requested to take charge of or take back the applicant.

3. Any Member State shall retain the right, pursuant to its national laws, to send an asylum-seeker to a third country, in compliance with the provisions of the Geneva Convention.

4. The asylum-seeker shall be informed in writing in a language that he or she may reasonably be expected to understand regarding the application of this Regulation, its time limits and its effects.

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 3 paragraph (2) Dublin II Council Regulation provides that each Member State may examine an application for asylum whereby this State becomes responsible, even if such examination is not its responsibility (*Selbsteintrittsrecht*). The Constitutional Court assumed interim that pursuant to article 10 paragraph (3) 2005 Asylum Act expulsion orders (pursuant article 10 paragraph (1) 2005 Asylum Act) may be postponed simultaneously with the expulsion order, if the expulsion order would constitute a violation of article 3 of the European Convention on Human Rights and such reasons are not long-lasting. According to the jurisdiction of the Constitutional Court (eg. VfSlg. 17.586/2005) also merely temporarily deportation barriers must be considered.

Out of article 10 paragraph (3) 2005 Asylum Act arises as well that in case of a long-lasting impediment no postponed execution can be considered. In such cases the expulsion order itself is improper and in these proceedings the right to examine the application for asylum is to be administrated pursuant to article 3 paragraph (2) Dublin II Council Regulation.

If the asylum agency (*Asylbehörde*) presumes – as in the present case – that no long-lasting impediment exists and suspends the expulsion execution for the necessary period, the deportation is admissible at the end of the period. However there is no regulation what happens if the duration of the impediment is disproved: An extension of time seems to be excluded by law, as the postponement of the execution shall be made "simultaneously with the expulsion order". Further there is no regulation if the impediment (eg. a sudden contracted disease) incidences between the pronouncement and the execution of the expulsion order. From this it follows that if an expulsion order is pronounced and legally binding, no further examination according to the state of health while a therapy can be done and an expulsion consistent with the European Convention on Human Rights cannot be assured. Especially in cases of postponement of expulsions, because of therapy measures where healing is only estimated not guaranteed, an execution of the expulsion order is disturbing.

The Constitutional Court had the compunction that a regulation which avoids only temporary a violation of article 3 ECHR and no extension is intended, that a violation of article 3 ECHR cannot be asserted past expiry. Same reservations exist in cases when an impediment incidences after pronouncement of the expulsion order.

The Court considered interim that the word order in article 10 paragraph (3) 2005 Asylum Act which shall be reviewed by the Constitutional Court violates furthermore the commandment of effective legal protection, because after expiration of the time limit of the postponement of the execution there are no adequate legal remedies.

In the law review process the government suggested that the expulsion order may not be executed if the applicant applies for a postponement of the deportation (*Abschiebungsaufschub*) pursuant to article 46 paragraph (3) 2005 Aliens' Police Act or if the applicant applies for reopening of the case (*Wiederaufnahme*).

The Constitutional Court assumed that both suggestions cannot avoid a violation of article 3 ECHR. On the one hand while the application of the postponement of the deportation is not passed the expulsion order can be executed. On the other hand the application for reopening the case has no suspensory effect, so that until the reopening of the case is approved the execution of the deportation is admissible. Therefore the expulsion order can be executed in the period of time until the decision of the reopening of the case.

However the government and the Constitutional Court estimated if a long-lasting impediment exists an expulsion is inadmissible, because the applicant will be granted subsidiary protection pursuant to article 8 2005 Asylum Act. In such cases the impediment poses a violation of article 3 ECHR, which is not temporary. The impediment is at any rate long-lasting if it is conceivable at the time of decision that the impediment will not cease to exist within six months (article 19 and 20 Dublin II Council Regulation). If another Member state is responsible to examine the application for asylum the asylum procedure will be admitted

therefore, after the right to examine the application oneself (*Selbsteintrittsrecht*) was administrated.

Taking this as a basis the word order "and such reasons are not long-lasting" is not to be abolished to establish a condition according to the constitution. This word order distinguishes between deportation impediments depending on whether the impediment is long-lasting or not, whereby the expulsion order is not to be enacted or is postponed.

In the appeal procedure as it is expected the administrative decision of the independent Federal Asylum Review Board will be abolished by reason that the administrative decision is based upon an unconstitutional law (article 10 2005 Asylum Act).

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