EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

DECISION

Application no. 32830/15
A.M.
against Austria

The European Court of Human Rights (Fifth Section), sitting on 3 October 2017 as a Committee composed of:

Erik Møse, *President,*
Yonko Grozev,
Gabriele Kucsko-Stadlmayer, *judges,*
and Anne-Marie Dougin, *Acting Deputy Section Registrar,*

Having regard to the above application lodged on 3 July 2015,

Having regard to the decision to grant the applicant anonymity,

Having regard to the observations submitted by the respondent Government and the comments in reply submitted by the applicant,

Having deliberated, decides as follows:

FACTS AND PROCEDURE

1. The applicant, Mr A.M., is a Somali national who was born in 1990 and lives in Vienna. The President granted the applicant's request for his identity not to be disclosed to the public (Rule 47 § 4). He was represented before the Court by Mr R. Frühwirth, a lawyer practising in Graz.

2. The Austrian Government ("the Government") were represented by their Agent, Ambassador H. Tichy, Head of the International Law Department at the Federal Ministry for Europe, Integration and Foreign Affairs.

The circumstances of the case

1. Events up to the communication of the case

3. The applicant is an asylum seeker who was granted subsidiary protection status in Italy in December 2008.

4. He subsequently travelled to the Netherlands, where he lodged another application for international protection in February 2009, which was rejected under Council Regulation (EC) No. 343/2003 ("the Dublin II Regulation"), in April 2010.

5. The applicant remained in the Netherlands, where he met his future wife, who lived in Austria and had been granted asylum there in 2009. On 15 January 2013 they were married in a religious ceremony in the Netherlands but continued to live separately (the applicant in the Netherlands and his wife in Austria).

6. On 13 July 2013 the applicant entered Austria to join his wife and applied for international protection. During the proceedings, he informed the competent authorities of his wife's pregnancy and their civil wedding, which had taken place in Austria on 16 October 2013.

7. On 12 December 2013 the Federal Asylum Office (*Bundesasylamt*) rejected the application, held that the Netherlands were responsible for its examination under the Dublin II Regulation and decided that the applicant should be expelled to the Netherlands.

8. On 14 February 2014 the Federal Administrative Court (*Bundesverwaltungsgericht*) dismissed the applicant's appeal against this decision. It held that Article 8 of the Convention did not require an examination of his application on the merits under Article 3 § 2 of the Dublin II Regulation.

9. The applicant subsequently lodged a complaint with the Constitutional Court (*Verfassungsgerichtshof*). He complained under Article 8 about the separation from his wife and child, and under Article 14 taken in conjunction with Article 8 of discrimination based on his status as a "post-flight spouse" in respect of family reunion, submitting that Austria was obliged to examine his application under the Dublin II Regulation.

10. At the end of February 2014 the applicant was transferred to the Netherlands.

11. On 6 May 2014 the applicant's son was born. He was granted asylum in Austria as a family member on 11 June 2014.

12. On 6 June 2014 the Constitutional Court declined to examine the applicant's complaint for lack of constitutional issues. As requested by the applicant, it referred the complaint to the Administrative Court (*Verwaltungsgerichtshof*).

13. On 26 November 2014 the Administrative Court rejected the complaint. That decision was served on the applicant's counsel on 9 January 2015.

14. On 6 November 2016 the application was communicated to the Government and they were invited to submit written observations on the admissibility and merits of the case.

2. Subsequent developments

15. On 28 April 2017 the Government submitted their observations. They informed the Court that the applicant had returned to Austria in April 2016 and that, on 7 April 2016, he had lodged another application for international protection, which had been admitted by the Federal Office for Migration and Asylum (*Bundesamt für Fremdenwesen und Asyl*), which had replaced the Federal Asylum Office as of 1 January 2014. They stated that Austria had thus declared itself competent to examine the applicant's new application on the merits, and that the proceedings were pending before the first instance authority.

16. On 14 June 2017 the applicant submitted in reply that his residence status resulting from the admission of his asylum proceedings in Austria was only of a temporary nature, whereas the aim of his application was to obtain international protection, the status held by his wife and child. He submitted that there was still a risk of a violation of his rights under Article 8, taken both alone and in conjunction with Article 14.

COMPLAINTS

17. The applicant complained under Article 8 of the Convention that permanent separation from his wife and child violated his right to family life.

Under Article 14 of the Convention taken in conjunction with Article 8 he complained that he suffered discrimination on the ground of his status as a post-flight spouse because pre-flight spouses of refugees were treated more favourably than post-flight spouses with regard to family reunion under the Asylum Act 2005.

THE LAW

18. Article 37 § 1 of the Convention provides:

> "1. The Court may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that
>
> ...
>
> (b) the matter has been resolved;
>
> ...

However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the Protocols thereto so requires."

19. The Court notes that the applicant's complaints under Article 8 of the Convention, taken alone and in conjunction with Article 14, are based on the consequences of the refusal of the Austrian authorities to examine the merits of his application for international protection under the Dublin II Regulation, and his expulsion to the Netherlands. The Court observes that the applicant has now returned to Austria and lodged a new application for international protection, which was admitted by the Federal Office for Migration and Asylum and is pending before the domestic authorities. As the Austrian authorities have assumed their competence to conduct the asylum proceedings, the Court is satisfied that the applicant will not be returned to the Netherlands or any other country under the Dublin regime, and that there will be a full examination on the merits of his application for international protection by the Austrian authorities, which may result in the applicant being granted the status he seeks.

20. Noting that the applicant will have the opportunity to lodge a new application with the Court (including the possibility of requesting an interim measure under Rule 39 of the Rules of Court) should that need arise, the Court considers that the matter has been resolved within the meaning of Article 37 § 1 (b) of the Convention and that respect for human rights as defined in the Convention and its Protocols does not require it to continue the examination of the application under Article 37 § 1 *in fine*.

Accordingly, the case should be struck out of the list.

For these reasons, the Court, unanimously,

Decides to strike the application out of its list of cases.

Done in English and notified in writing on 26 October 2017.

Anne-Marie Dougin	Erik Møse
Acting Deputy Registrar	President