

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

FIRST SECTION

DECISION

Application no. 73874/11
Mohammed ABUBEKER
against Austria and Italy

The European Court of Human Rights (First Section), sitting on 18 June 2013 as a Chamber composed of:

Isabelle Berro-Lefèvre, President,
Elisabeth Steiner,
Guido Raimondi,
Khanlar Hajiyev,
Mirjana Lazarova Trajkovska,
Julia Laffranque,
Linos-Alexandre Sicilianos, judges,

and Søren Nielsen, *Section Registrar,*

Having regard to the above application lodged on 30 November 2011,

Having regard to the interim measure indicated to Austria under Rule 39 of the Rules of Court

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

Having deliberated, decides as follows:

## THE FACTS

1. The applicant, Mr Mohammed Abubeker, stateless, was born in 1967 and resides at present in Traiskirchen. He is represented by Mrs N. Lorenz, a lawyer practising in Vienna.

2. The Austrian Government were represented by their Agent, Ambassador H. Tichy, Head of the International Law Department at the

Federal Ministry of European and International Affairs. The Italian Government were represented by their Agent, Ms. E. Spatafora, and their co-agent, Ms. P. Accardo.

## A. The circumstances of the case

3. The facts of the case, as submitted by the parties, may be summarised as follows.

### *1. Asylum proceedings and stay in Italy*

4. The applicant entered Italy on 3 August 2007, where his fingerprints were taken firstly at the *Questura* in Crotone. It was noted that the applicant was born in Eritrea in 1967 and that he had entered the European Union illegally. He was then transferred to the "*S. Anna*" Reception Centre at Isola di Capo Rizzuto, where his fingerprints were taken again on 29 August 2007 and where he was registered as an asylum seeker.

5. On 14 September 2007 the Territorial Commission for the Recognition of International Protection decided that the applicant was not entitled to the status of a recognised refugee, but that he met the requirements to obtain protection on humanitarian grounds. Thereupon, the applicant was granted leave to remain on humanitarian grounds and a travel document, both valid until 13 September 2008. According to the records of the authorities, the applicant left the reception centre of his own volition after he had collected his papers.

6. It seems that the applicant then left for Germany. On 8 February 2008 Italy was requested by Germany to take the applicant back under Article 16 § 1 c of the Council Regulation (EC) No 343/2003 ("the Dublin II Regulation", hereinafter "the Dublin Regulation"). Italy accepted jurisdiction, and on 22 April 2008 the applicant was transferred to Italy.

7. From 22 May 2008 until 17 May 2009, the applicant was an inmate in a facility of the "*Sistema di Protezione per Richiedenti Asilo e Rifugiati*" (Protection System for Asylum Seekers and Refugees, hereinafter "SPRAR"), which he left voluntarily. According to the files, the applicant was staying on 1 August 2008 at a residence belonging to the Jesuit Refugee Service in Rome.

8. On 7 July 2009 the *Questura* in Rome granted the applicant leave to remain on the basis of subsidiary protection, which was valid until 7 July 2012.

### *2. Asylum proceedings in Austria*

9. In November 2010 the applicant came to Austria and was taken into detention with a view to expulsion. On 19 February 2011 he lodged an asylum claim in Austria. The applicant stated that he did not want to return

to Italy, and that he would have been forced to sleep in the streets there and would not have had any access to financial subsistence, housing or food. He had had leave to remain in Italy on humanitarian grounds, but had returned his ID card to the authorities because he wanted full asylum status. He explained that he was suffering from diabetes, asthma and a dust mite allergy, and had psychological problems.

10. On 9 April 2011 the Federal Asylum Office (*Bundesasylamt*) rejected the applicant's asylum request and declared that Italy had jurisdiction regarding the asylum proceedings pursuant to Article 16 § 2 of the Dublin Regulation. It also ordered that the applicant be transferred to Italy. The Federal Asylum Office dismissed the applicant's claims that he had severe medical and psychological problems. Referring to country reports on Italy it concluded that the applicant would have access to financial subsistence in Italy and that being sent there would not breach Article 3 of the Convention.

11. The applicant lodged an appeal against that decision. On 2 May 2011 the Asylum Court (*Asylgerichtshof*) awarded suspensive effect to the applicant's appeal.

12. On 12 May 2011 the Asylum Court quashed the decision of the Federal Asylum Office and ordered it to complement the country information on Italy in fresh proceedings, to make enquiries about what the applicant's residential status in Italy would be if he were returned there, and to establish further facts about the applicant's health.

13. Thereupon, on 20 June 2011, the Federal Asylum Office contacted the Dublin Unit in Italy and asked for information on what the applicant's residence status would be in Italy and if he would have access to the medication Metamorphin in Italy. It repeated and detailed its requests for information on 6 July, on 21 July and on 1 August 2011. The Dublin Unit Italy responded to the Austrian authorities that asylum seekers and persons with subsidiary protection had access to subsistence and health support.

14. On 20 October 2011 the Federal Asylum Office again rejected the applicant's asylum request pursuant to the Dublin Regulation and ordered the applicant's removal to Italy. Referring to country reports on Italy from 2009, 2010 and 2011, it found that the "SPRAR" offered lodgings and other support for approximately 3,000 asylum seekers for the duration of six months. There were also 2,000 places in centres in which asylum seekers were supposed to stay for a maximum of six months, although there were exceptions for vulnerable persons. Outside those structures, private initiatives and municipalities organised sleeping places and accommodation for asylum seekers. The reports also stated that asylum seekers had access to subsistence and medical support, at least at the preliminary examination stage. However, only after registration of an asylum request would an asylum seeker have a right to accommodation and subsistence. A "Dublin returner" was requested to present himself before the *Questura* for his or her

legal status to be identified. Asylum seekers had to initially register with a health unit, after which they had access to medical treatment in public hospitals. However, asylum seekers without an address had difficulty in registering for medical treatment and subsistence. The Federal Asylum Office also referred to the fact that the applicant had undergone a psychiatric examination in May 2011 that showed an "adjustment disorder" (*Anpassungsstörung*). Therapeutic consultations had been recommended. However, the applicant had not taken up the psychiatric treatment offered. It could not be shown that the applicant's mental health would worsen. In any event, the applicant would have access to subsistence if returned.

15. The applicant appealed against that decision. On 14 November 2011 the Asylum Court again awarded suspensive effect to the applicant's appeal.

16. On 23 November 2011 the Federal Asylum Office sent an email to the association *Arciconfraternita San Trifone* informing them of the rejection of the applicant's asylum request in the first instance and of the pending guardianship proceedings (see below, paragraphs 22-25) in view of a possible removal of the applicant to Italy, in which case the association might wish to put in place "appropriate safeguards". It also informed the Dublin Unit Italy of the pending guardianship proceedings.

17. On 28 November 2011 the Asylum Court dismissed the applicant's appeal as unfounded. It referred to the Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection, and of the content of the protection granted, to the Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, and to the Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, which were all also applicable in respect of Italy, and concluded that Italy had an unobjectionable asylum practice and offered access to accommodation, subsistence and medical treatment for asylum seekers.

18. With regard to the applicant's representative's argument, claiming that the deadline for Italy to resume jurisdiction for the applicant's asylum proceedings had expired, it found that with the decision of suspensive effect taken on 14 November 2011 the deadline had not expired, and that Italy had jurisdiction regarding the applicant's asylum claim.

19. The Asylum Court further stated that, in contrast to the situation in Greece, there was no recommendation from the United Nations High Commissioner for Refugees ( "the UNHCR") to refrain from removals to Italy, and that the overall reports did not show a comparable situation for asylum seekers with the one in Greece. With regard to the applicant's physical illnesses, it stated that he had access to the Italian health system. It stated that it had ordered the Federal Asylum Office to contact the Italian

authorities in the event of a transfer, to ensure that the applicant was welcomed in Italy and would receive the necessary medical help.

20. With regard to the critical report of the association Pro Asyl [a German NGO] from 2011 about the situation of refugees in Italy, it alleged that the authors of that report worked in the field of counselling of refugees and had an agenda which favoured a critical approach to Italy as a host state. Furthermore, the situation of boat refugees in the south of Italy was not comparable to that of Dublin-returners. With regard to the applicant's mental health, the Asylum Court stated again that he had access to treatment in Italy, referred to the Court's case-law in that matter, and concluded that removal would not be in breach of Article 3.

21. The Constitutional Court (Verfassungsgerichtshof) dismissed the applicant's request for legal aid on 2 March 2012, and refused to deal with his complaint due to lack of prospects of success.

*3. The guardianship proceedings in Austria*

22. On 25 October 2011 the applicant's representative applied to the Baden District Court (*Bezirksgericht Baden*) for guardianship proceedings to be initiated in respect of the applicant. He claimed that he had become aware of a severe aggravation of the applicant's mental health status during legal counselling, and that there was a risk that the applicant would not be able to pursue his asylum proceedings in his own best interests.

23. On 1 December 2011, and after an initial hearing on 21 November 2011, the Baden District Court appointed a provisional guardian for the applicant for the course of the guardianship proceedings and for representation in proceedings before authorities and courts, with particular regard to asylum proceedings. On the same day, the Baden District Court commissioned a psychiatric report on the applicant, to be submitted to the court within eight weeks.

24. On 22 December 2011 the applicant's representative supplied a power of attorney in which the applicant's guardian entrusted him to represent the applicant in the proceedings before the European Court of Human Rights.

25. On 20 March 2012 the Baden District Court appointed a guardian for the applicant's representation before authorities and courts. It based its decision on an expert opinion that diagnosed the applicant with a severe psychological impairment whose clinical status display was comparable to florid paranoid schizophrenia. The applicant suffered from a bizarre delusion that absorbed his feeling and thinking. He was very irritable and completely occupied by a delusion that he was being pursued by Satanists suffering from Aids. At least in the past the applicant had linked his psychotic status with hallucinations of being tortured and manipulated by spirits. The applicant was further the victim of hallucinations of a lioness as Satan.

*4. The reopening of the asylum proceedings in Austria*

26. On 14 May 2012 the Asylum Court, at the applicant's request, ordered the Federal Asylum Office to reopen the applicant's proceedings. It referred at length to the psychiatric expert opinion obtained in the guardianship proceedings, which had further established that the applicant's psychotic symptoms had started in summer or autumn 2011 and that the applicant claimed to have been suffering from psychological problems since 1998. The expert had also stated that as regards the applicant's fitness to be questioned his answers would be coloured by his psychotic status and that thus, he was not fit to be questioned, especially in the context of guardianship proceedings, asylum proceedings and his personal situation. Overall, the guardianship proceedings had shown that the applicant was not able to take care of his own affairs without the risk of suffering a disadvantage.

27. The Asylum Court concluded that in the former proceedings it had wrongly acted on the assumption that the applicant was legally capable (*prozeßfähig*) to follow the proceedings adequately. The Asylum Court, again in the former proceedings, would have needed to either appoint a guardian for the applicant or to stay the proceedings until the guardianship proceedings before the District Court had been concluded. It was not doubted that the applicant's psychological disorder was already manifest at the time of the Asylum Court's decision of 28 November 2011, which was why the proceedings had had to be reopened. It stated further that because of the necessary further investigations and further interviews, the Asylum Court itself could not rule on the asylum request, possible subsidiary protection and a possible expulsion order. Therefore, the proceedings had to be continued by the Federal Asylum Office.

28. The reopened asylum proceedings in Austria are still pending.

*5. Rule 39 of the Rules of the Court*

29. On 9 December 2011 the Court applied the interim measure under Rule 39 and requested the Austrian Government to stay the applicant's expulsion to Italy until further notice.

## B. Relevant domestic, European and Italian law and practice

30. The relevant European and Italian law, instruments, principles and practice have only recently been exhaustively summarised, in *Mohammed Hussein v. the Netherlands and Italy* (dec.), no. 27725/10, §§ 25-28 and 33-50, 2 April 2013. In the following, only information that is particularly relevant for the present case will be repeated.

*1. Council Regulation (EC) No 343/2003 (the Dublin Regulation)*

31. Under the Regulation, the member States must determine, on the basis of a hierarchy of objective criteria (Articles 5 to 14), which member State bears responsibility for examining an asylum application lodged on their territory. The aim is to avoid multiple applications and to guarantee that each asylum seeker's case is dealt with by a single member State.

32. Where it is established that an asylum seeker has irregularly crossed the border into a member State, having come from a third country, the member State thus entered is responsible for examining the application for asylum (Article 10 § 1). This responsibility ceases twelve months after the date on which the irregular border crossing took place.

33. Where the criteria in the regulation indicate that another member State is responsible, that State is requested to take charge of the asylum seeker and examine the application for asylum (Article 17).

34. By way of derogation from the general rule, each member State may examine an application for asylum lodged with it by a third-country national, even if such an examination is not its responsibility under the criteria laid down in the Regulation (Article 3 § 2). This is called the "sovereignty" clause. In such cases the State concerned becomes the member State responsible and assumes the obligations associated with that responsibility.

*2. Austrian Asylum Act*

35. Section 5 of the Asylum Act 2005 (Asylgesetz) provides that an asylum application shall be rejected as inadmissible if, under treaty provisions or pursuant to the Dublin Regulation, another State has jurisdiction to examine the application for asylum. When rendering a decision rejecting an application, the authority shall specify which State has jurisdiction in the matter.

36. Section 12 establishes de facto protection against deportation (faktischer Abschiebeschutz) for aliens who have lodged an application for asylum. However, section 12a provides that a person whose asylum application has been rejected pursuant to lack of jurisdiction under the Dublin Regulation (section 5 of the Asylum Act) is not entitled to such de-facto protection against deportation in the event that he or she lodges a second asylum application.

*3. Asylum proceedings in Italy*

37. Again, reference is taken to the extensive description of the Italian asylum procedure and domestic law in *Mohammed Hussein,* cited above, §§ 33-41.

38. In particular it is noted (see ibid., § 36) that the Territorial Commission for the Recognition of International Protection can:

- grant asylum by recognising the petitioner as a refugee within the meaning of the 1951 Geneva Convention relating to the Status of Refugees;
- not recognise the petitioner as a refugee but grant subsidiary protection under the terms of Article 15c of the Council Directive 2004/83/EC of 29 April 2004, on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted ("the Qualification Directive") as implemented by the Legislative Decree (*decreto legislativo*) no. 251/2007;
- not grant asylum or subsidiary protection but grant leave to remain for compelling humanitarian reasons under the terms of Law Decree (*decreto legge*) nos. 286/1998 and 25/2008; or
- not grant the petitioner any form of protection.

39. A person granted subsidiary protection will be given leave to remain with a validity of three years, which can be renewed by the Territorial Commission that granted it. This leave can further be converted into a residence permit for the purposes of work in Italy, provided this is requested before the expiry of the validity of the leave to remain, and provided the person concerned holds an identity document. Leave to remain granted for subsidiary protection entitles the person concerned, *inter alia,* to an aliens' travel document, to work, to family reunion and to benefit from the general schemes for social assistance, health care, social housing and education under Italian domestic law.

40. A person granted leave to remain for compelling humanitarian reasons will be provided with a residence permit with a validity of one year which can be converted into a residence permit for the purposes of work in Italy, provided the person concerned holds a passport. Leave to remain granted on humanitarian grounds entitles the person concerned to work, to health care and, if he or she has no passport, to an aliens' travel document (see ibid., §§ 38-39).

*4. Reception conditions in Italy*

41. The reception scheme and the reception conditions in Italy are summarised again in *Mohammed Hussein,* cited above, §§ 42-50.

## COMPLAINTS

42. The applicant complained of ill-treatment under Article 3 of the Convention in respect of Italy in that he had not had access to

accommodation, to medical treatment or to subsistence in Italy whilst he was there.

43. The applicant also complained under Article 3 of the Convention in respect of Austria that a return to Italy under the Dublin Convention would subject him to a real risk of ill-treatment within the meaning of that provision in that he would not have access to accommodation, to medical treatment and to subsistence in Italy - circumstances that were aggravated by the applicant's precarious physiological and psychological health status.

# THE LAW

44. The applicant, who complained that he suffered ill-treatment in Italy and of a real risk of ill-treatment upon a return to Italy under the Dublin Regulation, relied on Article 3 of the Convention, which reads as follows:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

45. The Court will at first summarise the general case-law principles applying to the complaints at issue and subsequently firstly examine the complaint directed against Italy and then that directed against Austria.

## A. General Principles

46. According to the Court's established case-law, Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations, including the Convention, to control the entry, residence and expulsion of aliens (see, among many other authorities, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, § 67, Series A no. 94, and *Boujlifa v. France*, 21 October 1997, § 42, *Reports of Judgments and Decisions* 1997-VI). The Court also notes that the right to political asylum is not contained in either the Convention or its Protocols (see *Vilvarajah and Others v. the United Kingdom*, 30 October 1991, § 102, Series A no. 215, and *Ahmed v. Austria*, 17 December 1996, § 38, *Reports* 1996-VI).

47. However, deportation, extradition or any other measure to remove an alien may give rise to an issue under Article 3, and hence engage the responsibility of the Contracting State under the Convention, where substantial grounds have been shown for believing that the person in question, if removed, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. In such circumstances, Article 3 implies an obligation not to remove the individual to that country (see *Soering v. the United Kingdom*, 7 July 1989, §§ 90-91, Series A no. 161; *Vilvarajah and Others*, cited above, § 103; *Ahmed*, cited above,

§ 39; *H.L.R. v. France*, 29 April 1997, § 34, *Reports* 1997-III; *Jabari v. Turkey*, no. 40035/98, § 38, ECHR 2000-VIII; *Salah Sheekh v. the Netherlands*, no. 1948/04, § 135, 11 January 2007; and *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, § 114, ECHR 2012).

48. The assessment of whether there are substantial grounds for believing that the applicant faces a real risk inevitably requires that the Court assess the conditions in the receiving country against the standards of Article 3 of the Convention (see *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, § 67, ECHR 2005-I). These standards imply that the ill-treatment the applicant alleges he will face if returned must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this is relative, depending on all the circumstances of the case (see *Hilal v. the United Kingdom*, no. 45276/99, § 60, ECHR 2001-II). The Court reiterates that it is in principle for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if the measure complained of were to be implemented, he or she would be exposed to a real risk of being subjected to treatment contrary to Article 3 (see *N. v. Finland*, no. 38885/02, § 167, 26 July 2005).

49. In order to determine whether there is a real risk of ill-treatment in the present case, the Court must examine the foreseeable consequences of sending the applicant to Italy, bearing in mind the general situation there and his personal circumstances (see *Vilvarajah and Others*, cited above, § 108 *in fine*). It will do so by assessing the issue in the light of all material placed before it, or, if necessary, obtained *proprio motu* (see *H.L.R. v. France*, cited above, § 37, and *Hirsi Jamaa and Others,* cited above, § 116).

50. The Court further reiterates that the mere fact of return to a country where one's economic position will be worse than in the expelling Contracting State is not sufficient to meet the threshold of ill-treatment proscribed by Article 3 (see *Miah v. the United Kingdom* (dec.), no. 53080/07, § 14, 27 April 2010, and, *mutatis mutandis*, *N. v. the United Kingdom* [GC], no. 26565/05, § 42, ECHR 2008), that Article 3 cannot be interpreted as obliging the High Contracting Parties to provide everyone within their jurisdiction with a home, and that this provision does not entail any general obligation to give refugees financial assistance to enable them to maintain a certain standard of living (see *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, § 249, ECHR 2011).

51. Aliens who are subject to removal cannot in principle claim any entitlement to remain in the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance and services provided by the removing State. In the absence of exceptionally compelling humanitarian grounds against removal, the fact that the applicant's material and social living conditions would be significantly reduced if he or she were to be removed from the Contracting State is not sufficient in itself to give rise to a breach of Article 3 (see, *mutatis*

*mutandis*, *N. v. the United Kingdom*, cited above, § 42; *Sufi and Elmi v. the United Kingdom*, nos. 8319/07 and 11449/07, § 281-292, 28 June 2011; and *Mohammed Hussein,* cited above, § 71).

52. If the applicant has not yet been removed when the Court examines the case, the relevant time will be that of the proceedings before the Court (see *Saadi v. Italy* [GC], no. 37201/06, § 133, ECHR 2008, and *A.L. v. Austria*, no. 7788/11, § 58, 10 May 2012). A full assessment is called for, as the situation in a country of destination may change over the course of time (see *Salah Sheekh*, cited above, § 136).

## B. The applicant's complaint against Italy

### *1. The parties' submissions*

53. The Italian Government emphasised that the applicant had been granted leave to remain under the head of subsidiary protection, which allowed him to stay in Italy for three years. The leave to remain could be renewed on expiry, so long as the factors that had previously supported the original issuance of the permit still existed. The applicant's leave to remain thus awarded allowed him access to work and education and could have been converted to a work permit if the requirements had been met.

54. The Italian Government further stated that in view of the information so far received by the Austrian authorities, the applicant would, in the event of a transfer to Italy, be considered a vulnerable person, and appropriate housing would be arranged. They emphasised also that the Austrian authorities had been requested, in the event he was removed to Italy, to provide full and up-to-date medical records, including information on the medical treatment the applicant had been receiving in Austria.

55. Firstly, the applicant contested the Italian Government's observations, in that the Italian Government had given contradictory information on where the applicant had been housed in August 2008 and what kind of residence status he had been awarded. Furthermore, the Italian authorities had not been aware of where the applicant's was living between May 2009 and November 2010, before he came to Austria.

56. The applicant also claimed that the status of "leave to remain on humanitarian grounds" would not have allowed him access to social support and medical assistance. He asserted that he had been homeless, that he had had to sleep in the streets and did not have money to buy food and other essentials. The lack of housing and access to medical treatment amounted to treatment contrary to Article 3 of the Convention.

57. As regards the Italian Government's observations that the applicant had left the reception centres both times of his own volition, the applicant stated that he was suffering from florid paranoid schizophrenia that might already have been apparent during his stay in Italy, and that it was therefore

possible that he had suffered from psychotic episodes of varying duration. He therefore could not have effectively waived Government assistance. Finally, the housing provided for the applicant was in any event inadequate.

*2. The Court's assessment*

58. The Court notes that the applicant, upon arrival in Italy in the summer of 2007, was taken to a reception centre and granted leave to remain on humanitarian grounds, valid for one year. When he received his papers, the applicant left the reception centre of his own volition. After his return from Germany, the applicant was again admitted to a reception facility in spring 2008. In July 2009 the applicant received leave to remain on the basis of subsidiary protection, valid until July 2012. The permit issued on humanitarian grounds allowed the applicant to work in Italy and to have access to health care. The permit issued on subsidiary protection grounds entitled the applicant to an aliens' travel document, to work, to family reunion, to benefit from the general schemes for social assistance, health care, social housing and education under Italian domestic law (see paragraphs 39 and 40 above).

59. The Court firstly notes that the Italian Government has provided copies of the residence permits issued in relation to the applicant, which is why the Court has no reason to doubt the version of events set out above. As regards the applicant's contention that the Italian Government had given contradictory information on where the applicant was living in August 2008, the Court notes that, all the while the documents submitted by the Italian Government indeed seem to imply that the applicant had been housed in two locations at the same time, there is obviously therefore no indication that the applicant did not have access to housing at the relevant time. As regards the applicant's observation that he did not have access to social support and medical assistance under his humanitarian residence permit, the Court notes that the relevant information on the Italian legal system shows otherwise: leave to remain on humanitarian grounds entitled the applicant to work and to have access to health care (see paragraph 40 above and *Mohammed Hussein,* cited above, § 39). The Court further reiterates from the facts of the case that the applicant had been housed in a reception centre when he received leave to remain on humanitarian grounds. However, he chose to leave the reception facility. Under these circumstances, it cannot be considered wrongdoing on the part of the Contracting State if the applicant was homeless and lacked access to social support and medical assistance.

60. After his return to Italy from Germany the applicant was again lodged in a reception facility in Rome, for approximately one year, before leaving it again of his own volition. He was subsequently given leave to remain on subsidiary protection grounds, which entitled him to a range of

services, such as medical treatment, social assistance, social housing and work.

61. Again, when the applicant complains that he was homeless, had to sleep in the streets and lacked subsistence and food, the Court does not find that this situation resulted from the legal system or from a practical situation caused by the Contracting State. Quite to the contrary, it seems that in the applicant's case he had originally had access to a broad range of services, such as housing, subsistence and health care, but had decided voluntarily to leave the housing and support system. When the applicant now states that because of his mental illness he did not have the capacity to waive public assistance effectively, the Court observes that there is no indication in the documents submitted or in the observations by the parties that could establish the applicant's mental health status at the relevant time, or whether the Italian authorities could or should have known that the applicant might have a psychological impairment of such gravity.

62. Overall, the Court finds that upon arrival in Italy the applicant was given housing and residence permits on humanitarian grounds or on the basis of subsidiary protection. Therefore, he did have access to health care, to work and later on even to social assistance and social housing. However, the applicant left that support system of his own volition.

63. Therefore, and even assuming that the present complaint does not already fail on the requirements of exhaustion of domestic remedies pursuant to Article 35 § 1 of the Convention, the Court finds the applicant's complaint against Italy manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention, and thus inadmissible pursuant to Article 35 § 4 of the Convention.

## C. The applicant's complaint against Austria

### *1. The parties' submissions*

64. The Austrian Government, referring to the reopened asylum proceedings in Austria, contended firstly that, in their opinion, the present application should be declared inadmissible for non-exhaustion of domestic remedies or struck out of the Court's list of cases according to Article 37 § 1 b and/or c of the Convention. They observed that the Austrian authorities in the fresh asylum proceedings will have to examine the question whether removal to Italy would violate the applicant's rights under Article 3 of the Convention. The guardianship arrangement for the applicant and any new findings on the applicant's mental health status will have to be taken into account. Moreover, it will also have to be determined whether Italy will be able to guarantee adequate treatment in line with the applicant's specific situation in the event of removal to Italy.

65. The applicant contested that view and stated that the question of exhaustion of domestic remedies was to be determined by the Court at the time of the lodging of the application. And in the present case at that relevant time all remedies had been properly exhausted. Nor did the reopened proceedings in Austria constitute an effective remedy either, considering that the applicant's claim could be refused under those proceedings too, under the Dublin Regulation, and that the applicant had no right to request proceedings on the merits in Austria. The applicant claimed that the Federal Asylum Office in the reopened proceedings still planned to remove him to Italy. Furthermore, the long duration of the applicant's proceedings in Austria that had aggravated his mental health status must also be considered to breach Article 3 of the Convention.

66. The applicant referred at length to jurisprudence of the German Administrative Courts (such as the Frankfurt am Main Administrative Court, the Stuttgart Administrative Court and the Düsseldorf Administrative Court) that had ruled in decisions of 2012 that claimants did not have adequate access to asylum proceedings in Italy, that claimants returned to Italy could face homelessness, lack of subsistence and food, and that the conditions for Dublin-returners in Italy might not meet European standards.

*2. The Court's assessment*

67. The Court firstly turns to the Austrian Government's contention that the present application should be struck out of the Court's list of cases according to Article 37 of the Convention. The Court observes that the reopening of the applicant's proceedings in Austria because he lacked legal capacity in the first proceedings only concerns the applicant's proceedings under the Dublin Regulation. The Austrian authorities have not made use of the sovereignty clause and have not decided to examine the applicant's original asylum request on its merits. The matter of the present application, namely the complaint of a pending return to Italy and the accompanying allegedly detrimental consequences of such a return, seems therefore not to have been resolved within the meaning of Article 37 § 1 (b) of the Convention. However, the Court does not need to finally decide on this contention, since the applicant's complaint is in any event manifestly ill-founded, for the following reasons.

68. To examine the applicant's complaint directed against Austria, the Court will now consider the question whether the situation in which the applicant, if removed to Italy, is likely to find himself, can be regarded as incompatible with Article 3, taking into account his situation as an asylum seeker and, as such, a member of a particularly underprivileged and vulnerable population group in need of special protection (see *Mohammed Hussein,* cited above, § 76, with a reference to *M.S.S. v. Belgium and Greece,* cited above, § 251).

69. The Court observes that the applicant's leave to remain on subsidiary protection grounds has expired in the meantime. However, the Italian Government has stated in their observations to the Court that the leave could be renewed, so long as the factors justifying the original grant of the leave still existed (see paragraph 53 above). That observation is corroborated by the information on the Italian asylum system summarised in the decision of *Mohammed Hussein*: a relevant report cited there states that it was indeed possible to renew residence permits issued previously, by applying to the competent police immigration department. While the requirement for such a request to be accompanied by the original permit document may cause difficulties, if such papers are stolen or lost they can be replaced (see ibid, § 48). In conclusion, the Court finds that the applicant has the opportunity to request the renewal of his leave to remain on subsidiary protection grounds if removed to Italy.

70. Turning to the applicant's manifestly and seriously impaired mental health status, the Court also notes that the Italian Government has already observed that, according to the information so far received from the Austrian authorities, the applicant would upon return be considered a vulnerable person and thus would have access to housing (see paragraph 54 above). Therefore, the Court is able to establish that the applicant will be eligible for special consideration by the Italian authorities if returned to Italy as a vulnerable person within the meaning of Article 8 of Legislative Decree no. 140/2005 (see ibid, §§ 42-45).

71. The Court thus considers that the Italian authorities are already aware of the applicant's particular vulnerability and need for special assistance. It further trusts that the Austrian authorities will, in the event the applicant is removed to Italy, provide the Italian authorities with all the medical and psychological documentation available to them, to ensure that the applicant is appropriately received there. Under these circumstances, the Court finds that there is no basis on which it can be assumed that the applicant will not be able to benefit from the available resources in Italy or that, if he encountered difficulties, the Italian authorities would not respond in an appropriate manner to any request for further assistance (see for comparison *Mohammed Hussein,* cited above, § 78).

72. Finally, the Court takes note of the reports prepared by governmental and non-governmental organisations on the shortcomings of the general situation and living conditions in Italy for asylum seekers, recognised refugees and aliens in possession of residence permits on various grounds (see for the reports ibid., §§ 43-44, 46 and 49). However, the Court finds that it has not been shown that the Italian reception schemes demonstrate a systematic failure to provide support or facilities catering for asylum seekers as members of a particularly vulnerable group of people, as was the case in *M.S.S. v. Belgium and Greece* (cited above, see also *Mohammed Hussein,* cited above, § 78).

73. It follows that, at the time of the examination of the application before the Court, and assuming a comprehensive handover of relevant information on the applicant from the Austrian authorities to the Italian authorities in the event he is removed to Italy, the applicant's complaint under Article 3 against Austria is manifestly ill-founded and therefore inadmissible in accordance with Article 35 § 3 (a) and § 4 of the Convention.

### D. The Rule 39 of the Rules of Court

74. In view of the above, it is appropriate to discontinue the application of Rule 39 of the Rules of Court.

For these reasons, the Court by a majority

*Declares* the application inadmissible.

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| Søren Nielsen<br>Registrar | Isabelle Berro-Lefèvre<br>President |