

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

FIRST SECTION

DECISION

Application no. 62154/10
Eqbal ASGARI
against Austria

The European Court of Human Rights (First Section), sitting on 29 January 2013 as a Committee composed of:
Linos-Alexandre Sicilianos, *President,*
Elisabeth Steiner,
Ksenija Turković, *judges,*
and André Wampach, *Deputy Section Registrar,*
Having regard to the above application lodged on 26 October 2010,
Having deliberated, decides as follows:

FACTS AND PROCEDURE

1. The applicant, Mr Eqbal Asgari, is an Afghan national, who was born in 1981 and lives in Vienna. He was represented before the Court by Mrs N. Lorenz, a lawyer practising in Vienna.

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 European and International Affairs.

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

A. The asylum proceedings and application of Rule 39 of the Rules of Court

4. The applicant claimed to have left Afghanistan 18 years ago to live in Iran, where he got married and has a child.

5. In June 2010, the applicant left Iran with the aid of a trafficker who brought him to Europe, allegedly via Greece. Again with the aid of a trafficker, he was brought to Vienna where he received a train ticket to Hamburg. In Linz, the applicant was taken in by the Austrian police. He lodged an asylum request on 8 August 2010.

6. On 8 October 2010 the Federal Asylum Office (*Bundesasylamt*) dismissed the applicant's asylum request relying on Article 10 § 1 in connection with Article 18 § 7 of the Council Regulation (EC) No 343/2003 ("Dublin II Regulation", hereinafter the "Dublin Regulation") and stated that Greece had jurisdiction with regard to the applicant's asylum proceedings. It further declared the applicant's expulsion to Greece permissible.

7. On 11 October 2010 the applicant was taken into detention with a view to expulsion to Greece. He was placed in a detention facility in Vienna.

8. On 14 October 2010 the applicant signed a form regarding a voluntary return to Afghanistan that was presented to him by a member of the association "*Verein Menschenrechte Österreich*". The association was commissioned to supply social support services in the detention facility in which the applicant was held.

9. Even though the applicant had seemingly signalled a readiness to voluntarily return to Afghanistan, he lodged an appeal against the dismissal of his asylum claim with the Asylum Court (*Asylgerichtshof*) on 18 October 2010. The Asylum Court did not grant suspensive effect to the appeal. The applicant's expulsion to Greece was consequently planned for either 3 or 4 November 2010.

10. Thereupon, on 26 October 2010, the applicant, from that day on represented by his present counsel, lodged an application with the Court. He complained under Article 3 of the Convention of a real risk of ill-treatment within the meaning of that provision upon a possible return to Greece as regards lack of access to thorough asylum proceedings, harsh living conditions for asylum seekers in Greece, lack of access to subsistence and detrimental detention conditions. The applicant also complained under Article 13 of the Convention of the lack of suspensive effect of an appeal lodged with the Austrian Asylum Court. Lastly, he requested the application of an interim measure pursuant to Rule 39 of the Rules of the Court to stay his expulsion to Greece.

11. On 27 October 2010 the Court applied the interim measure under Rule 39 of the Rules of Court and requested the Austrian Government to

stay the applicant's expulsion to Greece until further notice. The applicant's counsel was also informed of the application of the interim measure on the same day.

12. On 27 October 2010 the Ministry of Interior Affairs (*Bundesministerium für Inneres*) notified among others the Vöcklabruck Administrative Authority (*Bezirkshauptmannschaft Vöcklabruck*) of the application of the interim measure by the Court and requested that the applicant was not to be expelled to Greece until a final decision by the Court.

13. On 29 October 2010 the Vöcklabruck Administrative Authority informed the Ministry of Interior Affairs that the planned expulsion to Greece had been cancelled, but that the applicant wanted to voluntarily return to Afghanistan - a wish that would be granted by the authority. The association *Verein Menschenrechte Österreich* had already organised his travel to Afghanistan which was planned for 2 November 2010. He would also be released from detention with a view to expulsion on that day.

14. The applicant stated that he had not been informed by the authorities that the Court had applied an interim measure under Rule 39 and that the Government had been requested to stay the applicant's expulsion to Greece. His counsel's letter informing him of these facts only reached the applicant's location on 2 November 2010, due to a weekend and a public holiday, when he was already at the airport to return to Afghanistan.

15. On 4 November 2010 the Government informed the Court that the applicant had left Austria for Afghanistan on 2 November 2010.

16. Upon inquiry by the Court, the applicant's counsel informed the Court on 1 December 2010 that she had lost contact to her client after he had left for Afghanistan. She explained that the association *Verein Menschenrechte Österreich* refused to forward any contact details of the applicant. Counsel stated further that – in view of the existing power of attorney – she would lodge a complaint against the detention with a view to expulsion between 28 October 2010 and 2 November 2010 on behalf of her client and that she doubted that her client left for Afghanistan voluntarily. She, therefore, did not want to withdraw his application with the Court.

On 8 December 2010 the Court lifted the interim measure under Rule 39 of the Rules of the Court.

B. The proceedings regarding the lawfulness of the detention with a view to expulsion

1. The first set of proceedings

17. On 11 October 2010, the Vöcklabruck Administrative Authority ordered the applicant's detention with a view to expulsion. The reasons

given were the expected immediate expulsion to Greece and the applicant's unwillingness to return to Greece.

18. On 20 October 2010 the applicant lodged a complaint against the detention with a view to expulsion to Greece. On 27 October 2010 the Upper Austria Independent Administrative Panel (*Unabhängiger Verwaltungssenat Oberösterreich*) dismissed the complaint as unfounded.

2. The second set of proceedings

19. On 13 December 2010 the applicant's counsel lodged another complaint against the detention with a view to expulsion between 28 October 2010 and 2 November 2010 referring in particular to the interim measure applied by the Court on 27 October 2010.

20. The Vöcklabruck Administrative Authority provided the files of the proceedings per email on 23 December 2010 and added that the applicant had been released from detention on 2 November 2010 to honour his wish to voluntarily return to Afghanistan. Furthermore, it was questionable if the applicant's counsel still held a valid power of attorney.

21. On 14 January 2011 the Upper Austria Independent Administrative Panel declared the applicant's detention with a view to expulsion between 28 October 2010 (afternoon) and 2 November 2010 unlawful. In addition to the above mentioned facts, it established that on 27 October 2010 the *Verein Menschenrechte Österreich* requested the applicant's release from detention on 2 November 2010 in view of his return to Afghanistan. Also on 27 October 2010 the Ministry of Interior Affairs informed the Vöcklabruck Administrative Authority of the application of an interim measure by the Court and that the applicant was not to be expelled to Greece. On the same date the Vöcklabruck Administrative Authority confirmed that the applicant's expulsion to Greece was cancelled. On 28 October 2010 the Federal Asylum Office marked in the asylum database AIS/DGA that the expulsion of the applicant to Greece was suspended. The applicant left Austria for Afghanistan on 2 November 2010.

22. The Independent Administrative Panel firstly found that there was no reason to doubt the power of attorney of the applicant's counsel, since she had supplied the necessary documentation. Referring to the application of an interim measure pursuant to Rule 39 of the Rules of Court it found that the Administrative Authority had obviously abandoned its plan to expel the applicant to Greece on 28 October 2010, as shown by the entry of data into the asylum data base. Therefore, the sole reason for the detention with a view to expulsion, namely securing the applicant for a pending expulsion to Greece, had ceased to exist by the authorities' decision to stay the applicant's expulsion to Greece following the application of the interim measure. Upon that development of facts, the Administrative Authority should have reconsidered the reasoning and justification for the detention with a view to expulsion and should have released the applicant on

28 October 2010. The Independent Administrative Panel also stated that a securing of a voluntary return by means of detention was not foreseen in the Aliens' Police Act (*Fremdenpolizeigesetz*).

3. Further developments

23. On 21 June 2011 the applicant's counsel informed the Court that the applicant had succeeded in contacting her office. He had explained that he had left Afghanistan again after his return for Iran and had been living there since. He further explained that he had never been informed of the application of the interim measure by the Court. He stated that would he have known that he was no longer at risk of being expelled to Greece, he would never have boarded the airplane to Afghanistan. He had feared the harsh living conditions in Greece and the risk of detention.

COMPLAINTS

24. The applicant complained under Article 3 of the Convention of a real risk of ill-treatment within the meaning of that provision upon a return to Greece.

25. The applicant also complained under Article 13 of the Convention of the lack of suspensive effect of an appeal lodged with the Austrian Asylum Court.

26. In his submissions of June 2011 the applicant further stated that he wished to pursue the application because, in his opinion, his return to Afghanistan could not be considered "voluntary" under the particular circumstances of the case: confronted with the sole choice between a return to Greece, where he feared ill-treatment, lack of access to asylum proceedings, lack of subsistence and possibly detention in degrading conditions, and a return to Afghanistan, he claimed to have been forced to accept the so-called "voluntary return". The applicant claimed that he wanted to return to Austria to pursue his asylum proceedings there.

THE LAW

27. On 10 July 2012 the Government submitted additional observations stating that the applicant had returned to Austria on 27 April 2012 and had lodged a fresh asylum request on the same day. The Federal Asylum Office had made use of the sovereignty clause of Article 3 § 2 of the Dublin Regulation and had admitted the asylum request for proceedings on its merits on 30 April 2012.

28. The applicant confirmed that his asylum request was admitted in Austria for an examination on the merits, but contested the Government's request to strike the present application out of the Court's list. He further claimed compensation for pecuniary and non-pecuniary damage and the reimbursement of costs and expenses incurred in the domestic proceedings and in the proceedings before the Court.

29. The Court considers nevertheless that, in the special circumstances of the case, the matter has been resolved within the meaning of Article 37 § 1 (b) of the Convention. Furthermore, in accordance with Article 37 § 1 *in fine*, the Court finds no special circumstances regarding respect for human rights as defined in the Convention and its Protocols which require the continued examination of the case.

30. In view of the above, it is appropriate to strike the case out of the list.

31. The Court finds it suitable in the special circumstance of the case to make an award in respect of the costs of the Convention proceedings (Rule 43 § 4 of the Rules of Court). The applicant claimed 8,799.48 euros (EUR) for costs and expenses incurred before the Court. This sum includes value-added tax (VAT). The Government commented that the applicant's claim was excessive.

32. The Court, taking note of the costs genuinely and necessarily incurred in the proceedings before it, awards the applicant reimbursement for costs and expenses in the amount of EUR 3,500. This sum includes VAT.

For these reasons, the Court unanimously

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

Decides

a) that the Government is to pay the applicant, within three months from the date of this decision, EUR 3,500 (three thousand five hundred euros), value-added tax included, in respect of costs and expenses;

b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending arte of the European Central Bank during the default period plus three percentage points.

André Wampach
Deputy Registrar

Linos-Alexandre Sicilianos
President