

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

FIRST SECTION

DECISION

Application no. 53852/11
Nasib HALIMI
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 26 August 2011,

Having regard to the interim measure indicated to the respondent Government under Rule 39 of the Rules of Court,

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

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Nasib Halimi, is an Afghan national who was born in 1994 and resides at present 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 of European and International Affairs.

A. The circumstances of the case

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

1. The first set of asylum proceedings in Austria

4. The applicant lodged his first asylum request in Austria on 20 September 2010. He claimed then to be 17 years old and to have left Afghanistan two and a half years before. He spent two years in Turkey and had finally left for Italy with the aid of traffickers. He and a group of others had hidden in a refrigerator truck that was held up and searched in Tarvisio, Italy. There, police officers had allegedly taken the applicant to a police station, interviewed him without an interpreter, and held him without food or water for twenty-four hours. After his release they had handed him an order to leave the country, which the applicant had thrown away. He had taken a train for Rome, slept in a railway station, received food from a church and, finally, after five days in Italy, travelled on to Austria. He stated that he had left Afghanistan because the Taliban had come to his village and had asked his father to cooperate with them, which he had refused to do. Thereupon, the Taliban had kidnapped his father and brother, and the applicant had been afraid that he would suffer the same destiny if he stayed in Afghanistan.

5. With regard to his age, the applicant claimed to have been born on 5 December 1372 according to the Afghan calendar. He stated that in Turkey he had been told to say that he was born on 24 February 1993, whereas a conversion of his birth date into the Gregorian calendar would give a birth date of 24 February 1994. The applicant mentioned that he had a birth certificate showing that he was 17 years old. However, he was not entirely certain about his date of birth.

6. When asked whether he had lodged an asylum request in Italy, the applicant replied in the negative, stating that he wanted to lodge his asylum application in Austria, not in Italy.

7. On 21 February 2011 the Federal Asylum Office (*Bundesasylamt*) rejected the applicant's asylum request under section 5 of the 2005 Asylum Act and declared that Italy had jurisdiction in respect of asylum proceedings pursuant to Article 10 § 1 taken in conjunction with Article 18 § 7 of European Council Regulation no. 343/2003/EC (hereinafter, "the Dublin Regulation"). It also ordered the applicant's transfer to Italy. It stated that the results of a forensic examination had found the applicant to be at least 19 years old. With reference to a number of country reports concerning

asylum proceedings in Italy, the Federal Asylum Office found that asylum requests could be lodged in Italy at any police station or in the local *Questura*. An asylum-seeker had to present himself personally to lodge a request. The Italian authority would first examine the question of the applicability of the Dublin Regulation and would then forward the request to one of ten Territorial Commissions to be dealt with. With regard to access to subsistence in Italy, the Federal Asylum Office referred to legislation on the provision to asylum-seekers of shelter or financial support and access to medical treatment in accordance with the relevant European Union directives. It further stated that problems had been reported concerning immigration centres in the south of the country owing to refugees arriving by boat. Upon a request by the authority, the Austrian embassy in Rome explained in February 2011 that every asylum-seeker could request an interpreter for his or her interviews, but that an interpreter had to be asked for specifically, which was sometimes difficult and often depended on the good will of the officials dealing with the case. As to the order to leave the country, the embassy explained that an illegal immigrant received an order to leave the country within fifteen days. If he or she did not leave the country, his illegal presence would become a criminal act which could lead to him or her being detained. It could happen that the order to leave the country was given in a language the foreigner could not understand, so that he would slip into a criminal illegal presence in Italy without knowledge or intent.

8. The applicant appealed against the decision.

9. On 21 March 2011 the Asylum Court (*Asylgerichtshof*) dismissed the applicant's appeal as unfounded. Referring to country reports on Italy, it found that there was no systematic real risk that the applicant would be subjected to ill-treatment because of lack of access to asylum proceedings, *refoulement*, or lack of subsistence upon his return to Italy. Furthermore, it found the applicant's story about his stay in Italy contradictory and not credible. With reference to the "*effet utile*" principle of Community law, it concluded that the applicant had thus not substantiated his claim of a real risk under Article 3 of the Convention sufficiently for the sovereignty clause to be engaged under the Dublin Regulation. Furthermore, any possible criticism with regard to the treatment of refugees arriving by boat in the south of Italy would not apply to the applicant as a returner to the north of Italy under that Regulation.

10. On 7 April 2011 the applicant was transferred to Italy.

2. *The second set of asylum proceedings in Austria and application of Rule 39 of the Rules of Court*

11. The applicant returned to Austria after twelve days and subsequently lodged an asylum request in Austria on 19 April 2011. In his first interview at the Baden police station the applicant stated that the conditions for

asylum-seekers in Italy had been inhuman and that the Italian police had treated him badly. In subsequent statements he stated that he had been stopped by police at the airport in Rome immediately upon his return and had been served with a paper ordering him to leave the country. There had again been no interpreter available. He had slept at the *Roma Ostiense* railway station together with other foreigners, and they had been woken at 6.00 a.m. by the police, in some cases brutally so. When he had tried to enter an official refugee camp in Rome he had been chased away by police. He had received food from a church once per day, but the church did not distribute food at weekends. The applicant further stated that he had had problems with his stomach and kidneys, but no access to medical care.

12. When asked whether he had lodged an asylum request in Italy, the applicant answered that he had not.

13. On 4 January 2012 the applicant was heard by the Federal Asylum Office in the presence of his legal representative. In respect of his medical condition, he submitted that he was suffering from post-traumatic stress disorder and asked for a further psychiatric examination to be carried out. It can be seen from the minutes of the hearing that the applicant interrupted the interview, claiming that he could not carry on because of an acute headache. A number of reports on the reception conditions for asylum-seekers in Italy were handed to his representative, who was given a two-week time-limit to comment. The applicant was placed in detention with a view to his expulsion.

14. On 6 January 2012 the Court applied an interim measure under Rule 39, requesting the Austrian Government to stay the applicant's transfer to Italy until further notice. Thereupon, the applicant's transfer to Milan scheduled for 19 January 2012 was cancelled.

15. The applicant's subsequent asylum proceedings in Austria are still pending at first instance.

3. Medical information

16. A doctor's note from the Amber-Med free clinic in Vienna dated 17 August 2011 stated that the applicant was suffering from gastritis and pain in the lower back and recommended further examinations.

17. In a letter of 29 December 2011 a psychologist at the Hemayat centre for support for trauma patients stated after an hour-long diagnostic meeting that the applicant was suffering from an acute stress reaction that had its origins in a post-traumatic stress disorder and posed a latent suicide risk that could very quickly become acute. The applicant further suffered from a somatoform pain disorder. A stable environment, medical investigation of the pain disorder and long-term psychotherapy were urgently recommended.

18. In the course of the proceedings, the applicant's representative provided an update by way of an information letter from the Hemayat centre

dated 23 May 2012. It was stated therein that the applicant had been receiving regular psychotherapy since 11 January 2012 and that a stable therapeutic relationship had been established in the course of the therapy. There were no diagnostic changes. The letter recommended a stable social environment for the applicant and the continuation of the promising therapy in order for him to avoid a deterioration of his current symptoms.

19. She also submitted an expert opinion prepared in June 2012 by a psychiatrist in Vienna after an examination on 26 June 2012. That opinion found that the applicant's post-traumatic stress disorder had developed into a depressive episode with a personality change due to extreme stress. The applicant was therefore a multiply traumatised adolescent and the expert classified him as gravely psychologically impaired. She urgently recommended a safe living environment and ongoing psychotherapy to stabilise the applicant's mental state. His removal would lead to re-traumatisation and could pose an acute suicidal risk.

20. The Austrian Government provided a psychological expert opinion, undated, submitted to the Federal Asylum Office in June 2012. It found that the applicant suffered from a mild adjustment disorder bordering on a stress disorder but without a clinical character. There were no indications of an acute suicidal tendency and no symptoms of serious post-traumatic stress disorder.

B. Relevant European, Austrian and Italian law and practice

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

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

22. 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.

23. 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.

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

25. 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

26. Section 5 of the Asylum Act 2005 (*Asylgesetz*) provides that an asylum application must 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.

27. Section 12 establishes – with the exception of cases falling under section 12a – *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 because of 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.

28. Asylum-seekers can lodge an appeal with the Asylum Court against decisions rejecting their application rendered by the Federal Asylum Office as the first-instance asylum authority within one week of the decision (see section 22(12)). However, section 36(1) stipulates that such an appeal shall not have suspensive effect. Section 37 allows the Asylum Court to grant suspensive effect to such an appeal – or to an appeal against a deportation order issued in conjunction with the rejection of an asylum application – within one week if there is reason to believe that the individual's deportation will give rise to: (i) a real risk of a violation of Articles 2 or 3 of the Convention or of Protocol 6 or Protocol 13 to the Convention; or (ii) a serious threat to his or her life or person as a result of arbitrary violence in connection with an international or internal conflict in relation to which the applicant is a civilian. Against decisions rendered by the Asylum Court, claimants may lodge a complaint with the Constitutional Court alleging a violation of a constitutionally guaranteed right (Article 144 a of the Federal Constitution). Such a complaint has no automatic suspensive effect; however, such suspensive effect can be granted by the Constitutional Court upon a request by the claimant.

3. Asylum proceedings in Italy

29. Reference is made to the extensive description of the Italian asylum procedure and domestic law in *Mohammed Hussein,* cited above, §§ 33-41.

30. In particular, paragraphs 33-36 state as follows:

> "33. A person wishing to apply for asylum in Italy should do so with the border police or, if already in Italy, with the police (*questura*) immigration department. As soon as an asylum request has been filed, the petitioner is granted access to Italy as well as to the asylum procedure, and is authorised to remain in Italy pending the determination of the asylum request by the Territorial Commission for the Recognition of International Protection.
>
> 34. For petitioners who do not hold a valid entry visa, an identification procedure (*fotosegnalamento*) is carried out by the police – if need be – with the assistance of an interpreter. This procedure comprises the taking of passport photographs and fingerprints. The fingerprints are checked for matches in EURODAC and the domestic AFIS (Automated Fingerprint Identification System) database. At the end of this procedure, the petitioner is given a notice confirming the first registration (*cedolino*), on which future appointments are noted, in particular the appointment for the formal registration of the request.
>
> 35. The formal asylum request will be made in writing. On the basis of an interview held with the petitioner in a language which he or she understands, the police will fill out the 'Standard form C/3 for the recognition of refugee status according to the Geneva Convention' (*Modello C/3 per il riconoscimento dello status di rifugiato ai sensi della Convenzione di Ginevra*), which contains questions on the petitioner's personal data (name, surname, date of birth, citizenship, name and surname of parents/spouse/children and their whereabouts) as well as the details of the journey to Italy and reasons for fleeing the country of origin and for seeking asylum in Italy. The petitioner will be asked to provide a written paper, which will be appended to the form, containing his or her asylum account and written in his or her own language. The police will retain the original form and provide the petitioner with a stamped copy.
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> 36. The petitioner will then be invited by a notification served in writing by the police for a hearing before the competent Territorial Commission for the Recognition of International Protection. During this hearing, the petitioner will be assisted by an interpreter."

31. The 'Dublin II Regulation National Report' on Italy of December 2012 states, in addition to the above-mentioned information with regard to access to the asylum procedure for Dublin-returners (pages 18 and 19 of the report):

> "At the arrival in the main airports, the applicant finds NGOs/associations which may help him/her to find an accommodation centre and provide him/her with further information on the asylum procedure. At the airport, the Border Police carry out the *fotosegnalamento* and verify the person's identity in the EURODAC database. After having undertaken these procedures, the applicant will receive a letter (called "*verbale di invito*") saying that s/he has to go to the *Questura* competent to continue the asylum procedure. The asylum seeker may be addressed to the office of the *Questura* where s/he was fingerprinted and photographed or to the office where s/he lodged the asylum

application or where the documents related to his/her case are kept. The law does not foresee any support for reaching the competent *Questura*. In the practice the NGOs working at the border points can provide the train ticket for that destination on the basis of a specific agreement with the competent Prefecture. However, this support is not always guaranteed and often it happens that the NGO does not have information on the real arrival of the asylum seekers and on whether s/he has found an accommodation there.

Once the person is at the *Questura*, s/he may face different outcomes according to whether s/he did not apply or s/he did apply for asylum when s/he was in Italy previously.

If the person had never applied for international protection before, s/he is able to ask for protection now and is entitled to the same rights as the other asylum seekers. ..."

32. Both the UNHCR in its "Recommendations on Important Aspects of Refugee Protection in Italy" of July 2012 (page 7) and the Swiss Refugee Council and the Norwegian NGO Juss-Buss in their report "Asylum procedure and reception conditions in Italy" of May 2011 (page 10) refer to incidents in which asylum-seekers have had difficulties lodging a formal asylum application with the *Questura,* or only obtained an appointment with the *Questura* several months after their arrival in Italy. During this period of time however, asylum-seekers have no access to accommodation or subsistence.

4. Reception conditions in Italy

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

34. In particular, it is noted in respect of vulnerable asylum-seekers that, pursuant to Legislative Decree no. 140/2005 implementing Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum-seekers, asylum-seekers in Italy are entitled to reception facilities. According to Article 8 of that Decree, reception arrangements are to be made on the basis of the specific needs of asylum-seekers and their families, in particular the needs of vulnerable persons, namely unaccompanied minors, disabled persons, pregnant women, single parents with minor children, and persons who have been subjected to torture, rape or other forms of serious psychological, physical or sexual violence. Italian domestic law provides for special guarantees for such vulnerable persons, including a reserved quota of places in the SPRAR reception scheme (see ibid., § 42). The Italian authorities specified in their comments on the report by the Council of Europe Commissioner for Human Rights dated 18 September 2012 that the system of reception in the CARA centres, which accommodate asylum-seekers, envisaged that a range of services must be provided to migrants, including, *inter alia,* socio-psychological support, with special attention for persons belonging to vulnerable categories, and medical appointments with consultants. These

reception conditions were also guaranteed to Dublin-returners. This category received a preliminary form of reception upon arrival from the services present in the main airports; subsequently these asylum-seekers were accommodated in government reception centres. When the transferring country reported an asylum-seeker as belonging to a vulnerable category, appropriate medical measures were taken in the centres with the aim of providing appropriate reception conditions. Special attention was paid to migrants with physical or psychological trauma and to victims of torture, who were entrusted to the medical stations of the reception centres or to a local centre to receive treatment and support of a professional and appropriate nature (see ibid., § 45).

35. As regards medical assistance, the Italian comments established as follows (ibid.).

> "In Italy, foreign citizens, even those not complying with the provisions regulating their presence, are entitled to ordinary and/or urgent treatment through the National Health Service.
>
> In the government centres for migrants the psychic/physical health of guests is recognized as an unalienable right of the individual, which is safeguarded by art. 32 of the Italian Constitution and it has always been put at the forefront when the regulatory and management system of the centres is being prepared.
>
> More specifically, the medical assistance service provided for in the centres for migrants must grant guests the following:
>
> > a) Visit upon entry and medical first aid, carried out in a consulting room set up within the facility with medical staff and nurses, whose shifts must be based on the ratio guests/staff as indicated in the tables of the tender specifications;
> >
> > b) When the need arises, possible transfer of guests to hospitals outside the centres, in compliance with art. 35 of Legislative Decree 286/98 as migrants hosted in CARA centres can benefit from the services of the National Health Service by showing their STP cards (Temporarily Present Alien), issued by the Local Health Service Unit, whereby they can enjoy treatment in the consulting room or in hospitals, when it is urgent or essential in case life is in peril;
> >
> > c) Administering of medicines and medical devices necessary for first aid and for ordinary medical assistance, including for generic conditions of psychological type;
> >
> > d) Recording of a personal medical file, a copy of which must be handed over to the guest. In this connection it is worth mentioning that doctors, when screening the guests upon entry must also evaluate their psychic-social situation as well as the presence of vulnerability factors (serious psychic-psychological conditions, including previous ones, victims of mistreatment/torture, substance addiction, etc.) in order to prescribe possible drug treatment or psychological counselling.

It is further specified that as provided for by the above mentioned art. 35 of Legislative Decree No. 286/98 (Consolidated Text on Immigration), foreign citizens who are on the national territory but do not comply with provisions regulating their presence are anyway entitled to treatment in public health care facilities either in consultation rooms and/or in hospital (both urgent and continuing treatment) because of illness or accident and they also benefit from the programmes of preventive medical treatment aimed at safeguarding individual and collective health.

Regardless of the possession of a residence permit, the Italian legislation provides for the social protection and medical assistance to expectant mothers and to mothers, the protection of the psychic-physical health of minors (as a result of the Convention on the Rights of the Child of 1989), interventions of prevention, diagnosis and treatment of infectious diseases and the decontamination of the related centres of infection.

Finally, when aliens not complying with provisions regulating their presence visit public medical facilities, they are not reported to the Police Authorities.

As far as social services are concerned, the principle enshrined in art. 24 of the 1951 Geneva Convention – according to which the status of a refugee is equal to that of a national – is embodied in the Italian legislation also as a consequence of art. 27 of the above mentioned Legislative Decree No. 251 of 19 November 2007, which lays down that individuals benefiting from refugee status and from subsidiary protection have the same status as Italian citizens and thus they have access to all services and benefits, including economic ones, covered by the social and medical assistance system.

Furthermore, the projects funded through resources of the ERF include measures to ease the access to social security, particularly on the part of vulnerable groups."

36. And finally, with regard to the reception of Dublin-returners, the "Dublin II Regulation National Report" on Italy stated in particular (ibid., § 49):

"Within this broader category, another distinction is deemed necessary according to whether the returnee had already enjoyed the reception system while s/he was in Italy.

If returnees (international protection seekers, beneficiaries of international protection or of a permit of stay for humanitarian reasons) had not been placed in reception facilities while they were in Italy, they may still enter reception centres. Due to the lack of available places in reception structures and to the fragmentation of the reception system, the length of time necessary to find again availability in the centres is – in most of the cases - too long. Since, there is no general practice, it is not possible to make a quantification of the time necessary to access to an accommodation. However, in the last years, temporary reception systems have been established to house persons transferred to Italy on the basis of the Dublin II Regulation. However, it concerns a form of temporary reception that lasts until their juridical situation is defined or, in case they belong to vulnerable categories, an alternative facility is found.

Such temporary reception has been set up thanks to targeted projects funded by the European Fund for Refugees. For instance, in Rome, there are currently projects

providing assistance to 200 persons – within this broader category 60 places are for vulnerable categories.

However, it happens that Dublin returnees are not accommodated and find alternative forms of accommodation such as self-organized settlements. ...”

COMPLAINTS

37. The applicant complained under Article 3 of the Convention in respect of Austria that a return to Italy under the Dublin Regulation 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, subsistence or medical treatment there – circumstances that would be aggravated by the applicant’s precarious physiological and psychological state of health.

38. The applicant also complained of ill-treatment under Article 3 of the Convention in respect of Italy in that he had not had access to accommodation, subsistence or medical treatment while he was there in April 2011.

39. The applicant lastly complained under Article 13 of the Convention that his subsequent asylum proceedings in Austria had no suspensive effect.

THE LAW

40. The applicant relied on Articles 3 and 13 of the Convention, which read as follows:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

and

“Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

A. The parties’ submissions

1. The Austrian Government

41. The Austrian Government firstly contended that the application was inadmissible for non-exhaustion of domestic remedies, since the applicant had failed to lodge a complaint with the Constitutional Court against the Asylum Court’s decision of 21 March 2011.

42. On the substance of the complaint, the Austrian Government emphasised that it was planned in the course of the pending first-instance proceedings to have the applicant's psychological state examined by an expert. This was done on 30 May 2012, and the expert opinion was received by the asylum authority on 5 June 2012. The expert stated that the applicant only suffered from a very mild adjustment disorder bordering on a stress disorder but without a clinical character (see paragraph 20 above). They further stated that the applicant was an adult according to a forensic expert opinion by the Ludwig Boltzmann Institute in Vienna. He was therefore not a particularly vulnerable person on account of his age.

43. As regards the questions whether the applicant should be considered vulnerable for other reasons, the Government observed that the Court had not developed general criteria for "vulnerability" in its jurisprudence, and that the applicant could have raised his particular vulnerability in a complaint with the Constitutional Court. By and large, only a health issue could render him vulnerable for the purposes of the proceedings concerned. Furthermore, the applicant's account of his stay in Italy had been taken into consideration by the Austrian authorities in that they had decided to organise his second transfer to Milan and not to Rome, as had been the case before. In the present case, the Austrian asylum authorities could safely assume that the applicant would not be subjected to treatment contrary to Article 3 upon his transfer to Italy, since they had thoroughly examined the Italian system for asylum proceedings, the reception conditions of asylum-seekers – especially in the case of Dublin-returners – and the places reserved for vulnerable persons at the SPRAR centres.

2. The Italian Government

44. The Italian Government added to the available facts the information that the applicant and fifteen other illegal immigrants had been found by the Italian border police on 12 September 2010 inside a refrigerator truck in Tarvisio. The truck had come from Greece. The applicant had then been taken to the *Questura* in Udine, where he was photographed, his fingerprints were taken and he was registered as an "illegal entry". The next day, the Prefect of Udine had issued an expulsion decision in respect of the applicant for illegal entry to the territory, and the *Questore* of Udine had issued an order for him to leave Italy within five days of his notification of that decision. On 14 December 2010 the applicant and the other fifteen Afghan nationals had been convicted *in absentia* of illegal entry into the national territory.

45. On 10 November 2010 the Austrian authorities requested Italy to accept jurisdiction under Articles 10 § 1 and 17 § 2 of the Dublin Regulation, which Italy did on 10 December 2010 by default. On 12 May 2011 Italy again accepted jurisdiction in respect of the applicant's case

under Article 10 § 1 of the Dublin Regulation; however, the transfer did not take place.

46. The Italian Government emphasised that the applicant had never lodged an asylum request in Italy and had never been registered as an "asylum-seeker" in Italy. He would, however, be able to lodge an asylum request upon arrival in Italy at the Border Police Station. The national law expressly provided for a reception service at the border upon arrival in Italy in order to give information and assistance to aliens wishing to file an asylum application. When an asylum application was lodged, the applicant was entitled to stay legally in the national territory until the relevant procedure was concluded, thus obtaining the temporary status of an asylum-seeker.

47. The Italian Government further clarified that the applicant had never spent any time in a reception or identification centre. Furthermore, according to the documents submitted by the Austrian Government, the applicant was over eighteen years old and thus no longer a minor. Access to health care was enshrined in the Italian Constitution – specifically in Article 32 of the Constitutional Charter – and was granted to anyone staying in the national territory. The current practice was that the Italian Dublin Unit requested the sending country to promptly transmit any medical records concerning asylum-seekers who were being returned to Italy, in order for any necessary medical measures to be arranged. In the present case the Austrian authorities had not as yet informed the Italian Dublin Unit of any medical problems with respect to the applicant.

48. When the applicant was returned to Italy and after lodging his asylum request, he would enter a shelter project funded by the European Refugee Fund 2011-2012 Yearly Program, and accommodation would be arranged on the basis of the medical records provided by the Austrian authorities. Such projects were operated inside the transit terminals of Rome Fiumicino, Milan Malpensa and Bari airports specifically for the reception, assistance, support and guidance of those belonging to ordinary and/or vulnerable groups who were transferred to Italy under the terms of the Dublin Regulation.

3. The applicant

49. Firstly, and as concerns the contention that he failed to exhaust domestic remedies, the applicant stated that his subsequent asylum request was based on the bad experiences he had had while in Italy in April 2011. However, those subsequent asylum proceedings had no suspensive effect and he did not have any other effective remedy available to him to stop the new transfer to Italy. Therefore, he had had no effective remedies to exhaust.

50. The applicant further observed that, while the Austrian Government had noted that he would be – and later was – given a psychological

examination in the ongoing proceedings to establish the state of his mental health, they had at first planned to transfer him in January 2012 – long before an examination had ever taken place – and had only been prevented from doing so by the interim measure applied by the Court. However, privately obtained diagnostic letters and therapy reports confirmed that the applicant was mentally ill. The applicant went on to state that the Austrian Government's assurance that they would transfer him to Milan and not to Rome was not sufficient to counterbalance the risk of unacceptable reception conditions; that the Austrian authorities had further not obtained any guarantees from the Italian authorities as regards appropriate reception arrangements, and that they had wrongly applied the case-law of the Court of Justice of the European Union established in case no C-411/10.

51. As regards the observations of the Italian Government, the applicant noted that from the relevant comments it seemed as if the Italian authorities had not been aware of his transfer to Italy in April 2011. He further stated that his experiences in Italy contradicted the Italian Government's statement that asylum-seekers could obtain information and lodge asylum requests. The applicant had not had the opportunity to lodge an asylum request, but had simply been requested to leave the country. He had not seen any reception orientation at the airport and had not had access to an interpreter. The Italian police had referred to the original expulsion order the applicant had been given in 2010, and the applicant had never received any information on how an asylum request would affect the expulsion order.

52. The applicant also noted that there were severe structural and systemic shortcomings in practice when it came to access to health care in Italy, and referred at length to the jurisprudence of a number of German administrative courts (such as the Frankfurt am Main Administrative Court, the Stuttgart Administrative Court and the Düsseldorf Administrative Court) which had ruled in decisions in 2012 that claimants did not have adequate access to asylum proceedings in Italy, that claimants returned to Italy could face homelessness and lack of subsistence and food, and that the conditions for Dublin-returners in Italy might not meet European standards. He considered that he would further risk homelessness due to the widely reported shortage of places in the CARA and SPRAR centres. There was furthermore not nearly enough accommodation available for vulnerable and mentally-ill asylum-seekers and it was reported that the chances of Dublin-returners obtaining one of those special places were almost zero.

53. Finally, the applicant observed that the European Commission had initiated infringement proceedings against Italy concerning Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum-seekers, 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, and Council Regulation 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (2012/2189, 24 October 2012).

B. The Court's assessment

1. General principles

54. 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 a 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).

55. 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).

56. 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 an 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).

57. 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 the 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).

58. The Court further reiterates that the mere fact of return to a country where ones 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).

59. 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 the 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).

60. If the applicant has not yet been removed when the Court examines the case, the relevant time with regard to the existence of the risk 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).

2. Application of these principles to the present case

61. The Court will first examine the complaints against Italy, and then the one against Austria.

(a) Italy

62. While the Court notes with concern that the Italian authorities were seemingly unaware of the applicant's transfer to Italy under the Dublin Regulation on 7 April 2011, it also observes that the applicant never applied for asylum, and therefore was not an asylum-seeker, in Italy. It is clear from the documents submitted that at the time of his first stay in Italy the applicant did not want to apply for asylum in Italy, but only in Austria. He was therefore considered an illegal immigrant by the Italian authorities. The applicant received an expulsion order from the Italian authorities based on the assessment that he had entered the country illegally, but he still did not lodge the relevant asylum claim; he simply left the country for Austria.

63. Apparently on the basis of his valid expulsion order from 13 September 2010, the Italian police again ordered the applicant to leave the country upon his return to Italy on 7 April 2011. The applicant again did not lodge an asylum request, either with the police upon his arrival, or in the course of his stay in Italy, but waited until he returned to Austria. The applicant had the status of an illegal immigrant in Italy and he did not seek to alter that status.

64. However, in Italy, access to reception schemes, accommodation and, in particular, to care for vulnerable persons is only available for persons who make their wish to seek asylum known and who are thus considered members 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). The applicant did not take any steps to become an asylum-seeker in Italy, and clearly stated during the first proceedings in Austria that he did not wish to seek asylum in Italy, but only in Austria.

65. Under these circumstances the Contracting State's responsibility cannot be engaged on account of the fact that the applicant did not have access to the reception schemes reserved for asylum-seekers, and, even assuming that on this point the applicant has complied with the requirements of Article 35 § 1, the complaint against Italy under Article 3 of the Convention is thus manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

(b) Austria

66. The Court will now consider the question whether, if the applicant is removed to Italy now, the situation in which the he is likely to find himself can be regarded as incompatible with Article 3.

67. Firstly, the Court takes note of the Austrian Government's contention that the applicant failed to exhaust the domestic remedies. However, the Court accepts the applicant's argument that the main complaints derive from his experiences during his stay in Italy in April 2011 – experiences that occurred after the first set of asylum proceedings was concluded. A complaint lodged with the Constitutional Court against the first transfer order can therefore not be considered an effective remedy. For the sake of completeness, the Court further observes that the asylum proceedings now pending in respect of the applicant have no suspensive effect. In relation to a complaint under Article 3 of the Convention concerning a pending transfer to Italy, the fact that the subsequent proceedings before the Federal Asylum Office are still pending, albeit without providing the applicant with protection from removal, means that his complaint cannot be found inadmissible for non-exhaustion of domestic remedies.

68. Since the applicant has no valid leave to remain in Italy and no asylum proceedings pending there, it must be examined whether he can safely be considered to have sufficient access to asylum proceedings on the merits of his claim for protection. Since the applicant never applied for asylum in Italy, he does not have any first-hand experience of being prevented from doing so or of encountering any other obstacles to accessing asylum proceedings in Italy. The Court therefore turns to the general information available to it on the legal and practical aspects of the asylum procedure in Italy, and refers first and foremost to the Italian Government's observation that the applicant will be able to lodge formal asylum applications with the competent authorities in Italy on his return there (see paragraph 46 and the additional information on the Italian asylum procedure in paragraphs 30 and 31 above). While not disregarding the criticism raised in various reports concerning *de facto* obstacles to the lodging of asylum applications in Italy (see paragraph 32 above), the Court finds that the information available does not point to the conclusion that those singular incidents amount to such a systemic failure as was the case in *M.S.S. v. Belgium and Greece* (cited above, § 300). The same applies as regards the reports concerning the shortcomings of the general situation and living conditions for asylum seekers in Italy (see for the reports *Mohammed Hussein*, cited above § 43-44, 46 and 49). Therefore, the Court finds that there is no indication in the applicant's submissions, or deriving from the general information available, that he would not be able to access sufficiently thorough asylum proceedings upon his arrival in Italy or that the reception schemes failed in such a way to provide support or facilities for asylum seekers as members of a particularly vulnerable group of people (see also ibid., § 78).

69. Turning now to the issue of accommodation and subsistence, the Court takes note of the Italian Government's assurance that the applicant,

upon his return and after he lodges an asylum claim in Italy, will enter a shelter project and accommodation will be arranged in accordance with the medical information transmitted by the Austrian authorities (see paragraph 48 above).

70. As regards the applicant's medical issues, the Court notes that the reports submitted vary considerably in their assessment of the applicant's mental health. Taking the applicant's – nevertheless – tender age into consideration and the worrying mention of a latent suicide risk, the Court is inclined to consider that the applicant in any event suffers from certain psychological impairments that should be taken into account for the purposes of his transfer and his reception in Italy.

71. In this context, the Court observes that in general the Italian reception system provides access to health care, including psychological care, for all aliens, whether they have leave to remain or not (see paragraphs 34 and 35 above). The Italian Government has not yet been made aware by the Austrian authorities of any relevant health issues in respect of the applicant, but they refer to the practice that sending countries are requested to promptly transmit relevant medical records in order to enable the receiving country to arrange for any necessary medical measures. Furthermore, the Italian Government submitted in respect of the applicant's specific case that, in accordance with the records to be submitted by the Austrian authorities, adequate accommodation would be arranged (see paragraph 47 above).

72. With regard to the Italian Government's observations in the present proceedings, and the consideration given in domestic Legislative Decree no. 140/2005 to vulnerable persons (see paragraph 34 above), the Court finds that the Italian authorities are now informed of the applicant's mental health issues and of the fact that he will need accommodation and subsistence after lodging his asylum request in Italy. It further trusts that the Austrian authorities will, in the event that the applicant is removed to Italy, provide the Italian authorities with all the most recent medical and psychological documentation available to them in order to ensure that the applicant is adequately and 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 encounters difficulties, the Italian authorities will not respond in an appropriate manner to any request for further assistance (see, for comparison, *Mohammed Hussein,* cited above, § 78).

73. Finally, the Court also notes the applicant's information that the European Commission initiated infringement proceedings against Italy on 24 October 2012. It observes that at the time of the present application's examination before the Court, the European Commission has given formal notice of the proceedings to the Italian Government in order to enable it to submit its comments on the alleged problem areas. The Court finds,

however, that the initiation of infringement proceedings alone cannot overturn the above conclusion.

74. 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 of his removal 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.

75. As concerns the applicant's complaint under Article 13 of the Convention, the Court reiterates that Article 13 guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms, in whatever form they may happen to be secured in the legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief (see, for example, *Kudła v. Poland* [GC], no. 30210/96, § 157, ECHR 2000-XI; *M.S.S. v. Belgium and Greece*, cited above, § 288; and *I.M. v. France*, no. 9152/09, § 128, 2 February 2012). However, referring to the foregoing considerations under Article 3, the Court notes that in the present case the applicant has no "arguable complaint" under that provision. It follows that this complaint is also manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

76. 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.

Søren Nielsen Registrar	Isabelle Berro-Lefèvre President