

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

FIRST SECTION

DECISION

Application no. 21662/10
by Mohamad Asif SARWARI
against Austria

The European Court of Human Rights (First Section), sitting on 3 November 2011 as a Chamber composed of:

Nina Vajić, *President,*
Anatoly Kovler,
Khanlar Hajiyev,
Mirjana Lazarova Trajkovska,
Julia Laffranque,
Linos-Alexandre Sicilianos,
Erik Møse, *judges,*

and André Wampach, *Deputy Section Registrar,*

Having regard to the above application lodged on 8 April 2010,

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

Having regard to the information submitted by the respondent Government and the comments submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Mohamad Asif Sarwari, is an Afghan national who was born in 1987 and is currently living in Austria. He was represented before the Court by Mr H. Pochieser, a lawyer practising in Vienna. 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.

A. The circumstances of the case

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

The applicant is an asylum seeker who entered the European Union via Greece. He arrived in Austria on 11 September 2008 and applied for asylum on the same day. It appears that the applicant's brother has been granted asylum in Austria in 2001 and is living there.

On 29 December 2008 the Federal Asylum Office (*Bundesasylamt*) dismissed the applicant's request. Relying on Council Regulation No 343/2003 ("Dublin II Regulation" hereinafter "the Dublin Regulation") it held that Greece was competent to conduct the asylum proceedings. It further declared the applicant's expulsion to Greece permissible.

On 22 September 2009 the Asylum Court (*Asylgerichtshof*) dismissed the applicant's appeal. It found that the applicant had failed to show that upon return to Greece he would face a real risk of treatment contrary to Article 3 of the Convention. Furthermore, it considered that his expulsion would not amount to a violation of Article 8 of the Convention. It concluded that Austria would not assume competence under Article 3 § 2 of the Dublin Regulation (the sovereignty clause).

By decision of 28 January 2010 the Constitutional Court (*Verfassungsgerichtshof*) refused to deal with the applicant's complaint. The Constitutional Court also refused to transfer the case to the Administrative Court, noting that following an amendment of the law, the latter was no longer competent to review decisions in asylum proceedings. The Constitutional Court's decision was served on the applicant's counsel on 17 February 2010.

B. The Court's Rule 39 indication

On 21 April 2010 the President of the First Section decided to apply interim measures under Rule 39 of the Rules of Court in the applicant's case, requesting the Austrian Government to stay the applicant's expulsion to Greece until further notice.

The application was communicated to the Government without questions as to the admissibility and merits pending the outcome of the Grand Chamber proceedings in the case of *M.S.S. v. Belgium and Greece*.

C. The Grand Chamber's judgment of 21 January 2011 in the case of *M.S.S. v. Belgium and Greece*

On 21 January 2011 the Grand Chamber gave judgment in the case of *M.S.S. v. Belgium and Greece* (application no. 30696/09). The case concerned an Afghan national, who entered the European Union through Greece. He travelled on to Belgium where he applied for asylum in February 2009. The Aliens Office decided to return him to Greece under the Dublin Regulation. He was expelled to Greece on 15 June 2009. He was detained there on two occasions, for a few days and a week, respectively, in a detention facility next to Athens airport. The remainder of the time he lived in the street with no means of subsistence.

The Court found violations of Article 3 in respect of the applicant's detention conditions in Greece (§§ 223-234) and in respect of his living conditions (§§ 249-264). In reaching this conclusion, it had regard to a wide range of sources, including reports and submissions from UNHCR and the Council of Europe Commissioner for Human Rights, who had both participated as third party interveners in the proceedings. Furthermore the Court found a violation of Article 13 taken together with Article 3 (§§ 294-322). It noted that it was in the first place for the Greek authorities to examine the risks to which the applicant would be exposed if returned to his country of origin but noted that the Greek asylum procedure was marked by major structural deficiencies. As a result asylum seekers had little chance to have their applications seriously examined. Moreover, there was a danger of forced returns of asylum seekers to high-risk countries.

Regarding Belgium, the Court found a violation of Article 3 in respect of the authorities' decision to expose the applicant to the asylum procedure in Greece, whose deficiencies must have been known to them when they issued the expulsion order against the applicant (§§ 338-361). Moreover, the Court found a violation of Article 3 in respect of the Belgian authorities' decision to expose the applicant to the detention and living conditions in Greece as the relevant facts were well known and freely ascertainable from a wide number of sources before the applicant's transfer (§§ 362-368). It also found a violation of Article 13 as the applicant did not have an effective remedy under Belgian law against the expulsion order (§§ 385-397).

D. Subsequent developments

On 10 February 2011 the Court requested the Government in the applicant's case and a number of others to indicate what, if any, practical consequences they would draw from the *M.S.S. v. Belgium and Greece* judgment.

By letter of 10 March 2011 the Government replied in the majority of cases that they would exercise their right under the Dublin Regulation (the

sovereignty clause) to assume the examination of their asylum claims. However, in the applicant's case the Government noted that the domestic decisions had become final and stated that they could not make use of that right.

Subsequently, on 15 June 2011, the Government were requested to submit observations on the admissibility and merits of the application. They were asked in particular whether in the light of the Court's judgment in the case of *M.S.S. v. Belgium and Greece* the applicant's expulsion to Greece would be in breach of Article 3 of the Convention.

By letter of 18 August 2011 the Government informed the Court that the applicant had lodged a fresh asylum request on 21 April 2011. Austria had decided to make use of its right under the Dublin Regulation to assume the examination of that asylum claim. The applicant's request was therefore being examined on the merits and he would not be expelled to Greece. The Government suggested that the application be struck off the Court's list of cases under Article 37 § 1 of the Convention following the decision of 5 July 2011 in *Ali Zada and Others v. Austria*, no. 17127/10.

The applicant's counsel was given an opportunity to comment. By letter of 21 September 2011 he confirmed that the Austrian authorities were making use of the sovereignty clause under the Dublin Regulation. However, he opposed the request to strike the application out of the list, arguing that the applicant had suffered anxiety and insecurity as a result of the authorities' decision to expel him to Greece. Moreover he requested reimbursement of procedural costs and claimed compensation for non-pecuniary damage.

COMPLAINTS

The applicant complained under Articles 2 and 3 of the Convention that his threatened expulsion to Greece constituted a real risk to his life and a real risk of torture and ill-treatment because of the danger of *refoulement* by the Greek authorities to Afghanistan without access to proper asylum proceedings. He also complained about the lack of support for asylum seekers in Greece and about the risk of violent treatment by the Greek authorities.

Under Article 8 the applicant complained that his expulsion to Greece would violate his right to respect for his family life as his brother was living in Austria.

Furthermore the applicant complained under Article 13 that the Austrian authorities had failed to evaluate the risk of *refoulement* in Greece and the risk of a violation of Article 3 in case of a return to Afghanistan.

Finally, the applicant complained under Article 14 in connection with Articles 2, 3 and 8 that following an amendment of the law, he could no longer lodge a complaint with the Administrative Court in asylum proceedings, while such a complaint was generally available in administrative proceedings.

THE LAW

Article 37 of the Convention provides:

> "1. The Court may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that
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> (a) the applicant does not intend to pursue his application; or
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> (b) the matter has been resolved; or
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> (c) for any other reason established by the Court, it is no longer justified to continue the examination of the application.
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> However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the Protocols thereto so requires.
>
> 2. The Court may decide to restore an application to its list of cases if it considers that the circumstances justify such a course."

In order to determine whether an application should be struck out of the list pursuant to Article 37 § 1 (c) of the Convention, the Court must consider whether "the circumstances lead it to conclude that "for any other reason ... it is no longer justified to continue the examination of [it]". The Court recalls that it enjoys a wide discretion in identifying grounds capable of being relied upon in a strike out decision on this basis; however, it also recalls that such grounds must reside in the particular circumstances of each case (*Association SOS Attentats and de Boery v. France* [GC], (dec.), no. 76642/01, § 37, ECHR 2006-XIV, and *M.H. and A.S. v. the United Kingdom* (dec.), nos. 38267/07 and 14293/07, 16 December 2008).

In the Court's view, the particular circumstances of the present application are such that it is no longer justified to continue its examination (see, *Ali Zada and Others v. Austria* (dec.), no. 17127/10, 5 July 2011, raising the same issues as the present case, and also, as a comparable case relating to an undertaking not to return asylum seekers under the Dublin Regulation, *B.S. and 232 other applications v. the United Kingdom* (dec.), no. 7935/09, 30 November 2010).

The applicant's complaints under Articles 2, 3 and 8 are based on the consequences of his return to Greece, on the conditions of reception in that country and the risk of expulsion from that country to his country of origin without a proper examination of his asylum requests. According to the information provided by the parties, the applicant has lodged a fresh asylum

request in Austria which is currently being examined on the merits. That means that he will not be returned to Greece or to any other country without a full examination of his asylum claim by the Austrian authorities. Consequently, there is no longer a basis for the applicant's complaints under Article 13 either, as these complaints related to the lack of an examination of the substance of his asylum claim by the Austrian authorities. No issue arises under Article 14 either. Moreover, the applicant will have the opportunity to lodge a new application with the Court (including the possibility of requesting an interim measure under Rule 39 of the Rules of Court) should that need arise.

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 present application.

Finally, the Court notes that the applicant asked for reimbursement of procedural costs and also requested compensation for non-pecuniary damage. Pursuant to Rule 43 § 4 of the Rules of Court, the Court has discretion to award costs if a case is struck out of the list. In the present case, the Court does not consider it appropriate to make such an award. Furthermore, the Court notes that it is not empowered to award damages if a case is struck out of the list.

For the reasons set out above, it is appropriate to lift the interim measures indicated under Rule 39 of the Rules of Court and to strike the case out of the list.

For these reasons, the Court unanimously

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

Dismisses the applicant's claims.

André Wampach
Deputy Registrar

Nina Vajić
President