

Austria - Administrative Court (VwGH), 19 March 2013, 2011/21/0128

Country of Decision:

Austria

Country of Applicant:

Nigeria

Date of Decision:

19-03-2013

Citation:

Administrative Court (VwGH) 19.03.2013, 2011/21/0128

Court Name:

Administrative Court (VwGH)

Keywords:

Detention

Dublin Transfer

Request to take back

Responsibility for examining application

Subsequent application

Relevant Legislative Provisions:European Union Law > [EN - Asylum Procedures Directive, Council Directive 2005/85/EC of 1 December 2005](#) [1]European Union Law > [EN - Charter of Fundamental Rights of the European Union](#) [2]European Union Law > [EN - Asylum Procedures Directive, Council Directive 2005/85/EC of 1 December 2005](#) [1] > [Art 18](#) [3]European Union Law > [EN - Charter of Fundamental Rights of the European Union](#) [2] > [Article 6](#) [4]European Union Law > [EN - Dublin II Regulation, Council Regulation \(EC\) No 343/2003 of 18 February 2003](#) [5] > [Article 2](#) [6]European Union Law > [EN - Dublin II Regulation, Council Regulation \(EC\) No 343/2003 of 18 February 2003](#) [5] > [Article 3](#) [7]European Union Law > [EN - Dublin II Regulation, Council Regulation \(EC\) No 343/2003 of 18 February 2003](#) [5] > [Article 4](#) [8]European Union Law > [EN - Dublin II Regulation, Council Regulation \(EC\) No 343/2003 of 18 February 2003](#) [5] > [Article 16](#) [9]

European Union Law > [EN - Dublin II Regulation, Council Regulation \(EC\) No 343/2003 of 18 February 2003](#) [5] > [Article 17](#) [10]

European Union Law > [EN - Dublin II Regulation, Council Regulation \(EC\) No 343/2003 of 18 February 2003](#) [5] > [Article 18](#) [11]

Headnote:

Foreigners who have lodged an application for international protection cannot be taken into detention pending deportation as a person remaining in the country unlawfully.

If a more recent application for international protection has been lodged in the transfer country, then the Applicant will again be assigned the status of an asylum seeker in accordance with the Dublin II Regulation. The (re-)receiving country must undertake an examination of the application for asylum made in another Member State, even if it is a ?subsequent application?.

Facts:

The Applicant travelled to Austria in 2003 and applied for asylum. A negative decision was finally reached lawfully on this application in January 2009 and an expulsion decision to Nigeria was issued. As of November 2009 the Applicant went into hiding and was found in Ireland in December 2010 at the latest.

Ireland initiated Dublin consultations with Austria and the Austrian authorities agreed to take back the Applicant in January 2011 in accordance with Art 16(1)(e) of the Dublin II Regulation. In March 2011 the Applicant was finally returned to Austria from Ireland and she was taken into detention pending deportation as a person remaining unlawfully in the Federal territory.

The Applicant lodged an appeal against the arrest and detention pending deportation. The Lower Austria Independent Administrative Chamber upheld the appeal and declared that both the arrest and the detention were unlawful. The grounds stated were primarily that the Applicant had lodged an application for international protection in Ireland and it could therefore be assumed that this would be examined by the responsible Member State of Austria. Only when the procedure was not followed, did she lodge another application for international protection in Austria.

The Security Department for the Federal State of Lower Austria filed an official appeal against this decision.

Decision & Reasoning:

An asylum seeker cannot (in accordance with § 76 (1) of the Aliens' Police Act 2005) be arrested and detained for the reason that he was residing unlawfully in Austria. The Asylum Act makes a distinction in § 17 between submitting and filing an application for international protection: the asylum application is filed if the Applicant has expressed the desire for this to an official from the security services; the asylum application is submitted when the Applicant is brought before the initial reception centre. However, both the submission as well as the filing of an application make the arrest and holding in detention owing to illegal residence unlawful ?an arrest is possible only on the basis of the provisions (more favourable for the person concerned) of § 76(2) and (2a) of the Aliens' Police Act, which are to be applied to asylum seekers.

For persons who are transferred to Austria in accordance with the Dublin II Regulation and who have already applied for asylum in another Member State, there are no special provisions in this

regard in the Asylum Act. Consideration is however to be given to the directly applicable provisions of the Dublin II Regulation (namely Art 2, 3, 4 and 16 of the Dublin II Regulation).

The obligation of the competent country to examine an asylum application is not associated with any additional conditions. It is triggered with the filing of an asylum application within the meaning of Art 2(c) in conjunction with Art 4(2) of the Dublin II Regulation and means that the examination of the application by the responsible Member State after any transfer in accordance with Art 16(1)(b) of the Dublin II Regulation is to be brought to an end. The Regulation therefore clearly assumes the concept of a single application, which is also to be dealt with by a single Member State within the meaning of the 'one-chance-only principle' laid down in Art 3(1) second clause of the Dublin II Regulation, without an additional application needing to be filed in the event of a transfer.

If such a procedure has already been carried out and if the application was rejected, then the obligation to take back in accordance with Art 16(1)(e) of the Dublin II Regulation takes effect. It also has an effect if the applicant has lodged a further application for asylum in another Member State after the rejection of his first application. This application also triggers the obligation to undertake an examination stipulated in Art 3 of the Dublin II Regulation. In principle, the Member State that is responsible for the examination is the one that was responsible for the initial application.

To this extent the Dublin II Regulation does not contain any special regulations for the treatment of a subsequent application: also in these cases the instruction in Art 16(1)(b) applies, according to which the examination of the application by the responsible Member State is to be completed. Lodging a more recent application in the responsible Member State is also not envisaged in this form according to the system of the Dublin II Regulation and cannot be the condition that the application is considered to have been lodged in the responsible Member State.

As a result, according to the Dublin II Regulation, the obligation of the responsible country to examine an application for asylum lodged in another Member State exists by implication. This also applies to subsequent applications for which it cannot be assessed whether new reasons for flight were asserted without a prior examination. This examination of the application must take place 'in accordance with national law' (see Art 2(e) of the Dublin II Regulation). In Austria this requires that an application for international protection within the meaning of § 17 of the Asylum Act is considered as already having been lodged. Against this background, the regulations in § 17 of the Asylum Act must however be understood to be incomplete in Dublin cases, as the legislator without doubt intended to make the asylum procedure system compatible with the Dublin II Regulation. This unintentional incompleteness is to be removed in accordance with the above-mentioned intention to satisfy requirements under Union law to the extent that an asylum application is also to be regarded as having been lodged if the Republic of Austria has declared itself, in accordance with the Dublin II Regulation, to be prepared to take back (again) a foreigner who has lodged an asylum application in another Member State and was returned. A (renewed) request for protection in Austria is not required.

Outcome:

The official appeal was refused and therefore the illegality of the imposition of detention pending deportation was confirmed.

Observations/Comments:

Further decisions with comparable content:

Administrative Court (VwGH) 11.06.2013, 2013/21/0037

VwGH 16.05.2013, 2012/21/0218

VwGH 19.03.2013, 2011/21/0250

VwGH 17.10.2013, 2013/21/0121

Attachment(s):



[VwGH_19032013_2011_21_0128.pdf](#)[12]

Other sources cited:

Filzwieser/Sprung:Dublin II Regulation, Das Europäische Asylzuständigkeitssystem, (The European system of responsibility for asylum) 3rd edition (2010)

Funke-Kaiser:Gemeinschaftskommentar zum (deutschen) Asylverfahrensgesetz 1992 (Community comments on the (German) Asylum Procedure Act 1992), update November 2009

National / Other Legislative Provisions:

[Austria - Asylgesetz \(Asylum Act\) 2005 - § 3](#) [13]

[Austria - Asylgesetz \(Asylum Act\) 2005 - § 2](#) [14]

[Austria - Asylgesetz \(Asylum Act\) 2005 - § 17](#) [15]

[Austria - Fremdenpolizeigesetz \(Aliens Police Act\) 2005](#) [16]

Links:

[1] <http://www.asylumlawdatabase.eu/en/content/asylum-procedures-directive>

[2] <https://www.asylumlawdatabase.eu/node/453>

[3] <http://www.asylumlawdatabase.eu/en/content/asylum-procedures-directive#Art%2018>

[4] https://www.asylumlawdatabase.eu/node/453#toc_39

[5] <https://www.asylumlawdatabase.eu/node/19>

[6] https://www.asylumlawdatabase.eu/node/19#toc_42

[7] https://www.asylumlawdatabase.eu/node/19#toc_65

[8] https://www.asylumlawdatabase.eu/node/19#toc_71

[9] https://www.asylumlawdatabase.eu/node/19#toc_138

[10] https://www.asylumlawdatabase.eu/node/19#toc_149

[11] https://www.asylumlawdatabase.eu/node/19#toc_157

[12] https://www.asylumlawdatabase.eu/sites/default/files/aldfiles/VwGH_19032013_2011_21_0128.pdf

[13] <https://www.asylumlawdatabase.eu/en/taxonomy/term/4427>

[14] <https://www.asylumlawdatabase.eu/en/taxonomy/term/4603>

[15] <https://www.asylumlawdatabase.eu/en/taxonomy/term/4257>

[16] <https://www.asylumlawdatabase.eu/en/taxonomy/term/4265>