

Austria- Constitutional Court, 02 October 2010, U3078/09

Country of Decision:

Austria

Country of Applicant:

Russia

Date of Decision:

02-10-2010

Citation:

VfGH 02.10.2010, U3078/09 ua

Additional Citation:

VfSlg 19.188-19.263, 19.275

Court Name:

Constitutional Court

Keywords:

Effective remedy (right to)

Legal assistance / Legal representation / Legal aid

Relevant Legislative Provisions:Council of Europe Instruments > [EN - Convention for the Protection of Human Rights and Fundamental Freedoms](#) [1]

Council of Europe Instruments

European Union Law > [EN - Charter of Fundamental Rights of the European Union](#) [2]Council of Europe Instruments > [EN - Convention for the Protection of Human Rights and Fundamental Freedoms](#) [1] > [Article 3](#) [3]European Union Law > [EN - Asylum Procedures Directive, Council Directive 2005/85/EC of 1 December 2005](#) [4] > [Art 15](#) [5]

Headnote:

The Applicant submitted applications for the assignment of a legal adviser and legal aid at the same time as his appeal. The Asylum Court rejected the appeal and the applications for the assignment of a legal adviser and legal aid as inadmissible. The Constitutional Court of Austria revoked this finding with reference to Art 15 Procedures Directive: the Asylum Court should not

have been permitted to reject the applications for the assignment of a legal adviser and legal aid, but should have pronounced a judgment on the merits by means of a separate decision that could be challenged with a legal remedy.

Facts:

The Applicant submitted an application on 11.02.2008 for protection status in Austria. The Federal Asylum Agency rejected this application for asylum and deported him to the Russian Federation. The Asylum Court rejected the appeal lodged against this as unjustified, in a decision of 02.04.2009.

On 16.10.2009 the Applicant submitted a second application for protection status. This was rejected because of the previous decision (*res judicata*). In the appeal against the last-mentioned decision the Applicant also made an application for the assignment of a refugee adviser (corresponds to the 'legal adviser' within the meaning of Art 15 Procedures Directive) as well as legal aid (corresponds to legal aid).

As a result of a failure of service, the decision of the Asylum Court of 02.04.2009 had not become legally binding; the Asylum Court therefore revoked the rejection because of the previous decision. With regard to the merits, the Asylum Court turned down the appeal regarding asylum, subsidiary protection and expulsion in a decision of 13.11.2009. At the same time it rejected the applications for the assignment of a legal adviser as well as legal aid as inadmissible without an assessment of the merits. According to the Asylum Court, the application for the assignment of a legal adviser should have been directed to the legal adviser himself and not the Asylum Court; there was no legal basis for an assignment of a legal adviser by the Asylum Court. The Asylum Court had no concerns under Community law in this connection as to whether the legal advisers were actually available, which the Asylum Court presumed.

The Applicant lodged an appeal against this to the Constitutional Court owing to an infringement of rights granted under constitutional law (right to equal treatment of foreigners, Art 3 ECHR).

The Constitutional Court revoked the decision by the Asylum Court which had been challenged on the grounds of unconstitutionality.

Decision & Reasoning:

In its judgment the Constitutional Court came to the conclusion that the Applicant's right to proceedings before the statutory judge had been infringed by the decision of the Asylum Court. This right is infringed, amongst other things, if an authority wrongly refuses to make a decision on the merits. The Constitutional Court justified its decision in detail as follows:

Asylum seekers would not necessarily require representation by a lawyer in their asylum proceedings. However, they might have special requirements, in particular with regard to the language-based and legal understanding of the (legal) questioning taken into account in the proceedings before the Asylum Court. These special requirements would be allowed for by §§ 64 ff. and § 66 Asylum Act 2005 (in the version Federal Law Gazette (BGBl.) I No. 29/2009). §66 Para. 2 Z 3 Asylum Act envisages that legal advisers ('Refugee advisers') are to represent the Applicant (amongst others) in asylum proceedings, if the involvement of a lawyer is not prescribed by law. The representation must take place at the request of the Applicant. The provisions leave open to whom this request must be directed. The Asylum Court was not correct in its opinion according to which the Applicant had to direct his request for representation directly to a legal

adviser. This is because the 'request' by the Applicant corresponds to the legal obligation of the authority to take action. This also arises if no sanctions are laid down in the event of inaction by a legal adviser despite a request by the Applicant for representation. Lastly Art 15 Para. 2 Procedures Directive (subject to Para. 3) stipulates that Member States must ensure that if an application is made by the asylum seeker, the latter receives legal advice and/or representation. It arises from Art 15 Para. 3 in conjunction with Art 39 that legal advice or representation must be provided free of charge at least in the proceedings before the Asylum Court.

Owing to the requirement for an interpretation of national law in accordance with the Directive, the wording 'on request' in § 66 Para. 2 Asylum Act is to be interpreted in the same way as the word 'request' in Art 15 Para. 2 Procedures Directive. Therefore the Asylum Court should have been obliged to assign a legal adviser to represent the Applicant in the proceedings before the Asylum Court or at least agree on the merits of his application. Also on the basis of the requirement for an interpretation in accordance with the Directive, the wording 'in proceedings' in § 66 Para. 2 Z 3 Asylum Act is to be understood as 'for proceedings', i.e. that the advice or representation by the legal adviser already applies to the submission of the appeal itself to the Asylum Court and the application is to be submitted before or at the start of the proceedings.

Lastly the Constitutional Court stated that the decision on an application for the assignment of a legal adviser must be taken through a decision that could be challenged separately with a legal remedy and not only with the decision concluding the asylum proceedings or through a decision that could not be challenged separately.

In the case in question the Asylum Court would therefore have been obliged not to reject the application for the assignment of a legal adviser, but to agree on the merits in the form of a decision that could be challenged with a legal remedy.

As the Asylum Court did not do this, the Applicant's right granted under constitutional law for proceedings before the statutory judge was infringed and the decision was to be revoked.

Outcome:

The appeal was granted and the decision of the Asylum Court that had been challenged was revoked.

Observations/Comments:

There is no legal aid for proceedings before the Asylum Court (within the meaning of the assignment of a lawyer free of charge). In the decision of the Constitutional Court of 03.11.2009, U556/09, the Constitutional Court had already stated that owing to the requirements under Community law (in particular from the Procedures Directive), the Asylum Court had wrongly interpreted an application for 'legal representation free of charge' exclusively as an application for the approval of legal aid.

The decision in question by the Constitutional Court first caused an immediate change to the practice of the Asylum Court that had been in existence until this time. Applicants were promised legal advisers in particular for corresponding applications per the decision.

An amendment to legislation (BGBl No. 38/2011, in force since 01.10.2011) and an invitation to tender for the awarding of legal advice to external organisations followed. According to the current legal position (status 31.03.2013), asylum seekers are notified in writing with their (at least partial) refusal notification from the Asylum Agency which of the two organisations instructed by the

Ministry for Internal Affairs is responsible for supporting and advising them when lodging the appeal and during the appeal proceedings before the Asylum Court. The previous wording contained in this stipulation of on request to represent lapsed.

The scope and opinion of legal advice (and representation) of both the organisations entrusted with the legal representation resulted in diverging reports from the persons concerned. Critics bemoan amongst other things the underfunding and lack of quality of the legal advice offered that is partly a result of this, as well as a lack of representation.

See on this subject the case summary of the Constitutional Court decision (VfGH) 15.06.2012, G41/12.

Attachment(s):



[VfGH 02.10.2010, U3078-09 ua.pdf](#)[6]

National / Other Legislative Provisions:

[Austria - Allgemeines Verwaltungsverfahrensgesetz \(General Administrative Procedure Act\) 1991 - § 14 Abs 6](#) [7]

[Austria - Allgemeines Verwaltungsverfahrensgesetz \(General Administrative Procedure Act\) 1991 - § 14 Abs 7](#) [8]

[Austria - Allgemeines Verwaltungsverfahrensgesetz \(General Administrative Procedure Act\) 1991 - § 17 Abs 2](#) [9]

[Austria - Allgemeines Verwaltungsverfahrensgesetz \(General Administrative Procedure Act\) 1991 - § 17a](#) [10]

[Austria - Allgemeines Verwaltungsverfahrensgesetz \(General Administrative Procedure Act\) 1991 - § 39 Abs 2](#) [11]

[Austria - Allgemeines Verwaltungsverfahrensgesetz \(General Administrative Procedure Act\) 1991 - § 44\(b\) Abs 2](#) [12]

[Austria - Allgemeines Verwaltungsverfahrensgesetz \(General Administrative Procedure Act\) 1991 - § 44\(f\) Abs 2](#) [13]

[Austria - Allgemeines Verwaltungsverfahrensgesetz \(General Administrative Procedure Act\) 1991 - § 57 Abs 3](#) [14]

[Austria - Allgemeines Verwaltungsverfahrensgesetz \(General Administrative Procedure Act\) 1991 - § 66](#) [15]

[Austria - Allgemeines Verwaltungsverfahrensgesetz \(General Administrative Procedure Act\) 1991 - § 67e Abs 2](#) [16]

[Austria - Allgemeines Verwaltungsverfahrensgesetz \(General Administrative Procedure Act\) 1991 - § 68](#) [17]

[Austria - Asylgerichtshofgesetz \(Asylum Court Act\) - § 23](#) [18]

[Austria - Asylgerichtshofgesetz \(Asylum Court Act\) - § 57 Abs 3](#) [19]

[Austria - Asylgesetz \(Asylum Act\) 2006 - § 10](#) [20]

[Austria - Asylgesetz \(Asylum Act\) 2006 - § 3](#) [21]

[Austria - Asylgesetz \(Asylum Act\) 2006 - § 61](#) [22]

[Austria - Asylgesetz \(Asylum Act\) 2006 - § 64](#) [23]

[Austria - Asylgesetz \(Asylum Act\) 2006 - § 66](#) [24]

[Austria - Asylgesetz \(Asylum Act\) 2006 - § 8](#) [25]

[Austria - Bundes-Verfassungsgesetz \(Federal Constitutional Law\) - Art 83 Abs 2](#) [26]

[Austria - Bundes-Verfassungsgesetz \(Federal Constitutional Law\) - Art 144a](#) [27]

[Austria - Verfassungsgerichtshofgesetz \(Constitutional Court Act\) - § 19 Abs 3 Z 2](#) [28]

[Austria - Verfassungsgerichtshofgesetz \(Constitutional Court Act\) - § 19 Abs 4](#) [29]

[Austria - Verfassungsgerichtshofgesetz \(Constitutional Court Act\) - § 88](#) [30]

Links:

[1] <http://www.asylumlawdatabase.eu/en/content/en-european-convention-protection-human-rights-and-fundamental-freedoms-echr>

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

[3] https://www.asylumlawdatabase.eu/node/195#toc_12

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

[5] <http://www.asylumlawdatabase.eu/en/content/asylum-procedures-directive#Art%2015>

[6]

<https://www.asylumlawdatabase.eu/sites/default/files/aldfiles/VfGH%2002.10.2010%2C%20U3078-09%20ua.pdf>

[7] <https://www.asylumlawdatabase.eu/en/taxonomy/term/4473>

[8] <https://www.asylumlawdatabase.eu/en/taxonomy/term/4474>

[9] <https://www.asylumlawdatabase.eu/en/taxonomy/term/4475>

[10] <https://www.asylumlawdatabase.eu/en/taxonomy/term/4476>

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[26] <https://www.asylumlawdatabase.eu/en/taxonomy/term/4272>

[27] <https://www.asylumlawdatabase.eu/en/taxonomy/term/4425>

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[29] <https://www.asylumlawdatabase.eu/en/taxonomy/term/4459>

[30] <https://www.asylumlawdatabase.eu/en/taxonomy/term/4487>

[31] <https://www.asylumlawdatabase.eu/en/taxonomy/term/4460>

[32] <https://www.asylumlawdatabase.eu/en/taxonomy/term/4485>