

Austria - Constitutional Court, 9 October 2010, U1046/10

Country of Decision:

Austria

Country of Applicant:

Nigeria

Date of Decision:

09-10-2010

Citation:

U1046/10

Additional Citation:

VfSlg. 19.215

Court Name:

Constitutional Court

Keywords:

Accelerated procedure

Non-refoulement

Effective remedy (right to)

Final decision

Right to remain pending a decision (Suspensive effect)

Subsequent application

Relevant Legislative Provisions:Council of Europe Instruments > [EN - Convention for the Protection of Human Rights and Fundamental Freedoms](#) [1] > [Article 2](#) [2]European Union Law > [EN - Charter of Fundamental Rights of the European Union](#) [3]

Council of Europe Instruments > ECHR (Frist Protocol) > Art 6

Council of Europe Instruments > ECHR (Frist Protocol) > Art 13

Council of Europe Instruments > [EN - Convention for the Protection of Human Rights and Fundamental Freedoms](#) [1] > [Article 3](#) [4]European Union Law > [EN - Asylum Procedures Directive, Council Directive 2005/85/EC of 1 December 2005](#) [5] > [Art 7](#) [6]European Union Law > [EN - Asylum Procedures Directive, Council Directive 2005/85/EC of 1 December 2005](#) [5] > [Art 23](#) [7] > [Art 23.4](#) [8] > [Art 23.4 \(h\)](#) [8]European Union Law > [EN - Asylum Procedures Directive, Council Directive 2005/85/EC of 1 December 2005](#)

[5] > [Art 23](#) [7] > [Art 23.4](#) [8]

European Union Law > [EN - Asylum Procedures Directive, Council Directive 2005/85/EC of 1 December 2005](#) [5] > [Art 23](#) [7]

Council of Europe Instruments > [EN - Convention for the Protection of Human Rights and Fundamental Freedoms](#) [1] > [Article 8](#) [9]

European Union Law > [EN - Asylum Procedures Directive, Council Directive 2005/85/EC of 1 December 2005](#) [5] > [Art 32](#) [10]

European Union Law > [EN - Qualification Directive, Directive 2004/83/EC of 29 April 2004](#) [11]

Headnote:

The withdrawal of practical protection against deportation for subsequent applications is lawful and does not represent an infringement of the right to an effective remedy (Art 13 ECHR), if the legality of the withdrawal is examined by the Asylum Court.

Facts:

The Applicant is a Nigerian national, who entered Austria for the first time in 2004 and applied for protection. In 2008 the proceedings were finally concluded with a negative outcome with regard to the granting of asylum and subsidiary protection and expulsion to Nigeria was pronounced.

In 2010 he again applied for protection in Austria without having returned to his home country in the meantime. The Federal Asylum Agency held a hearing and at the end of the latter announced the withdrawal of practical protection against deportation by means of a verbal decision in accordance with § 12a Para. 2 of the Asylum Act in conjunction with § 41a. The Asylum Court confirmed the legality of the withdrawal of practical protection against deportation. The reasons stated were that a valid expulsion existed from the previous asylum proceedings, with which the Applicant had not yet complied. The Applicant had not submitted any new reasons for fleeing and the subsequent application was expected to be rejected as already decided. The health problems (knee, heart and lung problems) were partly not life-threatening and partly not supported by evidence.

The Applicant lodged an appeal against this decision at the Constitutional Court. In the latter he pleaded, amongst other things, that his right to an effective remedy (Art 13 ECHR) and right to proceedings before the statutory judge (Art 83 Para. 2 Federal Constitutional Law) had been infringed.

Decision & Reasoning:

The Constitutional Court rejected the appeal.

In summary, the Applicant pleaded that § 12a Para.2 of the Asylum Act in conjunction with § 41a violated Art 13 ECHR and the constitutional principle because on the one hand it granted far-reaching intervention in rights protected by constitutional law ? amongst others in Art 2, 3 and 8 ECHR ? , and on the other hand however it provided for no effective legal remedy against such intervention.

These arguments were not accepted by the Constitutional Court. Based on the established case law of the ECHR, it was argued that Art 13 ECHR guaranteed the availability of a legal remedy at national level in order to safeguard the most important content of the rights and freedoms enshrined in the Convention, ?in whatever form they might be safeguarded in the national legal

system?. According to this, the purpose of Art 13 ECHR is the provision of a national legal remedy that makes it possible to challenge the most important elements of the relevant Convention compliant as well as creating suitable remedial action. Art 13 ECHR requires no particular form of legal remedy; the contracting countries are granted discretionary powers in satisfying their obligations in accordance with this provision.

In the case of subsequent applications an asylum procedure in accordance with the rule of law had been implemented and ended lawfully with a negative decision and an expulsion associated with this. As a result, before the submission of a second application, at least a refoulement review or consideration of interests had been undertaken. In addition, § 12a Para.2 Z 3 of the Asylum Act envisages that, before the withdrawal of practical protection against deportation and therefore before the possible implementation of an expulsion (deportation), a refoulement review in accordance with Art 2 and 3 ECHR and a consideration of interests within the meaning of Art 8 ECHR are to be undertaken again. The 'automatic' review of the decision of the Federal Asylum Agency triggered by the transmission of the administrative files to the Asylum Court in accordance with § 41a Asylum Act ensures a rapid review by the Asylum Court. The review by the Asylum Court is not assigned any suspensive effect in itself. However, with the period of three working days starting with the receipt of the administrative files at the responsible court department within which the implementation of the expulsion (deportation) is awaited, the legislator has ensured to the required extent that the Asylum Court is in a position to review the case and possibly to rectify the decision by the Federal Asylum Agency, before deportation is carried out.

Outcome:

Appeal rejected.

Attachment(s):

[VfGH_09102010_U1046_10.pdf](#)[12]

National / Other Legislative Provisions:

[Austria - Allgemeines Verwaltungsverfahrensgesetz \(General Administrative Procedure Act\) 1991 - § 33 Abs 2](#) [13]

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

[Austria - Allgemeines Verwaltungsverfahrensgesetz \(General Administrative Procedure Act\) 1991 - § 62 Abs 2](#) [15]

[Austria - Allgemeines Verwaltungsverfahrensgesetz \(General Administrative Procedure Act\) 1991 - § 62 Abs 3](#) [16]

[Austria - Allgemeines Verwaltungsverfahrensgesetz \(General Administrative Procedure Act\) 1991 - § 63 Abs 2](#) [17]

[Austria - Allgemeines Verwaltungsverfahrensgesetz \(General Administrative Procedure Act\) 1991 - § 66 Abs 2](#) [18]

[Austria - Asylgesetz \(Asylum Act\) 1997 - § 7](#) [19]

[Austria - Asylgesetz \(Asylum Act\) 1997 - § 8 Abs 1](#) [20]

[Austria - Asylgesetz \(Asylum Act\) 2005 - § 2 Abs 1 Z 23](#) [21]

[Austria - Asylgesetz \(Asylum Act\) 2005 - § 12a](#) [22]

[Austria - Asylgesetz \(Asylum Act\) 2005 - § 17](#) [23]

[Austria - Asylgesetz \(Asylum Act\) 2005 - § 19](#) [24]

[Austria - Asylgesetz \(Asylum Act\) 2005 - § 22](#) [25]

[Austria - Asylgesetz \(Asylum Act\) 2005 - § 29 \[26\]](#)
[Austria - Asylgesetz \(Asylum Act\) 2005 - § 39 Abs 2 \[27\]](#)
[Austria - Asylgesetz \(Asylum Act\) 2005 - § 40 \[28\]](#)
[Austria - Asylgesetz \(Asylum Act\) 2005 - § 41a \[29\]](#)
[Austria - Bundes-Verfassungsgesetz \(Federal Constitutional Law\) - Art 11 Abs 2 \[30\]](#)
[Austria - Bundes-Verfassungsgesetz \(Federal Constitutional Law\) - Art 18 Abs 1 \[31\]](#)
[Austria - Bundes-Verfassungsgesetz \(Federal Constitutional Law\) - Art 83 Abs 2 \[32\]](#)
[Austria - Bundes-Verfassungsgesetz \(Federal Constitutional Law\) - Art 133 Z 4 \[33\]](#)
[Austria - Bundes-Verfassungsgesetz \(Federal Constitutional Law\) - Art 144 \[34\]](#)
[Austria - Bundes-Verfassungsgesetz \(Federal Constitutional Law\) - Art 144a \[35\]](#)
[Austria - BVG u?ber die Beseitigung rassischer Diskriminierung \(Implementation of the International Convention on abolishment of all forms of racial discrimination\) - Art I \(1\) \[36\]](#)
[Austria - Fremdenpolizeigesetz \(Aliens Police Act\) 2005 - § 39 Abs 2 Z 1 \[37\]](#)
[Austria - Fremdenpolizeigesetz \(Aliens Police Act\) 2005 - § 67 Abs 4 \[38\]](#)
[Austria - Fremdenpolizeigesetz \(Aliens Police Act\) 2005 - § 74 Abs 2 Z 1 \[39\]](#)

Links:

[1] <http://www.asylumlawdatabase.eu/en/content/en-european-convention-protection-human-rights-and-fundamental-freedoms-echr>
[2] https://www.asylumlawdatabase.eu/node/195#toc_4
[3] <https://www.asylumlawdatabase.eu/node/453>
[4] https://www.asylumlawdatabase.eu/node/195#toc_12
[5] <http://www.asylumlawdatabase.eu/en/content/asylum-procedures-directive>
[6] <http://www.asylumlawdatabase.eu/en/content/asylum-procedures-directive#Art%207>
[7] <http://www.asylumlawdatabase.eu/en/content/asylum-procedures-directive#Art 23>
[8] <http://www.asylumlawdatabase.eu/en/content/asylum-procedures-directive#Art%2023>
[9] https://www.asylumlawdatabase.eu/node/195#toc_46
[10] <http://www.asylumlawdatabase.eu/en/content/asylum-procedures-directive#Art%20%2032>
[11] <http://www.asylumlawdatabase.eu/en/content/qualification-directive>
[12] https://www.asylumlawdatabase.eu/sites/default/files/aldfiles/VfGH_09102010_U1046_10.pdf
[13] <https://www.asylumlawdatabase.eu/en/taxonomy/term/4276>
[14] <https://www.asylumlawdatabase.eu/en/taxonomy/term/4277>
[15] <https://www.asylumlawdatabase.eu/en/taxonomy/term/4278>
[16] <https://www.asylumlawdatabase.eu/en/taxonomy/term/4279>
[17] <https://www.asylumlawdatabase.eu/en/taxonomy/term/4280>
[18] <https://www.asylumlawdatabase.eu/en/taxonomy/term/4281>
[19] <https://www.asylumlawdatabase.eu/en/taxonomy/term/4188>
[20] <https://www.asylumlawdatabase.eu/en/taxonomy/term/4264>
[21] <https://www.asylumlawdatabase.eu/en/taxonomy/term/4255>
[22] <https://www.asylumlawdatabase.eu/en/taxonomy/term/4256>
[23] <https://www.asylumlawdatabase.eu/en/taxonomy/term/4257>
[24] <https://www.asylumlawdatabase.eu/en/taxonomy/term/4258>
[25] <https://www.asylumlawdatabase.eu/en/taxonomy/term/4259>
[26] <https://www.asylumlawdatabase.eu/en/taxonomy/term/4260>
[27] <https://www.asylumlawdatabase.eu/en/taxonomy/term/4261>
[28] <https://www.asylumlawdatabase.eu/en/taxonomy/term/4262>
[29] <https://www.asylumlawdatabase.eu/en/taxonomy/term/4263>
[30] <https://www.asylumlawdatabase.eu/en/taxonomy/term/4270>
[31] <https://www.asylumlawdatabase.eu/en/taxonomy/term/4271>
[32] <https://www.asylumlawdatabase.eu/en/taxonomy/term/4272>
[33] <https://www.asylumlawdatabase.eu/en/taxonomy/term/4273>

- [34] <https://www.asylumlawdatabase.eu/en/taxonomy/term/4274>
- [35] <https://www.asylumlawdatabase.eu/en/taxonomy/term/4425>
- [36] <https://www.asylumlawdatabase.eu/en/taxonomy/term/4242>
- [37] <https://www.asylumlawdatabase.eu/en/taxonomy/term/4268>
- [38] <https://www.asylumlawdatabase.eu/en/taxonomy/term/4266>
- [39] <https://www.asylumlawdatabase.eu/en/taxonomy/term/4267>