

Austria - Federal Administrative Court, 19 October 2017, I403 2173192-1

Country of Decision:

Austria

Country of Applicant:

Morocco

Date of Decision:

19-10-2017

Citation:

I403 2173192-1

Court Name:

Federal Administrative Court

Keywords:

Assessment of facts and circumstances

Detention

Personal interview

Unaccompanied minor

Vulnerable person

Headnote:

The competent authority has to respect as legally binding a court order that determines a certain date of birth and thereby the minority of an applicant. This is also the case if the applicant himself indicates another (earlier) date of birth.

The personal interview of a minor without his legal representative constitutes a significant procedural violation. The facts are presumed to not be ascertained. The competent authority has to ascertain the facts and circumstances once again.

Facts:

The applicant has Moroccan citizenship. He indicated his birth date in the year of 1999. His minority was confirmed in an expert report. In a court order the district court presumed his date of birth to be in 2000 and entrusted the municipal authority of Vienna with legal representation.

The 14th of September 2017 the applicant was remanded in custody. The 18th of September 2017 the Federal Agency of Migration and Refugees (BFA) stated in an e-mail to the municipal authority of Vienna, that the presence of the legal representative during the personal interview would be possible, but that the authority is presuming the majority of the applicant.

The 25th of September 2017 the applicant had the personal interview without the presence of the legal representative. The applicant stated his date of birth was the (earlier) date of birth in the year 1999. The same day the BFA issued a decision, in which it rejected the application for asylum and for subsidiary protection. The BFA issued a return decision and permitted the deportation to Morocco. The decision was delivered to the applicant and his legal representative.

The legal representative submitted an appeal against this decision requesting the reassessment by the previous instance. In the appeal the legal representative claims the violation of § 19 Abs. 5 AsylG 2005. This law imposes the presence of the legal representative during the personal interview of a minor applicant. In the appeal, the legal representative requested the reassessment by the first instance because otherwise there would be an abridgement of the appeal stages to the disadvantage of the applicant.

Decision & Reasoning:

First of all, the Federal Administrative Court states that the BFA disregarded the court order determining the applicant's minority. This kind of court order is legally binding. According to the court order the applicant is presumed to be a minor, even though the applicant declared another date of birth.

The Federal Administrative Court alleges that the personal interview was held without the legal representative. According to § 19 Abs. 5 AsylG 2005 minor applicants can only be interviewed in the presence of the legal representative. The e-mail the BFA sent to the legal representative the 18th of September 2017 cannot remedy this procedural violation.

Because of this substantial procedural violation the applicant's statements in the personal interview cannot be used. The Federal Administrative Court states that the facts were not ascertained.

Furthermore, the Federal Administrative Court determines if it has an obligation to take a decision on the merits imposed by § 28 Absatz 3 VwGVG. The court decides that the investigation on the facts is insufficient. Nevertheless, it states that the investigation proceedings and the investigation of facts carried out by the Federal Administrative Court would not be according to the law. This would abbreviate the appeal stages.

Outcome:

Appeal granted - Reexamination by the first instance authorities

Attachment(s):



[ris.bvwg_BVWGT_20171019_I403_2173192_1_00 personal interview.pdf\[1\]](#)

Other sources cited:

National / Other Legislative Provisions:

[Austria - § 19 Abs. 5 AsylG 2005](#) [2]

[Austria - § 28 Absatz 3 VwGVG](#) [3]

[Austria - § 25a Abs. 1 VwGG](#) [4]

[Austria - Art. 133 Abs. 4 B-VG](#) [5]

Links:

[1]

https://www.asylumlawdatabase.eu/sites/default/files/aldfiles/ris.bvwg_.BVWGT_20171019_I403_2173192

[2] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/austria-%C2%A7-19-abs-5-asylg-2005>

[3] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/austria-%C2%A7-28-absatz-3-vwgv>

[4] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/austria-%C2%A7-25a-abs-1-vwgg>

[5] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/austria-art-133-abs-4-b-vg>