

Austria - Regional Administrative Court of Upper Austria, LVwG-350363/15/KLi/CHö, 18 December 2017

Country of Decision:

Austria

Country of Applicant:

Afghanistan

Date of Decision:

18-12-2017

Citation:

LVwG-350363/15/KLi/CHö

Court Name:

Regional Administrative Court of Upper Austria

Keywords:

More favourable provisions

Protection

Refugee Status

Subsidiary Protection

Relevant Legislative Provisions:

European Union Law > Treaty on the Functioning of the European Union 2010/C 83/01 > Article 267 § 1 (b)

European Union Law > Treaty on the Functioning of the European Union 2010/C 83/01 > Article 267 § 2

European Union Law > Treaty on the Functioning of the European Union 2010/C 83/01 > EN - Treaty on the Functioning of the European Union 2010/C 83/01 - Art 288

European Union Law > [EN - Recast Qualification Directive, Directive 2011/95/EU of 13 December 2011](#) [1] > [Article 3](#) [2]European Union Law > [EN - Recast Qualification Directive, Directive 2011/95/EU of 13 December 2011](#) [1] > [Article 24](#) [3]European Union Law > [EN - Recast Qualification Directive, Directive 2011/95/EU of 13 December 2011](#) [1] > [Article 29](#) [4]

Headnote:

The Regional Administrative Court of Upper Austria requests a preliminary ruling of the CJEU concerning the interpretation of Article 29 Directive 2011/95/EU in the context of social assistance for persons entitled to asylum with a temporary residence permit.

- 1) Must Article 29 Directive 2011/95/EU, entitling persons subject to international protection to the same level of social assistance in the Member State as nationals of this Member State, be interpreted as fulfilling the conditions for direct effect as set out in the CJEU's jurisprudence?
- 2) Must Article 29 Directive 2011/95/EU be interpreted in the way, that it opposes national legislation that provides for persons with a temporary residence permit the same level of social assistance as for persons falling under subsidiary protection, while persons with a permanent residence permit are allowed to the social assistance provided for nationals of the Member State concerned?

Facts:

The claimant is an Afghan national who came to Austria with his family from Afghanistan in summer 2016, where he was granted asylum. In accordance with Austrian law, he obtained a temporary residence permit for three years. In March 2017, he claimed for his family and himself housing and income assistance. The competent authority granted him an amount of 430 Euros (1575 Euros for the whole family) out of the means-tested minimum income scheme. Pursuant to Section 4 Subsection 3 of the Minimum Income Act of Upper Austria (Oö. BMSG) the claimant did not receive full social assistance but only a reduced amount of social assistance on the ground that he has only a temporary residence right. The claimant launched a complaint against this decision on 3 June 2017 where he argues that Section 4 Subsection 3 Oö. BMSG is in breach of EU law.

Decision & Reasoning:

The Regional Administrative Court of Upper Austria refers two questions to the CJEU for preliminary ruling pursuant to Article 267 TFEU:

- 1) Must Article 29 Directive 2011/95/EU, entitling persons subject to international protection to the same level of social assistance in the Member State as nationals of this Member State, be interpreted as fulfilling the conditions for direct effect as set out in the CJEU's jurisprudence?**

The Austrian Court confirms that Austria, in principle, has fulfilled its obligation to implement Directive 2011/95/EU by legislation such as the Asylum Act 2005. As a result of the massive influx of asylum seekers in 2016, this legislation has been amended by inserting Section 3 Subsection 4 of the Asylum Act 2005 (as amended by BGBl I 2016/24) which states that persons entitled to asylum will obtain a residence permit that (initially) is valid for three years. This led to a change in legislation on a regional level by the Upper Austrian legislator which contained a provision stating that persons with a temporary residence permit will only have access to a reduced amount of social assistance, as it is the case for persons granted subsidiary protection. In contrast, persons with an unconditional residence permit receive the full amount of social assistance in the same way as a national of the Member State concerned. The Austrian Court then posed the questions whether such a distinction is still covered by Article 29 Directive 2011/95/EU. It acknowledged that the nature of a directive allows Member States some margin of implementation, but then examined

whether it could have applied Article 29 directly, in case the national legislation would not be in line with this provision. The content of the provision is unconditional and sufficiently precise, as it requires Member States to provide the same level of social assistance for persons entitled to asylum as for its nationals. In principle, the Court held, that the conditions for a direct effect of Article 29 Directive 2011/95/EU are fulfilled.

2) Must Article 29 Directive 2011/95/EU be interpreted in the way, that it opposes national legislation that provides for persons with a temporary residence permit the same level of social assistance as for persons falling under subsidiary protection, while persons with a permanent residence permit are allowed to the social assistance provided for nationals of the Member State concerned?

While Article 24 Directive 2011/95/EU entitles Member States to issue residence permits that are limited for three years, the Court held that this does not argue in favour of a (further) distinction between temporary and permanent residence permit as regards social assistance. This would have, as consequence, that persons whose residence permit after three years transforms to a permanent one, would *de facto* be obliged to a waiting period before they can claim the full amount of social assistance. The Court considers this result to not be in line with Article 29 Directive 2011/95. The central argument of the Court in that respect is that the situation of a person with a temporary residence permit is rather comparable to the one of a permanent residence permit and not to the situation of subsidiary protection. While a person falling within subsidiary protection needs to re-apply for a prolongation of the status after one year, the temporary residence permit is automatically converted to a permanent residence permit after the expiration of three years (unless the authorities initiate a procedure to revoke the asylum status). Therefore, the Court believes that a person with a temporary residence permit shall be treated in a similar way as a permanent residence permit holder. In conclusion, the Court argues that a distinction between these two groups of residence permit holders as regards social assistance is in breach of Article 29 Directive 2011/95/EU.

Outcome:

The Regional Administrative Court of Upper Austria refers the above-mentioned questions to the CJEU for a preliminary ruling and pretermits the national judicial proceedings.

Subsequent Proceedings :

The request for preliminary ruling has been registered by the CJEU on 31 January 2018 and has been given the case reference C-713/17. The CJEU delivered its judgment on 21 November 2018; you can read the EDAL summary [here](#) [5].

Observations/Comments:

Case summary written by Chad Heimrich (LLM candidate, Queen Mary University of London).

Attachment(s):



[350363 Prelim Reference IP SP benefits.pdf](#)[6]

National / Other Legislative Provisions:

[Austria - Section 3 Subsection 4 Asylum Act 2005 \(as amended by BGBl I 84/2017\)](#) [7]

[Austria - Section 4 Subsection 3 Minimum Income Act of Upper Austria - Oberösterreichisches Mindestsicherungsgesetz \(Oö. BMSG\)](#) [8]

Links:

[1] <https://www.asylumlawdatabase.eu/node/4038>

[2] https://www.asylumlawdatabase.eu/node/4038#toc_90

[3] https://www.asylumlawdatabase.eu/node/4038#toc_264

[4] https://www.asylumlawdatabase.eu/node/4038#toc_287

[5] <https://www.asylumlawdatabase.eu/en/content/cjeu-case-c%E2%80%919171317-ayubi-21-november-2018>

[6]

<https://www.asylumlawdatabase.eu/sites/default/files/aldfiles/350363%20Prelim%20Reference%20IP%20>

[7] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/austria-section-3-subsection-4-asylum-act-2005-amended-bgbl-i-842017>

[8] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/austria-section-4-subsection-3-minimum-income-act-upper-austria>

[9] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/austria-section-13-o%C3%B6-bmsg>