

Germany - Administrative Court of Lueneburg, 16 December 2013, 6 B 64/13

Country of Decision:

Germany

Country of Applicant:

Unknown

Date of Decision:

16-12-2013

Citation:

6 B 64/13

Court Name:

Administrative Court of Lueneburg

Keywords:

Benefit of doubt
Burden of proof
Delay
Dublin Transfer
First country of asylum
Health (right to)
Humanitarian considerations
Individual assessment
Personal circumstances of applicant
Relevant Facts
Right to remain pending a decision (Suspensive effect)
Safe third country
Standard of proof
Temporary protection

Relevant Legislative Provisions:European Union Law > [EN - Charter of Fundamental Rights of the European Union](#) [1]European Union Law > [EN - Dublin II Regulation, Council Regulation \(EC\) No 343/2003 of 18 February 2003](#) [2] > [Article 3](#) [3]European Union Law > [EN - Dublin II Regulation, Council Regulation \(EC\) No 343/2003 of 18 February 2003](#) [2] > [Article 16](#) [4] > [2.](#) [5]

Headnote:

The interest of an applicant to obtain a temporary stay from deportation to Italy for the time being predominates, if the applicant, in case of his return back to Italy, would be threatened with serious damage to his health due to inadequate accommodation opportunities there and because medical care would not be guaranteed due to a permanent overstretch of resources.

Facts:

The applicant objects against being deported to Italy. On 7 November 2013 the Republic of Italy declared its willingness to take back the applicant and to complete the procedure concerning his motion for protection.

A final review of the asylum application has not yet been completed in Italy. By a decision dated 8 November 2013 the Federal Office for Migration and Refugees rejected the asylum applicant's request as invalid and ordered his deportation to Italy. On 20 November 2013, the applicant requested a court order to put in place the suspensive effect of his main law against this deportation order, which he filed on 8 November 2013.

The applicant was diagnosed with tuberculosis of the lymph nodes in his neck and treated. The treatment is now over. Regular medical follow-ups are required in order to detect early enough whether any additional treatment is needed. The applicant was examined in Italy, admitted to a hospital and provided with medicine, but nobody has helped him properly. He had two operations in Germany.

Decision & Reasoning:

The interest of an applicant to obtain a temporary stay from deportation to Italy for the time being predominates, if the applicant, in case of his return back to Italy, would be threatened with serious damage to his health due to inadequate accommodation opportunities there and because medical care would not be guaranteed due to a permanent overstretch of resources.

When making a decision whether the suspensive effect against the deportation order shall apply during the main lawsuit, the public interest in the swift enforcement of an administrative act has to be balanced against the interest of the affected person to receive preliminary legal protection.

In this respect, the restrictions that used to apply to such cases in the past, which were based on previously applicable statutory provisions under §80 and §123 of the Code of Administrative Procedure, and which did not allow for a temporary stay of a deportation to another EU member state, do no longer apply anymore.

Therefore the general principles for suspensive effects apply. If the outcome of the main legal proceeding is uncertain, after a summary review that is only possible in proceedings for temporary legal protection, because it is neither apparent that the law suit will be successful nor is it obvious that the law suit will remain unsuccessful, the outcome depends on a mere balancing of conflicting interests.

At present, the contested decision of the Federal Office dated 8 November 2013 is neither obviously legal nor obviously unlawful. The defendant also did not step into the proceeding pursuant to Article 3, paragraph 2 of the Dublin II Regulation. Because neither the questioning in preparation for the hearing in accordance with § 25 of the Asylum Protection Act on 18 September

2013, nor the hearing before the Federal Office on 31 October 2012 lead to the conclusion that the Federal Republic of Germany made the decision to use their right to conduct the Asylum, diverging from the usual procedure, as a "whole" under its own responsibility..

The questioning served only the purpose to orderly process the filed application for asylum, but it provides no reason to presume that Germany wanted to assume the case by itself. Currently it is also uncertain, whether there are exceptional reasons in the case of the applicant, pursuant to which the Federal Republic of Germany is obligated to step in and assume the proceedings in accordance with Article 3, Paragraph 2 of the Dublin II Regulation.

There is no reason to fear that the asylum process and the terms of admission for the asylum applicant in Italy are fundamentally defective. It can also be presumed that the accommodation, food and medical care for asylum seekers in Italy is ensured.

However, recognized refugees could be significantly discriminated against, especially as accommodation options are not made sufficiently available. Moreover there are an increasing number of cases where, especially concerning asylum applicants who are in need of special protection, do not receive places in special facilities, but who rather during their asylum procedure have to remain in accommodation centers which do not meet their special needs.

There is no decisive evidence of any significant systematic shortcomings of the asylum process and the terms of admission in Italy. Italy complies with the minimum standards of European refugee protection - at least for healthy young men. However, whether this also applies to the applicant is currently uncertain.

Up until an actual relaxation of the accommodation situation in Italy takes place, groups of people who are in need of special protection are affected by numerous grievances and put at risk due to the inadequate accommodation capacity.

Outcome:

The application was granted. The suspensive effect of the law suit against the deportation order from the Federal Office for Migration and Refugees dated 8 November 2013 has been put in place.

Subsequent Proceedings :

The main complaint procedure is pending in the administrative court of Lüneburg under the case number: 6 A 252/13.

Observations/Comments:

Case law summarised as part of [APAIPA Project](#) [6]. [6]

Attachment(s):

[Italien VG Lüneburg B. v. 16.12.2013 - 6 B 6413 -.pdf](#)[7]

Other sources cited:

UNHCR, Recommendations on important aspects of refugee protection in Italy, July 2013, S. 9 f. - UN-HCR 2013

Information from the German Foreign Ministry to the administrative court of Freiburg dated 11 July

2012

Statement from the High Commissioner for Refugees of the United Nations to the administrative court of Braunschweig dated 24 April 2012

Opinion of the refugee organization borderline-europe, Human Rights without Borders (Judith Gleitze) dated December 2012

Report from the Swiss Refugee Council dated October 2013 ("Italy: Terms of Admission, Current Situation of Asylum Seekers and Protected Persons, especially Dublin Returnees)

National / Other Legislative Provisions:

[Germany - AsylVfG \(Asylum Procedure Act\) - § 26a](#) [8]

[Germany - AsylVfG \(Asylum Procedure Act\) - § 27](#) [9]

[Germany - AsylVfG \(Asylum Procedure Act\) - § 34](#) [10]

[Germany - AsylVfG \(Asylum Procedure Act\)](#) [11]

[Germany - VwGO \(Code of Administrative Court Procedure\)](#) [12]

Links:

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

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

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

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

[5] https://www.asylumlawdatabase.eu/node/19#toc_145

[6] <http://www.ecre.org/component/content/article/63-projects/326-apaipa.html>

[7]

<https://www.asylumlawdatabase.eu/sites/default/files/aldfiles/Italien%20VG%20L%C3%BCneburg%20B.%206%20B%206413%20-.pdf>

[8] <https://www.asylumlawdatabase.eu/en/taxonomy/term/4357>

[9] <https://www.asylumlawdatabase.eu/en/taxonomy/term/7948>

[10] <https://www.asylumlawdatabase.eu/en/taxonomy/term/7946>

[11] <https://www.asylumlawdatabase.eu/en/taxonomy/term/4355>

[12] <https://www.asylumlawdatabase.eu/en/taxonomy/term/8224>