

Switzerland ? Federal Administrative Court, 5th September 2017, E-305/2017

Country of Decision:

Switzerland

Country of Applicant:

Morocco

Date of Decision:

05-09-2017

Citation:

E-305/2017

Court Name:

Federal Administrative Court (Bundesverwaltungsgericht)

Keywords:

Dublin Transfer
Individual threat
Inhuman or degrading treatment or punishment
Medical Reports/Medico-legal Reports
Non-refoulement
Real risk
Refugee Status
Request to take back
Responsibility for examining application
Serious harm
Torture

Relevant Legislative Provisions:

International Law > [1951 Refugee Convention](#) [1]
International Law > UN Convention against Torture > Art. 3
International Law > UN Convention against Torture
International Law > [1951 Refugee Convention](#) [1] > [Art 33](#) [2]
Council of Europe Instruments > [EN - Convention for the Protection of Human Rights and Fundamental Freedoms](#) [3]
Council of Europe Instruments

Headnote:

According to the principle of non-Refoulement, Switzerland is obliged to apply Art. 17 Dublin-III-Regulation, examining an asylum application, if otherwise a provision of public international law could be infringed.

That is the case when there is substantial evidence indicating that an asylum seeker will be tortured again in his home country, but the originally responsible state denied asylum and decided to deport the person. It needs to be examined, whether and to what extent the authorities included the evidence regarding torture in their decision-making.

Facts:

The complainant emigrated in February 2014 from Morocco and entered Switzerland via Bulgaria on the 28th of March 2016 claiming asylum. His asylum application had been rejected in Bulgaria. The decision was confirmed by the final appellate court.

The Bulgarian authorities agreed to the State Secretariat for Migration's (SEM) request to take the appellant back. The latter then ordered his transfer to Bulgaria and its enforcement.

The appellant filed a complaint at the Federal Administrative Court, which reversed the decision and remitted the case to the SEM (BVGE E-3034/2016). The complainant stated that he was tortured by the Moroccan authorities and presented evidence supporting this. However, after requesting the Bulgarian authorities to take back the applicant, the SEM denied asylum again and ordered the transfer to Bulgaria.

On the 16th of January 2017, the complainant issued another complaint at the Federal Administrative Court. He stated that the SEM did not examine, whether the asylum procedure and the reception conditions for asylum seekers in Bulgaria permit the transfer. He claimed the system has systemic deficiencies. Bulgaria would not fulfil its obligations under public international law. In Morocco he would be threatened by torture. Therefore, the deportation would violate Art. 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

Decision & Reasoning:

The complaint was successful. The court reversed the decision of the SEM.

Firstly, the court explained that the SEM, according to Art. 31a (1) (b) Asylum Act, generally does not go ahead with the asylum procedure, if another state is responsible according to European law. According to Art. 18 (1) (d) Dublin-III-Regulation, Bulgaria would be responsible to execute the asylum procedure.

The court then made note that each member state can decide to examine the application of an asylum seeker, even though another member state is originally responsible (Art. 17 (1) 1 Dublin-III-Regulation).

The judges disagreed with the applicant regarding the systemic deficiencies in the Bulgarian asylum procedure and reception conditions. The presented reports (by the European Council on Refugees and Exiles among others) as well as references to German and Belgian verdicts do not prove that Bulgaria violated its duties. They found the hygienic deficiencies that were brought forward by the complainant not sufficient to prove an inhuman or degrading treatment in Bulgaria.

The court then explained that the state is obliged to apply Art. 17 Dublin-III-Regulation, examining an asylum application, if otherwise a provision of public international law could be infringed (Federal Administrative Court, BVGE 2010/45 E. 7.2). In the present case, there is a possible violation of Art. 33 of the Convention Relating to the Status of Refugees, Art. 3 ECHR, Art. 7 of the International Covenant on Civil and Political Rights (ICCPR) or Art. 3 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). The Federal Administrative Court refers to a decision of the European Court of Human Rights prohibiting deportation in the case of a real risk of a violation of Art. 3 ECHR (ECtHR - T.I. v. The United Kingdom, Application No. 43844/98, Decision as to the Admissibility, 7 March 2000).

The judges clarified that generally one has to proceed on the assumption that the member states obey public international law. However, this assumption can be disproved.

They dissented from the SEM's finding that there are no concrete indicators for a violation of the principle of non-refoulement. The complainant repeatedly stated that he was tortured in Morocco. These statements and the correlating evidence result in the obligation to examine, whether the Bulgarian authorities included it in their decision. The court questioned the assessment of the SEM that the Bulgarian authorities considered the application for asylum and explicitly explained the outcome. Although the SEM was in possession of the Bulgarian decision, their records did not include a sufficient translation thereof. Moreover, it did not include the judgement of the Bulgarian court of appeal.

Therefore, it cannot be assessed, whether and to what extent the evidence of torture found its way into the Bulgarian asylum procedure. Yet it is a strong indicator for a specific and serious risk of further torture in the case of a return to Morocco.

Thus, the court concluded that a violation of the non-refoulement principle cannot be ruled out when transferring the applicant to Bulgaria.

The court reversed the decision of the SEM. The judges ordered the SEM to declare itself responsible and examine the applicant's claim for asylum.

Outcome:

The complaint was successful. The court reversed the decision of the SEM.

The judges ordered the SEM to declare itself responsible and examine the applicant's claim for asylum.

Observations/Comments:

This case summary was written by Tim Drunkenmölle.

In other case law considering the transfer of vulnerable persons to Bulgaria, the Federal Administrative Tribunal has given differing decisions. For example in the case of a man who claimed to have been detained and mistreated in Bulgaria, with diabetes and psychological problems, the Tribunal upheld the State's decision to transfer (E-521/2016 13 June 2016). This was also the case in another decision (D-6395/2015, 14 October 2015) where the Tribunal found that the applicant had not provided evidence to substantiate his argument that Article 17(1) DRIII applied in respect of Switzerland's responsibility for his claim. Conversely, in another decision (E-7365/2015, 2 December 2015) the Tribunal held that the State authorities had not undertaken an individualised and rigorous assessment of the risk the applicants would face on return to Bulgaria, in light of the country condition reports and their specific profiles (a family with young children).

Attachment(s):



[Switzerland - 170905_E-305_2017_Bulgaria_Dublin_Transfer.pdf](#)[4]

Other sources cited:

International Covenant on Civil and Political Rights, Article 7

National / Other Legislative Provisions:

[Switzerland - AsylG \(Asylum Act\) - Art. 105](#) [5]

[Switzerland - AsylG \(Asylum Act\) - Art. 106\(1\)](#) [6]

[Switzerland - AsylG \(Asylum Act\) - Art. 31a\(1\)\(b\)](#) [7]

[Switzerland ? BGG \(Federal Supreme Court Act\) ? Art. 83\(d\) No. 1](#) [8]

[Switzerland ? VGG \(Administrative Court Act\) - Art. 31-33](#) [9]

[Switzerland - VwVG \(Administrative Procedure Act\) - Art. 49\(b\)](#) [10]

[Austria - Asylgesetz \(Asylum Act\) 2005 - § 8](#) [11]

Links:

[1] <http://www.asylumlawdatabase.eu/en/content/1951-refugee-convention>

[2] <http://www.asylumlawdatabase.eu/en/content/1951-refugee-convention#33>

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

[4] https://www.asylumlawdatabase.eu/sites/default/files/aldfiles/Switzerland%20-%20170905_E-305_2017%20Bulgaria%20Dublin%20Transfer.pdf

[5] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/switzerland-asylg-asylum-act-art-105>

[6] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/switzerland-asylg-asylum-act-art-1061>

[7] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/switzerland-asylg-asylum-act-art-31a1b>

[8] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/switzerland-%E2%80%93-bgg-federal-supreme-court-act-%E2%80%93-art-83d-no-1>

[9] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/switzerland-%E2%80%93-vgg-administrative-court-act-art-31-33>

[10] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/switzerland-vwvg-administrative-procedure-act-art-49b>

[11] <https://www.asylumlawdatabase.eu/en/taxonomy/term/4428>