

ECtHR - Mohammed v Austria, Application No. 2283/12

Country of Applicant:

Sudan

Date of Decision:

06-06-2013

Citation:

Application No. 2283/12

Court Name:

European Court of Human Rights - First Section

Keywords:[Dublin Transfer](#) [1][Effective remedy \(right to\)](#) [2][Procedural guarantees](#) [3][Right to remain pending a decision \(Suspensive effect\)](#) [4]**Headnote:**

The proposed transfer of the Sudanese asylum seeker from Austria to Hungary would not constitute a violation of Article 3 of the ECHR.

Facts:

The Applicant was a Sudanese national who arrived in Austria via Greece and Hungary in October 2010 and applied for asylum. His application was rejected in January 2011 under the Dublin II Regulation (?Dublin Regulation?) and an order was made for his forced transfer to Hungary. In December 2011 the Applicant lodged a second application for asylum (which had no suspensive effect) following adverse reports by the UNHCR on the conditions for asylum-seekers in Hungary and a recent decision of the Austrian Asylum Court to grant suspensive effect to an appeal in another case in view of the risks of a possible violation of the Convention that had been identified in those reports. The second application for asylum was still pending at the date of the Court's judgment.

Decision & Reasoning:[Article 3](#)

Reports published in 2011 and 2012 on Hungary as a country of asylum and in particular as regards returnees under the Dublin Regulation were alarming. The UNHCR had identified areas of deficiency relating in particular to prolonged administrative detention of asylum-seekers and the conditions of their detention and the treatment of asylum applications by returnees.

The Court noted that there was seemingly a general practice of detaining asylum-seekers for a considerable time, partly under conditions that fell short of international and EU standards, and with deficient review procedures. There were also reports of abuse of detained asylum-seekers by officials and of forced medication. Nevertheless, although the UNHCR had advised the Austrian authorities of these problems in a letter of 17 October 2011 and had issued a comprehensive report in April 2012, it had never issued a position paper requesting European Union Member States to refrain from transferring asylum-seekers to Hungary under the Dublin Regulation (as it had done with respect to Greece, see *M.S.S. v. Belgium and Greece* [GC], 30696/09, 21 January 2011, Information Note 137). Furthermore, in a more recent note on the subject issued in December 2012, the UNHCR had appreciatively acknowledged the changes to the law planned by the Hungarian Government and made particular reference to the fact that transferees who applied for asylum immediately upon their arrival in Hungary would no longer be subject to detention. It had also remarked on the reported intention of the Hungarian authorities to introduce additional legal guarantees concerning detention and to ensure unhindered access to basic facilities. Indeed, the number of detained asylum-seekers had declined significantly in 2012. The Court therefore concluded that the Applicant would no longer be at a real and individual risk of proscribed treatment in respect of detention if transferred to Hungary.

As to the issue of insufficient access to asylum proceedings in Hungary and the risk of *refoulement* to a third country, the Court took particular note of reports that asylum-seekers transferred there under the Dublin Regulation had to re-apply for asylum upon arrival and that such a renewed application was treated as a second asylum application without suspensive effect. There was also a seemingly automatic process of handing out deportation orders upon entry and thus a real risk of *refoulement* without the merits of the asylum claim being examined. However, the Applicant had not substantiated any individual risk of being subjected to treatment contrary to Article 3 if he returned to Sudan and in any event, as the transferring State, Austria was not required to conduct an analysis of the underlying flight reasons, but only to establish whether another EU Member State had jurisdiction under the Dublin Regulation and to examine whether there were any general reasons or other obstacles that would require a stay of transfer. Lastly, it appeared that under the changes that had been made to Hungarian law and practice transferees now had sufficient access to and could await the outcome of asylum proceedings in Hungary, provided they applied for asylum immediately. The Court found no violation of Article 3 of the Convention.

Article 13 in conjunction with Article 3

The Applicant had made two applications for asylum in Austria. At the time of the first application in 2010, he did not have an arguable claim under Article 3 of the Convention, since the criticism voiced with regard to the situation of asylum-seekers in Hungary was not widely known at that time. However, the order for the Applicant's transfer to Hungary was not scheduled to be enforced until almost a year after it was made, by which time the Applicant had (in December 2011) lodged a second application for asylum based on the reports on the situation of asylum-seekers in Hungary that had come to light in the meantime. Under Austrian law, that second asylum application did not have suspensive effect. In the Court's view, however, in view of the passage of time before it was lodged and the intervening change of circumstances, that second application could not *prima facie* be considered abusively repetitive or entirely manifestly unfounded and its lack of suspensive effect meant that the Applicant had been denied access to an effective remedy against the enforcement of the order for his forced transfer. The Court found a violation of Article

13 in conjunction with Article 3.

Outcome:

A violation of Article 13 in conjunction with Article 3 of the Convention.

The Applicant's transfer to Hungary would not violate Article 3 of the Convention.

The finding of a violation constitutes sufficient just satisfaction for the non-pecuniary damage sustained by the Applicant.

Subsequent Proceedings :

On 11 January 2012 the Court applied an interim measure under Rule 39 of the Rules of Court and requested the Austrian Government to stay the Applicant's transfer to Hungary until further notice.

Case Law Cited:

ECtHR - P., C. and S. v the United Kingdom, Application No. 56547/00

[ECtHR - Hirsi Jamaa and Others v Italy \[GC\], Application No. 27765/09](#) [5]

[ECtHR - Salah Sheekh v The Netherlands \(Application no. 1948/04\) - resource](#) [6]

ECtHR - T.I. v United Kingdom (Application no. 43844/98)

ECtHR - Sultani v France (Application no. 45223/05) - (UP)

ECtHR - Mamatkulov Askarov v Turkey, Applications nos. 46827/99 and 46951/99

ECtHR - Jabari v Turkey, 11 July 2000, (Application no. 40035/98)

ECtHR - Bati and Others v Turkey, Application No. 33097/96 and 57834/00

ECtHR - Çakici v. Turkey [GC], Application No. 23657/94

ECtHR - Doran v Ireland, Application No. 50389/99

ECtHR - I.M. v France, Application No. 9152/09 - unpub

Austria - Asylum Court, 5 December 2011, S7 422195-1/2011; S7 422194-1/2011; S7 422197-1/2011

ECtHR - Kudla v Poland [GC], Application No. 30210/96

ECtHR - Waite and Kennedy v. Germany [GC], Application No. 26083/94

[ECtHR - M.S.S. v Belgium and Greece \[GC\], Application No. 30696/09](#) [7]

[ECtHR - Diallo v Czech Republic, Application No. 20493/07](#) [8]

Austria - Asylum Court, 31 October 2011, S4 422020-1/2011/5E

Austria - Asylum Court, 28 November 2011, S16 422704 1/20110

Austria - Asylum Court, 30 November 2011, S4 422775-1/2011/2E

Austria - Asylum Court, 1 December 2011, S21 422754 1/2011

[ECtHR - HLR v France \(Application no. 24573/94\)](#) [9]

Attachment(s):



[CASE OF MOHAMMED v. AUSTRIA.pdf](#)[10]

Other sources cited:

Letter from the Austrian office of the United Nations High Commissioner for Refugees dated 17 October 2011

UNHCR: Hungary as a country of asylum, April 2012

UNHCR: Notes on Dublin transfers to Hungary of people who have transited through Serbia, observations on Hungary as a country of asylum of October 2012 and December 2012

Report by the Hungarian Helsinki Committee: Stuck in Jail ? Immigration Detention in Hungary (2010), April 2011

Report by the Hungarian Helsinki Committee: Serbia as a Safe Third Country: A Wrong Assumption, September 2011

Report by the Hungarian Helsinki Committee: Access to protection jeopardised; Information note on the treatment of Dublin returnees in Hungary, December 2011

The Country Report on Human Rights Practices for 2011 in respect of Sudan issued by the United States Department of State

The Amnesty International Annual Report 2012 on Sudan

The Human Rights Watch World Report 2013 on Sudan

Authentic Language:

English

State Party:

Austria

National / Other Legislative Provisions:

Austria - Asylgesetz (Asylum Act) 2005

Austria - Fremdenpolizeigesetz (Aliens Police Act) 2005

Links:

[1] https://www.asylumlawdatabase.eu/en/case-law-search?f%5B0%5D=field_keywords%3A1213

[2] https://www.asylumlawdatabase.eu/en/case-law-search?f%5B0%5D=field_keywords%3A30

[3] https://www.asylumlawdatabase.eu/en/case-law-search?f%5B0%5D=field_keywords%3A59

[4] https://www.asylumlawdatabase.eu/en/case-law-search?f%5B0%5D=field_keywords%3A71

[5] <https://www.asylumlawdatabase.eu/en/content/ecthr-hirsi-jamaa-and-others-v-italy-gc-application-no-2776509>

[6] <https://www.asylumlawdatabase.eu/en/content/ecthr-salah-sheekh-v-netherlands-application-no-194804-resource>

[7] <https://www.asylumlawdatabase.eu/en/content/ecthr-mss-v-belgium-and-greece-gc-application-no-3069609>

[8] <https://www.asylumlawdatabase.eu/en/content/ecthr-diallo-v-czech-republic-application-no-2049307-0>

[9] <https://www.asylumlawdatabase.eu/en/content/ecthr-hlr-v-france-application-no-2457394>

[10]

<https://www.asylumlawdatabase.eu/sites/default/files/aldfiles/CASE%20OF%20MOHAMMED%20v.%20A>