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Introduction

In Austria, an oral hearing needs to be formally requested both in [asylum appeal procedures](#) [1] and administrative procedures in general. Notwithstanding that a request may be lodged, the competent Federal Administrative Court (*Bundesverwaltungsgericht*) may dispense with an oral hearing under Section 21 Para. 7 Federal Office Procedure Act (*BFA-Verfahrensgesetz* [2]) in cases where the applicant has already been heard in his/her first instance procedure and if certain conditions are met. These conditions are: the facts of the case included in the file read together with the appeal seem to be clarified or if there is no doubt from the previous findings that the submission does not correspond to the facts. Section 21 Para. 7 Federal Office Procedure Act refers to [Section 24 Administrative Court Proceedings Act](#) [3], where explicit reference is made to Article 47 of the Charter of Fundamental Rights of the European Union ([CFREU](#) [4]) and Article 6 § 1 of the [European Convention on Human Rights](#) [5] (ECHR). At the same time, there might be the obligation to hold an oral hearing even if it has not been requested. In its crucial decision on the nature of the CFREU within the Austrian legal system ("VfGH 14.03.2012, U466-11 ua", see the respective [EDAL case summary](#) [1]) the Austrian Constitutional Court establishes that Section 41 Para. 7 Asylum Act 2005 (the predecessor provision to Section 21 Para. 7 Federal Office Procedure Act) complies with Article 47(2) CFREU. This article aims at examining the line drawn between legitimate and illegitimate dispensation with an oral hearing especially in asylum appeal procedures by the Austrian jurisprudence explicitly referring to Article 47(2) CFREU.

Overview of Austrian jurisprudence on the right to a public hearing referring to Article 47(2) CFREU

Given that the Charter is now primary law (Article 6(1) of the Treaty on European Union) it serves as an aid to interpret secondary EU law and national law falling within the scope of EU law which must be read in light of the Charter. Moreover, any EU secondary law found to be in breach of a Charter Article will be held to be void by the CJEU. Similarly, any national law that falls within the scope of EU law and which violates a Charter provision needs to be set aside by national courts. As such, like general principles of EU law, it can be relied upon for grounds of judicial review (for further reading, see: "[An examination of the Reception Conditions Directive and its recast in light of Article 41 and 47 of the Charter of Fundamental Rights of the European Union](#) [6]" by ECRE, December 2013).

Since March 2012 the Austrian high courts have rendered several important judgments on the

right to an oral hearing under Article 47(2) CFREU:

Constitutional Court's judgments

In the afore-mentioned case "[VfGH 14.03.2012, U466-11 ua](#) [7]" the Austrian Constitutional Court held that it is competent to interpret the CFREU due to the similarity in purpose of the rights laid down in the CFREU to Austrian constitutional rights and the extensive similarity in contents and terms of the CFREU to the ECHR, which has constitutional status in Austria. Therefore the CFREU is, in some aspects, directly applicable in Austria. If the Constitutional Court has doubts about the interpretation of a provision under the CFREU it is obliged to submit the question to the Court of Justice of the European Union (CJEU) for a preliminary ruling, except for cases where a point of law is not relevant to the decision. The latter is the case where reference to the CFREU is made and where the right under the CFREU has the same area of application as an Austrian constitutional law, in particular as a right under the ECHR. The Constitutional Court establishes that asylum proceedings come under the area of application of the CFREU, and that Article 6 ECHR is not directly applicable to asylum proceedings but that the right to an oral hearing derives from Article 47(2) CFREU. It further sets out the case law of the ECtHR as to when oral hearings can be omitted. The Court holds that an oral hearing is required if the issues raised in the administrative proceedings or in the appeal cannot be answered from the administrative files, and in particular, if the facts of the case need to be supplemented or the assessment of the evidence is lacking. As to the appeals themselves, the Constitutional Court found no violation of Article 47(2) CFREU. For more details, see the respective [EDAL case summary](#) [1].

In the case "[VfGH 13.03.2013, U1175/12 ua](#) [8]" the Constitutional Court held again, by referring to "[VfGH 14.03.2012, U466-11 ua](#)" that it is in line with Article 47(2) CFREU to dispense with an oral hearing in asylum appeal procedures if the facts of the case are sufficiently clarified. This was, however, not applicable to the "[VfGH 13.03.2013, U1175/12](#)" case, since the reasons provided by the Asylum Court, relating to the lack of credibility, were general and did not refer to the personal circumstances of the applicant. In fact, the contradictions identified by the Asylum Court concerned mere nuances of the otherwise coherent submission. Therefore, the Constitutional Court ruled that by not holding an oral hearing, the Asylum Court violated the applicant's constitutional right to an oral hearing under Article 47 (2) CFREU.

In "[VfGH 26.06.2013, U1257/2012](#) [9]" the Constitutional Court again finds a violation of the applicant's constitutional right to an oral hearing under Article 47(2) CFREU by the Asylum Court. The facts of the case included in the file read together with the appeal are not sufficiently clarified in this case for the following reasons: the Asylum Court based its reasoning on the lack of credibility of the applicant on the argument that his submission was "vague and superficial" without giving concrete examples for that finding, and, secondly, on speculative reasons. The Constitutional Court further held that the Asylum Court should have examined the question of the intensity of harassments by the prosecutors put forward by the applicant.

In the case "[VfGH 03.10.2013, U642/2012](#) [10]" the Constitutional Court finds a violation of the applicant's right to an effective remedy and the right to impartial tribunal under Article 47(2) CFREU since the Asylum Court mainly judged the credibility of the applicant on the basis of her submissions in the first instance, ignoring that the appeal contained relevant submissions, questioning the assessment of evidence by the first instance as well as the facts established thereupon.

In "[VfGH 22.11.2013, U729/2013](#) [11]" the Constitutional Court advanced that the Asylum Court was not allowed to consider the facts in conjunction with the appeal sufficiently clarified as the appeal was lodged a long time ago. According to the Constitutional Court the Asylum Court should have held an oral hearing to personally assess the private life and the alleged good knowledge of

German instead of denying the appeal on the grounds that there had been a lack of written evidence for the knowledge of German.

In the case "[VfGH 21.02.2014, U152/2013](#) [12]" the Constitutional Court held that the Asylum Court's decision refusing the application for international protection without holding an oral hearing violated Article 47(2) CFREU because the facts of the case, according to the information on file, in conjunction with the appeal were not clarified. The Asylum Court submitted that the applicant lacks credibility as to his place of origin. This finding was based on one contradiction relating to the age of the applicant when leaving Afghanistan, and in fact contradicted the facts as already established by the first instance authority, who had heard the applicant personally.

In the case "[VfGH 19.09.2014, U610/2013](#) [13]" the Constitutional Court found a violation of Article 47(2) CFREU since the Asylum Court should have heard the applicant personally to assess his credibility. Instead, the Asylum Court established a lack of details concerning the alleged torture put forward by the applicant, whereas the lack of details indicates that the facts of the case are not sufficiently clarified.

Finally, the Constitutional Court established in "[VfGH 22.09.2014, U2529/2013](#) [14]" that the Asylum Courts decision rejecting an application for international protection violated the applicant's constitutional right to an oral hearing under Article 47(2) CFREU: the facts of the case, according to the information contained in the file read together with the appeal, are not clarified given obvious contradictions in the record of an interview by the first instance authority.

Administrative Court's judgments

The Administrative Court has also made reference to Article 47(2) CFREU in some decisions. However, only two of the cases cited hereafter are asylum cases, most of the decisions deal with detention pending deportation, residence bans and return decisions.

In the cases "[VwGH 14.06.2012, 2011/21/0278](#) [15]" (on an entry ban) and "[VwGH 19.03.2013, 2011/21/0267](#) [16]" (on a return decision) the Administrative Court clarified that there is a general right to an oral hearing under Art 47(2) CFREU in cases on entry bans or in cases against return decisions, as well as in cases under the Aliens Police Act in general (transposing parts of the Returns Directive). More importantly, the Court held that a party not represented by a lawyer can only waive his/her right to an oral hearing if he/she has been given notice of the right to request an oral hearing or if evidence exists that he/she should have known that an oral hearing has to be applied for.

In the case "[VwGH 23.01.2013, 2010/15/0196](#) [17]", a decision dealing with the Federal Revenue Code, the Administrative Court held that it is irrelevant to the question of a possible violation of the right to an oral hearing whether the outcome of a procedure would have been different if an oral hearing had been held as long as a case falls within the ambit of Article 47(2) CFREU.

In "[VwGH 22.01.2014, 2013/21/0135](#) [18]" (an entry ban procedure concerning an EU citizen) and in "[VwGH 22.05.2014, Ro 2014/21/0047](#) [19]" (a case on detention pending deportation) the parties had been represented by lawyers, but had not explicitly applied for an oral hearing. However, the Court held that the obligation to hold an oral hearing under Art 47(2) CFREU was still applicable since the parties had asked for the hearing of a witness in their appeals and the authority whose decision was challenged was thus not allowed to assume that the party waived their rights to an oral hearing.

In the Administrative Court's landmark decision on Art 47(2) CFREU "[VwGH 28.05.2014, Ra 2014/20/0017](#) [20]" the Administrative Court sets out, among others, how Section 21 Para. 7

Federal Office Procedure Act, namely the words "if the facts of the case included in the file read together with the appeal seem to be clarified" is to be interpreted in the light of Art 47(2) CFREU against the background of the amendments to the asylum legislation in force since 01.01.2014: all the facts relevant to the decision must have been established in a duly conducted preliminary investigation, and they still need to be up to date and comprehensive at the time of the decision of the Federal Administrative Court; the first instance administrative authority must disclose its assessment of the evidence determining its final findings and the Federal Administrative Court must share the first instance's crucial assessment of evidence; the appeal must not contain any facts contravening or going beyond the authority's findings, whereby unsubstantiated denial of the facts established by the first instance authority as well as submissions contravening the restriction of new facts and evidence under Section 20 Federal Office Procedure Act may be left aside; and finally, procedural particularities need to be taken into account.

Finally, very recently, the Administrative Court has confirmed the afore-mentioned decision in "VwGH 13.11.2014, Ra 2014/18/0011-0016, 0083" (though without explicitly citing Article 47(2) CFREU) reasoning that the Federal Administrative Court should have held an oral hearing since the facts of the case were not sufficiently clarified due to a deficient assessment of evidence by the first instance authority. The Federal Administrative Court was therefore not allowed to share this deficient assessment of evidence. Interestingly, the Administrative Court denied a violation of the right to an oral hearing for a family member of the applicant because his submissions did not relate to a Convention reason and the facts therefore did not need any further clarification.

Conclusion:

The right to an oral hearing is not absolute. This article does not contain an exhaustive list of when there is an obligation to hold an oral hearing under the CFREU, but gives examples of how the Austrian Constitutional and Administrative Courts have limited or applied this right in the past.

Article 47 CFREU is complex, but it definitely strengthens the guarantees for asylum seekers as compared to Articles 6 and 13 ECHR. For the Austrian courts the added value of Article 47(2) CFREU seems to be limited to the applicability of Article 6 ECHR and the corresponding ECtHR's jurisprudence to asylum cases for the time being.

The Austrian Constitutional Court does not consider itself obliged to refer a question to the CJEU if the CFREU has the same area of application as an Austrian constitutional law, in particular as a right of the ECHR. However, the CJEU has not yet interpreted Article 47 CFREU. The Constitutional Court, therefore, anticipates the interpretation of Article 47 CFREU, otherwise it could not ascertain the overlap with Austrian constitutional law. This is problematic due to the fact that the CJEU is considered the primarily competent court to interpret Union law, and because there is an obligation to refer questions to the CJEU where national constitutional law and Union law are simultaneously engaged (see: "[The application of the EU Charter of Fundamental Rights to asylum procedural law](#) [21]" by ECRE and the Danish Refugee Council, October 2014, recital 1.6; for further reading, see: "[EU Asylum Procedures and the Right to an Effective Remedy](#) [22]" by Marcelle Reneman, December 2014).

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(This journal entry is an expression of the author's own views, and not those of EDAL, ECRE or Caritas Austria)

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Tags:

Charter of Fundamental Rights
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Links:

- [1] <http://www.asylumlawdatabase.eu/en/case-law/austria-constitutional-court-14-march-2012-u46611-ua#content>
- [2] <http://www.unhcr.at/english/austrian-asylum-legislation.html>
- [3] <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20008>
- [4] <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0389:0403:en:PDF>
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0389:0403:en:PDF>
- [5] http://www.echr.coe.int/Documents/Convention_ENG.pdf
- [6] <http://www.ecre.org/component/downloads/downloads/830.html>
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- [12] https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Vfgh&Dokumentnummer=JFT_20140221_13U0017183-4798-b452-02f6d5b368e9&Position=1&Entscheidungsart=Undefined&Sammlungsnummer=&Index
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