

## ■ CONSTITUTIONAL DEVELOPMENTS IN AUSTRIA

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### **Asylum Court's Allocation of Duties and no Third-State-Security for Russia**

Austrian Constitutional Court  
Judgement of 8 October, 2008  
U5/08

#### **Circumstances of the Case**

The applicant entered Austria on 1 May 2008 illegally and sought asylum on the same day. The Federal Asylum Agency (*Bundesasylamt*) rejected his claim for asylum, released a deportation order and declared that the deportation to the Russian Federation was legitimate. This decision was reasoned on the applicant's valid student visa for the Russian Federation and the possibility to seek asylum there. It was argued that there is third-state-security (*Drittstaatensicherheit*, Article 4 Asylum Act 2005, *Asylgesetz 2005*) for the applicant in the Russian Federation.

The applicant appealed against the decision of the Federal Asylum Agency on 19 June 2008 to the Independent Federal Asylum Review Board (*Unabhängiger Bundesasylsenat*). The Asylum Court (*Asylgerichtshof*) rejected the appeal (which was now treated as a complaint) on 9 July 2008 based on Sec. 4 and 10 Asylum Act 2005, represented by the single judge Dr. L. The main reason for this decision was, again, the existing possibility to seek asylum in the Russian Federation. Due to rule of law and the functioning state power "systematic, notorious violations of fundamental human rights ... are not observable"; hence, in the view of the Asylum Court, the Russian Federation can be regarded as secure third-state.

The applicant complained against that decision of the Asylum Court at the Constitutional Court and claimed violations of the constitutionally guaranteed rights of equal treatment among aliens according to Art. I para 1 Federal Constitutional Act (BVG), BGBl 1973/390, and Art. 14 of the European Convention on Human Rights (hereinafter: ECHR), the prohibition of torture according to Art. 3 ECHR and the prohibition of deprivation of the lawful judge according to Art. 83 para 2 Federal Constitutional Law (*Bundes-Verfassungsgesetz*, hereinafter B-VG).

#### **Relevant Provisions**

ECHR

Article 3 – Prohibition of Torture

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

B-VG

Article 83 para 2 – Prohibition of Deprivation of the Lawful Judge

No one may be deprived of his lawful judge.

Article 87 para 3

Business shall be allocated in advance among the judges of a court for the period provided by the law on the organization of the courts. A matter devolving upon a judge in accordance with this allocation may be removed from his jurisdiction by decree of the judiciary's administrative authorities only in case of his being prevented from the discharge of his responsibilities or his being unable to cope with his duties, due to their extent, within a reasonable time.

Article 129c – Asylum Court

The Asylum Court pronounces after the exhaust of remedies on

1. decisions of the administrative authorities on matters of asylum.
2. complaints because of the violation of the obligation to decide in matters of asylum.

Article 129e para 2

The cases are distributed by the full-assembly or its committee to single judges or panels for the time regulated by federal act in advance. Cases devolved to a member according to the allocation of duties are to be removed only in the event of his prevention or if he is, due to the amplitude of his duties, incapable of settlement within an appropriate time-limit.

Article 129f

More detailed regulations on organisation and procedure at the Asylum Court are set out in a federal act.

Article 151 para 39

1. From July 1<sup>st</sup> 2008 on the former Independent Federal Asylum Tribunal will be the Asylum Court.

...

4. Trials pending at the Independent Federal Asylum Tribunal on July 1<sup>st</sup> 2008 are to be continued by the Asylum Court. Trials pending at the Administrative Court or the Constitutional Court concerning complaints against decisions of the Independent Federal Asylum Review Board have to be continued with the requirement that the Asylum Court is considered as the authority, against which the complaint was filed.

Asylum Court Act<sup>1</sup>

Sec. 9 – Panels and chamber panels

(1) Decisions of the Asylum Court shall be rendered by panels unless provision is made by federal law for decisions to be pronounced by sole judges or by enlarged panels (chamber panels).

(2) Each panel shall be composed of a judge as chairperson and a further judge as associate. At least one deputy chairperson and at least one alternate member (alternate associate judge) shall be provided for each panel.

2005 Asylum Act<sup>2</sup>

Sec. 61 para 3

Decisions of the Asylum Court shall be rendered by sole judges on complaints against:

1. administrative decisions of rejection pronounced:
  - a) by reason of safety in a third country, as referred to in article 4;
  - b) by reason of the responsibility of another State, as referred to in article 5;
  - c) by reason of *res judicata* pursuant to article 68, paragraph (1), of the General Administrative Procedures Act; and
2. deportation orders issued in conjunction with such decisions.

Sec. 75 para 7

Procedures which at 1 July 2008 are pending before the independent Federal Asylum Review Board shall be continued by the Asylum Court in accordance with the following provisions:

1. Members of the independent Federal Asylum Review Board who have been appointed as Asylum Court judges shall continue to conduct, as sole judges, all procedures which are pending before them and in which an oral hearing has already taken place;
2. Procedures against administrative decisions of dismissal in which an oral hearing has not yet taken place shall be continued by the panel which is competent in accordance with the first work schedule of the Asylum Court;
3. Procedures against administrative decisions of dismissal which were conducted by members of the independent Federal Asylum Review Board who have not been appointed as Asylum Court judges shall be continued by the competent panel in accordance with the first work schedule of the Asylum Court.

Allocation of Duties (Geschäftsverteilung des Asylgerichtshofs )

Sec. 17 para 5

Every further legal case will be distributed to the judge with the lowest allocation rate of the judges, whose field of competence is affected. If more

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1 Unofficial translation, see [http://www.unhcr.at/fileadmin/unhcr\\_data/pdfs\\_at/information\\_in\\_english/asylghq08-eng-logo.pdf](http://www.unhcr.at/fileadmin/unhcr_data/pdfs_at/information_in_english/asylghq08-eng-logo.pdf).

2 Unofficial translation, see [http://www.unhcr.at/fileadmin/unhcr\\_data/pdfs\\_at/information\\_in\\_english/asyl2005-eng-logo.pdf](http://www.unhcr.at/fileadmin/unhcr_data/pdfs_at/information_in_english/asyl2005-eng-logo.pdf).

judges have the same allocation rate, the sequence of judges in sec 4 applies. Legal cases concerned are to be allocated primarily to the judges designed for the preliminary allocation (Sec. 18).

### **Decision of the Constitutional Court**

The principle of the fixed allocation of duties signifies that the allocation of duties to the respective decision-making bodies has to be determined in advance by regulations, which is the decision on the allocation of duties, to prevent anyone from influencing the allocation of duties, and furthermore that compliance with the regulations must be reviewable. Exceptions are only made in cases of incapability or overload of a judge, particularly set out in Art. 87 para 3 2<sup>nd</sup> sentence B-VG.

The allocation of duties of the Asylum Court contains – in contrary to the assertion of the applicant – sufficiently determined regulations, enabling a distribution in accordance with the principle of allocation of duties.

Two systems of allocation are implemented, one for special procedures in chamber S and one for all further legal cases (Sec. 13). Sec. 16 and 17 of the allocation of duties regulate the distribution of legal cases to single judges. Legal cases of chamber S are to be assigned according to Sec. 16 para 1 in the allocation system prior to the ones under the general allocation system. Para 2 of Sec. 16 determines the allocation according to the country of origin respectively according to family name, first name and date of birth. The allocation to chamber S is not affected by this way of allocation, because the list of judges of chamber S is not structured with similar criteria (Sec. 4 para 6 allocation of duties). Moreover, the distribution to judges within chamber S orientates exclusively on the burden (Sec. 17 para 5 of the allocation of duties), while the cases, which were pending at the Independent Federal Asylum Review Board are distributed by the electronic procedure administration (Sec. 35 para 2 of the allocation of duties).

The Constitutional Court does not doubt that the allocation according to Sec. 17 para 5 of the allocation of duties orientates on the burden of the judges of the Asylum Court. This system ensures the determination that at the moment a complaint is submitted it will be allocated to the member of chamber S of the Asylum Court with the lowest allocation rate – in cases of a similar allocation rate with the sequence regulated in Sec. 4 of the allocation of duties. For this reason proscribed influences are excluded.

Contrary to the opinion of the applicant, the allocation of duties determines in advance how legal cases within chamber S are to be allocated to single judges. The actual allocation rate at the time constitutes an objective and, therefore, reviewable criteria.

The applicant claims that the criteria which apply to the present legal case cannot be extracted from the allocation of duties. That is – as indicated – untrue. The complaint does not contain any information, giving cause to serious concerns, that the legal case was not allocated correctly according to Sec. 17 para 5 of the allocation of duties to the single judges, who decided, particularly because the allocation was performed by the electronic procedure administration.

The constitutionally guaranteed right not to be subjected to torture or to inhuman or degrading treatment or punishment of Art. 3 ECHR is violated by a

decision of the Asylum Court if the decision is based on the application of a legal norm contrary to the stated constitutional provision, if the decision is based on an interpretation of a legal norm in contrary to the stated human right, or if the Asylum Court performs rough procedural errors (regarding the former legal situation refer to VfSlg 13.897/1994, 15.026/1997, 15.372/1998 and 16.384/2001).

The Asylum Court can be accused of performing such rough procedural errors:

According to Sec. 4 Asylum Act 2005, it is possible to reject an application for international protection without assessing the case in essence, if the asylum seeker enters from a secure third-state. Not only formal criteria to assess the third-state-security, such as the membership to the Geneva Refugee Convention, the release of a statement according to Art. 52 ECHR and the existence of an asylum act, are relevant. In contrary, whether the protection will be granted effectively must also be considered. Therefore, the asylum authorities have to take permanent precautions to receive relevant information of significant sources in order to assess the actual situation without delay. The Asylum Court has to pursue an independent investigation, if reliable information is otherwise not available (refer to VwGH 11.11.1998, 98/01/0284 etc).

The decision at stake justifies the third-state-security substantially with the membership of the Russian Federation to the Geneva Refugee Convention and the ECHR and the existence of a procedure to grant the legal refugee status.

The argumentation going beyond, when the Asylum Court sets out that no systematic notorious violations of fundamental human rights would occur in the Russian Federation and that this state would be governed by the rule-of-law-principle, these are only assertions not based on respective investigations. Moreover these assertions are not proved by concrete facts. The Asylum Court neither considers the assertion of the applicant trying to disprove the third-state-security, which is sustained by precise and substantial documentation – e.g. the reports pointed out in the appeal –, nor examines whether the principles of the ECHR are implemented effectually and do not only exist in theory. Country documentation and knowledge on the situation in the Russian Federation remains unconsidered. The Asylum Court obviously considers that investigations of the factual situation and the assertion of the applicant are irrelevant due to the legal situation in the Russian Federation.

These coarse procedural errors lead to the conclusion that the applicant's constitutionally guaranteed right under Art. 3 ECHR is violated.

Hence the appealed decision is revoked. Due to that result there is no need to assess the further assertions in the complaint.

### Comments

The decision at stake is one of the few where a judgement of the Asylum Court was revoked by the Constitutional Court. The reason is that the alleged third-state-security of Russia was not reasonably argued.

The second issue, however, relating to the crucial allocation of duties, ended in a confirmation of the present procedural regulations. As it was pointed out by the Court 'the principle of the fixed allocation of duties signifies, that the allocation

of duties to the respective decision-making bodies has to be determined in advance by regulations', to limit any potential influence on the distribution process. This principle is generally enshrined in Art. 87 para 3 2<sup>nd</sup> sentence B-VG and reiterated particularly concerning the Asylum Court in Art. 129e para 2 B-VG.

The most prominent of allocation-of-duties-concepts is the 'principle of rotation', which is commonly applied at several Austrian courts as well as generally at the Asylum Court.<sup>3</sup> Even though this concept was criticised,<sup>4</sup> the Constitutional Court never followed these arguments.

The ideological background behind the fixed allocation of duties is the ban of any influence on the merits of the decision via the selection of the decision-maker in particular cases.<sup>5</sup> In the decision at stake the Constitutional Court did not regard the system of allocation taking the allocation rates into account, of having the potential to influence the judges.

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3 Refer to *Muzak/Rohrböck*, *Asylgerichtshof* (2008) 125.

4 For an intensive elaboration on the issue refer to *Piska*, *Das Prinzip der festen Geschäftsverteilung in der ordentlichen Gerichtsbarkeit* (1995) 333.

5 *Walter/Mayer/Kucsko-Stadlmayer*, *Bundesverfassungsrecht*<sup>10</sup> (2007) 764.