Field: BVerwGE: No

Asylum law Professional press: Yes

Sources in law:

Asylum Procedure Act	Section 27a
European Charter of Human Rights	Article 3
Charter of Fundamental Rights	Article 4
Code of Administrative Court Procedure	Section 86 (1), Section 108 (1) sentence 1, (2)
Regulation (EU) 343/2003	Article 3 (1) sentence 2, Article 10 (1), Article 19 (2)
Regulation (EU) 604/213	Article 3 (2)

Headwords:

Asylum seeker; asylum application; asylum procedure; reception conditions; considerable probability; reversal of the burden of proof; Dublin II Regulation; degrading treatment; Common European Asylum System; operational problems; prognosis of danger; individual experience; systemic deficiencies; inhuman treatment; investigative principle; refutable presumption; transfer to Italy; strong probability; (jurisdictional) responsibility.

Headnotes:

An asylum seeker may counter a transfer to the Member State responsible for him or her under the Dublin II Regulation only by pleading systemic deficiencies of the asylum procedure and of the reception conditions for asylum seekers. It is not relevant, however, whether in individual cases below the threshold of systemic deficiencies, there may be inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights or Article 3 of the European Charter of Human Rights, or whether an applicant has already been exposed to such treatment at one time in the past (following the same reasoning as the decision of 19 March 2014 – BVerwG 10 B 6.14).

Decision of the 10th Division of 6 June 2014 – BVerwG 10 B 35.14

I. Cologne Administrative Court of 16 November 2011 –
Case: VG 3 K 2890/11.A –
II. Münster Higher Administrative Court of 7 March 2014 –
Case: OVG 1 A 21/12.A –

FEDERAL ADMINISTRATIVE COURT

DECISION

BVerwG 10 B 35.14
OVG 1 A 21/12.A

In the administrative case

of Mr A. B.,

Complainant in the original proceedings, respondent in the appeal below, and complainant before this Court,

- Counsel of record:
L, attorney at law -

v.

The Federal Republic of Germany,
represented by the Federal Ministry of the Interior,
represented in its turn by the President
of the Federal Office for Migration and Refugees,
90343 Nuremberg,

Respondent in the original proceedings, appellant in the appeal below, and respondent before this Court,

Translator's Note: The Federal Administrative Court, or *Bundesverwaltungsgericht*, is the Federal Republic of Germany's supreme administrative court. This unofficial translation is provided for the reader's convenience and has not been officially authorised by the *Bundesverwaltungsgericht*. Page numbers in citations of international texts have been retained from the original and may not match the pagination in the parallel English versions.

When citing this decision, it is recommended to indicate the court, the date of the decision, the case number and the paragraph: BVerwG, Decision of 6 June 2014 – BVerwG 10 B 35.14 – para. …

the 10th Division of the Federal Administrative Court
on 6 June 2014
by Presiding Administrative Court Justice Prof. Dr Berlit and Administrative Court Justices Prof. Dr Dörig und Prof. Dr Kraft

decides:

The Complainant's complaint against the denial of leave to appeal under the judgment of the Higher Administrative Court of the State of North Rhine-Westphalia of 7 March 2014 is dismissed.

Costs of these proceedings are imposed on the Complainant.

Reasons:

I

1 The Complainant, a Moroccan national, by his own account entered Italy by sea in 2009. He lived for approximately one month at a reception centre in Sicily, underwent identity screening there, and travelled onwards to Germany in the autumn of 2009 without applying for asylum in Italy. In October 2009 he lodged an application for asylum in Germany, which the Federal Office for Migration and Refugees – the 'Federal Office' – denied as inadmissible, in view of the fact that Italy was the responsible country under the Dublin II Regulation. The Complainant was thereupon returned by air to Italy in December 2009, by way of Rome Fiumicino airport. In January 2011 he was found again in Germany, and again lodged an application for asylum. In a decision dated 27 April 2011, the Federal Office declined to conduct any further asylum procedure and ordered the Complainant deported to Italy. The Administrative Court upheld his complaint against that decision; the Higher Administrative Court denied it upon appeal by the respondent Federal Office. It denied leave for an appeal to this Court. The Complainant's complaint to this court challenges that denial.

II

2 The complaint, in which the Complainant asserts the fundamental importance of the question at issue (Section 132 (2) No. 1 Code of Administrative Court Procedure), does not meet with success.

3 The complaint raises the question, as being of fundamental importance,

> ‘to what extent should the decision as to a considerable probability of inhuman or degrading treatment upon being returned to the Member State that normally has responsibility give substantial consideration to the individual experiences undergone by the person concerned in that Member State.’

4 This, he claims, is associated with the question of

> ‘whether a determination of systemic deficiencies is needed if a person concerned has already met with degrading and inhuman treatment on one or even more occasions, particularly after a return has already taken place once.’

5 The questions raised do not justify leave to appeal under Section 132 (2) No. 1 of the Code of Administrative Court Procedure because they are not in need of clarification. Insofar as they have not already been clarified in the case law of the European Court of Justice and the Federal Constitutional Court, they can be answered on the basis of the relevant case law without conducting proceedings before this Court. This Court ruled as follows on this issue in its decision of 19 March 2014 – BVerwG 10 B 6.14 – (juris para. 5 et seq.):

> Pursuant to Article 3 (1) sentence 2 of Council Regulation No. 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (OJ L 50 p. 1) – the Dublin II Regulation – which (still) applies to the present case, an application shall be examined by a single Member State, which shall be the one which the criteria set out in Chapter III indicate is responsible. As is evident from its Recitals 3 and 4, one of the principal goals of the Dublin II Regulation was to establish a clear and work-

able method for determining the Member State responsible for the examination of an asylum application, so as to guarantee effective access to the procedures for determining refugee status and ensure rapid processing of asylum applications. The Common European Asylum System is founded on the principle of mutual confidence that all participating States will observe fundamental rights, including the rights based on the Geneva Convention and the 1967 Protocol, and on the ECHR (ECJ – Grand Chamber, judgment of 21 December 2011 – Cases C-411/10 and C-493/10, N.S. et al. – ECR 2011, I-13905 at para. 78 et seq. = NVwZ 2012, 417). From this, the Court of Justice derived the presumption that the treatment of asylum seekers in all Member States complies with the requirements of the Charter of Fundamental Rights, the Geneva Convention and the ECHR (ECJ, loc. cit., at 80).

In so deciding, the Court of Justice did not fail to recognise that in practice, this system may encounter rather significant operational problems in a given Member State, meaning that there is a substantial risk that asylum seekers may, when transferred to the Member State having jurisdiction under Union law, be treated in inhuman or humiliating ways. It therefore finds that the presumption that asylum seekers will be treated in every Member State in a way which complies with the rights under the Charter of Fundamental Rights, the Geneva Convention and the European Convention on Human Rights must be regarded as rebuttable (ECJ, loc. cit., at 104). However, because of the important purposes of the Common European Asylum System, it attached significant hurdles to the rebuttal of this presumption: not every threat of violation of fundamental rights or minor violations of Directives 2003/9, 2004/83 or 2005/85 would suffice to exempt the asylum-seeker from transfer to the Member State that would normally have jurisdiction (ECJ, loc. cit., at 81 et seqq.). However, if there is serious concern that the asylum procedure and the reception conditions of asylum seekers in that Member State present systemic deficiencies that would result in inhuman or degrading treatment of the asylum seekers transferred to that Member State within the meaning of Article 4 of the Charter of Fundamental Rights, transfer is incompatible with that provision (ECJ, loc. cit., at 86 and 94).

The Court of Justice summarised its findings to the effect that the Member States, including the national courts, may not transfer an asylum seeker to the ‘Member State responsible’ within the meaning of the Dublin II Regulation where they cannot be unaware that systemic deficiencies

in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds, supported by fact, for believing that that asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights (ECJ, loc. cit., at para. 106 and headnote 2; likewise judgment of the Grand Chamber of 14 November 2013 – Case C-4/11, Puid – NVwZ 2014, 129 at 30). Finally, in the event that the Member State responsible agrees to take charge, the court decided that the only way in which the applicant for asylum can call into question the choice of the criterion for responsibility laid down in Article 10(1) of the Dublin II Regulation with an appeal or review as provided in Article 19 (2) of that Regulation is by pleading, as already mentioned above, systemic deficiencies in the asylum procedure and in the conditions for the reception of applicants for asylum in that latter Member State (ECJ – Grand Chamber, judgment of 10 December 2013 – Case C-394/12, Abdullahi – NVwZ 2014, 208 at 60). This case law of the Court of Justice also underlies Article 3 (2) of the new version of Regulation (EU) No. 604/2013 of 26 June 2013 (OJ L No. 180 p. 31) – the Dublin III Regulation.

The European Court of Human Rights has in substance affirmed the applicability of such systemic defects in the asylum procedure and of conditions for the reception of asylum seekers in Greece, in cases of the transfer of asylum seekers under the Dublin system (ECHR – Grand Chamber, judgment of 21 January 2011 – No. 30696/09, M.S.S. v. Belgium and Greece – NVwZ 2011, 413) and, in that regard, based its reasoning in subsequent decisions on the criterion of ‘systemic failure’ (ECHR, decisions of 2 April 2013 – No. 27725/10, Mohammed Hussein et al. v. Netherlands and Italy – ZAR 2013, 336 at 78; of 4 June 2013 – No. 6198/12, Daytbegova et al. v. Austria – at 66; of 18 June 2013 – No. 53852/11, Halimi v. Austria and Italy – ZAR 2013, 338 at 68; of 27 August 2013 – No. 40524/10, Mohammed Hassan v. Netherlands and Italy – at 176; and of 10 September 2013 – No. 2314/10, Hussein Diirshi v. Netherlands and Italy – at 138).

For proceedings in the administrative courts in Germany, which – in contrast to other legal systems – are characterised by the investigative principle (Section 86 (1) Code of Administrative Court Procedure), the criterion of systemic deficiencies in asylum proceedings and in the conditions for the reception of asylum seekers in another Member State of the European Union is of significance for the prognosis of danger under Article 4 of the Charter of Fun-

damental Rights and Article 3 of the European Convention on Human Rights. To refute the presumption, based on the principle of mutual trust between Member States, that the treatment of asylum seekers in every Member State is consistent with the requirements of the Charter of Fundamental Rights and with the Geneva Convention and the European Convention on Human Rights, the judge of fact must establish a certainty at the level of conviction (Section 108 (1) sentence 1 Code of Administrative Court Procedure) that there is a considerable – i.e., a strong – probability (see judgment of 27 April 2010 – BVerwG 10 C 5.09 – BVerwGE 136, 377 at 22 with further authorities = Buchholz 451.902 Europ. Ausl.- u. Asylrecht No. 39) that the asylum seeker will be exposed to inhuman or degrading treatment because of systemic deficiencies in the asylum procedure or the reception conditions in the Member State that would normally be responsible. Here, as can be seen from the considerations of the Court of Justice on the ability of other Member States to recognise deficiencies (ECJ, judgment of 21 December 2011 – Cases C-411/10 and C-493/10 – loc. cit., at 88 through 94), focusing the prognosis on systemic deficiencies is founded upon the foreseeability of such deficiencies inasmuch as they are inherent in the legal system of the Member State having responsibility or structurally characterise its enforcement practices. Such deficiencies do not come to affect the individual in the responsible Member State unpredictably or adventitiously, but rather can be predicted reliably, from the viewpoint of the German authorities and courts, because of their regularity inherent in the Member State's system. The refutation of the aforesaid presumption on the grounds of systemic deficiencies therefore presupposes that the asylum procedure or the reception conditions in the responsible Member State are regularly so deficient, because of operational problems, that it must be assumed that there is also a considerable probability that the asylum seeker in the specific case that is to be decided will be at risk of being subjected to inhuman or degrading treatment there. In that case, a transfer to the Member State responsible under the Dublin II Regulation becomes out of the question.

6 It is evident from the cited case law of the Court of Justice of the European Union that an asylum seeker can counter a return to the Member State that has responsibility for him or her under the Dublin II Regulation, with regard to inadequate reception conditions for asylum applicants, only by pleading systemic deficiencies in the asylum procedure and reception conditions, and that it is not relevant whether in individual cases, below the threshold of systemic deficien-

cies, there may be inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights or Article 3 of the European Convention on Human Rights, or whether an applicant has already been exposed to such treatment at one time in the past. The court below correctly pointed out that such individual experiences must instead be incorporated into the overall assessment of whether systemic deficiencies are present in the state to which the applicant may be deported (here: Italy) (Copy of the Judgment, p. 26). Individual experiences of the person concerned must be taken into account within this limited scope. In this regard, however, it must be borne in mind that individuals' personal experiences that lie several years in the past – as in the instant case – may have been overtaken by more recent developments in the state concerned. Individual experiences of treatment in violation of Article 4 of the Charter of Fundamental Rights do not, however, result in a reversal of the burden of proof for the existence of systemic deficiencies (as the court below also held, Copy of the Decision p. 26 et seq.). The complaint does not demonstrate any further need for clarification. There is no need for a reference to the Court of Justice of the European Union to answer the questions raised by the complaint.

7 The disposition as to costs is founded on Section 154 (2) of the Code of Administrative Court Procedure. In accordance with Section 83b of the Asylum Procedure Act, no court costs are imposed. The value at issue proceeds from Section 30 of the Act on Attorney Compensation; there are no grounds for an exception under Section 30 (2) of the Act on Attorney Compensation.

Prof. Dr Berlit Prof. Dr Dörig Prof. Dr Kraft