Field: BVerwGE: No

Asylum law Professional press: Yes

Sources in law:

Asylum Procedure Act	Section 27a
European Charter of Human Rights	Article 3
Basic Law	Article 103 (1)
Charter of ‘ Fundamental Rights	Article 4
Code of Administrative Court Procedure	Section 86 (1), Section 108 (1) sentence 1 and Section (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; Dublin II Regulation; degrading treatment; Common European Asylum System; operational problems; prognosis of danger; complaint of denial of fair hearing; systemic deficiencies; inhuman treatment; investigative principle; refutable presumption; transfer to Italy; strong probability; (jurisdictional) responsibility.

Headnotes:

Transfer of an asylum seeker to the Member State responsible under the Dublin II Regulation is impermissible only if the asylum procedure or reception conditions for reception of asylum seekers in that Member State, because of systemic defects, or in other words, regularly, are so inadequate that it must be expected that there is a considerable probability, including in the specific case to be decided, that the asylum seeker will be at risk of being subjected to inhuman or degrading treatment there.

Decision of the 10th Division of 19 March 2014 – BVerwG 10 B 6.14

I. Magdeburg Administrative Court of 10 December 2012 – Case: VG 1 A 167/12 MD -
II. Magdeburg Higher Administrative Court of 14 November 2013 – Case: OVG 4 L 44/13 -

FEDERAL ADMINISTRATIVE COURT

DECISION

BVerwG 10 B 6.14
OVG 4 L 44/13

In the administrative case

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 19 March 2014 – BVerwG 10 B 6.14 – para. …

the 10th Division of the Federal Administrative Court
on 19 March 2014
by Administrative Court Justices Prof. Dr Dörig, Prof. Dr Kraft and Fricke

decides:

The Complainant's complaint against the denial of leave to appeal under the decision of the Higher Administrative Court of the State of Saxony-Anhalt of 14 November 2013 is dismissed.

Costs of the complaint proceedings are imposed on the Complainant.

Reasons:

I

1 The Complainant, a Malian national, entered Italy by sea in May 2009 and applied there for asylum. In July 2009 he lodged a further application for asylum in Switzerland, and evaded transfer to Italy. In response to his application for asylum lodged in Austria on 1 October 2010, the Austrian authorities transferred him to Italy in July 2011. In November 2011 the Complainant was apprehended in Germany, and again lodged an application for asylum. In response to a request from the Federal Office for Migrations and Refugees – the 'Federal Office' – the Italian authorities consented in February 2012 to take charge. Thereupon, in a decision of 7 May 2012, the Federal Office decided that the application for asylum was inadmissible, and ordered the Complainant deported to Italy. The Administrative Court upheld his complaint against that decision, while the Higher Administrative Court denied it on appeal by the Respondent. The court below denied leave to appeal to this Court. The Complainant's complaint is directed against that denial.

II

2 The complaint, in which the Complainant argues the fundamental importance of the case (Section 132 (2) No. 1 Code of Administrative Court Procedure) and also alleges a violation of the right to a fair hearing by the court below (Section 132 (2) No. 3 in conjunction with Section 108 (2) Code of Administrative Court Procedure), does not meet with success.

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

> ‘to what legal requirements is the concept of “systemic deficiencies” subject; in particular, what standard of probability and proof is necessary for the assumption that an asylum-seeker is in fact in danger of being exposed to inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union.’

4 This question does not justify leave to appeal to this Court under Section 132 (2) No. 1 Code of Administrative Court Procedure because the question is not in need of clarification. Insofar as it has not already been clarified in the case law of the European Court of Justice, it can be answered on the basis of the relevant case law and national procedural law without conducting proceedings before this Court.

5 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 workable 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. – Col. 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).

6 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).

7 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 if 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.

8 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).

9 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 Fundamental 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. The court below recognisably based the challenged decision on this standard.

10 2. In its charge concerning a fair hearing, the complaint claims that at the same time as its announcement of 8 October 2013 that the court was contemplating deciding the case without an oral hearing by a decision under Section 130a of the Code of Administrative Court Procedure, the court below indicated that the Third Division of the same court had also decided in this manner in comparable cases. Even though it had been requested to do so, the Complainant claims, the court below did not provide access to the decisions of the other division, which had not yet been entered at that time, and also did not extend the period for a response. The complaint concerning a fair hearing is without merit.

11 Article 103 (1) of the Basic Law and Section 108 (2) of the Code of Administrative Court Procedure indicate that a court's decision may be founded only on the facts and evidence on which the parties have been able to state their response. No differently than for other findings of fact, the assessment of findings of fact from other proceedings for the dispute that is to be decided is subject to the principle of a fair hearing (judgment of 8 February 1983 – BVerwG 9 C 847.82 – Buchholz 310 Section 108 Code of Administrative Court Procedure No. 132 = InfAuslR 1983, 184). A court contravenes that principle if, instead of gathering evidence itself, it relies on decisions with extensive findings of fact without making those decisions accessible to the parties in such a way that they are able to state a response to them. However, if a court consults other decisions only as confirming evidence that in judging the facts, other courts within a state have assessed the situation (of a certain group) in a similar manner, and therefore drew the same legal conclusions, then such references are not subject to the special requirements of Section 108 (2) of the Code of Administrative Court Procedure (judgment of 22 March 1983 – BVerwG 9 C 860.82 – Buchholz 310 Section 108 Code of Administrative Court Procedure No. 133; decision of 12 July 1985 – BVerwG 9 CB 104.84 – Buchholz 310 Section 103 Code of Administrative Court Procedure No. 8 = NJW 1986, 3154).

12 Measured by this standard, the complaint as to a fair hearing proves unfounded. In the challenged decision, the court below performed an independent assessment of the facts concerning the situation of asylum seekers in Italy, analysing a

variety of sources. On the evidence of the grounds of the decision, it did not make use of the decisions of the Third Division of the Higher Administrative Court of the State of Saxony-Anhalt that are cited in the letter of 8 October 2013. It is therefore not evident how the challenged decision could have violated the Complainant's right to a fair hearing by way of the approach taken by the court below, although that approach was surely procedurally maladroit. The sources of information used as the basis for the findings of fact by the court below were made known to the Complainant in the court's letter of 8 October 2013, so that he could respond to them.

13 This Court refrains from any further discussion of grounds (Section 133 (5) sentence 2 half-sentence 2 Code of Administrative Court Procedure).

14 The decision 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 Dörig Prof. Dr Kraft Fricke