National Report Austria

Part 1 Jurisprudence on the Dublin II Regulation – April 2012 (by C. Filzwieser)

Procedure

Decision of inadmissibility by administrative authority after 2 interviews
Appeal within one week to Asylum Court
Asylum Court may grant suspensive effect within a week, otherwise asylum-seeker can be transferred to responsible Member State before the Court's decision.
Asylum Court has to decide the appeal within 8 weeks.
Asylum Court rules by single judge, public hearing only in exception cases.
If administrative decision is gravely deficient, case may be sent back to 1st instance by Asylum Court, otherwise Court may refuse the appeal or grant it, thereby ordering "normal asylum-procedure" to start at administrative level.
Ruling by Asylum Court may be appealed against only with the Constitutional Court; at the moment suspensive effect is rarely granted.
Sometimes further judicial review is directly requested in Strasbourg

Statistical Trends

Still an **overall important type of procedure** due to Austria's geographical location.
The 10 judges dealing with those appeals have received 382 appeal cases in the first three months of 2012.
Most cases concern Hungary, Italy and Poland.

Corner-Stones of the Asylum Court's Jurisprudence

A "Dublin decision" is illegal when

*) **the transfer of the asylum-seeker violates art. 3 & 8 ECHR or relevant provisions of the Charter of Fundamental Rights** because of **systemic deficiencies in the respective Member State** (following the MSS ruling); to be applied as a general rule (up to now only Greece)

***) the transfer of the individual asylum-seeker violates art. 3 & 8 ECHR or relevant provisions of the Charter of Fundamental Rights** because of **particularities of the case (eg. vulnerability**); to be applied as an exception; normally judicial relief has to be requested in the responsible MS (following Strasbourg's KRS ruling and the Luxembourg ruling in the NS case)

In those types of cases Austria **must apply art. 3/2 Dublin II Regulation**; with the asylum-seeker having a subjective right that this is done (details of this are subject to a preliminary ruling procedure at Luxembourg instigated by the Court in the *K*-case)

*) the **procedure** leading up to the responsible Member State's acceptance of the transfer is **gravely deficient** (thereby violating fundamental principles of law, like the right to good administration) or is based on a **manifestly wrong interpretation of**

certain provisions of the Regulation; there is a wide amount of rulings on individual issues.

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Summary

Unlike other Member States the recent Strasbourg & Luxembourg rulings had no dramatic impact on relevant jurisprudence which had been, generally speaking, consistent with those rulings before. Deciding upon whether the deficiencies of MS are systemic like in Greece is a complex issue, with the focus at the moment on Hungary. The fact that those are complex cases may in the Austrian experience not be so much an example of a “Dublin crisis”, but of a crisis of the “European Asylum System”.

Part 3: "Union citizenship under the jurisdiction of the ECJ (e.g. cases C-34/09 *Zambrano* and C-256/11 *Dereci et al*.), consequences for the national practice"

A. Migration law (by B. Maurer-Kober)

- ***Legal situation:***

From the point of view of the Austrian migration law, the ECJs jurisprudence in the cases *Zambrano* and *Dereci* has to be taken into account concerning both **returning measures**, such as expulsions, exclusion orders or entry-ban decisions under the *2005 Aliens' Police Act*, and the granting of **residence permits** under the *Federal Law on establishment and residence (NAG)*.

The NAG draws a line between residence rights conferred by EU law and the ones derived from national law. Thus, as far as derived residence rights of a third country national, who is a family member of an Austrian national, is concerned, the NAG distinguishes between those family members having made use of their EU-right of free movement (§§ 52-57 NAG) and the ones who have never exercised this right. The latter ones regularly have to fulfil various general conditions (such as the residence not being against the public interest, sufficient financial resources, a comprehensive sickness insurance etc. - exceptions if Art. 8 ECHR is at stake) and have to fall within certain defined groups (family members in the strict sense, i.e. minor children and spouses, and certain other family members under further conditions laid down in § 47 NAG); in addition to that, they are regularly required to submit their initial application before entering Austria to the competent local diplomatic services and to stay abroad until a decision on the application has been made.

- ***Case Dereci - reference for a preliminary ruling from the (Supreme) Administrative Court (Verwaltungsgerichtshof - VwGH):***

Following the *Zambrano* case, the Administrative Court (Decision 2008/22/0145, 5.5.2011) referred in May 2011 several questions for preliminary ruling to the ECJ (C-256/11, *Dereci and others*), since the notion and scope of the "genuine enjoyment of the substance of the rights conferred by virtue of the status as a citizen of the Union" was not clear.

- ***Follow-up Jurisprudence of the Administrative Court:***

The Administrative Court does not decide in merits. So far, the Administrative Court has not had cases yet, which allowed to state under which circumstances such an exceptional case as depicted in *Zambrano* (ie the Austrian Union citizen being in fact forced to leave the EU territory if his/her third country family member was denied a residence permit) could be assumed. All the cases which were subject to the preliminary reference had to be referred back to the administrative appeal authorities for further examination in merits along the lines of the ECJ's *Dereci* judgement - this examination being without prejudice to the one concerning a possible violation of Art. 8 ECHR.

However, the Administrative Court held in several cases that if the third country national is an asylum seeker (thus having a temporary right to stay under asylum law during his asylum procedure) (cf. VwGH 2008/21/0162, 2008/22/0837) or if a family life is actually not existing (eg. marriage of convenience, adoption of convenience – cf. VwGH 2011/22/0314, 2008/22/0220), there will be no such denial of the rights conferred by virtue of the Union citizenship to his/her Austrian family member.

Criteria for restrictions (separation) to be accepted by the Union citizen:

In addition to this, in VwGH 2008/22/0140, 28.3.2012, the Court also held that in the light of the *Dereci*-ruling, the conditions under which a right of residence can be denied to the third country national family member of a ("static") Union citizen – for reasons of public order and public security (e.g. criminal offences committed by the third country national) - thus restricting the Union citizenship rights, can in any case not be less restrictive than those to be applied according to EU law in the assessment of the permissibility of restrictions imposed on the family member of a Union citizen who has exercised his/her right of free movement. (So, in actual fact, the standards and circumstances laid down in the Union Citizenship Directive allowing for possible restrictions of the free movement and residence of Union citizens and their family members are to be taken into account in the case of "static" Union citizens and their family members, too.)

[All decisions of the Administrative Court can be found on www.ris.bka.gv.at]

B. Asylum law (by K. Winter)

National legal basis

According to § 10 (1) Federal Act Concerning the Granting of Asylum, Federal Law Gazette (FLG) I No. 138/2011, (Asylum Act 2005) a ruling pursuant to this federal act shall be issued in conjunction with an expulsion order if:

1. an application for international protection is rejected;
2. an application for international protection is dismissed in regard to the granting of both asylum status and subsidiary protection status;
3. an alien's asylum status is withdrawn and the subsidiary protection status is not conferred or
4. an alien's subsidiary protection is withdrawn.

According to § 10 (2) Asylum Act 2005 an expulsion as referred to in para (1) above shall be inadmissible if:

1. an alien holds a right of residence that is not based on this federal act or
2. expulsion would constitute a violation of Art. 8 ECHR.

Consequences

A right of residence to be considered under §10(2)(1) Asylum Act 2005 can also be derived from Art. 20 TFEU.

Jurisdiction – selected rulings of the Asylum Court

23.1.2012, B3 258087-0/2008
The complainant is a citizen of Kosovo who has to pay child support (EUR 110,- per month) for his minor Austrian daughter; he never lived together with his daughter and her mother in Austria. The Court argued that if her father is expelled she still can enjoy the substance of the rights conferred by virtue of European Union citizen status because she lives together with her mother and her father can pay child support from Kosovo or she can apply for an (Austrian) advance child support payment (see § 2 UVG [Austrian Law on Advance Child Support]). Consequently the complainant doesn't have a right of residence based on Art. 20 TFEU. Furthermore an economic reason is not sufficient in itself to support the view that the Union citizen will be forced to leave Union territory if the right to reside is not granted.

23.3.2012, B4 423392-2/2012
Case of a Montenegrin national whose wife and two minor daughters had been granted the Austrian citizenship; the Court found that the situation of the complainant cannot be compared to the one characterising the Zambrano case as the complainant did not provide for the maintenance of the mentioned family members.

10.2.2012, B3 258412-0/2008
The complainant, a Kosovar, is married to an Austrian and lives with her in Austria. The Court decided that the separation of spouses is not likely to affect the core of the Union citizen's rights, for it is up to the Union citizen to decide between maintaining the family unity, or make use of the citizenship rights.

15.3.2012, B3 417648-1/2011
Case of an Algerian national who lives in Austria and is the father of a minor Italian girl, who has lived with adoptive parents in Italy since 2003. An expulsion of the complainant would not interfere with the enjoyment of the core of the rights conferred by the Union citizen status because there is no risk that she could remain unmaintained in Italy.

[All decisions of the Asylum Court can be found on www.ris.bka.gv.at]

Part 4 Repeated Asylum Applications after final decision in an asylum-procedure (by C. Filzwieser)

Legal Solutions

Traditionally, follow up asylum-applications in Austria have been treated according to general principles of administrative law. If there were no new evidence, the application was refused under the rule of "ne bis idem" (as a decision of inadmissibility, however with full possibility of judicial review), otherwise a new "regular procedure" was to begin. Since an expulsion ordered in the first procedure had to be suspended till after the final decision in the follow-up procedure was taken, this was criticised by some because it seemed to allow "mala fide" delay of expulsions by applicants.

*) Nowadays, the possibility to lodge a follow-up asylum-application still exists at all times.

*) Normally, at first instance, there is one initial interview at the police (when lodging the procedure) and one follow-up interview with the asylum-authority, at which a legal counsellor is also present to support the applicant.

*) To refuse the application under the "ne bis idem" principle" (§ 68 of the General Administrative Procedure Law"), the authority has to show that **no significant change (possibly leading to a different decision upon the merits as the one taken in the 1st procedure) has taken place** since the final decision relating to the 1st asylum-application & **no new credible statements have been brought forward** ("*nova producta*"), **either concerning the decision on asylum** (under the Geneva Convention) **or the decision on subsidiary protection** (violation of art. 3 ECHR; for example when the applicant falls seriously ill or the general situation in the applicant's home-country gravely deteriorates; see VfGH 29.06.2011, U 1533/10; VfGH 19.09.2011, U 2359/10).

This decision **must always be taken together with a new** (not restricted to the "ne bis idem" principle) **look upon the admissibility of expulsion** under art. 8 ECHR as the second part of the decision (this may be relevant for example when the asylum-seeker during the second procedure forms family relationships); see VwGH 19.02.2009, Zl. 2008/01/0344.

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*) Unlike before, certain types of follow up - applications do not any longer suspend the possibility of **enforcing an expulsion-order from the earlier application, even during the (2nd) 1st instance procedure** ("*kein faktischer Abschiebeschutz*"); see §12a AsylG 2005 idF BGBl I Nr. 138/2011. **So the applicant may be expelled at all times during the follow-up procedure.**

-) this is – by law – the case in most follow-up "Dublin" applications.

-) in other applications the administrative authority may decide so at the beginning of the procedure, when (1) the **expulsion-order from the first procedure is still legally valid**, (2) the **follow-up application will probably be refused as inadmissible on the basis of the "ne bis in idem"-rule** in the assessment of the administrative authority and (3) the **expulsion probably will not lead to a violation of the applicant's rights under the ECHR**.

-) This decision is to be rendered orally after the second interview to the applicant and is subject to an **automatic judicial review by the Asylum Court** (to be taken within 8 weeks; however the suspension of the possibility to be expelled lasts only for 3 days after the Asylum-Court starts the ex lege judicial review).

-) When the follow-up application is lodged only days before a date already set for an expulsion such applications are deemed to be an abuse of procedure unless in certain quite restrictive scenarios (especially when the objective situation in the respective country changes to the detriment of the asylum-seeker). Here, judicial review may not be possible immediately (id est before the actual expulsion). The detailed legal regulations are complex.

-) When the Asylum Court upholds the decision by the administrative authority (not to provide for "*faktischer Abschiebeschutz*"), this ruling (which in substance deals with the same questions than a "normal" on the merits decision in a follow up asylum application case) is subject to further review by the Constitutional Court.

-) The Constitutional Court has upheld the constitutionality of this system (VfGH 09.10.2010, U 1046/10) but in various rulings since has also made clear that the Asylum Court's review is to be done thoroughly (see for example VfGH 03.05.2011, U 2795/10; VfGH 10.06.2011, U 2570/10, VfGH 19.09.2011, U 538/11).

-) If this procedure is finished (and the asylum-seeker concerned possibly no longer in Austria) the **regular decision on the follow-up application still has to be done**. This decision once taken is then subject to judicial review like any other decision in a follow-up case. However, as long as the 1st instance does not take this decision, there may be a **gap in effective judicial protection**, possibly violating the European Convention on Human Rights and/or the Law of the European Union (see for example AsylGH 03.04.2012, S1 416.449-2/2012/2E)

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*) The ne bis in idem decision by the administrative authority is **subject to an appeal within 7 days**. If the **Asylum Court, within 7 days** after receiving the appeal & the files does not **grant suspensive effect** the expulsion-decision of the first procedure will become legally enforceable

*) The Asylum Court may grant suspensive effect when a violation of art. 3 & 8 of the ECHR is probable. If no suspensive effect is given, there is no formal decision on that. This may be problematic relating to the principle of effective remedy.

*) Decisions by the Court on the appeal are done by single judge, usually without a public hearing. Unlike in the 1st instance, no free legal counsel is foreseen here, by law. If the procedure at the administrative level is deficient, there is the possibility to send the case back.

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Summary:

The new set of rules described above has to a degree increased the number of expulsions and led to a certain acceleration in the overall decision-time, always a very problematic issue in Austria. On the other hand, the law is complex and, in parts, in need of judicial clarification. It also may be in conflict with the principle of effective remedy.