Field:

BVerwGE: no
Professional press: yes

Asylum law

Sources in law:

Asylum Act, Sections 27a, 34a, 71a, 77(1)
Dublin III Regulation, Art. 3, 27(3), Art. 29, 49(2)
Charter of Fundamental Rights, Art. 4
Implementing Regulation (EC) No. 1560/2003, Art. 9(2)
Code of Administrative Court Procedure, Section 80(5) and (7)

Title line:

Claim for compliance with Dublin responsibility provisions in the absence of willingness to take charge or take back on the part of a Member State that does not have responsibility

Headwords:

Asylum application; inadmissibility; responsibility; transfer of responsibility; taking back; willingness to take charge; transfer; transfer time limit; legal appeal; suspensive effect; deportation order; need for legal protection; complaint for lack of investigation; assessment of evidence.

Headnote:

If a Member State is responsible for carrying out an asylum procedure under the relevant terms of the Dublin Regulations, an applicant may in any event invoke that Member State’s responsibility in court proceedings against a rejection of his or her application for asylum as inadmissible under Section 27a Asylum Act if it has not been positively established that another Member State (which does not have responsibility) is willing to take charge of the applicant or take him or her back.

Judgment of the First Division of 27 April 2016 – BVerwG 1 C 24.15

I. Trier Administrative Court, 3 August 2015
Case: VG 6 K 793/15.TR

II. Koblenz Higher Administrative Court, 23 November 2015
Case: OVG 1 A 10969/15

FEDERAL ADMINISTRATIVE COURT

IN THE NAME OF THE PEOPLE

JUDGMENT

BVerwG 1 C 24.15
OVG 1 A 10969/15

Released
on 27 April 2016
Ms …
As clerk of the court

In the administrative matter

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, Judgment of 27 April 2016 – BVerwG 1 C 24.15 – para. …

the First Division of the Federal Administrative Court
upon the oral hearing of 27 April 2016
by Presiding Federal Administrative Court Justice Prof. Dr Berlit and Federal Administrative Court Justices Prof. Dr Dörig, Prof. Dr Kraft, Fricke and Dr Rudolph

finds:

The Respondent's appeal against the decision of the Rhineland-Palatinate Higher Administrative Court of 23 November 2015 is denied.

The Respondent is to bear the costs of these proceedings.

Reasons:

I

1 The Complainant, an Iranian national, appeals the rejection of his asylum application as inadmissible together with the ordering of his deportation to Hungary.

2 By his own account, the Complainant entered the Federal Territory at the end of 2014 and applied for asylum in January 2015. A Eurodac check showed that he had previously applied for asylum in Hungary. In response to an apposite request from the Federal Office for Migration and Refugees – the 'Federal Office' – Hungary declared that it was willing to take back the Complainant. Thereupon, in a decision of 24 February 2015, the Federal Office denied the asylum appli-

cation as inadmissible because another country had international responsibility (Point 1) and ordered the Complainant deported to Hungary (Point 2).

3 The Administrative Court, in decisions of 9 April and 28 July 2015, denied applications by the Complainant for provisional protection under Section 80(5) and (7) of the Code of Administrative Court Procedure, and rejected the Complainant's lawsuit in a judgment of 3 August 2015.

4 In a decision of 16 November 2015, the Higher Administrative Court ordered that the action brought against Point 2 of the challenged administrative decision should have a suspensive effect in accordance with Section 80(7) of the Code of Administrative Court Procedure, and in a decision of 23 November 2015 in the main matter, it set aside the Federal Office's decision. The court founded its decision on the fact that although Hungary was originally responsible for carrying out the asylum proceedings under the Dublin III Regulation, nevertheless responsibility had been transferred in the meantime to Germany because the Complainant had not been transferred to Hungary within six months. This time limit began running with Hungary's acceptance of the request to take back in February 2015, and had not been reinitiated during the court proceedings. The court found that the unlawful decision also violated the Complainant's rights. It intentionally left aside the question of whether, and to what extent, the Dublin Regulations offer individual protection. It held that at any event, a violation of subjective rights proceeded from substantive law, because otherwise the Complainant would not be able to effectively assert the review of his application by a Member State as guaranteed by Union law. It is conceivable in an individual case, the court allowed, that a Member State might still be willing to take an applicant back after the transfer time limit had passed; but this could not be assumed as the rule. In the absence of any reference to Hungary's continuing willingness to take him back, it must be held here that the Complainant's rights were violated. The decision on inadmissibility could also not be reinterpreted as some other decision that would be lawful.

5 In its appeal to this Court, the Respondent asserts that the time limits governed by the Dublin Regulations serve only for a prompt establishment of the respon-

sible Member State and for a prompt transfer to that state, but do not establish any subjective rights of the applicant. Any violations of substantive law, it argues, are founded solely on the Complainant's conduct. Furthermore, the Respondent complains of a breach of the court's duty to investigate, because the court below did not examine whether Hungary was in fact no longer willing to take charge of the Complainant after the transfer time limit had passed.

6 The Complainant defends the challenged decision.

II

7 The appeal does not meet with success. The decision of the court below does not violate law subject to review by this Court (Section 137(1) Code of Administrative Court Procedure). The appellate court correctly held that the complaint was not only admissible (1.), but also well-founded (2.). The challenged administrative decision is unlawful, and violates the Complainant's personal rights (Section 113(1) Code of Administrative Court Procedure). The application for asylum is not inadmissible because another country has international responsibility under Section 27a of the Asylum Act (2.1). To that extent, the administrative decision also cannot be upheld as a decision under Section 71a of the Asylum Act not to conduct any further asylum proceedings (2.2). Under the circumstances of the present case, the rejection of the asylum application violates the Complainant's personal rights (2.3). If Germany is responsible for examining his application, and if the Complainant can rely on that responsibility, the requirements also have not been met for issuing a deportation order (2.4).

8 The legal assessment of the Complainant's application is governed by the Asylum Act in the version promulgated on 2 September 2008 (BGBl. I p. 1798), as last amended by the Act for the Introduction of Expedited Asylum Procedures of 11 March 2016 (BGBl. I p. 390) and the Act Facilitating the Expulsion of Criminal Aliens and for the Expanded Exclusion of Refugee Status for Criminal Applicants for Asylum, of the same date (BGBl. I p. 394), as well as Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013

establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (OJ L 180 p. 31) – the Dublin III Regulation. Under the established case law of the Federal Administrative Court, changes in the law that take place after an appellate decision must be taken into account if the court below – were it to decide instead of this Court – would have to take them into account itself (see Federal Administrative Court, judgment of 11 September 2007 – 10 C 8.07 – BVerwGE 129, 251 para. 19). As the instant case is a dispute in asylum law for which the court below would regularly have to rely on the situation of fact and law at the time of the last oral proceedings, pursuant to Section 77(1) of the Asylum Act, if it were to decide now it would have to base its decision on the new situation of law unless reasons of substantive law compelled some deviation.

9 1. The action is admissible. In particular, the action bringing the challenge is also admissible with regard to the inadmissibility decision in Point 1 of the decision of the Federal Office for Migration and Refugees – the Federal Office – of 24 February 2015 (Federal Administrative Court, judgment of 27 October 2015 – 1 C 32.14 – NVwZ 2016, 154 para. 13 et seq.). The requisite need for legal protection in order to set aside the challenged decision has not been forfeited on grounds that the transfer time limit under Art. 29(1) of the Dublin III Regulation has now expired (see below). After all, this did not cause any expiry of the regulatory effect of the Federal Office's decision to reject the asylum application as inadmissible because another country had international responsibility and to order the Complainant deported to Hungary, nor was the matter thereby disposed of in any other way.

10 2. The action is also well-founded.

11 2.1 The requirements that the Federal Office cites for rejecting the asylum application as inadmissible under Section 27a of the Asylum Act have not been met, or are met no longer. According to that provision, an application for asylum shall be inadmissible if another country is responsible for processing an asylum application based on European Community law or an international treaty. In as-

sessing international responsibility, the court below correctly consulted the Dublin III Regulation. Under the transitional provision in Art. 49(2) of the Dublin III Regulation, that regulation is now applicable to applications for international protection that – as in the instant case – are lodged as from the first day of the sixth month following its entry into force, and therefore from 1 January 2014.

12 2.1.1 We may leave aside the question whether Hungary was originally responsible under the Dublin III Regulation, as the court below has held.

13 Under the second sentence of Art. 3(1) of the Dublin III Regulation, an application is to be examined by a single Member State, which is the one which the criteria set out in Chapter III indicate is responsible. This is intended to prevent asylum seekers from seeking out a Member State that is sympathetic to them to review their asylum application, and thus continuing to migrate from one Member State to another (prevention of secondary migration). A core aim of the Dublin system is to set up clear, workable and fair criteria for responsibility so as to guarantee that the persons concerned have rapid and effective access to a substantive review (see in particular Recitals 4 and 5 of the Dublin III Regulation). Where no Member State responsible can be designated on the basis of the criteria of Chapter III, according to the standard rule under Art. 3(2) subsection 1 of the Dublin III Regulation the first Member State in which the application for international protection was lodged is to be responsible for examining it. Where it is impossible to transfer an applicant to the Member State primarily designated as responsible because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights, under Art. 3(2) subsection 2 of the Dublin III Regulation the Member State responsible for examining responsibility is to continue to examine the criteria set out in Chapter III in order to establish whether another Member State can be designated as responsible. Under the further standard rule of Art. 3(2) subsection 3 of the Dublin III Regulation, where the transfer cannot be made pursuant to this paragraph to any Member State designated on the basis of the criteria set out in Chapter III or to the first Member State with which the applica-

tion was lodged, the determining Member State is to become the Member State responsible.

14 This Court cannot determine with finality whether under the above provisions, in the absence of prior responsibility of another Member State, Hungary had primary responsibility under Art. 3(2) subsection 1 of the Dublin III Regulation, as the first Member State in which the Complainant lodged an asylum application, because the court below – quite logically, from the legal standpoint it adopted – made no findings of fact about the absence of the conditions under Art. 3(2) subsection 2 of the Dublin III Regulation.

15 2.1.2 We may, however, leave aside the question of primary responsibility because even if one were to presume that Hungary had primary responsibility, responsibility was transferred to Germany upon the expiry of the transfer time limit under Art. 29(2) of the Dublin III Regulation.

16 Art. 29 of the Dublin III Regulation governs the modalities and time limits for transfer. Under Art. 29(1) subsection 1 of the Dublin III Regulation, transfer is to be carried out as soon as practically possible, and at the latest within six months of acceptance of the request by another Member State to take charge or to take back the person concerned (Alternative 1) or of the final decision on an appeal or review where there is a suspensive effect in accordance with Art. 27(3) of the same Regulation (Alternative 2). Where the transfer does not take place within the six months' time limit, under Art. 29(2) of the Regulation the Member State responsible shall be relieved of its obligations to take charge or to take back the person concerned, and responsibility shall then be transferred to the requesting Member State. This time limit may be extended up to a maximum of one year if the transfer could not be carried out due to imprisonment of the person concerned or up to a maximum of eighteen months if the person concerned absconds. According to Art. 9(2) of the Implementing Regulation (EC) No. 1560/2003, both extension options presuppose that the Member State that wishes to avail itself of the extension must inform the Member State responsible before the end of the regular time limit of six months.

17 The court below held, correctly in its approach, that here the beginning of the transfer time limit is governed by Alternative 1 under Art. 29(1) subsection 1 of the Dublin III Regulation. Therefore the six-month transfer time limit began to run on 6 February 2015, with the Hungarian authorities' acceptance of the request to take the Complainant back. This is not opposed by the fact that although the Complainant's application for provisional legal protection under Section 80(5) of the Code of Administrative Court Procedure met with no success, the appellate court nevertheless ordered that his action had a suspensive effect under Section 80(7) of the Code of Administrative Court Procedure. It is possible to postpone the beginning of the time limit until the date of the final decision on an appeal only if the time limit that began to run under Alternative 1 of Art. 29(1) subsection 1 of the Dublin III Regulation has not yet expired at the time when the characterising conditions under Alternative 2 arise. It is self-evident that a change of responsibility tied to the expiration of the transfer time limit without results cannot be quashed by initiating a new transfer time limit.

18 When the court below ordered the suspensive effect in November 2015, the transfer time limit had indisputably expired – irrespective of the fact that the Complainant had lodged a timely application to have the suspensive condition ordered (on how a timely application for an order for a suspensive effect affects the course of the transfer time limit under Art. 29(1) subsection 1 Alternative 1 of the Dublin III Regulation, see this Court's reference seeking a preliminary ruling of 27 April 2016 – 1 C 22.15). The notification of the Administrative Court's decision of April 2015 denying the Complainant's application for provisional legal protection and the appellate court's decision of November 2015 ordering the suspensive effect are separated by a continuous period of more than six months, during which the Complainant could have been transferred to Hungary. The application under Section 80(7) of the Code of Administrative Court Procedure did not trigger the effects of Section 34a(2) second sentence of the Asylum Act, and the decision declining that application also did not restart the transfer time limit.

19 2.2 The court below correctly held that the rejection of the asylum application as inadmissible in Point 1 of the challenged decision also cannot be upheld as a

decision under Section 71a of the Asylum Act not to carry out any further asylum procedure, because procedurally this constitutes a different cause of action, with more adverse consequences for the Complainant (see, for more details, Federal Administrative Court, judgment of 16 November 2015 – 1 C 4.15 – InfAuslR 2016, 120 para. 26 et seq.).

20 2.3 Under the circumstances of the instant case, the Complainant is also entitled to have his asylum application reviewed in Germany. Here we may leave aside the question whether the provisions of the Dublin III Regulation on responsibility – as Advocate General Sharpston argued in her Opinion of 17 March 2016 in two requests for preliminary rulings pending before the Court of Justice of the European Union (C-63/15 <Ghezelbash> and C-155/15 <Karim>) – have a general effect protecting the individual, and whether the applicant can in any case demand a review by the responsible Member State. This is because the Member State that is responsible under the Dublin rules cannot in any event refer an applicant to a review by another Member State (which does not have responsibility) if the latter Member State's willingness to take charge of or to take back the applicant has not been positively established. This proceeds as an unwritten characterising circumstance from the intent and purpose of the Dublin system, and the procedural dimension it realises of the substantive rights granted to applicants by Directive 2011/95/EU (known as the Qualification Directive). Under that Directive, while applicants cannot themselves select the Member State responsible for reviewing their application, they are entitled to have an application for international protection that is lodged within the EU also reviewed within the EU. If applicants could not rely on Germany's responsibility even if no other Member State were willing to take charge of them or take them back, the situation of a 'refugee in orbit' would arise, in which no Member State would consider itself responsible for the substantive review of an application for asylum. This would be contrary to the Dublin Regime's core aim of guaranteeing effective access to the procedures for granting international protection and not compromising the objective of the rapid processing of applications for international protection (Recital 5 of the Dublin III Regulation). However, this does not exclude the possibility that asylum applications might be rejected for other reasons, without a substantive examination, for example if the applicant fails to

pursue the asylum proceedings adequately. Moreover, this applies not just for first applications, but also for second applications, even if the latter can result in a further asylum procedure only under special conditions.

21 In the instant case, the court below found that Hungary is no longer willing to take charge of the Complainant or take him back. That finding of fact is binding on this Court (Section 137(2) Code of Administrative Court Procedure) and is unobjectionable from the viewpoint of the present appeal. Determining and assessing the facts material to a decision is normally the task of the judge of fact, and is accessible for review by this Court only insofar as it is challenged by an admissible procedural complaint (Section 137(3) Code of Administrative Court Procedure), or violates in substantive law the principle of that matters must be established to the court's satisfaction, or is founded on too narrow a basis of fact for the decision. None of those conditions is present here.

22 Insofar as the appeal's procedural complaint claims an inadequate investigation of the facts by the court below (Section 86(1) Code of Administrative Court Procedure), its arguments do not even meet the formal requirements for demonstrating this procedural error. There is no explanation of what investigative measures would be considered suitable and necessary in order to clarify Hungary's willingness to take charge of the Complainant, and what findings of fact would presumably have been reached if the omitted investigation had been carried out. Nor is there any explanation that any effort was already made during the proceedings in the court below to obtain a further investigation of the matter, or that it should have been obvious to that court that further investigation was necessary even without any such efforts (Federal Administrative Court, decision of 19 August 1997 – 7 B 261.97 – Buchholz 310 Section 133 <new version> Code of Administrative Court Procedure No. 26 with further references).

23 But the decision of the court below is also not objectionable in substantive law on this point; in particular, it is not founded on too narrow a basis in fact on the grounds that that court did not carry out investigations of its own. Before its decision, the court expressly reminded the parties of the expiry of the transfer time limit and the associated transfer of responsibility. Given this situation, the Fed-

eral Office, which is familiar from its cooperation in conducting Dublin transfers with how the individual Member States respond to the change of responsibility associated with the expiry of the transfer time limit, could have, and should have, as part of its procedural duty to cooperate, pointed out in a substantiated manner any peculiarities specifically relating to carrying out transfers to Hungary. As it did not do so, the court below had good reason to interpret the Federal Office's silence here, even without further inquiry, as an indication that the Federal Office had no further findings indicating that a willingness to take charge or take back continued, and thus it could ultimately conclude from the Federal Office's conduct alone that there was no such willingness on the part of Hungary.

24 In light of the clear requirements under Union law, in the instant case, which is characterised in that there is no positive indication of a continuing willingness to take charge or take back, this Court holds that there was an 'acte clair' with regard to individual protection, so that there is no need for a stay of proceedings until the Court of Justice of the European Union reaches a decision in the proceedings now pending for preliminary rulings on the extent to which the responsibility provisions of the Dublin III Regulation generally have an effect protecting the individual.

25 2.4 If the Federal Office improperly rejected the asylum application as inadmissible under Section 27a of the Asylum Act, and if that decision must be set aside to that extent, the requirements for a deportation order under Section 34a of the Asylum Act have also not been met.

26 3. The disposition as to costs proceeds from Section 154(2) of the Code of Administrative Court Procedure. No court costs are imposed, in accordance with Section 83b of the Asylum Act. The value at issue proceeds from Section 30 of the Act on Attorney Compensation. There are no reasons for a derogation pursuant to Section 30(2) of that Act.

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

Fricke Dr Rudolph