U 466/11-18
U 1836/11-13
14 March 2012

IN THE NAME OF THE REPUBLIC

The Constitutional Court

chaired by its president

Dr. Gerhart HOLZINGER,

in the presence of the vice-president
Dr. Brigitte BIERLEIN

and of the members
Mag. Dr. Eleonore BERCHTOLD-OSTERMANN,
Dr. Sieglinde GAHLEITNER,
DDr. Christoph GRABENWARTER,
Dr. Christoph HERBST,
Dr. Michael HOLOUBEK,
Dr. Helmut HÖRTENHUBER,
Dr. Claudia KAHR,
Dr. Georg LIENBACHER,
Dr. Rudolf MÜLLER,
DDr. Hans Georg RUPPE,
Dr. Johannes SCHNIZER

as voting members, in the presence of the recording clerk
Mag. Petra PEYERL,

has ruled on the complaints filed by Fengije S. and Jie Z., both residing (...) 1090 Vienna, both represented by Dr. Lennart Binder LL.M., attorney-at-law, Rochusgasse 2/12, 1030 Vienna, against the decisions of the Federal Asylum Tribunal of 18 January 2011, case no. C4 413.019-1/2010/3E, and of 20 April 2011, case no. C2 417092-1/2011/13E, in today's *in camera* session pursuant to Article 144a, Federal Constitutional Act, (*B-VG*) as follows:

Complainants' rights have not been violated by the contested decisions, neither as regards any constitutionally guaranteed right nor as regards the application of an unlawful general norm.

The complaints are dismissed.

Ratio decidendi

I. Facts of the case, case stated, and preliminary proceedings

1. As regards U 466/11 1

1.1. Complainant, a citizen of the People's Republic of China, entered Austria on 29 March 2010, where she filed an application for international protection on 30 March 2010. According to the case-file of the Federal Asylum Office *("Bundesasylamt"*), Complainant stated during interrogation that she had injured a female police officer in China and therefore could not return to China. 2

1.2. By way of administrative decision *("Bescheid*") of 19 April 2010, the Federal Asylum Office disallowed this application pursuant to sec 3(1) 2005 Asylum Act (*Asylgesetz*), Federal Law Gazette BGBl. I 100 as amended by BGBl. I 135/2009, and refused to grant Complainant subsidiary protection pursuant to sec 8(1) 2005 Asylum Act regarding her state of origin, and expelled her pursuant to sec. 10(1), item 2, 2005 Asylum Act from the Austrian Federal territory to the People's Republic of China. 3

1.3. The complaint filed on 29 April 2010, in which, inter alia, an oral hearing was requested, was dismissed by the Federal Asylum Tribunal by the contested 4

decision of 18 January 2011 pursuant to sections 3, 8 and 10, 2005 Asylum Act, such concurring with the Federal Asylum Office, which had rated the reasons for Claimant's flight as unlikely, since she had entangled herself in numerous factual and temporal contradictions during the proceedings, and, as stated, her claim lacked plausibility. Moreover, the general situation in China did not suggest that Complainant was at risk. After all, she had been in Austria since March 2010 only, did not speak any German, was not pursuing any permanent lawful employment and had no family members or other relatives in Austria, for which reasons her expulsion was not in contravention of Article 8 ECHR.

Invoking sec 41(7) 2005 Asylum Act, the Federal Asylum Tribunal desisted from holding an oral hearing. 5

1.4. The complaint filed against this decision pursuant to Article 114a Austrian Federal Constitutional Act (*B-VG*) invokes a violation of constitutionally guaranteed rights (to an effective remedy and a fair trial pursuant to Article 47 of the Charter of Fundamental Rights of the European Union) and applies for the contested decision to be set aside, with full compensation of costs, and for an oral hearing to be scheduled. 6

1.5. The Federal Asylum Tribunal produced the administrative and court files, submitted a defence, and requested for the complaint to be dismissed. 7

2. As regards U 1836/11 8

2.1. Complainant, a citizen of the People's Republic of China, was apprehended by law-enforcement officials on 3 November 2010 and applied for international protection on 4 November 2010. On interrogation, Complainant stated in particular that he had run into high debts in China and had heard that one could make easy money in Austria. On return, he would face imprisonment if he could not repay the money. 9

2.2. By way of administrative decision *("Bescheid*") of 10 December 2010, the Federal Asylum Office disallowed this application pursuant to sec 3(1) 2005 Asylum Act, and refused to grant Complainant subsidiary protection pursuant to 10

sec 8(1) 2005 Asylum Act regarding his state of origin, and expelled him pursuant to sec 10(1), item 2, 2005 Asylum Act from the Austrian Federal territory to the People's Republic of China.

2.3. The complaint filed on 28 December 2010, in which, inter alia, an oral hearing was requested, was dismissed by the Federal Asylum Tribunal by the contested decision of 20 April 2011 pursuant to sections 3, 8 and 10, 2005 Asylum Act, such concurring with the Federal Asylum Office, which had rated the reasons for Claimant's flight as unlikely, since he had entangled himself in numerous factual and temporal contradictions during the proceedings, and, as stated, his case lacked plausibility. In addition, the general situation in China did not suggest that Complainant was at risk. After all, he had been in Austria since November 2010 only, did not speak any German, was not pursuing any permanent lawful employment, and had no family members or other relatives in Austria, for which reasons his expulsion was not in contravention of Article 8 ECHR. 11

Invoking sec 41(7) 2005 Asylum Act, the Federal Asylum Tribunal desisted from holding an oral hearing. 12

2.4. The complaint filed against this decision pursuant to Article 114a Austrian Federal Constitutional Act *(B-VG*) invokes a violation of constitutionally guaranteed rights (to an effective remedy and a fair trial pursuant to Article 47 of the Charter of Fundamental Rights of the European Union) and applies for the contested decision to be set aside, with full compensation of costs, and for an oral hearing to be scheduled. 13

2.5. The Federal Asylum Tribunal submitted the administrative and court files, desisted however from submitting a defence, and referred to its reasoning in the contested decision. 14

Reasoning

15 The complaints, which were joined for deliberation and decision, were considered by the Constitutional Court, applying mutatis mutandis the provisions of sections 187 and 404 Austrian Code of Civil Procedure (*ZPO*) in conjunction with sec 35 Constitutional Court Act (*VfGG*):

16 1. Pursuant to sec 144a Federal Constitutional Act (*BV-G*), the Constitutional Court decides on complaints against decisions rendered by the Federal Asylum Tribunal, if the complainant is allegedly violated in a constitutionally guaranteed right by such decision or by the application of an unlawful ordinance, the unlawful publication of a re-promulgated act (international treaty), an unconstitutional act or an unlawful international treaty. Under the general claim of having been violated in their constitutionally guaranteed rights, Complainants are exclusively invoking rights which they are basing on Article 47 of the Charter of Fundamental Rights of the European Union (referred to as "CFR" in the following).

17 2. First one must verify whether the alleged violation of the Charter of Fundamental Rights actually gives rise to the competence of the Constitutional Court and whether the Charter of Fundamental Rights is a standard of review for proceedings according to Article 144a Federal Constitutional Act (which in this respect is identical with Article 144 Federal Constitutional Act, cf. VfSlg 18.613/2008). If such is the case, the complaints are at any rate admissible, since all other requirements for proceedings are met.

18 3. Proclaimed at the Nice summit in 2000, the Charter of Fundamental Rights is a part of the Lisbon Treaty, which Austria ratified on 13 May 2008. Since the entry into force of the Lisbon Treaty on 1 December 2009 (OJ 2007 C 303, p 1, consolidated version OJ 2010 C 83, p 389), the Charter of Fundamental Rights has the same legal value as the Treaties, as explicitly imposed by Article 6 (1) Treaty on European Union (TEU), and is therefore part of European Union primary law (cf. ECJ 19/01/2010, Case C-555/07, *Kücükdeveci*, [2010], ECR I-365 [paragraph 22]). From Article 51 CFR it follows that it is immediately applicable by the Member States when implementing European Union law.

4. From the outset, i.e. since Austria's accession to the European Union, the Austrian Constitutional Court has concurred with the case law of the Court of Justice of the European Union (ECJ 15/07/1964, Case 6/64, *Costa/ENEL*, [1964], ECR 1253; 17/12/1970, Case 11/70, *Internationale Handelsgesellschaft*, [1970], ECR 1125; 09/03/1978, Case 106/77, *Simmenthal II* [1978], ECR 629), according to which the primacy of directly applicable rules over domestic law results from the autonomous validity of Community (now: European Union) law (VfSlg. 14.886/1997; prior to that, implicitly already VfGH 13/06/1995, B 877/95; VfSlg. 14.390/1995; as regards the review of federal laws cf. VfSlg. 14.805/1997, 15.036/1997). At the same time, however, the Constitutional Court found that European Union law in general is not a standard of review for its decisions. 19

4.1. In the proceedings VfSlg. 14.886/1997 relating to the review of an administrative decision ("*Bescheidprüfung*") according to Article 144 Federal Constitutional Act, (*B-VG*) the Constitutional Court held that the inapplicability of a law to a given situation could also arise from directly applicable provisions of Community law: 20

"If domestic law is in contradiction with Community law, it will be superseded. Every domestic body that is to adjudicate a given case or assess the lawfulness of acts of public authority must comply with the primacy of Community law and, as appropriate, desist from applying the domestic norm. However, it shall assess the conformance of the norm with Community law for itself only if the matter is "so obvious" as to rule out the possibility for reasonable doubt." (ECJ Case 283/81 CILFIT, [1982], ECR 3415 et. seq., 3429, paragraph 16); otherwise the matter would have to be referred to the Court of Justice of the European Union according to Art 177 of the EC Treaty."

From this the Constitutional Court inferred: 21

"Such obligation would also be on the Constitutional Court if it had to assess the lawfulness of an act of public authority. As set out above, the Constitutional Court is not to assess, on the basis of the relevant fundamental rights [in the former case the freedom of exercising a profession, Article 18 Basic Act *(Staatsgrundgesetz)* and to education in general, Article 2, Additional Protocol No.1, ECHR], whether the authority had applied [the relevant statutory provision] lawfully to Complainants. This question was therefore irrelevant for its decision. Considering the constitutional non-objectionability of the applied law, the relevant constitutionally guaranteed rights would only be violated if this law were applied in pretence, in other words without being based on actual fact, if it were logically inconceivable to ascribe the facts to it. Since constitutional

grounds against its applicability were not submitted and did not arise otherwise and *since from the perspective of the Constitutional Court a violation of Community law would be tantamount to a violation of a simple (i.e. not of constitutional status) domestic law, which would be for the Supreme Administrative Court to address,* this would only be the case if the contradictions with Community law were obvious and could be found without any further considerations" (italics used here for emphasis, not present in original).

In VfSlg. 15.189/1998 the Constitutional Court argued that directly basing an ordinance on Community law was inadmissible within the terms of Article 18(2) Constitutional Act (*B-VG)*, because it had no competence to review general Austrian legal norms according to the standard of Community law, and the Court of Justice of the European Union likewise was incompetent to review legal provisions of the Member States for conformity with Community law. 22

In VfSlg. 15.215/1998, it generalised its argument as follows: 23

"The Constitutional Court, while under an obligation to observe the primacy of EC law (cf. e.g. Constitutional Court of 12/04/1997, G 400/96, G 44/97, of 04/10/1997, G 322, G 323/97, of 05/12/1997, G 23-26/97), must only do so in the exercise of its mandated functions. Hence, it is only called upon to decide itself whether an Austrian legal norm must not be applied because of the primacy of directly applicable Community law if the matter is relevant for its decision, which per se is to be assessed according to national law (cf. also the already quoted decision of the ECJ 09/03/1978, Case 106/77, Simmenthal II, [1978], ECR 629 et seq., 644, paragraph 21, and the ruling of the Constitutional Court of 26/06/1997, B 877/96). Inasmuch as the Constitutional Court is not held to decide whether an authority acted lawfully, which, given the shared judicial review function of public-law courts as regards the - here relevant - fundamental rights of integrity of property and equality of all citizens before the law, is the case here, the question whether the challenged authority should have applied simple (i.e. not of constitutional status) domestic laws or Community norms cannot be relevant for the decision of the Constitutional Court."

4.2. The Constitutional Court then generally held that European Union (formerly Community) law was not a standard for its own judicial review (cf. e.g. VfSlg. 15.753/2000, 15.810/2000; as already *Öhlinger*, *Unmittelbare Geltung und Vorrang des Gemeinschaftsrechts und die Auswirkungen auf das verfassungsrechtliche Rechtsschutzsystem*, in: Griller/Korinek/Potacs [ed.], *Grundfragen und aktuelle Probleme des öffentlichen Rechts*, 1995, 359 [373]; *Holzinger*, *Zu den Auswirkungen der österreichischen EU-Mitgliedschaft auf das* 24

Rechtsschutzsystem der Bundesverfassung, FS Winkler, 1997, 351 [357 et seq.]; *Korinek*, *Zur Relevanz von europäischem Gemeinschaftsrecht in der verfassungsgerichtlichen Judikatur*, FS Tomandl, 1998, 465 [467]; adverse opinions *Walter/Mayer/Kucsko-Stadlmayer*, Bundesverfassungsrecht[10], 2007, paragraph 246/27; *Griller*, *Individueller Rechtsschutz und Gemeinschaftsrecht*, in: Aicher/Holoubek/Korinek [ed.], *Gemeinschaftsrecht und Wirtschaftsrecht*, 2000, 27 [136]; *Vcelouch*, *Auswirkungen der österreichischen Unionsmitgliedschaft auf den Rechtsschutz vor dem VwGH und dem VfGH*, ÖJZ 1997, 721 [724]).

5. Rendered before the entry into force of the Lisbon Treaty, these decisions on European Union law cannot be transferred to the Charter of Fundamental Rights. In European Union law, the Charter is an area that is markedly distinct from the “Treaties”. (cf. also Article 6(1), TEU: "the Charter of Fundamental Rights and the Treaties”), to which special provisions apply arising from the domestic constitutional set-up (cf. 5.4. to 5.6 below): 25

5.1. Basing itself on *Rewe* (ECJ 16/12/1976, Case 33/76, *Rewe*, [1976] ECR 1989) and *Comet* (ECJ 16/12/1976, paragraph 45/76, *Comet*, [1976] ECR 2043) the Court of Justice of the European Union developed the doctrine that, consistent with the principle of sincere cooperation (now laid down in Article 4(3), 2nd sentence, TEU), it was for domestic courts to ensure the legal protection arising to the citizens from the direct effect of Community law. For lack of Community law provisions in this area, it is therefore for the domestic legal systems of the Member States to designate the courts and tribunals having jurisdiction and to lay down the procedural rules governing actions for safeguarding rights which individuals derive from the immediate effect of Community (now European Union) law; provided, however, that such rules are not less favourable than those governing similar domestic actions. 26

This principle, later called equality or equivalence doctrine, was summarised by the Court of Justice of the European Union in *Levez* (ECJ 01/12/1998, Case C-326/96, *Levez*, [1998] ECR I-7835 [paragraph 18]) as follows: 27

"According to established case-law, in the absence of Community rules governing the matter it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals

derive from Community law, provided, however, that such rules are not less favourable than those governing similar domestic actions (the principle of equivalence) and do not render virtually impossible or excessively difficult the exercise of rights conferred by Community law (the principle of effectiveness) (cf. to that effect judgments of 16 December 1976 in the Case 33/76, Rewe, [1976] ECR 1989, paragraph. 5, in the Case 45/76, Comet, [1976] ECR 2043, paragraphs 13 and 16, of 14 December 1995 in the Cases C-430/93 and C-431/93, Van Schijndel and Van Veen, [1995] ECR I-4705, paragraph 17, of 10 July 1997 in the Case C-261/95, Palmisani, [1997] ECR I-4025, paragraph 27, of 11 December 1997 in the Case C-246/96, Magorrian and Cunningham, [1997] ECR I-7153, paragraph 37, and of 15 September 1998 in the Cases C-279/96, C-280/96 and C-281/96, Ansaldo Energia et. al., [1998] ECR I-5025, paragraph 16)."

In *Pasquini* (ECJ 19/06/2003, Case C-34/02, *Pasquini*, ECR 2003, I-6515) it expounded on the freedom of workers (paragraph 59): 28

"It would be contrary to the principle of equivalence for a situation arising from the exercise of a Community freedom to be classified or treated differently from a purely internal situation when they are similar and comparable, and for the situation of Community origin to be subjected to special rules less favourable to the worker than those applicable to a purely internal situation, the only reason being that difference in classification or treatment."

5.2. From this judgment the Constitutional Court infers that under Union law, rights which are guaranteed by directly applicable Union law must be enforceable in proceedings that exist for comparable rights deriving from the legal order of the Member States. With this in mind, the Court of Justice of the European Union stated in *Pontin* (ECJ 29/10/2009, Case C-63/08, *Pontin*, [2009] ECR I-10.467 [paragraph 45]): 29

"The principle of equivalence requires that the national rule at issue be applied without distinction, whether the infringement alleged is of Community law or national law, where the purpose and cause of action are similar (judgment of 1 December 1998, Case C-326/96 *Levez* [1998] ECR I-7835, paragraph 41). [....] . In order to verify whether the principle of equivalence has been complied with, it is for the national court, which alone has direct knowledge of the procedural rules governing actions in the field of domestic law, to verify whether the procedural rules intended to ensure that the rights derived by individuals from Community law are safeguarded under domestic law comply with that principle and to consider both the purpose and the essential characteristics of allegedly similar domestic actions (see *Levez*, paragraphs 39 and 43, and of 16 May 2000 Case C-78/98 *Preston and Others* [2000] ECR I-3201, paragraph 49). For that purpose, the national court must consider whether the actions concerned are similar as

regards their purpose, cause of action and essential characteristics (see, to that effect, *Preston and Others*, paragraph 57)."

30 5.3. For the scope of application of European law, the Charter of Fundamental Rights has now enshrined (ensuing) rights as they are guaranteed by the Austrian Constitution in a similar manner as constitutionally safeguarded rights. As emphasized in the preamble to the Charter of Fundamental Rights, it reaffirms "with due regard for the powers and tasks of the Union and the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), the Social Charters adopted by the Union and by the Council of Europe and the case law of the Court of Justice of the European Union, and of the European Court of Human Rights".

31 The ECHR is directly applicable in Austria and has constitutional status (cf. Federal Law Gazette BGBl. 59/1964). The rights it ensures are rights that are guaranteed by constitutional law within the meaning of Articles 144 and 144a Federal Constitutional Act (*B-VG*) respectively, whose protection must be ensured by the Constitutional Court. According to the explanations to the Charter of Fundamental Rights, several of its rights are modelled, both in wording and intention, on the corresponding rights laid down in the ECHR.

32 5.4. In light of the principle of equivalence one will have to review in which manner and in which proceedings the rights laid down in the Charter of Fundamental Rights can be enforced on the basis of the domestic legal situation.

33 5.5. According to Article 144 Federal Constitutional Act (*B-VG*), it is for the Constitutional Court to review last-instance administrative decisions ("*Bescheide*") as to whether they violate constitutionally guaranteed rights; Article 144a Federal Constitutional Act (*B-VG*) states the corresponding competence for asylum proceedings. Article 133(1) Federal Constitutional Act (*B-VG)* exempts complaints claiming a violation of constitutionally guaranteed rights from the competence of the Supreme Administrative Court. The system of legal protection set out in the Federal Constitutional Act provides in general for a concentration of claims for violation of constitutionally guaranteed rights with one instance, i.e. the Constitutional Court, which also is the only instance to

adjudicate on such violations through general norms, i.e. statutory acts and regulations, and the only instance that has competence to set aside such norms.

As expressed in its Article 51, the Charter of Fundamental Rights contains "rights" and "principles", yet it remains to be specified which of its provisions qualify as one or the other, and what the significance of this differentiation is. As set out earlier, the Charter of Fundamental Rights has at any rate for the scope of application of Union law the same function in many of its provisions – the "rights" – as the constitutionally guaranteed rights have for the (autonomous) area of Austrian law. Largely overlapping areas of protection emerge from this intended near-identity in substance and similarity in wording of the Charter of Fundamental Rights and the ECHR, whose rights are constitutionally guaranteed rights in Austria. It would counter the notion of a centralized constitutional jurisdiction provided for in the Austrian Federal Constitution if the Constitutional Court were not competent to adjudicate on largely congruent rights such as those contained in the Charter of Fundamental Rights. 34

The Constitutional Court has thus concluded that, based on the domestic legal situation, it follows from the equivalence principle that the rights guaranteed by the Charter of Fundamental Rights may also be invoked as constitutionally guaranteed rights pursuant to Articles 144 and144a respectively, Federal Constitutional Act (*B-VG*) and that they constitute a standard of review in general judicial review proceedings in the scope of application of the Charter of Fundamental Rights, in particular under Articles 139 and 140, Federal Constitutional Act (*B-VG*). In any case, this is true if the guarantee contained in the Charter of Fundamental Rights is similar in its wording and purpose to rights that are guaranteed by the Austrian Federal Constitution. 35

In fact, some of the individual guarantees afforded by the Charter of Fundamental Rights totally differ in their normative structure, and some, such as e.g. Article 22 or Article 37, do not resemble constitutionally guaranteed rights, but "principles". One would therefore have to decide on a case-by-case basis which of the rights of the Charter of Fundamental Rights constitute a standard of review for proceedings before the Constitutional Court. 36

5.6. The result that the Charter of Fundamental Rights is a standard of review of proceedings before the Constitutional Court is not contradictory to the fact that - according to the case law of the Court of Justice of the European Union - the fundamental rights as they result from the constitutional traditions common to the Member States or from conventions on the protection of human rights under international law, in the conclusion of which the Member States were involved or which they acceded to, existed as general principles of law that governed the implementation of European Union law even before the Charter of Fundamental Rights entered into force (and according to Article 6(3) TEU continue to do so) - so that no measures can be held lawful in the Member States which are incompatible with the fundamental rights protected by the constitutions of the Member States (cf. ECJ 14/05/1974, Case 4/73, *Nold*, [1974] ECR 491; 13/07/1989, Case 5/88, *Wachauf*, [1989] ECR 2609; 13/04/2000, Case. C-292/97, *Karlsson*, [2000] ECR I-2737; 03/09/2008, Case C-402/05 P and C-415/05 P, *Kadi*, [2008] ECR I-6351). 37

In this respect, all bodies rendering decisions within the scope of application of European Union law had to respect the fundamental rights within the framework of general legal principles even before the entry into force of the Charter of Fundamental Rights (cf. e.g. VwGH 23/10/2000, 99/17/0193). However, the applicability of a detailed catalogue of rights and duties as set out in the Charter of Fundamental Rights is not comparable to the derivation of legal positions from general legal principles. As constitutionally guaranteed rights, the rights guaranteed by the Charter of Fundamental Rights are therefore a standard of review in proceedings before the Constitutional Court. 38

5.7. For the jurisdiction of the Constitutional Court in the scope of application of the Charter of Fundamental Rights (Article 51(1) CFR), the case law of the Court of Justice of the European Union is relevant, which in turn looks at the case law emanating from the European Court of Human Rights, as does the Constitutional Court. 39

This means that the Constitutional Court - as it has done so far (cf. VfSlg 15.450/1999, 16.050/2000, 16.100/2001) - will refer a matter to the Court of Justice of the European Union for a preliminary ruling if there are doubts on the interpretation of a provision of Union law, including also the Charter of 40

Fundamental Rights. If such doubts to not arise, in particular in light of the ECHR and pertaining case law of the European Court of Human Rights and other supreme courts, the Constitutional Court will decide without seeking a preliminary ruling. In matters relating to the Charter of Fundamental Rights, the Constitutional Court is held by Article 267(3) TFEU to bring them to the Court of Justice of the European Union, so that the Federal Asylum Tribunal does not violate the right of due process according to the Constitutional Court's case law (VfSlg. 14.390/1995, 14.889/1997, 15.139/1998, 15.657/1999, 15.810/2000, 16.391/2001, 16.757/2002) if it does not submit a specific case to the Court of Justice of the European Union for a preliminary ruling.

41 However, this does not affect the power of all courts and tribunals to refer questions on the interpretation of the treaties and on the validity and interpretation of the acts of the organs, institutions and other bodies of the Union to the Court of Justice of the European Union for a preliminary ruling according to Article 267 TFEU, provided the court deems a ruling thereon necessary for rendering its judgment. This is contradicted neither by the shared competences of the Supreme Administrative Court and the Constitutional Court when it comes to reviewing the lawfulness of administrative decisions ("*Bescheide*") emanating from administrative authorities and of decisions of the Federal Asylum Tribunal, nor by the concentration of judicial review at the Constitutional Court (see 5.5. supra).

42 In the context of a constitutional review of a law transposing a European Directive, the Court of Justice of the European Union has held that Article 267 TFEU does not stand in the way of interlocutory proceedings for the review of the constitutionality of laws, provided that the other courts in the proceedings are free, at whatever stage of the proceedings they consider appropriate, even after the end of the interlocutory procedure, to refer to the Court of Justice for a preliminary ruling any question which they consider necessary, to adopt any measure to ensure provisional judicial protection, and to disapply the national legislative provision at issue if it is considered to be contrary to EU law (ECJ 22/06/2010, Case C-188/10, C-189/10, *Melki/Abdeli,* [2010] ECR I-5665, paragraph 57). Here it is relevant that the Court of Justice of the European Union is not denied the possibility of reviewing national law relating to the

requirements of primary law and of the Charter as having the same legal value as the Treaties (paragraph 56).

5.8. In summary, the Constitutional Court – after having referred a matter for a preliminary ruling to the Court of Justice of the European Union according to Article 267 TFEU as appropriate – takes the Charter of Fundamental Rights in its scope of application as a standard for national law (Article 51(1) CFR) and sets aside contradicting general norms according to Article 139 and/or Article 140 Federal Constitutional Act (*B-VG*). In this manner, the Constitutional Court fulfils its obligation to remove from the domestic legal order provisions incompatible with Community law, which is also postulated by the Court of Justice of the European Union (cf. ECJ 02/07/1996, Case C-290/94, *Commission v Greece*, [1996], ECR I-3285; 24/03/1988, Case 104/86, *Commission v. Italy*, [1988] ECR 1799; 18/01/2001, Case C-162/99, *Commission v. Italy*, [2001] ECR I-541; see also ECJ 07/01/2004, Case C-201/02, *Wells*, [2004] ECR I-723; 21/06/2007, Case C-231/06 - C-233/06, *Jonkman*, [2007] ECR I-5149). 43

5.9. It remains to be emphasized that there is no duty to bring a matter to the Court of Justice of the European Union for a preliminary ruling if the issue is not relevant for the decision (cf. ECJ 06/10/1982, Case 283/81, *Cilfit*, [1982] ECR 3415; 15/09/2005, Case C-495/03, *Intermodal*, [2005] ECR I-8151), meaning that the answer, whatever it is, can have no impact on the decision of the case. Concerning the Charter of Fundamental Rights, this is the case if a constitutionally guaranteed right, especially a right of the ECHR, has the same scope of application as a right of the Charter of Fundamental Rights. In such a case, the Constitutional Court will base its decision on the Austrian Constitution without there being a need for reference for a preliminary ruling under the terms of Article 267 TFEU. 44

In this context one must point out (specified in detail under item 7 for the complaint proceedings at issue), that according to Article 52(4) CFR, fundamental rights which are recognized in the Charter as they result from the constitutional traditions common to the Member States, must be interpreted in unison with those traditions. In so far as the Charter contains rights which correspond with rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall 45

be the same as those laid down by the said Convention (Article 52(3) CFR). This provision does not prevent Union law from providing more extensive protection. Moreover, Article 53 CFR guarantees that the level of protection of existing fundamental right guarantees is not lowered by the Charter.

From this the Constitutional Court infers that the fundamental rights resulting from the national constitutions, international law conventions, and from the Charter of Fundamental Rights, must be interpreted as consistently as possible. 46

6. However, the provisions of the Charter of Fundamental Rights are applied to acts of the bodies and institutions of the Member States only when they are "implementing European Union law" (Article 51(1), CFR), i.e. when complaints in which a right of the Charter of Fundamental Rights is invoked fall within the scope of application of Union law (cf. VfSlg. 15.139/1998, 15.456/1999, 17.225/2004, 18.541/2008). According to case law by the Court of Justice of the European Union, the latter is to be interpreted broadly. It covers the implementation of directly applicable Union law by courts or administrative authorities of the Member States (ECJ 14/07/1994, Case C-351/92, *Graff*, [1994] ECR I-3361 [paragraph 17]), as well as the enforcement of Member States' implementing regulations (ECJ 15/05/1986, Case 222/84, *Johnston*, [1986] ECR I-1651 [paragraph 18 et seq.]). 47

While the interpretation of Article 51(1) CFR is controversial in individual cases as regards the scope of application of the Charter of Fundamental Rights, the Federal Asylum Tribunal was at any rate "implementing Union law" in the proceedings that rendered the contested decisions: Complainants are seeking international protection within the meaning of the 2005 Asylum Act (*ASylG*). During the proceedings, their legal status is guaranteed under Union law by Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ L 304, p. 12-23 (status directive). As another legislative act of the European Union, Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ L 326, p 13-34 (procedural directive) 48

governs asylum proceedings. The Court of Justice of the European Union has likewise held that the Charter of Fundamental Rights is generally applicable to asylum proceedings (ECJ 28/07/2011, Case C-69/10, *Brahim Samba*, ECR [2011] [paragraphs 48 and 49]).

Hence, asylum proceedings in general, and the two proceedings that rendered the contested decisions, fall within the scope of application of the Charter of Fundamental Rights. 49

7. Article 47 CFR reads: 50

"Right to an effective remedy and to a fair trial

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice".

The explanations to Article 47 CFR (OJ 2007 C 303, pp. 29.) state as follows 51

"The first paragraph is based on Article 13 of the ECHR:

[...]

However, in Union law the protection is more extensive since it guarantees the right to an effective remedy before a court. The Court of Justice enshrined that right in its judgment of 15 May 1986 as a general principle of Union law (Case 222/84 Johnston [1986] ECR 1651; see also judgment of 15 October 1987, Case 222/86 Heylens [1987] ECR 4097 and judgment of 3 December 1992, Case C-97/91 Borelli [1992] ECR I-6313). According to the Court, that general principle of Union law also applies to the Member States when they are implementing Union law. The inclusion of this precedent in the Charter has not been intended to change the system of judicial review laid down by the Treaties, and particularly the rules relating to admissibility for direct actions before the Court of Justice of the European Union. The European Convention has considered the Union's

system of judicial review including the rules on admissibility, and confirmed them while amending them as to certain aspects, as reflected in Articles 251 to 281 of the Treaty on the Functioning of the European Union, and in particular in the fourth paragraph of Article 263(4). Article 47 applies to the institutions of the Union and of Member States when they are implementing Union law and does so for all rights guaranteed by Union law."

The second paragraph corresponds to Article 6(1) of the ECHR […]:

[...]

In Union law, the right to a fair hearing is not confined to disputes relating to civil law rights and obligations. That is one of the consequences of the fact that the Union is a community based on the rule of law as stated by the Court in Case 294/83, "Les Verts" v. European Parliament (judgment of 23 April 1986, [1988] ECR 1339). Nevertheless, in all respects other than their scope, the guarantees afforded by the ECHR apply in a similar way to the Union.

[…]"

Article 52(3) CFR states that "Insofar as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection." 52

7.1. According to Article 53 CFR, "Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions". 53

Article 52(1) CFR contains a reservation which – in the light of Article 52(3) and Article 53, CFR in particular - basically applies to all rights under the Charter and such also to Article 47(2), CFR. 54

7.2. In the field of application of Article 6 ECHR, Article 47(2) CFR has the same scope and meaning as the former. Beyond that, the guarantees of Article 6 ECHR apply to the scope of application of Article 47(2), CFR accordingly (as set forth in the explanations to the Charter of Fundamental Rights, OJ 2007 C 303, p. 30). In this context one must note that the guarantees apply differently depending on the matter, the issue at stake, and the stage of the proceedings, which in turn are governed by the principle of proportionality. The strictest requirements apply in criminal cases; in civil proceedings the Constitutional Court and the European Court of Human Rights accept limitations, in particular as regards the oral hearing, or the degree of judicial review in administrative proceedings which merely affect civil law positions (VfSlg. 11.500/1987). 55

7.3. Applying these considerations to that part of the scope of application of the guarantees afforded by the Charter which does not affect civil rights and criminal proceedings, one can conclude, also for that part, that further restrictions (beyond those in criminal proceedings) are admissible. Yet, since case law of the European Court of Human Rights on Article 6, ECHR, cannot be directly drawn on in this point, the extent of assurance of individual guarantees is ultimately determined by Article 52(1), CFR, in other words by the principle of proportionality. In order to assess whether it is admissible to desist from an oral hearing it is therefore relevant whether restrictions in conducting an oral hearing are required based on section 41(7) 2005 Asylum Act (*AsylG*) and actually meet the objectives recognized by the Union and serving the common interest or the requirements of protecting the rights and freedoms of others. 56

7.3.1. According to Article 6(1) ECRH, everyone is entitled to a fair and public hearing in the determination of his civil rights and obligations. It follows that whenever a hearing is requested, a general right to a public oral hearing exists (cf. European Court of Human Rights, 28 May 1997, *Pauger v. Austria*, Appl. 16717/90, paragraph 60). 57

7.3.2. As regards access to court, Article 6 ECHR - according to case law of the European Court of Human Rights - is subject to the (implied) reservation of proportionate limitation (starting with European Court of Human Rights 21 February 1975, *Golder v. The United Kingdom*, Appl. 4451/70, paragraph 38). The exclusion of the public from hearings is governed by the explicit reservation of 58

proportionate limitations. With other guarantees as well, the implicit limitations are based on considerations of proportionality (e.g. on full jurisdiction, European Court of Human Rights 21 September 1993, *Zumtobel v. Austria*, Appl. 12235/86, paragraph 29; on witness examination and a fair trial, European Court of Human Rights 13 October 2005, *Bracci* case, Appl. 36822/02, paragraph 49 et seq.; what is at stake for the applicant in the proceedings is a material consideration for the length of the proceedings, European Court of Human Rights 16 September 1996 [GC], *Süßmann v. Germany*, Appl. 20024/92, paragraph 61). Recent case law of the European Court of Human Rights has related issues regarding the scope of application to fundamental right requirements (European Court of Human Rights, 19 April 2007 [GC], *Eskelinen* and Others v. Finland, Appl. 63235/00, paragraph 62).

7.3.3. Proceedings rendering decisions on asylum and on the residence of aliens in the territory of a state do not fall within the scope of application of Article 6 ECHR (e.g. European Court of Human Rights 5 October 2000, *Maaouia v. France*, Appl. 39652/98). From Article 47(2) CFR one can, however, derive a right to an oral hearing also in those cases where such requirement does not directly follow from the inapplicability of Article 6 ECHR. In light of the fact that Article 47(2) CFR recognizes a fundamental right which is derived not only from the ECHR but also from constitutional traditions common to the Member States, it must be heeded also when interpreting the constitutionally guaranteed right to effective legal protection (as an emanation of the duty of interpreting national law in line with Union law and of avoiding situations that discriminate nationals). Conversely, the interpretation of Article 47(2) CFR must heed the constitutional traditions of the Member States and therefore the distinct characteristics of the rule of law in the Member States. This avoids discrepancies in the interpretation of constitutionally guaranteed rights and of the corresponding Charter rights. 59

7.4. According to the case law of the European Court of Human Rights, an oral hearing may be dispensed with in proceedings according to Article 6(1) ECHR if justified by exceptional circumstances. Such circumstances may apply in decisions on social security claims, which exclusively deal with points of law and complex technicalities. In such cases, the court may desist from an oral hearing, in due consideration of procedural economy and effectiveness, if the case can be 60

adequately resolved on the basis of the case-file and the parties' written observations. (European Court of Human Rights 12 November 2002, *Döry v. Sweden*, Appl. 28394/95, paragraph 37 et seq.; European Court of Human Rights 8 February 2005, *Miller v. Sweden*, Appl. 55853/00, paragraph 29).

Furthermore, in light of Article 6(1) ECHR, the nature of the issues to be resolved for assessing the concerns raised against the contested administrative decision ("*Bescheid*") is relevant. Given the possibilities of participation in administrative procedures, an oral hearing according to Article 6(1) ECHR may routinely be dispensed with if the plea submitted suggests that the holding of an oral hearing will not further clarify the bases of decision-making. If an asylum seeker has already brought certain circumstances or issues before the Federal Asylum Office, or if such circumstances or issues become known only afterwards, an oral hearing before the Federal Asylum Tribunal must be held if the questions already raised by the asylum seeker in the administrative proceedings or in the complaint to the Federal Asylum Tribunal – supported by supplementary investigations as appropriate – cannot be resolved based on the case-file, and in particular if the established facts need to be supplemented or if the evaluation of evidence is inadequate. 61

Based on the European Court of Human Rights' case law on the public hearing requirement in appellate proceedings, it is furthermore relevant in such a context how significant and necessary a hearing is for taking and assessing evidence as well for resolving points of law (European Court of Human Rights 29 October 1991, *Helmers v. Sweden*, Appl. 11826/85, paragraph 37). 62

7.5. In fact, the European Court of Human Rights has explicitly recognized that for some types of proceedings not all of the guarantees of Article 6(1) ECHR need to be fulfilled in an equal manner. For example, in interim relief proceedings the guarantees of Article 6(1) ECHR are applicable only to the extent that this can be reconciled with the nature of the interim measures (European Court of Human Rights 15 October 2009 [GC], *Micallef v. Malta*, Appl. 17056/06, paragraph 86). For proceedings before a constitutional court, case law recognizes that the guarantees of Article 6 ECHR are applied in a modified manner (e.g. on excessive length of proceedings, European Court of Human Rights 16 September 1996 [GC], *Süßmann v. Germany*, Appl. 20024/92). 63

8. In light of this case law, the Constitutional Court neither holds any reservations as to the constitutionality of sec 41(7) 2005 Asylum Act (AsylG), nor does it find that the Federal Asylum Tribunal subsumed an unconstitutional content under this provision by desisting from holding an oral hearing. Desisting from holding a hearing in cases in which the facts seem to be clear from the case-file in combination with the complaint, or where investigations reveal beyond doubt that the plea submitted is contrary to the facts, is consistent with Article 47(2) CFR, if preceded by administrative proceedings in the course of which the parties were heard. 64

9. Complainants' rights under Article 47 (2), Charter of Fundamental Rights have therefore not been violated. 65

II. Conclusion and related observations

1. Hence, there was no violation of constitutionally guaranteed rights as alleged. 66

2. Nor was it found in the complaint proceedings that Complainants were violated in a constitutionally guaranteed right which they had not invoked; and just as much, this complaint did not give rise to constitutional objections against the legal provisions underlying the contested decisions. Equally, the Complainants' rights were thus not violated by the application of any unlawful general norm. 67

3. Therefore, the complaints had to be dismissed as unfounded. 68

4. Pursuant to sec 19(4), first sentence, Constitutional Court Act (*VfGG*), this decision was handed down *in camera* without there being a need for oral proceedings. 69

Vienna, 14 March 2012
The President:
Dr. HOLZINGER

Recording clerk
Mag. PEYERL