Austrian Higher Administrative Court
VwGH No. 2001/01/0499
RULING
Vienna, Austria
15 May 2003

UNOFFICIAL SUMMARY

I. Key Facts:

The complainant, a national of Bosnia-Herzegovina, entered Austrian territory on 24 April and applied for asylum on 29 April 1999. At that time the applicant had a passport issued in Bijeljina on 7 January 1998 which was valid until 7 January 2000. During his interview at the Federal Asylum Agency the asylum seeker, who was member of the ethnic minority of Roma, claimed to have left his hometown Bijeljina, situated in the Republic Srpska, after ethnic Serb plainclothes policemen had – within the course of a recruitment campaign having started in March 1999 – attempted to arrest him on 22 April 1999 in order to send him to Kosovo to perform military service. The applicant did not know whether he would face prosecution for evasion of conscription to military service upon return. He stated to fear being killed by civilians belonging to the Serbian ethnic community upon return since acts of violence against Muslims and Roma were committed every now and then. In this context the asylum seeker submitted together with his appeal country of origin information provided by ACCORD, the Austrian Center for Country of Origin and Asylum Research and Documentation, i.a. saying that Bijeljina was regarded a "Hardliner-City" ruled by radical-nationalist Serbs and that no manifest amelioration of the situation had taken place since a delegation of the Council of Europe had reported in August 1996 that members of the Roma community should for reasons specified in that report in no case be returned to the Republic Srpska. During the appeals procedure the applicant added that relatives had faced the same situation and had therefore moved to Tuzla.

At the second instance hearing the asylum seeker proved his identity with a passport issued by the Bosnian embassy in Vienna on 13 March 2000. Confronted with the fact that by having the passport issued he had re-availed himself of national protection the complainant said that he had the passport issued since he needed a valid document for crossing the border. Actually he had only used the passport to visit his wife's elderly parents in Germany he said upon request. Previously he had needed a stamp from the district administration authority which was no longer necessary when having a passport, he added.

II. Second Instance Decision:

The Austrian Independent Federal Asylum Senate (IFAS, second instance) rejected the appeal against the negative first instance asylum decision arguing that through the issuance of a passport the asylum seeker had re-availed himself of the protection of his country of nationality. In accordance with the established judicial practice of the Higher Administrative Court the issuance of a passport or the extension of its validity fulfilled the criteria of Article 1 C (1) of the 1951 Convention relating to the Status of Refugees (in the following: Refugee Convention) unless the particular circumstances of the individual case have a profile which do not allow this presumption. While according to earlier judgments issued by the Higher Administrative Court this assumption was not justified if the voluntariness of the respective action was to be doubted against the background of the particular circumstances of a case the issuance of a passport for the facilitation of travel did not exclude voluntariness in the present case.
Finally, even if one did not apply Article 1 C (1) there were no reasons for flight since according to corresponding country of origin information Roma were not subjected to persecution in Bosnia. There were also no legal obstacles rendering deportation to Bosnia inadmissible, i.e. no valid grounds for assuming that the appellant would run risk of being subjected to inhumane treatment or punishment or to the death penalty upon return.

III. Main Legal Findings of the Austrian Higher Administrative Court:

[Paragraph (1) and (2) not relevant]

Paragraph (3)

The authority proceeded against has reasoned its decision with the applicability of Article 1 C (1) of the Refugee Convention which is regarded as a negative "mirror image" (see German Bundesverwaltungsgericht, decision No. BVerwGE 89, 231 (238)) to the requirement stipulated under Article 1 A (2) of the Refugee Convention, namely to be *"unable or, owing to such fear, (...) unwilling to avail"* oneself of national protection. Article 1 C (1) correspondingly foresees that the Refugee Convention shall cease to apply if a person *"has voluntarily re-availed himself of the protection of the country of his nationality"* since – as stipulated under paragraph 118 of the UNHCR-Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees of 1979 (in the following: UNHCR-Handbook) – a person has thereby "demonstrated" that he is no longer unable or unwilling to do so.

Paragraph (4)

In his cited judicial practice under the 1968 and 1991 Asylum Laws the Higher Administrative Court has decided some 50 cases, most of them concerning rejections of asylum applications based on Article 1 C (1) of the Refugee Convention. Most of them were based on the issuance of passports or the extension of their validity by the country of nationality. The Higher Administrative Court in its judicial practice had followed the legal opinion that the issuance of a passport or the extension of its validity would generally have to be regarded as a form by which a state grants protection to its citizens unless the circumstances of the particular case contradict this legal assessment. The latter comprised essentially only assertions questioning the voluntariness of the application for its issuance or extension of validity. The legal opinion followed in ruling No. 94/20/0838 of 19 December 1995 based on the UNHCR-Handbook, namely that – apart from voluntariness – Article 1 C (1) of the Refugee Convention would also require the intention to re-avail oneself of national protection, remained isolated. The lack of intention to re-avail oneself of state protection was rather deemed as a "mental reservation" not affecting free decision-making and consequently to be a misapprehension with respect to legal subsumption (rulings No. 95/01/0441 of 20 December 1995 and No. 96/20/0787 of 18 December 1996). Consequently the complaint lodged by an asylum seeker who had seen himself forced to apply for a new passport because he continuously faced difficulties to proof his identity was only assessed with respect to voluntariness which was deemed to be given since it was held reasonable to bear the legal consequences following from Austrian legislation for not being able to proof one's identity (ruling No. 94/20/0824 of 16 January 1996).

Further, the application for a national travel document was deemed to be voluntary i.a. in cases where an asylum seeker applied for the extension of the validity of a passport "to be at least in possession of a valid document" (ruling No. 96/20/0308 of 5 June 1996), where it has been merely alleged that the aliens police had – in the absence of physical and psychological coercions – "pressed" the asylum seeker to have a passport issued (ruling No. 95/01/0219 of 25 September 1996), where the extension of the validity of the passport should have enabled the asylum seeker to receive a work permit and to register with a university (ruling No. 96/20/0587 of 24 October 1996), where a recognised refugee had a passport issued by the consulate to "see his 80-year-old sick father once more alive" (ruling No. 95/01/0417 of 13 November 1996), where the aim of an asylum seeker to receive a residence permit with the help of the extended validity of the passport was deemed futile (ruling No. 95/20/0466 of 18 December 1996), where the summon to the district authority did merely include the request "to bring the passport" and the asylum seeker could later on not object the assertion that a visa could also be issued in the form of a written notice and thus without a passport (ruling No. 97/20/0230 of 18 September 1997) or where an asylum seeker who relied on an income after dismissal from federal care applied for the issuance of a new passport in order to fulfil respective labour law requirements (ruling No. 97/01/0302,0802 of 28 January 1998).

On the contrary, the voluntariness of the application was questioned in cases of denial of civil marriage in the absence of a passport (ruling No. 94/20/0838 of 19 December 1995), of application for the issuance of a (mere) identity document for submission to the record section (ruling No. 95/20/0925 of 18 December 1996) and lately – contrary to the tendency of earlier decisions – in a case where a person had asserted that "the Austrian authorities" would "always require a passport" so e.g. to be able to receive money transfers or a registered letter from the post office (ruling No. 96/20/0925 of 19 February 1998). All these cases exclusively concerned asylum seekers.

Paragraph (5)

In literature Grahl-Madsen explained in his publication of 1966 that it was impossible to avail state protection in the absence of diplomatic or consular relations between country of origin and that of residence or in case of denial of issuance of a passport by the country of origin and that the unwillingness to avail oneself of national protection enabled the acquisition of refugee status where the latter was related to fear of persecution upon return although the availment of protection was not deemed to be dangerous in the country of residence (*ibidem* p. 254ff and 379f). He stressed that the cessation clauses would not be applicable where a person fulfilled the inclusion criteria set up by Article 1 A (2) Refugee Convention at the time of the decision which can be taken as evidence for the relation between the inclusion and cessation criteria (*ibidem* p. 391). The acquisition of a passport would normally be attributed the consequence of cessation, if it was based on the wish of the individual concerned to normalise his relations to his country of origin or to receive advantages restricted to a particular nationality and did not merely comply with a request of the authorities in the country of residence or pursue legitimate interests which are generally independent from nationality and would normally only be achievable in that way (*ibidem* p. 385, 388 and 391). Whereas a refugee could not choose between "the best of the two worlds" (*ibidem* p. 391) this clause did not intend to punish refugees: If the availment of state protection proves to be a mistake, e.g. in case the planned return cannot be realised, a person can at any time claim existing or renewed danger of persecution and protection under the Refugee Convention (*ibidem* p. 389-392). In a more recent publication (The Yale Journal of International Law, Vol. 11 No. 2 (1986), p. 362ff) Grahl-Madsen refers to the "peculiar situation" which arises "if a refugee registers at the consulate of his country of origin and obtains a national passport without intending to renounce his refugee status" (*ibidem*, p. 393). Starting by saying that a refugee who possesses a national passport at the time he obtains refugee status is normally not required to return or to surrender such passport and that the latter only remains prima facie proof of nationality but no longer an instrument of protection he concludes that "the same approach is justified with regard to a passport acquired after refugee status has been obtained, but without an understanding of the implications of the acquisition". A refugee should in his opinion lose refugee status and at the same time regain status as an alien possessing the effective nationality of the country of nationality only if, "with full knowledge of the consequences, he submits his passport to the authorities of his new country of residence and requests a visa so that he may continue his stay in that country as a national of his country of origin."

In the UNHCR-Handbook the legal view is taken that Article 1 C (1) of the Refugee Convention includes a third requirement besides voluntariness and actual re-availment: The refugee concerned must intend by his action to re-avail him/herself of the protection of the country of his nationality. However, in the absence of proof to the contrary, this intent is presumed if a refugee applies for and obtains a national passport or its renewal. If the person concerned does subsequently reject the idea to return to the country of nationality or to seek national protection of that particular state outside of it his refugee status will need to be determined afresh. He will then "need to explain why he changed his mind, and to show that there has been no basic change in the conditions that originally made him a refugee" (UNHCR-Handbook, paragraph 123).

These three requirements are also adopted by Goodwin-Gill (The Refugee in International Law 2 (1996), p. 80ff) and Hathaway (The Law of Refugee Status (1991), p. 192ff). Goodwin-Gill also advocates a presumption of re-availment in passport cases makes however reference to an extensive number of aspects which have to be taken into consideration and accords particular importance to the question which documents have been issued by the state of residence. Hathaway speaks of actions which can "technically" be interpreted as re-availment of state protection and thus allow for a respective presumption. But it was only a fiction to believe that more than a evanescent percentage of all those who address the consulates of their countries of nationality would thereby manifest their political loyalty or trust. This would normally take place out of mere practical necessity or routine "with no thought to the legal ramifications". A strict interpretation of this cessation clause was consequently required. It was necessary to examine the reasons for this particular action. Article 1 C (1) of the Refugee Convention could only be applied where a refugee had indeed intended to again entrust his country of nationality with the protection of his interests.

Finally, in the course of the 2001 Global Consultations i.a. the view was taken that in cases of issuance or extension of validity of passports by the country of nationality where normally voluntariness was doubted it was rather the intent which was missing. With regard to this intention no presumption was justified. For understanding the action it was i.a. relevant to know which other travel documents were available and whether the refugee knew so. "The cessation clauses should not be transformed into a trap for the unwary or a penalty for risky or naïve conduct." (Fitzpatrick, Current Issues in Cessation of Protection Under Article 1 C of the 1951 Refugee Convention and Article I.4 of the 1969 OAU Convention, paragraph 18 to 24 und p. 94 ff).

Paragraph (6)

With reference to this stage of discussion – and insofar in line with previous judicial practice – the Higher Administrative Court takes the legal opinion that the successful application for the issuance or extension of validity of a passport of the country of nationality can lead to a cessation of refugee status even when the danger of persecution remains in the country of origin and a return there is not envisaged. That will be the case where a recognised refugee insists on using a passport issued by the authorities of the country of nationality for purposes for which the Convention travel document would suffice or where a refugee wants to gain advantages bound to nationality by applying for the issuance of such a passport. However, contrary to judicial practice taken up under the former Asylum Laws in addition to voluntariness and re-availment the additional requirement of intent as argued by all scholars is decisive. An intent to normalise relations to the country of origin as mentioned by Grahl-Madsen and to again entrust that country with the representation of one's interest will normally be missing as long as (in particular: state) persecution prevails.

Further, in the context of issuance or extension of validity of passports the difference between the situation of an asylum seeker lacking a Convention travel document and facing a yet unknown final decision and that of a refugee has to be taken into account when interpreting the action concerned (see German Bundesverwaltungsgericht judgment: BVerwGe 78, 152 of 20 October 1987). Thoughtful of this difference – and thereof that the mentioned excerpts of the UNHCR-Handbook as well as the cited authors generally and partly exclusively refer to recognised refugees only – a rebuttable presumption of "re-availment" respectively a respective intention is unsuitable. Whether or not such an intent had existed has to be investigated and examined in the particular case whereby the concerned asylum seeker will have to explain the reasons for his action.

Finally, it must be taken into account that for the procedure for the granting of asylum as well as that for the cessation of refugee status it was relevant to determine whether or not a person is a refugee at the time of the decision. In accordance with the reflected lack of finality of the cessation in the case discussed as outlined by Grahl-Madsen and the UNHCR-Handbook persons have to be given the chance to lay out why they again fulfil the inclusion criteria whereby not only circumstances which occurred after the re-availment have to be taken into account with regard to the element of danger of persecution.

Paragraph (7)

In the present case the ascertainments of the authority proceeded against do not suffice to establish that the plaintiff had intended an accumulation of protection by country of origin and country of residence or had chosen the first in consciousness of the meaning of his action.

Paragraph (8)

The alternative assumption that reasons for flight did not exist was only reasoned with the reference that according to the ascertainments made Roma were not subjected to persecution in Bosnia. Since the authority proceeded against does not seem to have wanted to say that the applicant had no asylum relevant reasons to leave Bijelina in 1999 and it remains unclear whether it has either deemed an internal flight alternative existing without making ascertainments regarding the reception of Roma from other parts of the country outside of the Republic Srpska or the circumstances to have changed without however, dealing with the requirements of Article 1 C (5) of the Refugee Convention, the correctness of the content of that part of the decision could not be judged.

The decision proceeded against was consequently in accordance with Article 42 (2) 1 of the Higher Administrative Court Law to be annulled for illegality of its substance.

Vienna, 15 May 2003