



EUROPEAN COURT OF HUMAN RIGHTS  
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

Application no. 6198/12  
Khalisat DAYTBEGOVA and Mariat MAGOMEDOVA  
against Austria  
lodged on 30 January 2012

**STATEMENT OF FACTS**

THE FACTS

The applicants, Ms Khalisat Daytbegova and Mariat Magomedova, are Russian nationals who were born in 1967 and 1997 respectively and live in Semriach. They were represented before the Court by Ms U. Pils, a legal advisor with the Verein Zebra in Graz.

**A. The circumstances of the case**

The facts of the case, as submitted by the applicants, may be summarised as follows.

*1. The asylum proceedings in Austria*

The first applicant is the second applicant's mother. Together with the first applicant's son, born in 2002, the applicants travelled to Austria via Italy and lodged an asylum request in Austria on 23 June 2011. In Italy, the applicants had not lodged an asylum request, but held a visa valid from 18 until 25 June 2011.

Upon request by the Austrian authorities, Italy accepted jurisdiction with regard to the applicants' asylum proceedings pursuant to the Council Regulation (EC) No 343/2003 ("Dublin II Regulation", hereinafter "the Dublin Regulation").

In the Austrian proceedings, the first applicant claimed to fear *refoulement* from Italy to Dagestan and lack of access to medical treatment in Italy. Her whole family, with exception of the smallest boy, suffered from depression. Especially the second applicant was very sick,

uncommunicative and suffered from headaches. The first applicant claimed that her husband was registered as a suspect with the Russian military services. As a result, he had hidden in the mountains. The first applicant and her family had been repeatedly threatened to disclose the information about her husband's hiding place.

On 26 August 2011, the Federal Asylum Office (*Bundesasylamt*) rejected the asylum requests pursuant to section 5 of the 2005 Asylum Act (*Asylgesetz 2005*) in conjunction with Article 9 § 2 of the Dublin Regulation and ordered the applicants' expulsion to Italy.

On 26 September 2011, the Asylum Court (*Asylgerichtshof*) quashed those decisions and stated that the statements made by the Federal Asylum Office regarding the health condition of the second applicant were insufficient and that the authority had failed to establish the applicant's ability to be expelled to Italy (*Überstellungsfähigkeit*). Furthermore, the authority had failed to evaluate information regarding access to medical treatment in Italy. Finally, since the applicants must be considered vulnerable persons, the authority needed to get assurances from the Italian authorities regarding lodgings, related support and access to medical treatment.

On 1 December 2011, the Federal Asylum Office again rejected the applicants' asylum request pursuant to the 2005 Asylum Act and the Dublin Regulation and ordered their expulsion to Italy. Referring to relevant country reports, it found that asylum seekers had access to medical treatment in Italy after an initial registration with the sanitary unit. Vulnerable persons also had special access to lodgings with SPRAR. With reference to the medical documents concerning the second applicant's health status, it found that since the applicants had access to Italian medical services, the applicants could count on the necessary support upon an expulsion to Italy. To complement the information, the authority also referred to the fact that the Aliens' Police (*Fremdenpolizei*) was called upon to decide if an expulsion was factually possible or not for medical or psychological reasons.

On 26 January 2012, the Asylum Court dismissed the applicants' appeal against those decisions as unfounded. It found that the applicants had not sufficiently proven the lack of access to medical treatment in Italy. Furthermore, the applicants had not even lodged an asylum request in Italy which weakened their criticism of the Italian asylum system. The general information available to the authority would not warrant the opinion that the applicants would be subjected to treatment contrary to Article 3 upon a return to Italy. Acknowledging the fact that the second applicant, and also the first applicant with lesser symptoms, suffered from psychological impairments, the Asylum Court found that they had to take into account a deterioration of their conditions and of the treatment possibilities upon an expulsion, which was in line with case-law of the European Court of Human Rights. Furthermore, the Austrian authorities would treat the expulsion as "problematic" and thus provide medical assistance during the expulsion attempt. Finally, the Austrian authorities had also declared that they would inform the Italian authorities in due time of the planned expulsion to enable them to prepare the reception of the applicants in Italy.

On 3 February 2012, the Constitutional Court (*Verfassungsgerichtshof*) granted legal aid for the applicants to lodge a complaint against that last decision.

The applicants' expulsion was planned for 25 January 2012.

## *2. The second applicant's health issues*

On 24 January 2012, the second applicant was admitted to the secure ward of the Sigmund Freud Psychiatric Hospital in Graz (*Landesnervenklinik Sigmund Freud Graz*) for at least two weeks. This admission to the secure ward was approved by the competent court by decision based on an expert's diagnosis of an acute post-traumatic stress disorder with grave suicidal tendency and concrete ideas of realisation of those tendencies. A further hearing date for the evaluation of the measure was planned for the 9 February 2012, except for the case that the hospital would release the second applicant before that date. The date of that court decision was not provided.

The file further contained two psychological statements that were commissioned by the Federal Asylum Office and dated 27 July 2011 and 10 October 2011 respectively. Both statements diagnosed an adjustment disorder of the second applicant, but no acute suicidal tendencies.

A first psychological statement of the Sigmund Freud Psychiatric Hospital of 9 December 2012 confirmed that the second applicant had been in regular treatment at the hospital since 23 September 2011 and diagnosed a post-traumatic stress disorder with distinct symptoms and a traumatic neurosis. They had started a sleep activating anti-depressive therapy. However, since the start of the therapy only a slight amelioration of the second applicant's status was noticed. The statement recommended a stable environment; a rupture of the therapy could lead to an aggravation of the symptoms. Furthermore, the second applicant showed suicidal tendencies with partly concrete impulses of execution of the tendencies. From a psychiatric point of view it was recommended that the second applicant stayed in an environment that she considered safe.

A second statement of the Sigmund Freud Psychiatric Hospital of 19 January 2012 confirmed that pharmacological treatment and psychotherapy had started; however, an amelioration of the second applicant's status was not yet noticeable. The insecure status of the second applicant's stay in Austria led to a depression, a sleeping disorder and an ongoing weight loss. It further stated that a continuing and long-term treatment of the second applicant was paramount and that a disruption of the second applicant's environment could mean an aggravation of the symptoms including the suicidal tendencies. The applicant was treated with Mirtabene, Seroquel and Dominal forte and was in regular psychotherapeutic treatment.

On 31 January 2012, the Sigmund Freud Psychiatric Hospital confirmed that the second applicant was admitted for treatment to the secure ward of the hospital on 24 January 2012 due to a post-traumatic stress disorder and a severe depression. The reason for the admission to the hospital were the acute suicidal tendencies of the second applicant.

### *3. Further developments*

On 31 January 2012, the Court requested the Government to inform it of any concrete measures taken to ensure an appropriate reception of the applicants upon an expulsion to Italy until 8 February 2012.

On 6 February 2012, received by the Court on 7 February 2012, the Government responded as follows:

Firstly, the Government informed the Court that the expulsion, that had been planned for the 25 January 2012, had to be cancelled because the first applicant's son, born in 2002, had disappeared and could not be found.

Subsequently, the Austrian authorities had informed the Italian authorities of the expansion of the expulsion period to eighteen months because of the disappearance of the first applicant's son.

The Government further explained that on 16 November 2011, the Italian Ministry for Interior Affairs had responded to the Austrian request for information concerning the reception conditions by stating in general terms that the reception and lodging of asylum seekers in Italy was guaranteed in governmental asylum centres (CARA or SPRAR). It was further especially referred to the fact that Italy paid particular attention to vulnerable asylum seekers. Therefore, to ensure appropriate medical and sanitary support for such vulnerable groups, the Austrian authorities were requested to submit detailed information for each individual case.

The Austrian authorities provided thereupon some medical information, including the statement of the Sigmund Freud Hospital dated 9 December 2012.

On 23 January 2012, the Italian authorities again requested information regarding the applicants' medical status. The Austrian authorities responded on 24 January 2012 that there were no new medical statements and that all relevant information had already been submitted.

The Government finally stated that there was no expulsion date fixed at the moment, since the first applicant's son was not yet found.

The Government and the applicants' representative informed the Court that in the meanwhile, the first applicant's husband and the elder son had arrived in Austria and had lodged asylum requests. Those proceedings are pending.

### *4. Rule 39 of the Rules of the Court*

On 10 February 2012, the Court applied the interim measure under Rule 39 and requested the Austrian Government to stay the applicants' expulsion to Italy until further notice.

## **B. Relevant domestic law**

### *1. Council Regulation (EC) No 343/2003 (Dublin Regulation)*

Under the Regulation, the Member States must determine, based on a hierarchy of objective criteria (Articles 5 to 14), which Member State bears responsibility for examining an asylum application lodged on their territory. The aim is to avoid multiple applications and to guarantee that each asylum seeker's case is dealt with by a single Member State.

Where it is established that an asylum seeker has irregularly crossed the border into a Member State having come from a third country, the Member State thus entered is responsible for examining the application for asylum (Article 10 § 1). This responsibility ceases twelve months after the date on which the irregular border crossing took place.

Where the criteria in the regulation indicate that another Member State is responsible, that State is requested to take charge of the asylum seeker and examine the application for asylum. The requested State must answer the request within two months from the date of receipt of that request. Failure to reply within two months is stipulated to mean that the request to take charge of the person has been accepted (Articles 17 and 18 §§ 1 and 7).

By way of derogation from the general rule, each Member State may examine an application for asylum lodged with it by a third-country national, even if such examination is not its responsibility under the criteria laid down in the Regulation (Article 3 § 2). This is called the “sovereignty” clause. In such cases the State concerned becomes the Member State responsible and assumes the obligations associated with that responsibility.

## 2. 2005 Asylum Act

Section 5 of the 2005 Asylum Act provides that an asylum request shall be rejected as inadmissible if, under treaty provisions or pursuant to the Dublin Regulation, another country has jurisdiction for examining the application for asylum or the application for international protection. When rendering the rejecting decision, the authority shall also specify which country has jurisdiction in the matter.

## COMPLAINT

The applicants complain under Article 3 of the Convention that in view of the applicants’ health status, so especially the second applicant’s mental health condition, an expulsion to Italy would subject them to treatment contrary to that provision.

## **QUESTIONS TO THE PARTIES**

1. In the light of the applicants’ health status, so especially the second applicant’s mental health condition, her admission to the secure ward of the *Landesnervenklinik Sigmund Freud Graz*, and the proposed treatment, would the applicants’ removal to Italy pursuant to the provisions of the Council Regulation (EC) No. 343/2003 (the “Dublin Regulation”) amount to treatment in breach of Article 3 of the Convention?

2. The parties are requested to provide full and in view of the second applicant’s admission to the secure ward of the *Landesnervenklinik Sigmund Freud Graz* updated details on the accommodation and medical arrangements to be put in place by the Italian authorities upon the

applicants' arrival in Italy and to comment on the sufficiency of those arrangements.