HIGHER ADMINISTRATIVE COURT JUDGMENT
No. 2001/01/0402-10

In the name of the Republic,

The Higher Administrative Court, with divisional chairman Dr. Höss presiding, Dr. Nowakowski, Dr. Pelant, Dr. Thoma and Dr. Berger as judges, and Dr. Stieger present as court clerk, has reached the following verdict with regard to the complaint filed by B of W, born in 1954, represented by Dr. Leopold Boyer, lawyer of Zistersdorf 2225, against administrative decision No. 221.553/0-V/13/01 issued on 22 May 2001 by the independent Federal Asylum Review Board concerning articles 7 and 8 of the 1997 Asylum Act (additional party: the Federal Minister of Interior):

The contested administrative decision is annulled by reason of illegality owing to a breach of procedural rules.

The Federal Government shall reimburse to the complainant, within two weeks, costs amounting to € 991.20, on pain of seizure of assets.

Reasons for the verdict:

In the summer of 2000, the complainant, a national of Bosnia and Herzegovina, travelled with her two daughters, born in 1982 and 1987, to the federal territory on the strength of a "C Visa", issued to her by the Austrian Embassy in Sarajevo, and subsequently went to Germany. From there she was transferred back to Austria on 7 November 2000 in application of the Dublin Convention.

By administrative decision of 23 February 2001, the Federal Asylum Agency dismissed the complainant's asylum application under the terms of article 7 of the Asylum Act and declared, pursuant to article 8 of the Asylum Act, that her deportation, rejection at the border or forcible return "to Bosnia" was admissible. Following the appeal lodged against that decision, the authority proceeded against conducted an oral appeal hearing on 24 April 2001. The complainant's testimony at that hearing was essentially as follows:

(CH = chairman of the hearing, C = complainant, CR = complainant's representative)

"CH: The case records show that you are Roma?

C: That is correct.
…

C: I was previously in Germany with my family, recently for three months and before that for five years.
…

C: No, we did not apply for asylum. In Germany we were granted a temporary stay of deportation …

CH: Were you ordered by the German authorities to return to Bosnia and Herzegovina in 1998?

C: We received a negative decision and then returned to Bosnia and Herzegovina voluntarily because we feared that we would be deported

CH: Can you explain to me in a few words why you have now come to Austria?

C: Because the Serbs threatened us and behaved badly toward us. We certainly did not come here voluntarily.

CH: Can you describe this in more detail?

C: I do not wish to; I am ashamed.

CR: As she explained to me, the complainant evidently went to the authorities in connection with the return of her house and I have the impression that she was threatened at that time and that this was not the only occasion.

...

C: We are constantly under threat; they tell us that we have no right to exist. … The Serbs insulted us verbally and physically. I do not want to say anything about it since I become nervous immediately.

CH: I am sorry that I have to put such questions to you.

C: I cannot bear to watch them making indecent advances towards my two young daughters and perhaps molesting them.

CH: Do you relate these present fears to the Republica Srpska?

C: Yes but there are also Serbs in Tuzla and we are treated with hostility everywhere, including by the Muslims.

CR: As I see it, there is a certain difference; the greatest danger obviously comes from the Serbs but the living conditions for the Roma are virtually insupportable in Tuzla also.

CH: How were the living conditions?

C: In Tuzla we were without water and had nothing at all; no one helps us and we cannot turn to anyone. We sought assistance in Tuzla; I do not know which authority it was since I do not know my way around Tuzla; the y are simply unwilling to help us. We do not have adequate sanitary facilities. I caught an infectious disease there because of the unhygienic conditions.

…"

By administrative decision of 22 May 2001, the authority proceeded against dismissed the complainant's appeal under the terms of article 7 of the Asylum Act (point I of the decision). The authority proceeded against also declared, pursuant to article 8 of the Asylum Act in conjunction with article 57 of the Aliens Act, that the complainant's deportation, rejection at the border or forcible return to Bosnia and Herzegovina was admissible (point II of the decision).

In substantiation of the verdict, the aforementioned administrative decision initially states that the complainant is of the Muslim faith and a member of the Roma population. Prior to entering the federal territory, she had already spent approximately one year in Austria in 1991 and then approximately five years in the Federal Republic of Germany. In 1998, she returned with her two under-age daughters to Bosnia and Herzegovina, where she had latterly been living in a tent since the return of the house which she formerly owned had not been made possible.

The decision continues with reported findings concerning the general situation in Bosnia and Herzegovina. Among these, the following should be mentioned in particular:

"In the Federation of Bosnia and Herzegovina there is no knowledge of any particular measures on the part of the State which are directed specifically against members of the Roma population. According to available information, persons in the Federation of Bosnia and Herzegovina are not at risk of persecution by virtue of the fact that they belong to the Roma population. That group of persons generally shares the same fate as the rest of the population of Bosnia and Herzegovina. Discrimination does not take place. Specific and well-informed intelligence on the situation of the Roma in the Republica Srpska is currently not available. ...

Members of the Roma population have access to refugee settlements. The camp conditions have been described by UNHCR representatives as better than those of many residents of Bosnia and Herzegovina. Little information is available on the situation of the Roma in the Republica Srpska. … Also, members of the Roma population can participate in aid programmes in Bosnia and Herzegovina in exactly the same way as all other persons in need of assistance.

… Nationals of Bosnia and Herzegovina who are deported usually undergo police formalities solely for the purpose of recording their personal particulars. … Among the returnees, those who are especially in need of social protection, such as single women with children or older persons who have no immediate family and are without means must, unless they can rely on help from distant relatives or acquaintances or find temporary accommodation, take up residence in what are known as collective centres. Living conditions in these centres are harsh and not comparable with the living conditions in Western European countries. All available information and intensive exchanges on the spot with institutions present, such as UNHCR, OHR, IOM and ICRC, show that no specific danger to life and limb is linked to the harsh conditions in those centres. The collective centres are supervised by UNHCR.

Essentially, all persons returning to Bosnia and Herzegovina may freely choose their domicile. Should they provisionally be unable or unwilling to return to

their former place of residence, returnees are accommodated in collective centres. Accommodation in a collective centre guarantees them a roof over their heads, three meals a day and basic medical care. No additional support from the State is provided. Persons returning are always assigned to the collective centre situated nearest to their pre-war place of residence. …

Harassment and discrimination against members of the Roma population have been more pronounced and in recent years more noticeable in the Republica Srpska than in the Federation. Members of the Roma population are in a poor socio-economic situation and 70 per cent of them would be unable to ensure their physical existence without social assistance (!).

The general supply position has latterly undergone an increasingly marked improvement in the territory of the Federation of Bosnia and Herzegovina, primarily in the Croatian-dominated part. The situation in the Republica Srpska has been distinctly worse to date, although showing significant signs of a return to normal in the very recent past. The provision of basic food is guaranteed throughout the country. …

Supplies of food, in particular basic items, and also of clothing and heating fuel are ensured country-wide, not least through international aid programmes. No deterioration in the supply situation has as yet occurred as a result of the return of refugees. According to information from WHO and UNHCR, all refugees returning to Bosnia and Herzegovina are in principle granted the same right of free access to the health service as persons already living there. All residents in Bosnia and Herzegovina are entitled to consult a doctor and to receive cost-free treatment in hospitals and clinics. The provision of medicines normally takes place through humanitarian aid organizations."

It was further contended by the authority proceeded against that the complainant had failed to demonstrate any specific measures of persecution of a high level of intensity directed at her person for a reason covered by the "protective purpose" of the 1951 Convention relating to the Status of Refugees. The discrimination which she claimed on the part of members of the Serb and Muslim population and accompanying "minor insults" could not justify the granting of asylum owing to their insufficient intensity. It cannot be concluded from the facts adduced by the complainant in this connection that, if she had continued to remain in Bosnia and Herzegovina, she would have been in danger of serious violation of her personal integrity because she belonged to a particular population group. Merely the fact that, after 1998, she had lived with her two daughters in her native country for a period of two years and had not suffered any serious assaults against her person indicates that she was not at risk of any acts of persecution of a high level of intensity in the future. It did not emerge during the procedure that she and her two daughters had been in a totally hopeless social situation, especially since vital basic supplies were ensured for members of the Roma population, at least in the territory of the Federation of Bosnia and Herzegovina. In particular, it is apparent from the accessible documentation that, if the complainant returned, for example via Sarajevo, with her two daughters, she could well expect to obtain accommodation and sufficient food and clothing and to receive medical care.

Based on legal arguments, it can be concluded that, were the complainant to return, there was no definite probability of her being subjected to acts of persecution of an intensity that would have a bearing on her right to asylum. It cannot be presumed that "by changing her location she would not have been able on a permanent basis to evade assaults from private individuals of which she was constantly at risk, nor do the reports available to the authority state that, had she sought protection, she would most probably have been denied all support". It fully emerges that the complainant could on factual grounds have reasonably been expected to return to Bosnia and Herzegovina.

The Higher Administrative Court's findings on the complaint filed against that decision are as follows:

The authority proceeded against did not specify the exact location to which the complainant returned in 1998 following her stay in the Federal Republic of Germany. However, the observation that the complainant had been unable to regain possession of the house which she previously owned leads to the conclusion that the authority proceeded against was basing its conclusions on a return to the city of Bijeljina, situated in the Republica Srpska, where, according to the complainant's testimony, which has not been called into question, her former house was located.

The circumstances which the complainant found in Bijeljina, her original native town (cf., in this connection, this Court's judgment No. 2001/01/0499 of 15 May 2003), were described by her before the Federal Asylum Agency as being such that it was impossible to live there; she maintained that "the Serbs" were very dangerous, that crimes and rapes were being committed and that she (the complainant) had been afraid. In the oral appeal hearing the complainant added (see above, in this connection, the remarks reproduced verbatim) that "the Serbs" had behaved badly towards her and her daughters; they had been verbally and physically insulted; and she (the complainant) could not bear to watch them "making indecent advances towards my two young daughters and perhaps molesting them".

The authority proceeded against submitted no detailed findings with regard to any incidents in Bijeljina. It in fact considered that the complainant had been unable to demonstrate any specific acts of persecution of a high level of intensity directed against her or against her daughters. The discrimination and accompanying minor insults claimed by her could not justify the granting of asylum owing to the absence of sufficient intensity. The complainant had failed to show in a comprehensible way any specific evidence of acts of persecution of a high level of intensity by private individuals based on ethnic grounds in violation of the duty as guarantor devolving fundamentally upon the State.

That assessment does not go far enough and does not fully do justice to the complainant's assertions. Upon closer examination, it can be seen that she was in fact referring to sexual assaults against her person and against her daughters, both when she gave an account of "physical insults" in the appeal hearing and consequently also when she said that the reason for her departure from her native town of Bijeljina to Tuzla was that she could not bear to watch them "making indecent advances towards my two young daughters and perhaps molesting them". While those statements could not have given rise to the conclusion, as is now being maintained in the complaint,

that rape had taken place, they nevertheless pointed to sexual insults which could not simply be dismissed as not having the nature of persecution. It would accordingly have been necessary to put forward arguments to that effect. A closer examination of the problem expounded would have been required notwithstanding the fact that the complainant stated that she was unwilling to describe the behaviour of "the Serbs" in greater detail because she was ashamed or did not want to say anything "about it" since she became "nervous immediately". Furthermore, this information constitutes notable indication of a not insignificant violation of her privacy, an aspect which the authority proceeded against should not have passed over in silence.

The authority proceeded against did not analyse more closely the complainant's testimony concerning the "molesting" of her daughters, possibly in the light of the shame expressed by her. Any further questioning of the complainant on this matter at the specific appeal hearing may in fact have been restricted or unreasonable, especially since, with the exception of the authority's clerk, all other persons present at the hearing (in particular the person chairing the hearing and the interpreter) were males. In view of this last point, the procedure followed by the authority proceeded against proves, on the basis of the considerations set out below, to be insufficient:

In this connection, reference should first be made to relevant conclusions adopted by the Executive Committee of the UNHCR Programme, in particular to Conclusion No. 64 (XLI) of 1990 on Refugee Women and International Protection, in accordance with whose paragraph a) iii), States are urged to provide, wherever necessary, skilled female interviewers in procedures for the determination of refugee status and to ensure appropriate access by women asylum-seekers to such procedures, even when accompanied by male family members. A comparable provision is set out in point 28 of the Council Resolution of 20 June 1995 on minimum guarantees for asylum procedures, which stipulates that member States must endeavour to involve skilled female employees and female interpreters in the asylum procedure where necessary, particularly where female asylum-seekers find it difficult to present the grounds for their application in a comprehensive manner owing to the experiences they have undergone or to their cultural origin.

The requirements of the above-quoted international instruments are met by the last sentence of article 27, paragraph (3), of the Asylum Act, which provides that asylum-seekers who base their fear of persecution on interference with their right to sexual self-determination shall be interviewed by officials of the same sex (cf. the express reference to the aforementioned conclusion of the Executive Committee in the explanatory notes on article 27 accompanying government bill, 686, appendix to National Council record 20, 27th legislative period). That provision is applicable initially to procedures conducted before the authority of first resort, i.e. the Federal Asylum Agency. However, it must be presumed that it also has to be applied to interviews held at hearings to be conducted by the authority proceeded against. Even if the last sentence of article 27, paragraph (3), of the Asylum Act is construed as a rule governing procedures before the authority of first resort, the above deduction in fact follows from the general principle that, when conducting its own procedure, the appeal authority must, unless otherwise stipulated, apply the rules governing the procedure conducted by the authority of first resort (cf. Walter and Mayer, *Verwaltungsverfahrensrecht*, 8th edition [2003], marginal reference 532). Also, that

conclusion is in conformity with the aforesaid international instruments, whose stipulations can be seen to be incorporated in the last sentence of article 27, paragraph (3), of the Asylum Act (see also specifically the rule set out in article 24b, paragraph (2a), of the Asylum Act, as amended by the Asylum Law Amendment Act 2003, *Federal Law Gazette I* No. 101, which enters into force on 1 May 2004). The necessity, under the circumstances encompassed by the above-quoted provision, of engaging an interpreter of the same sex at all stages of the asylum procedure is, in the opinion of the Higher Administrative Court, self-evident if that rule is analysed rationally, since it is only thus that the intended purpose of the last sentence of article 27, paragraph (3), of the Asylum Act (i.e. to remove thresholds of inhibition) can be adequately met (see more on the question UNHCR Guidelines on International Protection, *Gender-Related Persecution within the context of Article 1 A (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, point 36, reproduced in *Neue Zeitschrift für Verwaltungsrecht*, Supplement I, 2003, 69; cf. also, Feller/Türk/Nicholson (eds.), *Refugee Protection in International Law* [2003], 349 et seq., with further evidence).

In the present case, references to sexual assaults against the complainant did not come to light until the appeal hearing. From that moment, the need accordingly arose for the complainant to be interviewed by a person of the female sex, given that the authority proceeded against is also required to comply with the last sentence of article 27, paragraph (3), of the Asylum Act. The senior male official of the authority proceeded against who was entrusted with the case was unable to meet that requirement; he was thus genuinely hindered in the further conduct of the procedure. Within the meaning of article 8, paragraph (2), of the Federal Law on the Independent Federal Asylum Review Board (UBASG), according to which provision a member of the authority proceeded against may be relieved of cases for which he is responsible solely in the event of impediment, by order of the chairman of the independent Federal Asylum Review Board, a "case for withdrawal" accordingly arose (see also article 38, paragraph (2), of the Asylum Act), for which the relevant work allocation plan of the authority proceeded against for the calendar year 2001 does not provide any explicit rules but which, if that work allocation plan is interpreted in accordance with the law taking into account the last sentence of article 27, paragraph (3), of the Asylum Act, can readily be assumed to apply to a situation where, as provided for therein, the initially responsible member suffers an impediment for more than two months (cf. article 4, point 2; the member is thus to be relieved of an assigned case by the chairman if the member is impeded for more than two months, in which event the withdrawn case is treated, on the working day following the day when the member was relieved of it, as a newly received work task).

In the case under consideration, the member was not relieved of his allocated task and, despite the references which emerged in the appeal hearing to sexual assaults, with visible inhibition on the complainant's part in giving a more detailed account of her experiences, the complainant was not interviewed by a person of the female sex. Therefore, in the light of the foregoing, the procedure conducted by the authority proceeded against was wholly vitiated by procedural irregularity (also in view of the failure to engage a female interpreter), for which reason the assertion now being made in the complaint to the effect that the constant acts of persecution against the person of the complainant had begun with "verbal insults" and had ultimately amounted to rape, does not constitute an inadmissible innovation (cf. also the

testimony of one of the complainant's daughters, which is reproduced in judgment No. 2002/01/0154 of today). If such acts of persecution are presumed to have taken place, there can be no question of a level of intensity not sufficient to have a bearing on the matter of asylum. It is not apparent with sufficient clarity from the reported findings put forward concerning the situation in the Republica Srpska that the complainant had had the possibility of, if necessary, availing herself of effective State protection, as the authority proceeded against also suggests in the decision rendered by it.

Assuming that the complainant's persecution in Bijeljina (Republica Srpska) has a bearing on her asylum and assuming to be correct the view held by the authority proceeded against, which has not been examined in detail here, that the complainant "by changing her location … would … have been able on a permanent basis to evade assaults", the question arises as to whether an internal protection alternative is now available to her in the Muslim/Croatian part of the entire State of Bosnia and Herzegovina (in the Federation of Bosnia and Herzegovina). In the light of the complainant's prolonged stay in Tuzla following her departure from Bijeljina, the possibilities existing there in particular needed to be examined. The authority proceeded against made no analysis with respect to "internal protection alternatives". It in fact reported general findings concerning the situation in Bosnia and Herzegovina, which, in its opinion, provide for the possibility of a return. It is not, however, possible for the Higher Administrative Court to conclude, on the basis of those findings, that an internal protection alternative exists for the complainant since, with regard to the collective centres available to single women with children or to older persons with no immediate family, it is also stated that it is specifically the collective centre situated nearest to the returnee's pre-war place of residence that is assigned, which in this case is precisely Bijeljina. Moreover, the authority proceeded against did not give consideration to the 50-year-old complainant's specific situation in that it did not examine further the recorded fact of her chronic lung disease.

In summary, it can be concluded that the contested decision is vitiated by serious procedural irregularities. It should accordingly be annulled, pursuant to article 42 (2) 3 (b) and (c) of the Higher Administrative Court Act (VwGG), by reason of illegality owing to a breach of procedural rules.

The pronouncement concerning reimbursement of costs is based on articles 47 et seq. of the Higher Administrative Court Act in conjunction with the Higher Administrative Court Cost Reimbursement Regulations of 2003.

Vienna, 3 December 2003