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Association des Conseils d'Etat et des Juridictions administratives  
suprêmes de l'Union européenne a.l.s.b.l.



Association of the Councils of State and Supreme Administrative  
Jurisdictions of the European Union i.n.p.a.

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Conseil du Contentieux des Etrangers de Belgique– Raad van  
Vreemdelingenbetwistingen van België

**Association of the Councils of State and the Supreme  
Administrative Jurisdictions of the European Union  
With scientific support of the Council of Alien Litigations  
of Belgium**

**Asylum and immigration law: the  
national judge between national and  
european standards**

**AUSTRIA**

**Brussels**

**- 17 December 2010 –**

**Seminar organised with the support of the European  
Commission**

## QUESTIONNAIRE

### PRELIMINARY REMARK

Actions filed by foreign nationals should be understood as those actions concerning asylum-related issues (as per Article 78 of the Treaty on the Functioning of the European Union), and immigration-related issues (as per Article 79 of the Treaty on the Functioning of the European Union).

### 1. EVIDENCE LAW IN COMPETENT NATIONAL COURTS WITH REGARD TO ACTIONS FILED BY FOREIGN NATIONALS

#### A) RULES OF EVIDENCE

1. Are the rules of evidence in actions filed by foreign nationals laid down specifically in internal law?

1.1. Do national law or case law rule out certain types of evidence? Where applicable, make a distinction between those actions relating to asylum and those relating to immigration.

*There are no certain types of evidence in Austrian (asylum- or immigration) law. Evidence has to be judged case by case without any binding rules for its consideration.*

1.2. Do national law or case law allow certain presumptions (e.g. in asylum cases, in the event of past persecution or safe countries of origin)? Where applicable, make a distinction between those actions relating to asylum and those relating to immigration.

*Yes, there are presumptions relating to the protection in a safe third country (except EU-member-states) in Art 4 (3) of the Austrian Asylum-Code 2005 and to the safety of EU-member-states in Art 5 (3) of the Austrian Asylum-Code 2005, that says:*

#### **"Section 2**

#### **Absence of responsibility of Austria**

#### **Safety in a third country**

**Article 4.** (1) *An application for international protection shall be rejected as inadmissible if the alien is able to find protection against persecution in a country to which a treaty concerning the determination of responsibility for the examination of applications for asylum or applications for international protection or the Dublin Regulation is not applicable (protection in a safe third country).*

(2) *Protection in a safe third country shall exist if a procedure for the granting of refugee status in accordance with the Geneva Convention on Refugees is available to an alien in a country where he is not exposed to danger as specified in article 8, paragraph (1), or is guaranteed via other countries (asylum procedure), and the alien is entitled to reside in that country during such procedure and has protection there against deportation to the country of origin, including via other countries, provided that the alien is exposed in the country of origin to danger as specified in article 8, paragraph (1). The foregoing shall, in cases involving the same protection from rejection at the border, forcible return or deportation, apply to countries which have already rendered a decision in a procedure for the granting of refugee status in accordance with the Geneva Convention on Refugees.*

**(3) The requirements set out in paragraph (2) above shall refutably be met in a country if that country has ratified the Geneva Convention on Refugees and has established by law an asylum procedure incorporating the principles of the aforesaid Convention, of the European Convention on Human Rights and of Protocols No. 6, No. 11 and No. 13 to the Convention.**

...

#### **Responsibility of another State**

**Article 5.** (1) An application for international protection which has not been decided in accordance with article 4 shall be rejected as inadmissible if, under treaty provisions or pursuant to the Dublin Regulation, another country is responsible for examining the application for asylum or the application for international protection. When the rejection decision is rendered, the country responsible shall also be specified.

(2) The steps set out in paragraph (1) above shall also be followed if, under treaty provisions or pursuant to the Dublin Regulation, another country is responsible for determining which country is responsible for examining the application for asylum or the application for international protection.

**(3) Unless specific reasons relating to the person of the asylum-seeker and indicating a real risk of absence of protection against persecution are satisfactorily established or are evident to the Federal Asylum Agency or to the Asylum Court, it shall be assumed that the asylum-seeker can find protection against persecution in a country as referred to in paragraph (1) above. "**

#### **B) BURDEN OF PROOF**

2. What is the role of the parties in the administration of evidence in actions filed by foreign nationals? Where applicable, make a distinction between those actions relating to asylum and those relating to immigration.

Parties have the duty to cooperate in the procedure. They have e.g. to establish satisfactorily that they would be at risk of persecution in the country of origin, if they want to be granted asylum. Relating to asylum the Austrian asylum Code 2005 stipulates a special duty of cooperation in it's Art 15:

#### **"Duty of cooperation**

##### **Asylum-seekers' duty to cooperate in the procedure**

**Article 15.** (1) An asylum-seeker shall cooperate in procedures pursuant to the present federal law; in particular he shall be obliged:

1. without undue delay to substantiate his application and, upon request, furnish truthfully all indications required in support of the application for international protection;
2. in the event of the conduct of procedural acts or expert examinations, to appear in person at the due time and to cooperate in such measures. Any involuntary violation of the right to physical integrity shall be inadmissible;
3. ...
4. ...
5. to hand over to the Federal Asylum Agency or the Asylum Court all documents and articles available to him at the commencement of the procedure, or without delay if they emerge or become accessible only during the course of the procedure, insofar as they are relevant to the procedure."

...

(4) At the commencement of the procedure, the asylum-seeker shall be informed in a provable manner of his duty of cooperation and the consequences of any breach thereof. He shall also be furnished, insofar as is possible, with an information sheet prepared in a language understandable to him.

3. Can trial judges play a role in the administration of evidence in actions filed by foreign nationals? If so, on what terms (e.g. do trial judges have the authority to examine evidence in detail or do they give a more marginal assessment)? Where applicable, make a

distinction between those actions relating to asylum and those relating to immigration.

*Jugdes shall endeavour ex officio at all stages of the procedure to ensure that relevant information is adduced. Art. 18 of the Austrian Asylum Code 2005 says:*

*"Article 18. (1) The Federal Asylum Agency and the Asylum Court shall endeavour ex officio at all stages of the procedure to ensure that information relevant to a decision is adduced or that incomplete information concerning the circumstances invoked in support of the application is supplemented, that the evidence to substantiate such information is specified or that the evidence offered is complete and, in general, that any explanations required in support of the application are provided. If necessary, evidence is also to be procured ex officio.*

*(2) In the assessment of the credibility of an asylum-seeker's allegations, due account shall be taken of his cooperation in the proceedings. "*

#### C) WEIGHT OF EVIDENCE

4. How and on what terms do trial judges weight the various types of evidence submitted to them in asylum and immigration cases? Is any such weighting determined by national law or by case law? Where applicable, make a distinction between those actions relating to asylum and those relating to immigration.

*There is no legal rule, how jugdes have to weight the various types of evidence. In practice all types of evidence are jugded case by case.*

5. What powers of review does the supreme administrative court have in assessing the evidential weighting of documents? Where applicable, make a distinction between those actions relating to asylum and those relating to immigration.

*The Administrative Court decides cassational. With regard to the scope of the review, the Court cannot rule on the appropriateness of the contested administrative measure. The consideration of evidence is judged only so far, as it has to be logical and coherent and the result of a fair procedure.*

## **2. COMPETENCE OF THE NATIONAL COURT TO ACT OF ITS OWN MOTION IN A EUROPEAN CONTEXT**

1. Where the parties raise preliminary questions, can procedural restrictions be applied? For example, at what point in proceedings may the parties submit preliminary questions? Do those questions have to be submitted in a specific written procedural document or can they be submitted at any time, including at the hearing?

*Parties have no right to raise preliminary questions; they can only suggest that the court should do so by itself.*

2. Has the national court already ruled on the issue of direct applicability in your country of Articles 18 and 47 of the Charter of Fundamental Rights of the European

Union? If so, is the national court which has jurisdiction to rule on disputes concerning actions filed by foreign nationals able or obliged to raise, of its own motion, arguments from these provisions?

*There are no decisions on that issue so far.*

### **3. THE NATIONAL COURT AND EUROPEAN INSTRUMENTS**

1. Do you regularly refer to European case law when handing down judgements? Have you ever referred to the case law of other Member States when handing down judgements?

*The Austrian Administrative Court regularly refers to European case law in it's decisions. In Asylum-Cases the Court also refers to case-law of other Member States, as long as the decisions of those Courts can be found in internet.*

2. Can the national court autonomously interpret Article 1(A) to (F) of the Geneva Convention of 28 July 1951, specifically when abstracting information from Council Directive 2004/83/EC (the so-called Qualification Directive)? Has a conflict ever arisen between the two standards (e.g. in terms of their criteria of attachment or exclusionary clauses)? What solution(s) did the national court adopt, if any?

*The national court can interpret Art 1 (A) to (F) of the Geneva Convention autonomously, but it has to keep the QD in mind. If a conflict between the two standards would arise, it would be - to my mind - a question of a preliminary ruling; national decisions on that issue do not exist so far.*

3. Some European Directives contain provisions which do not have to be transposed, including Articles 5(3), 8(1) and (3), and 17(3) of Council Directive 2004/83/EC (the so-called Qualification Directive), Articles 26 and 27 of Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (the so-called Procedure Directive) and Articles 4(2) and (3), and 7(1) and (2) of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification. Where these provisions have not been transposed, does the national court attach a level of importance to them anyway (soft law, minimal standards, etc.)?

*Yes, these provisions are seen as a "guideline" for interpretation of the transposed law.*

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