Judith Putzer, Asylum Court, Vienna

Judges' power of recognition vis-a-vis new facts or new means of evidence in asylum procedures – overview Austria

I. Institutional framework

Any claim for international protection (asylum/subsidiary protection) is to be brought forward at the federal asylum office (first instance). Against a negative decision of the asylum office a complaint may be lodged with the **Asylum Court**.

The Asylum Act (2005) regulates material and (certain) procedural issues.

Against a decision of the Asylum Court a complaint may be lodged (only) with the Constitutional Court (not with the Administrative Court, although „asylum" is a matter of administrative law: this specific regime formed part of the 2008 amendment of the Asylum Act). A complaint with the Constitutional Court is an extraordinary remedy. It is (by the Constitutional Courts' rules of procedure) only admissible if the decision of the Asylum Court *prima facie* violates provisions of constitutional law. (According to the Austrian constitution, the ECHR forms part of constitutional law, which is of basic relevance esp with regard to subsidiary protection) AND the Constitutional Court does not have full power of recognition with regard to the underlying facts but is bound to the facts found by the Asylum Court (at the time of the Asylum Courts decision).

II. General legal framwork of the asylum procedure before the Asylum Court

(1) In general, the procedures before the Asylum Office **and the Asylum Court** are governed by **general administrative law**. (There is not a „closed" set of specific rules of procedure of the Asylum Court; however, certain specific provisions to be found in the Asylum Act regulate matters of procedure before the Court thus prevailing general administrative law.)

According to general administrative law, the following principles apply (also) in asylum procedures:

- Obligation incumbent on the (asylum) authorities to ascertain the facts *ex officio* (and not leave it to the parties)
- Obligation to establish the material truth
- Free evidentary assessement
- Unlimited numbers of means of evidence.

These principles are applicable at any stage of the procedure. This means, that in general adminstrative procedure, there is full power of recognition (facts and the law) of the autority - also at the appeals stage.

(2) However, Art 40 of the Asylum Act contains **specific norms** with regard to new facts or means of evidence admissible in a complaint against a decision of the asylum office:

Art 40 provides that new facts and means of evidence may only be brought forward in a limited number of cases:

- the factual situation on which the decision of the asylum office was based has substantially changed (after the decision was taken) or
- the procedure before the asylum office was incorrect or

- the applicant did not have access to means of evidence or facts at the time before the decision of the asylum office was taken or
- the applicant (by individual grounds) was not able to bring forward means of relevant evidence or facts at the first instance stage.

In Austrian practice, these provisions are applied in a **restrictive/narrow sense**:

First, Art 40 of the Asylum Act in principle is directed „against" the applicant but not hindering the Asylum Court from ascertaining the facts *ex officio*. As regards „objective" issues, such as COI, but also individual facts, the Court is even **bound** by general administrative law, to establish the **material truth**. This might include conducting an oral hearing.

Second, The Court is bound (by general administrative law) to **fully control** the decision of the asylum office with regard to either violations of procedural rules or incorrect legal conclusions, irrespective of any „new" argumentation (concerning facts or means of evidence) brought forward in the complaint. Thereby, it might be necessary to conduct an oral hearing, eg if the first instance procedure did not include a correct, extensive and conclusive ascertainment of all underlying facts. Within the course of an **oral hearing**, no restrictions apply concerning new facts or new means of evidence. This means in practice, that the whole case might be argued and discussed anew.

Third, according to jurisprudence of the Constitutional Court, Art 40 (especially its para 4) has to be interpreted (*vis-a-vis* the applicant) in a very restrictive sense. The Court found (in a decision concerning a „Dublin" case), that the provision **only applies** in case that the applicant *via* his/her complaint tries to prolongue/extend the procedure in **an abusive way**. In the specific case, the Court found that it was not „abusive" when the applicant tried to demonstrate the fact that he felt his personal safety at risk in the concerned „Dublin state" by including COI documents in the complaint; the „new" material facts had to be part of the decision.
With regard to Art 40 para 4, Austrian jurisprudence also found that one has to bear in mind the fact that an asylum seeker might in his/her specific situation be hindered by **psychological grounds** to bring forward all relevant facts at the beginning of the procedure. Again, it was argued that Art 40 had to interpreted in a narrow sense.

III. Conclusions

Any restriction on facts or means of evidence in the procedure before the Austrian Asylum Court has to applied in a very „cautious" way, thus drawing in line with the findings of the ECHR in the *Chahal* case (the severe/grave consequences of a potentially incorrect decision have to be beared in mind when applying restrictive procedural rules in asylum procedures).

This principle applies likewise in „material" asylum cases and in „Dublin" cases (esp when concerning the use of the sovereignty clause - Art 3 para 2, what according to Austrian jurisprudence is a legal duty under constitutional law, when there are serious grounds to assume that the applicant's rights under the ECHR – specifically its Art 3 – might be violated by his/her transfer to the Dublin State concerned.