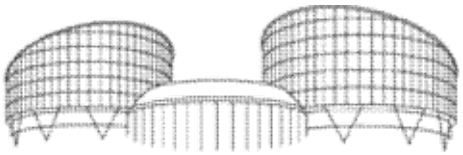

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF MOHAMMADI v. AUSTRIA

(Application no. 71932/12 (/sites/eng/Pages/search.aspx#{"appno":["71932/12"]}))

JUDGMENT

STRASBOURG

3 July 2014

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Mohammadi v. Austria,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Isabelle Berro-Lefèvre, *President,*
Elisabeth Steiner,
Khanlar Hajiyev,
Linos-Alexandre Sicilianos,
Erik Møse,
Ksenija Turković,
Dmitry Dedov, *judges,*

and Søren Nielsen, *Section Registrar,*

Having deliberated in private on 10 June 2014,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 71932/12 (/sites/eng/Pages/search.aspx#{"appno":["71932/12"]})) against the Republic of Austria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Afghan national, Mr Qadam Shah Mohammadi ("the applicant"), on 13 November 2012.

2. The applicant was represented by Mrs N. Lorenz, a lawyer practising in Vienna. The Austrian Government ("the Government") were represented by their Agent, Mr Ambassador H. Tichy, Head of the International Law Department at the Federal Ministry for European and International Affairs.

3. The applicant alleged that his forced transfer to Hungary under the Dublin II Regulation would subject him to inhuman and degrading treatment, that he would face imprisonment under deplorable detention conditions, and that he would run risk of *refoulement* to Serbia.

4. On 20 November 2012 the Court decided to apply Rule 39 of the Rules of Court, indicating to the Government that it was desirable in the interests of the parties and the proper conduct of the proceedings not to expel the applicant to Hungary until further notice.

5. On the same day the Court decided to communicate the application to the Austrian Government and to grant priority to the application under Rule 41 of the Rules of Court. It further requested the Hungarian Government to provide information regarding the status of the applicant's asylum proceedings, as well as the reception conditions for unaccompanied minor asylum-seekers in Hungary.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1995 and currently lives in Rein.

7. He entered Austria on 20 October 2011 and lodged an asylum application. It remained undisputed by the Austrian authorities that at that time he was still a minor, even though his exact date of birth is unknown. He was not accompanied by any family members, nor were any of his relatives present in another member State of the European Union.

8. The applicant stated that he had left his village in Afghanistan three months earlier, crossed the border to Iran and then the border to Turkey by foot. With the aid of a trafficker he reached Istanbul, where he stayed for three days. Together with a group of other refugees, he crossed into Greece by boat, where he was arrested and processed. He was released shortly after with an order to leave the country. He travelled to Athens, where he stayed for a month. He then left Greece together with two other refugees via the Former Yugoslav Republic of Macedonia and Serbia, from where he crossed the border to Hungary by foot.

9. In Hungary, the applicant was arrested and processed. He claimed that he was forced to lodge an asylum request and placed in an open camp. Allegedly, the Hungarian authorities did not give any consideration to the fact that he was a minor. Because he had never planned to stay in Hungary, but wanted to lodge an asylum application in Austria, he left the camp two or three days later and took a train to Vienna.

10. When the applicant was interviewed by the Austrian authorities on 21 October 2011, he stated that he did not want to return to Hungary. He claimed not to know the status of his asylum proceedings there because he was illiterate. In a second interview on 18 November 2011, he stated that he was arrested and detained for three days in Hungary. He was not given enough to eat and suffered from hunger in detention. He claimed that the conduct of the police towards him was rough. Officers were armed at all times, and he was woken up during the night for interviews. He further stated that he was afraid of being sent back to Serbia.

11. When the applicant was asked why he had left Afghanistan, he stated that his family had sent him away so he could live a safer life. His father had died in Afghanistan six years earlier. His mother lived with the applicant and his three young siblings in the Jaghori district in Ghazni province. The precarious security situation and the lack of access to subsistence and education in the region prompted him to leave the country.

12. On 15 December 2011 the Traiskirchen Federal Asylum Office (*Bundesasylamt* – hereinafter "the Asylum Office") rejected the applicant's asylum request and established Hungary's jurisdiction in this regard in accordance with Article 16 § 1 (c) of Council Regulation (EC) No. 343/2003 ("the Dublin II Regulation"). On 11 January 2012 the Asylum Court (*Asylgerichtshof*) quashed that decision pursuant to Article 66 § 2 of the Code of General Administrative Procedure (*Allgemeines Verwaltungsverfahrensgesetz*) on the grounds that the facts had not been established exhaustively. It stated that the Asylum Office had failed to update its country information regarding the risk of *refoulement* of asylum-seekers from Hungary to Serbia. Furthermore, the decision had not established the legal framework under which minors could be detained in Hungary and what the conditions of detention were.

13. On 28 February 2012 the Asylum Office again rejected the applicant's asylum request and ordered his expulsion to Hungary under the Dublin II Regulation. In addition to general information on the situation of asylum-seekers in Hungary, the Asylum Office referred to information obtained from the Austrian Embassy in Hungary dated 25 January and 2 February 2012. According to that information, the detention of minors could not be ordered in Hungary. If a detained refugee claimed to be a minor, an age assessment was ordered and the minor was released if his or her age was confirmed. As regards the evaluation of Serbia by Hungary as a safe third country, the Hungarian authorities stated that they did not have a list of safe third countries and evaluated each case individually. However, in most cases Serbia was considered to be a safe third country. Hungary expelled asylum-seekers to Serbia, if their first asylum proceedings were terminated and there was no obstacle under the *non-refoulement* rule. A person lodging a subsequent asylum request was not allowed to remain in Hungary. The same applied for Dublin returnees if their first asylum proceedings were terminated. If asylum proceedings were

discontinued after an asylum-seeker left Hungary, an asylum request after his or her return under the Dublin regulation was considered a subsequent asylum request. It was further established that appeals against asylum decisions at first instance and during the first proceedings had automatic suspensive effect. However, appeals against decisions in subsequent asylum proceedings did not. It was in any event possible to lodge an appeal against the expulsion order itself. It was then up to the judge's discretion to award the proceedings suspensive effect.

14. When it came to the personal credibility of the applicant, the Asylum Office stated that it found his allegations of having been detained in Hungary for three days unconvincing, as the country information had shown that the detention of minors could not be ordered in Hungary. It further held that the information had shown that Hungary did not practise *refoulement* to Serbia. Finally, the Hungarian authorities had assumed jurisdiction over the applicant's asylum request under Article 16 § 1 (c) of the Dublin II Regulation, which proved that the applicant still had access to asylum proceedings on the merits in Hungary. The Asylum Office concluded that it hence did not consider itself legally obliged to make use of the sovereignty clause and rejected the asylum request.

15. On 20 March 2012 the Asylum Court awarded suspensive effect to the applicant's appeal against that decision, but on 24 September 2012 dismissed it as unfounded. It pointed out that the Hungarian authorities had informed the Asylum Office that they had planned an age assessment, but could not carry it out because the applicant had left the country. Thereupon, on 24 October 2011 the Hungarian authorities had discontinued his proceedings. However, the Asylum Court assumed that because of Hungary's acceptance of jurisdiction under Article 16 § 1 (c) of the Dublin II Regulation the applicant would have access to asylum proceedings on the merits in Hungary. In its reasoning the Asylum Court took note of a letter from the UNHCR Office in Vienna dated 3 February 2012, seemingly citing problems with the techniques of age assessment in Hungary, detention and the detention conditions for asylum-seekers, *refoulement* to Serbia and the fact that a Dublin-returner's asylum request was considered a subsequent asylum request if the proceedings had been discontinued in Hungary. However, the Asylum Court noted a lack of sources in the UNHCR's letter and referred to the recently updated country information obtained by the Austrian asylum authorities, which did not indicate systematic deficiencies in the Hungarian asylum proceedings and reception conditions that would have warranted an extensive use of the sovereignty clause of Article 3 § 2 of the Dublin II Regulation.

16. On 10 October 2012 the applicant lodged a complaint with the Constitutional Court, which was rejected on 22 November 2012. This decision was served on the applicant's counsel on 30 November 2012. An arrest order stated that a transfer of the applicant to the Hungarian authorities was planned for 22 November 2012. At that time, the applicant was still a minor.

17. On 20 November 2012 the Court applied an interim measure under Rule 39 of the Rules of Court and requested the Austrian Government to stay the applicant's transfer to Hungary until further notice. The Austrian Government complied with this request.

18. On 3 December 2012 the Hungarian Government informed the Court that the applicant's asylum proceedings in Hungary had been discontinued on 24 October 2011. The decision had become final on 4 November 2011. The first asylum proceedings would not be reopened upon his return to Hungary. If he was returned to Hungary, an asylum request would be considered a subsequent request which would not have automatic suspensive effect if there were no new circumstances supporting his application but there was a safe third country which he could be returned to. Regarding the issue of appointing a guardian for the minor applicant, the Hungarian authorities stated that unaccompanied minor asylum-seekers were usually immediately assigned a guardian, except when the applicant would reach the age of majority before the decision on the merits was taken.

Unaccompanied minors were placed in a children's home in Fót, where care and education were provided to them according to their age. Having regard to the fact that the applicant would turn 18 on 1 January 2013, it was very unlikely that a guardian would be appointed for him upon his return.

II. RELEVANT DOMESTIC LAW AND INTERNATIONAL INFORMATION

A. Relevant European and Austrian law

1. Council Regulation (EC) No 343/2003 ("the Dublin II Regulation")

19. The Court notes that on 1 January 2014 Regulation (EU) No 604/2013 of the European Parliament and of the Council ("the Dublin III Regulation") entered into force. However, at the time of the decision by the Austrian authorities to expel the applicant to Hungary, the Dublin II Regulation was the applicable legal basis.

20. Under the Dublin II Regulation, 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.

21. 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 may be asked to take charge of the asylum-seeker and examine the application for asylum. The requested State must answer the request within two months of the date of receipt of the 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).

22. 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.

23. Article 19 § 2 provides that appeals and reviews concerning a decision of a requesting member State in which an applicant is informed that his or her request is not being examined by the requesting member State and that he will be transferred to the responsible member State shall not suspend the implementation of the transfer unless the courts and competent bodies so decide on a case-by-case basis.

24. Article 6 of the Dublin II Regulation provides that, the member State responsible for examining an asylum application of an unaccompanied minor shall be that where a member of his or her family is legally present, provided that this is in the best interests of the minor. In the absence of a family member, the member State responsible for examining the application is that where the minor has lodged his or her application for asylum.

25. For more detailed information on proceedings under the Dublin II Regulation see *M.S.S. v. Belgium and Greece* [GC] (no. 30696/09 (/sites/eng/Pages/search.aspx#{"appno":["30696/09"]}), §§ 65–75, ECHR 2011).

2. Austrian Asylum Act

26. Section 5 of the Asylum Act 2005 (*Asylgesetz*) provides that an asylum application must be rejected as inadmissible if, under treaty provisions or pursuant to the Dublin Regulation, another State has jurisdiction to examine it. When rendering a decision rejecting an application, the authority must specify which State has jurisdiction in the matter.

3. Austrian Code of General Administrative Procedure

27. Article 66 § 2 of the Code of General Administrative Procedure provides that the appellate body can quash a decision and remit the matter to the lower instance, if the facts have been established so inconclusively that the renewal of an oral hearing and the issuing of a new decision appears to be indispensable.

B. International documents describing the reception and detention conditions of asylum-seekers in Hungary

28. International documents describing the conditions of detention and reception of asylum-seekers in Hungary are extensively summarised in the judgment in *Mohammed v. Austria* (no. 2283/12 (/sites/eng/Pages/search.aspx#{"appno":["2283/12"]}), §§ 32-50, 6 June 2013). In the paragraphs that follow, the most relevant information will be reiterated, and new developments after the adoption of that judgment will be taken into account.

1. United Nations High Commissioner for Refugees (UNHCR)

29. In October 2012 the UNHCR published a note on Hungary and Serbia as countries of asylum and concluded that it maintained its previously expressed concerns regarding Hungary's ongoing practice of treating the asylum claims of most Dublin transferees as second applications, without guaranteed protection from removal to third countries before an examination of the merits of the asylum claims. The UNHCR was also particularly concerned about Hungary's continuing policy and practice of considering Serbia as a safe third country and returning asylum-seekers to that country without conducting an examination of the merits of their claims.

30. In an update to that note dated December 2012 the UNHCR observed that in November 2012 the Hungarian Parliament had adopted a comprehensive package of legislative amendments, and the UNHCR welcomed these initiatives and the amendments' reported aim of ensuring that asylum-seekers whose claims had not yet been decided might remain in Hungary pending an examination of the merits of their claims, and would not be subject to detention, as long as they applied for asylum immediately. Furthermore, the UNHCR appreciated the State's reported intention to introduce additional legal guarantees concerning detention to ensure, *inter alia*, unhindered access to basic facilities such as toilets, and access for detainees with special needs to appropriate treatment.

31. The UNHCR further observed that Hungary no longer denied an examination of asylum claims on the merits where asylum-seekers had transited via Serbia or Ukraine prior to their arrival in Hungary. Such asylum-seekers were no longer returned to Serbia or Ukraine. In addition, access to asylum proceedings in Hungary had improved for those asylum-seekers transferred to Hungary under the Dublin system whose claims had not been examined and decided in Hungary (in other words, those for whom no final decision on the substance of the asylum claim had been taken). Such asylum-seekers had access to an examination of the merits of their claims upon their return, provided they made a formal application to (re)initiate the examination of the previously made asylum claim. They would then not be detained and could await the outcome of the proceedings in Hungary.

32. Some improvements had also been observed with regard to the detention of asylum-seekers. The UNHCR noted that the number of asylum−seekers detained had significantly declined in 2012. Asylum-seekers who applied for asylum immediately upon their arrival, or at the latest during their first interview with the immigration police, were no longer detained. People who failed to apply immediately, or who otherwise failed to communicate such an intention, continued to be subject to detention for the duration of the entire asylum proceedings.

2. Hungarian Helsinki Committee

(a) Statement on the Status of the Asylum Processes of Asylum-seekers returned under the Dublin II Regulations, 8 April 2013

33. In this statement, the Hungarian Helsinki Committee commented on legislative changes in Hungary which entered into force on 1 July 2013. It raised concerns that there might be a threat that asylum-seekers were placed in alien policing detention upon return to Hungary under the Dublin II Regulation for up to twelve months, if the person already had an expulsion order in Hungary before leaving for another EU member State. Arbitrariness could not be excluded, as detention was up to the discretion of the Office of Immigration and Nationality. The proposed detention regime for asylum−seekers would also foresee the detention of first-time asylum-seekers as well as those whose cases had started even before the adoption of the proposed regulations.

(b) Protection Interrupted – Jesuit Refugee Service Europe, DIASP national Report: Hungary, June 2013

34. The Hungarian Helsinki Committee noted that following the changes in legislation in January 2013 Dublin returnees were now considered as first-time applicants if they did not have a negative decision on the merits in their asylum procedure before leaving Hungary. They had the chance to substantiate the reasons for their application in a detailed “in-merit procedure” and were not detained. Those asylum-seekers who had withdrawn their application, or had received a negative decision on the merits, may however be placed in immigration detention after being returned under the Dublin II Regulation.

(c) Brief information note on the main asylum-related legal changes in Hungary as of 1 July 2013, 28 June 2013

35. In this note, the Hungarian Helsinki Committee concluded that the amendments introducing a separate detention regime for asylum-seekers seriously weakened the judicial review of immigration and asylum detention and the right to appeal in asylum proceedings, and failed to ensure adequate reception conditions.

(d) Country Report: Hungary, update of 30 April 2014, published on the Asylum Information Database (AIDA)

36. The Hungarian Helsinki Committee reported that following the changes in legislation taking effect in January 2013, asylum-seekers would not be automatically detained anymore if they submitted their first asylum application immediately upon apprehension. Those who were returned to Hungary under the Dublin II Regulation were not detained anymore either. Dublin returnees were therefore guaranteed access to the asylum procedures and to a full examination of their asylum claim if it was not yet examined on its merits, or if it was not rejected as manifestly unfounded or if they had not previously withdrawn the claim in writing.

37. From 1 July 2013, pursuant to Act XCIII of 2013, the Asylum Act provides for a newly created detention regime called “asylum detention”. These amendments widen the grounds for detention of asylum-seekers, applicable also to those who submitted their first asylum application immediately upon apprehension or return in the Dublin procedure. Under section 31/A of the Asylum Act, the refugee authority may detain asylum−seekers if their identity or nationality is uncertain; if they absconded from the proceedings; if there is a risk of them obstructing, frustrating or delaying the asylum procedure; if they pose a threat to national security or public order or safety; if the application has been submitted at an airport; or if they have failed to appear on summons. The maximum period of asylum detention is six months. Asylum seekers submitting subsequent applications remain subject to immigration detention.

38. Between July and December 2013, 1762 asylum-seekers were detained under the asylum detention regime. The Hungarian Helsinki Committee observed that since the introduction of that regime, the asylum detention facilities were usually at full capacity. It calculated that on average, approximately 26% of all asylum-seekers were in asylum detention, while the number of male asylum-seekers in detention increased to around 42%. Vulnerable people were not excluded from detention, with the exception of unaccompanied children.

39. Alternatives to detention were available in the form of bail, a designated place to stay, and periodic reporting obligations. However, the Hungarian Helsinki Committee criticised that the scope of application of bail as alternative to asylum detention was not defined clearly enough, which it feared could result in the non-application of this measure in practice. Further, the conditions of assessment were not properly defined by law, which casted doubt on its transparent and coherent application.

40. Concerning conditions of detention, the Hungarian Helsinki Committee noted that the legal amendments relating to asylum detention provided that detention shall be carried out in "closed asylum reception centres", which cannot be established on the premises of police jails or penitentiary institutions. The new rules specified minimum requirements for such facilities, including material conditions such as freedom of movement, access to open air, as well as access to recreational facilities, the Internet and phones, and a 24-hour availability of social assistance from social workers.

41. When carrying out visits to asylum detention facilities in Békéscsaba and Nyírbátor in summer 2013, the Hungarian Helsinki Committee noted that both facilities were at full capacity, which meant that there was a significant increase in the number of detained asylum-seekers. It examined some of the detention orders and observed that the Office of Immigration and Nationality failed to carry out a proper individual assessment of the cases before subjecting asylum-seekers to detention. It criticised that detention orders did not contain any justification why alternatives to detention were not used, despite the consideration of such alternatives being obligatory under the law. Further, it observed that the detention conditions for families were not appropriate; that the majority of the social workers hardly spoke any foreign languages and were mainly performing administrative tasks rather than engaging with the detainees; and that there were no psychologists working at the asylum detention facilities.

42. During a field visit under the auspices of the UNHCR Regional Representation for Central Europe in September 2013, detainees complained about inadequate housing conditions, such as a lack of equipment and cleaning materials, inadequate water quality, and difficulties in practising their religion. Further, there were complaints of a lack of access to specialist medical care. On a positive note, it was found that although the centres were usually at full capacity, there were no problems with overcrowding. Asylum-seekers had outdoor access during the day, and each centre was equipped with a fitness room and

computers with internet access. Religious dietary requirements were always respected. Lawyers, family members and non-governmental organisations were able to access the detention centres, as long as they gave prior notice to the facility.

43. Turning to the issue of possible *refoulement* to countries which Hungary previously considered to be "safe third countries", such as Serbia, the Hungarian Helsinki Committee noted that following the changes in legislation which took effect in January 2013, deportation could no longer be imposed on asylum-seekers during the asylum procedure.

3. UN Working Group on Arbitrary Detention

44. In its Statement on the conclusion of its visit to Hungary from 23 September to 2 October 2013, the UN Working Group on Arbitrary Detention reported on its visits to two detention facilities for irregular migrants and asylum-seekers in Nyírbátor and Békéscsaba. It highlighted the pressure and challenges faced by Hungary as a transit country, having seen a radical increase in the numbers of asylum-seekers in 2013 alone. While in 2012 a total of 2,157 asylum-seekers' applications were registered, in 2013 an estimated 15,000 were registered. It noted that the Government had responded in the last few years with different approaches to the influx of people crossing Hungary's borders. The legislative changes to the Asylum Act that had come into effect in July 2013 had led to some positive changes, such as asylum detention having to be based on individual assessment; the introduction of alternatives to detention such as bail, and benefits such as the availability of social workers to assist those in detention. Unaccompanied minors remained exempted from detention.

45. However, the UN Working Group on Arbitrary Detention expressed its concern that there had been a significant focus on detaining asylum-seekers. The issue of prolonging the detention of an asylum-seeker and the lack of proper judicial review were consistently raised during interviews it conducted. The right to a complaint which could be submitted against a detention order was not often explicitly communicated to those being detained. The Working Group therefore called to the Hungarian Government's attention the fact that the situation of asylum-seekers and migrants in irregular situations needed robust improvements and attention to ensure against arbitrary deprivation of liberty. It recommended that the measures introduced by the recent law, which were considered to be positive, should be implemented in a clear and defined manner. Detention should not be the common and first resort and should be for the shortest possible duration, especially when genuine asylum-seekers may be overlooked or detained unnecessarily without proper justification.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

46. The applicant complained that his forced transfer to Hungary would subject him to treatment contrary to Article 3 of the Convention. Relying on Article 5, he further complained that he would be likely to be detained after his transfer to Hungary, which would subject him to inhuman and degrading treatment. The Court considers that the complaint regarding the detention conditions in Hungary in fact also falls under Article 3, and will consequently be examined under that head. Article 3 reads as follows:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

47. The Government contested that argument.

A. Admissibility

48. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Arguments of the parties

(a) The applicant

49. The applicant stressed that according to the information given by the Hungarian Government, on the application of Rule 39 of the Rules of Court on the applicant, his asylum proceedings would not be reopened if he was returned to Hungary under the Dublin II Regulation, but would be considered a subsequent asylum application which did not have automatic suspensive effect, unless there were new circumstances supporting his application. Hence, the Hungarian Government did not declare expressly that it did not consider Serbia as a safe country anymore, nor did they guarantee that a new asylum application by the applicant would be examined on the merits.

50. The applicant submitted that due to the changes in Hungarian legislation from 1 July 2013 onwards, asylum-seekers were at risk of being systematically detained for up to twelve months, even if they were first-time applicants. He contended that the detention conditions, especially for minors, did not meet European standards, as mistreatment occurred regularly and resisting refugees were tranquillised through sedatives.

51. Turning to the issue of age assessment, the applicant pointed out that in Austria, a formal age assessment did not take place during the asylum proceedings, because under section 15 of the Asylum Act, such an assessment only has to be carried out if the minority of an applicant is in doubt. It followed that the Austrian authorities considered that there was no doubt that the applicant was a minor.

(b) The Government

52. The Government noted that pursuant to the provisions of the Dublin II Regulation, Hungary was the responsible EU member State to examine the applicant's asylum application and had accepted responsibility pursuant to Article 16 § 1 (c) of the Dublin II Regulation. A transfer to the competent member State was inadmissible only if systematic deficiencies in the asylum procedure and the reception conditions for asylum-seekers constituted serious and substantive grounds for the assumption that the applicant was exposed to a real risk of being subjected to inhuman or degrading treatment pursuant to Article 3 of the Convention. A mere possibility, however, could not give rise to a breach of that Article, and it was for the applicant to prove sufficiently that it was very likely that he or she would be exposed to a real, serious and considerable risk within the meaning of Article 3.

53. The Government contended that both the decisions of the Asylum Office of 28 February 2012 and the Asylum Court's ruling of 24 September 2012 had analysed not only the situation of asylum-seekers including the situation faced by Dublin II returnees, the detention practice and a possible *refoulement* in general, but also in particular whether the applicant's transfer in the light of his young age might violate Article 3 of the Convention. This was evident from the fact that the Asylum Court had set aside the Asylum Office's decision in the first set of proceedings because of deficiencies in the investigation. The comprehensive examination in the instant case did not reveal any necessity to make use of the right to conduct the proceedings under Article 3 § 2 of the Dublin II Regulation. With

reference to the UNHCR's Note on Dublin Transfers to Hungary of people who have transited through Serbia, published in December 2012, it could no longer be assumed that refugees who had entered Hungarian territory via Serbia were refused having their asylum application examined on the merits.

54. The Government pointed out that the applicant's age could not be determined during the proceedings in Hungary since he had evaded these proceedings. In Austria, no formal medical assessment took place during the asylum proceedings. The Asylum Office rather relied on the statements made by the applicant himself that he was a minor.

55. Regarding the risk of detention of the minor applicant, the Government made reference to the amendments made by the Hungarian Government in November 2012 to the legal framework applicable to the detention pending expulsion of asylum-seekers. It followed from the above-mentioned Note of the UNHCR that asylum-seekers transferred to Hungary under the Dublin II Regulation were no longer imprisoned if they filed a request for the resumption of the proceedings not yet determined on the merits. There were no unlawful systematic detentions of asylum-seekers in Hungary anymore, and the legal framework was in compliance with human rights obligations.

56. The Government concluded that no violation of the Convention had been discernible in the case at issue. Due to the legal situation and enforcement practice in Hungary, there appeared to be no violation of the rights of asylum-seekers according to the information available to the Austrian courts and authorities, nor was there a real risk for individual asylum-seekers, in particular in the light of the latest developments which were considered to be positive by the UNHCR.

2. The Court's assessment

(a) General principles

57. The Court reiterates at the outset the relevant general principles under Article 3 of the Convention as set out most recently in its decisions on admissibility in the cases of *Mohammed Hussein v. the Netherlands and Italy* ((dec.), no. 27725/10 (/sites/eng/Pages/search.aspx#{"appno":["27725/10"]}), §§ 65-71, 2 April 2013) and *Daybetgova and Magomedova v.Austria* ((dec.) 6198/12 (/sites/eng/Pages/search.aspx#{"appno":["6198/12"]}), §§ 58-64, 4 June 2013) as well as in its recent judgments of *Sharifi v. Austria* (no. 60104/08 (/sites/eng/Pages/search.aspx#{"appno":["60104/08"]}), § 29, 5 December 2013), and *Mohammed* (cited above, § 92).

58. According to the Court's established case-law, Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations, including the Convention, to control the entry, residence and expulsion of aliens (see, among many other authorities, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, § 67, Series A no. 94, and *Boujlifa v. France*, 21 October 1997, § 42, *Reports of Judgments and Decisions* 1997-VI). The Court also notes that the right to political asylum is not contained in either the Convention or its Protocols (see *Vilvarajah and Others v. the United Kingdom*, 30 October 1991, § 102, Series A no. 215, and *Ahmed v. Austria*, 17 December 1996, § 38, *Reports* 1996-VI).

59. However, deportation, extradition or any other measure to remove an alien may give rise to an issue under Article 3, and hence engage the responsibility of the Contracting State under the Convention, where substantial grounds have been shown for believing that the person in question, if removed, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. In such circumstances, Article 3 implies an obligation not to remove the individual to that country (see *Soering v. the United Kingdom*, 7 July 1989, §§ 90-91, Series A no. 161; *Vilvarajah and Others*, cited above, § 103; *Ahmed*, cited above, § 39; *H.L.R. v. France*, 29 April 1997, § 34, *Reports* 1997-III; *Jabari v. Turkey*,

cited above, § 38; *Salah Sheekh v. the Netherlands*, no. 1948/04 (/sites/eng/Pages/search.aspx#{"appno":["1948/04"]}), § 135, 11 January 2007; and *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09 (/sites/eng/Pages/search.aspx#{"appno":["27765/09"]}), § 114, ECHR 2012).

60. In the specific context of the application of the Dublin Regulation, the Court has found before that indirect removal, in other words, removal to an intermediary country which is also a Contracting State, leaves the responsibility of the transferring State intact, and that State is required, in accordance with the Court's well-established case-law, not to transfer a person where substantial grounds had been shown for believing that the person in question, if transferred, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. Furthermore, the Court has reiterated that where States cooperate in an area where there might be implications for the protection of fundamental rights, it would be incompatible with the purpose and object of the Convention if they were absolved of all responsibility *vis-à-vis* the Convention in the area concerned (see, among other authorities, *Waite and Kennedy v. Germany* [GC], no. 26083/94 (/sites/eng/Pages/search.aspx#{"appno":["26083/94"]}), § 67, ECHR 1999‑I). When they apply the Dublin Regulation, therefore, the States must make sure that the intermediary country's asylum procedure affords sufficient guarantees to avoid an asylum-seeker being removed, directly or indirectly, to his country of origin without any evaluation of the risks he faces from the standpoint of Article 3 of the Convention (see *T.I. v. the United Kingdom* (dec.), no. 43844/98 (/sites/eng/Pages/search.aspx#{"appno":["43844/98"]}), ECHR 2000-III, and *K.R.S. v. the United Kingdom* (dec.), no. 32733/08 (/sites/eng/Pages/search.aspx#{"appno":["32733/08"]}), 2 December 2008, both summarised in *M.S.S. v. Belgium and Greece*, cited above, §§ 342 et seq.).

61. The assessment of whether there are substantial grounds for believing that the applicant faces a real risk inevitably requires that the Court assess the conditions in the receiving country against the standards of Article 3 of the Convention (see *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 (/sites/eng/Pages/search.aspx#{"appno":["46827/99"]}) and 46951/99 (/sites/eng/Pages/search.aspx#{"appno":["46951/99"]}), § 67, ECHR 2005‑I). These standards imply that the ill-treatment the applicant alleges he will face if returned must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this is relative, depending on all the circumstances of the case (see *Hilal v. the United Kingdom*, no. 45276/99 (/sites/eng/Pages/search.aspx#{"appno":["45276/99"]}), § 60, ECHR 2001‑II).

62. In order to determine whether there is a real risk of ill-treatment in the present case, the Court must examine the foreseeable consequences of sending the applicant to Hungary, bearing in mind the general situation there and his personal circumstances (see *Vilvarajah and Others*, cited above, § 108 *in fine*). It will do so by assessing the issue in the light of all material placed before it, or, if necessary, obtained *proprio motu* (see *H.L.R.*, cited above, § 37, and *Hirsi Jamaa and Others,* cited above, § 116).

63. If the applicant has not yet been removed when the Court examines the case, the relevant time of the risk assessment will be that of the proceedings before the Court (see *Saadi v. Italy* [GC], no. 37201/06 (/sites/eng/Pages/search.aspx#{"appno":["37201/06"]}), § 133, ECHR 2008, and *A.L. v. Austria*, no. 7788/11 (/sites/eng/Pages/search.aspx#{"appno":["7788/11"]}), § 58, 10 May 2012). A full assessment is called for, as the situation in a country of destination may change over the course of time (see *Salah Sheekh*, cited above, § 136).

(b) Application of those principles to the present case

64. At the outset, the Court notes that the applicant in the instant case was still a minor when the Austrian authorities intended to transfer him to Hungary. However, because the relevant time of the assessment is that of the proceedings before the Court, and the applicant in the meantime has attained full age, the legal regime applicable to minor asylum -seekers in Hungary is not to be addressed in the instant case.

65. The Court observes that the subject matter of the present application is similar to that of the above-mentioned *Mohammed* case. In that judgment of 6 June 2013, the Court came to the conclusion that despite the alarming nature of the reports published in 2011 and 2012 in respect of Hungary as a country of asylum and in particular as regards transferees, in the light of recent changes to Hungarian legislation pertaining to asylum-seekers, the applicant's transfer to Hungary under the Dublin II Regulation would not amount to a breach of Article 3 of the Convention (see *Mohammed v. Austria*, cited above, §§ 102-111). The main question to be considered by the Court is whether there have been significant changes since the adoption of that judgment in the situation for asylum-seekers, and Dublin returnees in particular.

66. The Court therefore takes note of the various reports on Hungary as a country of asylum either referred to by the parties in the application and during the domestic proceedings or obtained *proprio motu*. It also notes, however, that the Hungarian asylum legislation and practice has significantly changed since the applicant lodged the instant application and the parties made their submissions on the merits of the case. The Court therefore will only take into consideration the most recent reports and respective arguments by the parties.

67. The two main complaints by the applicant relate to (i) the risk of arbitrary detention of asylum-seekers and the detention conditions, and (ii) the risk of *refoulement* to Serbia without having his asylum claim considered on the merits. The Court will examine each complaint separately in the following paragraphs.

(i) The applicant's complaints relating to the detention regime and detention conditions for asylum-seekers in Hungary

68. As regards the applicant's complaints directed against the detention practices applicable and the detention conditions for asylum-seekers in Hungary, the Court, referring to the information before it in that respect, acknowledges that they were at least arguable. The country reports showed that there is still a practice of detaining asylum-seekers, and that so-called asylum detention is also applicable to Dublin returnees. The grounds for detention are vaguely formulated, and there is no legal remedy against asylum detention. However, the reports also showed that there is no systematic detention of asylum-seekers anymore, and that alternatives to detention are now provided for by law. The maximum period of detention has been limited to six months. Turning to the conditions of detention, it is noted that while there are still reports of shortcomings in the detention system, from an overall view there seem to have been improvements.

69. Moreover, the Court notes that the UNHCR never issued a position paper requesting EU member States to refrain from transferring asylum−seekers to Hungary under the Dublin II or Dublin III Regulation (compare the situation relating to Greece discussed in *M.S.S. v. Belgium and Greece*, cited above, § 195, and the UNHCR recommendation of 2 January 2013 to halt transfers to Bulgaria).

70. Under those circumstances and as regards the possible detention of the applicant and the related complaints, the Court concludes that in view of the recent reports cited above, the applicant would currently not be at a real and individual risk of being subjected to treatment in violation of Article 3 of the Convention upon a transfer to Hungary under the Dublin Regulation.

(ii) The applicant's complaints relating to access asylum proceedings in Hungary and possible refoulement to Serbia

71. The issue of sufficient access to asylum proceedings allowing an examination of the merits of the applicant's claim in Hungary and the consequent risk of *refoulement* to a third country raises different issues.

72. Concerning the question whether the applicant would have access to asylum proceedings on the merits if returned to Hungary, the Court observes that both the UNHCR as well as the Hungarian Helsinki Committee in their latest reports stated that since the changes in legislation, those asylum-seekers transferred to Hungary under the Dublin system whose claims had not been examined and decided in Hungary had access to an examination of the merits of their claims upon their return (see paragraphs 31 and 36 above). According to the information provided by the Hungarian Government, the applicant has not yet had a decision on the merits of his case. Therefore, the Court notes that he will have the chance to reapply for asylum if returned to Hungary and to have his application for international protection duly examined.

73. When it comes to the alleged risk of *refoulement* to Serbia, recent reports by the UNHCR and the Hungarian Helsinki Committee consistently confirmed that Hungary no longer relied on the safe third country concept and in particular examined asylum applications by Dublin returnees on the merits, as long as there had not yet been a decision on the case. Following the changes in legislation which took effect in January 2013, deportation could no longer be imposed on asylum-seekers during the asylum procedure.

(iii) Conclusion

74. The Court considers that the relevant country reports on the situation in Hungary for asylum-seekers, and Dublin returnees in particular, do not indicate systematic deficiencies in the Hungarian asylum and asylum detention system.

75. The Court therefore concludes that the applicant would currently not be at a real, individual risk of being subject to treatment in contrary to Article 3 of the Convention if expelled to Hungary.

II. RULE 39 OF THE RULES OF COURT

76. The Court reiterates that in accordance with Article 44 § 2 of the Convention, the present judgment will not become final until (a) the parties declare that they will not request that the case be referred to the Grand Chamber; or (b) three months after the date of the judgment, if reference of the case to the Grand Chamber has not been requested; or (c) the Panel of the Grand Chamber rejects any request to refer under Article 43 of the Convention.

77. It considers that the indication made to the Government under Rule 39 of the Rules of Court (see above § 4) must continue in force until the present judgment becomes final or until further notice.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that the applicant's transfer to Hungary would not violate Article 3 of the Convention;

3. *Decides* to continue to indicate to the Government under Rule 39 of the Rules of Court that it is desirable in the interests of the proper conduct of the proceedings not to transfer the applicant to Hungary until such time as the present judgment becomes final or until further notice.

Done in English, and notified in writing on 3 July 2014, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen Isabelle Berro-Lefèvre
Registrar President