

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

FIRST SECTION

CASE OF MOHAMMED v. AUSTRIA

(Application no. 2283/12)

JUDGMENT

STRASBOURG

6 June 2013

FINAL

06/09/2013

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.



In the case of Mohammed v. Austria,

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

Isabelle Berro-Lefèvre, *President,*
Elisabeth Steiner,
Khanlar Hajiyev,
Mirjana Lazarova Trajkovska,
Julia Laffranque,
Linos-Alexandre Sicilianos,
Erik Møse, *judges,*

and André Wampach, *Deputy Section Registrar,*

Having deliberated in private on 14 May 2013,

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

PROCEDURE

1. The case originated in an application (no. 2283/12) 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 a Sudanese national, Mr Salaheldin Mohammed ("the applicant"), on 11 January 2012.

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

3. The applicant alleged under Article 3 of the Convention that his forced transfer to Hungary under the Dublin Regulation would breach that provision and under Article 13 of the Convention that he had lacked an effective remedy in the proceedings concerning his second asylum application made in Austria that would have put a stay on his transfer to Hungary.

4. On 11 January 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 until further notice.

5. On the same date the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1981 and at present lives in Vienna.

7. On 9 October 2010 he arrived in Austria via Greece and Hungary and lodged an asylum application.

8. On 5 January 2011 the Federal Asylum Office (*Bundesasylamt*) declared that Hungary had jurisdiction regarding the asylum proceedings pursuant to Council Regulation (EC) No 343/2003 (the "Dublin II Regulation", hereinafter the "Dublin Regulation") and therefore rejected the applicant's asylum application under section 5 of the Asylum Act 2005. It also ordered the applicant's transfer to Hungary. The applicant did not lodge an appeal against that decision.

9. Subsequently, the applicant went into hiding and thwarted an attempt to detain and forcibly transfer him planned for 5 May 2011.

10. However, on 21 December 2011 the applicant was detained in Vienna. On 22 December 2011 the Vienna Federal Police Authority (*Bundespolizeidirektion Wien*) ordered the applicant's detention with a view to his forced transfer to Hungary.

11. On 30 December 2011 the applicant lodged a second asylum application that had no suspensive effect in relation to the valid transfer order. He referred to the Asylum Court's own practice at that time as regards the transfer of asylum-seekers to Hungary and to the pertinent reports on reception conditions and access to asylum proceedings there (see below).

12. On 2 January 2012 he also lodged a complaint against the detention order, referring to his second asylum application. He referred to a decision of the Austrian Asylum Court (*Asylgerichtshof*) of 1 December 2011 in which the Asylum Court had granted suspensive effect to an appeal lodged by an Algerian asylum-seeker, stating that a real risk of a violation of the European Convention on Human Rights could not be excluded in case of the transfer of asylum-seekers to Hungary under the Dublin Regulation. The Asylum Court had based its reasoning on a letter from the Austrian office of the United Nations High Commissioner for Refugees ("UNHCR") dated 17 October 2011 concerning detention conditions for asylum-seekers in Hungary and the risk of *refoulement* to Serbia (see paragraphs 32-36 below).

13. On 5 January 2012 the Vienna Independent Administrative Panel (*Unabhängiger Verwaltungssenat Wien*) dismissed the complaint against the detention order as unfounded. It stated that the order for the applicant's detention with a view to his transfer had been issued in accordance with the law.

14. On 10 January 2012 the Administrative Court (*Verwaltungsgerichtshof*) dismissed the applicant's motion for his complaint to be granted suspensive effect. It stated that it would only decide upon a complaint against an order for detention with a view to forced transfer and not on the lawfulness of any transfer to Hungary. However, it concluded that the immigration police (*Fremdenpolizei*) would in any event have to refrain from transferring the applicant to Hungary – even if the order was itself valid – if the current situation in Hungary for individuals transferred there under the Dublin Regulation would breach Article 3 of the Convention.

15. On 9 January 2012 the applicant also lodged an application with the Vienna Federal Police Directorate (*Bundespolizeidirektion Wien*) as the competent immigration police authority, asking it to establish that his transfer to Hungary would constitute a risk for him within the meaning of section 50(1) or (2) of the Immigration Police Act (*Fremdenpolizeigesetz*, see paragraph 26 below). On the same date, the Federal Police Directorate rejected the application under section 51 of the Immigration Police Act, stating that such an application would only be allowed in the course of proceedings in which an order prohibiting the recipient from returning to Austria (*Rückkehrentscheidung*), an order for deportation (*Ausweisung*) or an order prohibiting the recipient from residing in the country (*Aufenthaltsverbot*) had been rendered. However, no such proceedings were currently pending against the applicant, which was why the request had to be rejected.

16. The applicant also lodged an application for the transfer order to be lifted with the immigration police. Those proceedings are still pending, as are two further sets of proceedings: one concerns the applicant's detention with a view to his forced transfer and is pending before the Administrative Court, the other concerns his second asylum application and is pending before the Federal Asylum Office.

17. The applicant's forced transfer to Hungary was again scheduled for 12 January 2012. On 11 January 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.

II. RELEVANT DOMESTIC LAW AND INTERNATIONAL INFORMATION

A. Relevant domestic law

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

18. Under the Dublin 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.

19. 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 from 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).

20. 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.

21. 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.

2. The Asylum Act

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

23. Section 12 establishes – with the exception of cases falling under section 12a – *de-facto* protection against deportation (*faktischer Abschiebeschutz*) for aliens who have lodged an application for asylum. However, section 12a provides that a person whose asylum application has been rejected pursuant to lack of jurisdiction under the Dublin Regulation (section 5 of the Asylum Act) is not entitled to such *de-facto* protection against deportation in the event that he or she lodges a second asylum application.

24. Asylum-seekers can lodge an appeal with the Asylum Court against decisions rejecting their application rendered by the Federal Asylum Office

as the first-instance asylum authority within one week of the decision (see section 22(12)). However, section 36(1) stipulates that such an appeal shall not have suspensive effect. Section 37 allows the Asylum Court to grant suspensive effect to such an appeal, or to an appeal against a deportation order issued in conjunction with the rejection of an asylum application, within one week, if it is reasonable to believe that the individual's deportation would give rise to: (i) a real risk of a violation of Articles 2 or 3 of the Convention or of Protocol 6 or Protocol 13 to the Convention; or (ii) a serious threat to his or her life or person as a result of arbitrary violence in connection with an international or internal conflict in relation to which the applicant is a civilian.

25. The Asylum Court is required to decide upon appeals against decisions rejecting an asylum claim within eight weeks (see section 41(2)).

3. Immigration Police Act

26. Section 50(1) and (2) of the Immigration Police Act (*Fremdenpolizeigesetz*) contains a prohibition on *refoulement* arising from the enforcement of deportation orders. Amongst other things, it states that the deportation of an alien to a country of destination is unlawful if it violates Articles 2 and 3 of the Convention or Protocols 6 or 13 to the Convention or if it gives rise to a real threat to the life or the physical integrity of a civilian due to arbitrary violence in the course of an international or internal conflict.

27. During proceedings regarding a prohibition on returning to Austria, deportation or a residence prohibition, the individual concerned was entitled to lodge an application asking the immigration police to determine whether the alien's deportation to a country other than his or her country of origin would be unlawful under section 50 of the Immigration Police Act (see section 51(1) of the Immigration Police Act, as in force at the relevant time). If such an application concerned the deportation of the alien to his or her country of origin, the application was considered an asylum application (section 51(2)). Until a final decision on the application had been taken, he or she could not be deported to the country he or she had specified in making the application under section 51(1), unless the application fell to be rejected as *res judicata*. The proceedings were to be discontinued in the event of the alien's deportation to a third country (section 51(3)).

4. Relevant domestic practice

28. On 31 October 2011 the Austrian Asylum Court quashed a decision of the Federal Asylum Office dismissing an asylum claim in which it had ordered an Afghan national to be transferred to Hungary under the Dublin Regulation. The Asylum Court allowed the asylum proceedings to proceed

in Austria. It stated as follows (see Asylum Court decision of 31 October 2011, No. S4 422020-1/2011/5E):

> "The UNHCR report of 17 October 2011 ... refers to 'general detention of asylum-seekers', adding that judicial review of their detention is 'a mere formality'. Besides this, the report states that the 'main problem' is 'ill-treatment by the police in detention facilities' and that 'it appears that ill-treatment and harassment by the police are a daily occurrence'.
>
> These serious allegations support the conclusion that assaults by the police on asylum-seekers are not merely isolated incidents. The existence of such reports by the UNHCR – which in any event carries weight as the designated authority in assessing such matters – indicates the need for closer investigation of the issues they raise in relation to the European Convention on Human Rights.
>
> This will involve determining which specific and verifiable cases form the basis for the UNHCR's finding that there is a general practice of detaining asylum-seekers (specifically, returnees within the meaning of the Dublin II Regulation); to that end, in so far as these can be ascertained, statistical data and the views of the Hungarian authorities may also be useful in investigating the situation. In addition, there is a need for further investigations regarding the number and nature of assaults by police officers on asylum-seekers in detention pending deportation (measured in relation to the number of asylum-seekers in Hungary), and also whether officials involved in assaults of this kind face any legal consequences, and whether such consequences have had any practical effect.
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> The UNHCR mentions as a further problem the fact that, under the Dublin II Regulation, Hungary treats returning asylum-seekers as repeat applicants; this means that appeals against negative decisions concerning them do not have automatic suspensive effect, and the Hungarian authorities send any asylum-seekers who have entered Hungary via Serbia ... back to Serbia, as a safe third country. In the light of the Hungarian Helsinki Committee's report of September 2011, the criticisms expressed by the UNHCR cannot be dismissed as irrelevant from the outset; as a result, it appears necessary to establish – for example, through statistical data – the extent to which asylum-seekers who are returned to Hungary by Austria under the Dublin II Regulation, having previously entered Hungary via Serbia, are able in practice to secure proceedings on the merits there or a substantive review of their grounds for protection against *refoulement*, coupled with access to an effective legal remedy. ..."

29. On 28 November 2011 the Asylum Court quashed the dismissal of an asylum application made under the Dublin Regulation by the Federal Asylum Office and an associated order for the claimant to be transferred to Hungary. It stated that it held the view that forced transfer to Hungary was, in general, lawful, after having conducted an individual examination of the case. However, it noted that in the case before it the Federal Asylum Office had based its evaluation of the situation of asylum-seekers in Hungary on outdated reports and had not taken into consideration newer sources, including documents such as a letter from the UNHCR dated 17 October 2011, a report by the Hungarian Helsinki Committee dated April 2011 on detention conditions in Hungary and another report from that body dated September 2011 on the issue of whether Serbia could be considered a safe

third country. It confirmed that the Federal Asylum Office would have to investigate the issue of the detention in Hungary of individuals transferred there under the Dublin Regulation, including the conditions of their detention, allegations of police violence in detention centres that had been made, and their access to asylum proceedings and effective legal remedies (see Asylum Court decision of 28 November 2011, No. S16 422704-1/20110).

30. The Asylum Court took similar decisions in a number of other cases: for example, on 30 November 2011 (No. S4 422775-1/2011/2E), on 1 December 2011 (No. S21 422754-1/2011) and on 5 December 2011 (Nos. S7 422195-1/2011; S7 422194-1/2011; S7 422197-1/2011).

31. In a number of cases the Asylum Court awarded suspensive effect to complaints against decisions of the Federal Asylum Office ordering transfer to Hungary under the Dublin Regulation, for example on 1 December 2011 (Nos. S15 422847-1/2011 and S3 422772-1/2011) and on 12 December 2011 (No. S6 422809-1/2011).

B. Relevant domestic and international information on Hungary

1. Letter from the Austrian office of the United Nations High Commissioner for Refugees dated 17 October 2011 and subsequent developments

32. Upon a request of the Asylum Court, the Austrian office of the United Nations High Commissioner for Refugees ("UNHCR") made the following statements regarding the situation of asylum-seekers in and individuals transferred under the Dublin Regulation ("transferees") to Hungary.

33. Asylum-seekers and transferees were taken into detention immediately after their arrest for illegal entry or residence in Hungary. Only unaccompanied minors were not detained. The detention of asylum-seekers had become increasingly commonplace since April 2010. Following an amendment of the law, detention could also be ordered during the conduct of substantive asylum proceedings and could last for up to twelve months. Detention orders needed to be judicially approved. However, the results of the UNHCR's investigation showed that judicial review was only a formality and did not lead to a substantive review of the grounds for detention.

34. The facilities used for the detention of asylum-seekers partly operated under a high-security regime, including, for example, furniture which was fixed in place, barred cells and visiting regulations. Depending on the facility, privileges were granted, such as only being locked in the cell during the night, and access to outside activities, sanitary facilities and common areas. Furthermore, social workers were employed and internet

access was granted. However, the main problem that had been established after interviews were conducted by the UNHCR with detainees in September 2011 related to allegations of abuse by police officers in the detention facilities. It thus seemed that abuse and harassment by the authorities occurred on a daily basis. A Syrian asylum-seeker had been brutally beaten up on the day of the UNHCR visit; another asylum-seeker had been the victim of a different incident only days before the visit. All the asylum-seekers interviewed had complained of police brutality. According to their statements, not all police officers were violent, but a number of officers began by provoking the detainees and proceeded to beat them up and to abuse them verbally. Asylum-seekers also reported having been systematically drugged with tranquilisers, even occasionally to the extent of the development of an addiction. That last piece of information was confirmed by employees of refugee centres to which asylum-seekers had been sent after their detention was lifted. Finally, detained asylum-seekers were forced to conduct their administrative dealings in handcuffs, even though their detention was only the result of illegal entry to or residence in the country.

35. Contrary to UNHCR recommendations, Hungary still viewed Serbia as a safe third country and expelled asylum-seekers and transferees who had come into Hungary from Serbia back to Serbia without them having access to substantive asylum proceedings. The Hungarian authorities conducted substantive proceedings examining the asylum-seekers' original flight reasons in only 20% of all asylum applications. The practice of Hungarian courts concerning appeals differed widely: whilst the court in Budapest had ordered the substantive examination of an asylum application in several cases following UNHCR recommendations, appeals decided by the Szeged court, which had jurisdiction over most asylum-seekers travelling via Serbia, were usually dismissed without a thorough examination. Based on the information available to the UNHCR, Hungary did not transfer asylum-seekers to Greece at the present time.

36. Finally, transferees were considered applicants lodging second asylum applications, which led to their appeals against decisions dismissing their asylum claims not automatically being given suspensive effect. Furthermore, access to other services was limited in comparison to new applicants.

2. UNHCR: Hungary as a country of asylum, April 2012

37. The UNHCR report stated as regards access to asylum proceedings that such access was, in general, available in Hungary for applicants, both in-country and at the airport. However, access had proven problematic for those in detention, for transferees and for those entering Hungary via Serbia (paragraph 19 of the report. All references in this section are to paragraphs of the report unless otherwise stated). As regards access for transferees, the

report highlighted that asylum-seekers transferred to Hungary under the Dublin Regulation were not automatically considered to be asylum-seekers by the Hungarian authorities. They therefore had to reapply for asylum once they had been transferred to Hungary, even if they had previously sought asylum in another EU Member State, and irrespective of the fact that they had been transferred in accordance with the Dublin Regulation. These applications were considered second applications. In most cases, upon return to Hungary, the issuance of a deportation order was automatically followed by placement in administrative detention. Applicants were required to show new elements in support of their claims which were additional to those raised in their initial applications. Following legislative amendments in December 2010, second applications did not have automatic suspensive effect on deportation orders in all cases. As a result, asylum-seekers transferred to Hungary under the Dublin Regulation were generally not protected against deportation to third countries, even if the merits of their asylum claims had not yet been examined. In sum, the report stated that applicants subject to the Dublin Regulation might not have access to asylum proceedings (paragraph 20). The report recommended that Hungary ensure full access to asylum proceedings in all circumstances envisaged by applicable international standards.

38. As regards the reception conditions for asylum-seekers in Hungary, the report observed that its reception system was camp-based. Asylum-seekers and refugees had in the past been hosted in open reception centres run by the Office for Immigration and Nationality (hereinafter "OIN") and provided with in-kind assistance. By 2010, that practice was superseded by a policy of extensive detention of asylum-seekers unlawfully entering or staying in the country. Most asylum-seekers were accommodated in one of the four permanent administrative detention facilities run by the police in Budapest, Győr, Kiskunhalas and Nyirbátor. Families with children, married couples and single women were accommodated in a temporary detention facility in Békéscsaba. Unaccompanied children were hosted in the Home for Separated Children in Fót. Recognized refugees and individuals benefiting from subsidiary protection status were accommodated in the OIN's open reception centre in Bicske. Asylum-seekers who had spent 12 months in detention and submitted second applications were, since June 2011, placed in the OIN open reception centre in Balassagyarmat (paragraphs 28 and 29).

39. The report noted that the reception conditions and services in place at that time in Hungary continued to fall short of international and European Union reception standards. Persons of concern were kept in isolation in OIN reception centres during often lengthy asylum proceedings. Limited access to language learning and the isolation of the facilities prevented them from establishing contact with society in the host country (paragraph 31). Persons of concern in Debrecen and Balassagyarmat complained of insufficient

medical services, citing superficial medical examinations, the lack of specialised services, difficulties repairing and replacing broken glasses and prohibitively expensive dental treatment. Different health problems were often treated with the same generic medication, and there were reports that medical problems were often not fully addressed. Heavily medicated in detention, by the time they arrived in Balassagyarmat some had become practically dependent on tranquilisers. There had been reported cases of hepatitis and drug addiction and many suffered from psychological problems that were inadequately addressed (paragraph 33).

40. The facility in Debrecen was considered particularly problematic, with residents reporting toilets and bathrooms in poor condition, buildings infested with cockroaches despite regular fumigation, frequent shortages of hot water in the building housing vulnerable people, and the insufficient quality and quantity of hygiene packages. Further information concerned insufficient attention being paid to dietary needs, a lack of flexibility in the provision of meals and the poor quality of meals provided in Balassagyarmat (paragraph 34). The report also referred to tensions between different groups of asylum-seekers and serious security threats arising from fights breaking out between residents from different ethnic groups (paragraph 35). Also, nightly police checks in the Debrecen facility were often conducted in a harsh manner without respect for privacy and dignity. The atmosphere in Balassagyarmat was tense, with many verbal arguments reported. Security checks had had a particularly negative impact on patients treated for post-traumatic stress disorder (paragraph 37). Asylum-seekers in Debrecen reported that they were not given sufficient information about the asylum procedures governing their individual cases. In Balassagyarmat, residents also reported that neither the grounds for their detention nor the next steps in their cases were adequately explained. Finally, there was no external oversight or quality control monitoring mechanism in place with regard to reception conditions in Hungary (paragraphs 40 and 41).

41. As regards the detention of asylum-seekers, the UNHCR noted that since April 2010, detention had become the rule rather than the exception in Hungary. On 24 December 2010 amendments of the legislation relevant to asylum-seekers and refugees had entered into force, making it possible to detain asylum-seekers while the merits of their cases were being reviewed, increasing the maximum length of administrative detention to twelve months and authorising the detention of families with children for up to thirty days (paragraph 43). Hungary had imposed prolonged periods of administrative detention upon asylum-seekers without providing avenues to effectively challenge the detention once ordered or considering alternatives to detention. Judicial review of administrative detention of asylum-seekers was ineffective in Hungary in many instances, as courts failed to address the lawfulness of detention in individual cases, or to provide individualised reasoning based upon the specific facts of the case and the circumstances of

the applicant (see paragraph 46). The report also referred to the issue of the legal aim of administrative detention – to ensure the availability of the person in case of deportation – and the Court's case-law in this regard (see *Lokpo and Touré v. Hungary*, no. 10816/10, §§ 22 et seq., 20 September 2011).

42. Permanent detention facilities had been renovated and applied a high-security regime, even where residents had only committed the minor offence of illegal entry or stay. Detained asylum-seekers vehemently complained of the violent behaviour of the guards. While not every guard behaved in an inappropriate manner, some particular guards and indeed entire shifts allegedly harassed detainees verbally and even physically. Detained asylum-seekers also complained of having been systematically given drugs/tranquilisers, resulting in some of them becoming addicted by the end of their detention terms. When escorted from the facility to court or administrative hearings, detained asylum-seekers were handcuffed and led in chains, methods which were normally used on the accused in criminal proceedings (paragraph 50).

3. Reports by the Hungarian Helsinki Committee

(a) Stuck in Jail – Immigration Detention in Hungary (2010), April 2011

43. The report was published in the furtherance of the NGO's mandate to regularly monitor detention facilities in Hungary. It noted firstly that until 2010, four immigration detention centres were operational in Hungary, namely Kiskunhalas, Nyíbátor, Győr and Budapest Airport. Between April and July 2010, eleven new immigration detention centres were opened in different locations, including in Baja, Debrecen, Kiskunhalas, Nyíbátor, Salgótárján, Sopron. Nine of these facilities had been operated as jails; many had been closed down years ago and had not been used since. The report published the NGO's findings after visiting the nine new, temporary immigration detention centres in August 2010.

44. The Hungarian Helsinki Committee remarked on the fact that the recently established detention scheme for immigrants treated them as criminals, even though illegal border-crossing was considered a petty offence in Hungarian law. It further noted a high-security regime was in operation in some of the detention facilities visited, such as those in Kiskunhalas, Nyíbátor and Salgótárján. As regards the Salgótárján, Nyíbátor and Baja facilities, the report also observed unacceptable physical and hygiene conditions. It further noted a lack of necessary medical and psychological care in almost all detention facilities visited and a general problem of forced inactivity and deprivation of time outdoors. Furthermore, in almost all detention centres visited, the detainees reported that they were not receiving a sufficient amount of food. A major shortcoming was detected in that Hungarian legislation concerning the immigration police did

not set forth different rules to be applied to vulnerable people with specific needs. The Hungarian Helsinki Committee also stated that it had found two unlawfully detained minors upon its visits, even though immigration detention of unaccompanied minors was explicitly prohibited by the Immigration Act. It also remarked on the fact that legal challenges to their detention brought by asylum-seekers had often failed, as courts reviewing detention matters appeared to carry out a purely formal assessment of whether there was a legal basis for it, without examining if detention was "lawful" within the meaning of Article 5 of the Convention. Finally, it observed that protests, violent acts and self-harm had frequently occurred at some immigration detention centres since the opening of those facilities, which showed, according to the NGO, a clear correlation with the physical conditions and the detention regime applied in the various detention centres.

(b) Serbia as a Safe Third Country: A Wrong Assumption, September 2011

45. The report was triggered by a significant increase in the number of asylum-seekers returned by the Hungarian authorities to Serbia in 2011. In its executive summary it concluded that there was only limited access to asylum proceedings for asylum-seekers in Serbia; that asylum-seekers returned to Serbia were at risk of *refoulement*; and that assistance and reception conditions in Serbia did not meet the needs of asylum-seekers. Overall, the Hungarian Helsinki Committee stated that Serbia could not be regarded as a safe third country for asylum-seekers.

(c) Access to protection jeopardised; Information note on the treatment of Dublin returnees in Hungary, December 2011

46. The Hungarian Helsinki Committee summarised its report by stating that in its opinion, Hungary at that time did not provide appropriate reception conditions and access to asylum proceedings to asylum-seekers transferred to it under the Dublin procedure. This assessment was based on the practice that asylum-seekers transferred under the Dublin procedure were, in general, immediately issued with a deportation order, irrespective of their wish to seek asylum. Transferees who had previously submitted an asylum claim in Hungary could not continue their previous (discontinued) asylum proceedings. If they wished to maintain their claim, it would be considered as a second application for asylum, which had no suspensive effect on deportation measures. Based on the automatically-issued deportation order, the majority of transferees were routinely placed in immigration detention without consideration of their individual circumstances or alternatives to detention. Finally, transferees who were not detained were deprived of proper reception conditions, as their "second" asylum claim did not entitle them to accommodation and support services normally provided to asylum-seekers.

4. UNHCR: Notes on Dublin transfers to Hungary of people who have transited through Serbia, observations on Hungary as a country of asylum of October 2012 and December 2012

47. 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.

48. 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.

49. The UNHCR further observed that Hungary no longer denied an examination on the merits of asylum claims 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 might await the outcome of the proceedings in Hungary.

50. 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.

C. Relevant international information on Sudan

51. The Country Report on Human Rights Practices for 2011 in respect of Sudan issued by the United States Department of State stated in its Executive Summary that Sudan was a republic transitioning, after the secession of South Sudan, toward a new constitution from a power-sharing arrangement established by the 2005 Comprehensive Peace Agreement. The National Congress Party controlled the government. In April 2010 the country had held its first national, multiparty elections in twenty-four years. However, the elections had not met international standards. In January 2011 ninety-eight percent of eligible voters voting in a referendum concerning the secession of South Sudan from Sudan had voted in favour of secession. The Republic of South Sudan had formally gained its independence in July 2011. A referendum on the status of Abyei which had been planned to be held simultaneously with the secession referendum had not been held, and consultations in Southern Kordofan had been postponed. Blue Nile consultations had been concluded, but the recommendations had not been implemented by year's end. Conflict had continued in Darfur and in the three border areas of Abyei, Southern Kordofan and Blue Nile – termed the "Three Areas".

52. The main human rights abuses documented included government forces and government aligned groups committing extrajudicial and other unlawful killings, security forces committing torture, beatings, rape and other cruel and inhuman treatment or punishment, and prison and detention conditions being harsh and life-threatening. Other major abuses concerned arbitrary arrests and arbitrary, incommunicado, and prolonged pre-trial detention, executive interference with the judiciary and denial of due process, obstruction of humanitarian assistance, restrictions of freedoms of speech, press, assembly, association, religion and movement, harassment of internally displaced persons, restrictions on privacy, violence against women including female genital mutilation, child abuse including sexual violence and recruitment of child soldiers, human trafficking, violence against ethnic minorities and forced and child labour. Except in rare cases, the government did not take any steps to prosecute or punish officials in the security services and elsewhere in the government who committed abuses. The impunity of security forces remained a serious problem. Rebels in Darfur and the Three Areas also committed abuses during the year 2011.

53. The Amnesty International Annual Report 2012 on Sudan also referred to widespread human rights abuses in the course of the armed conflicts in Darfur and the Three Areas. Attacks in Darfur including aerial bombardments had been carried out by government forces and allied militia

and there had been ground attacks in and around towns and villages, including camps for internally displaced people. The UN Humanitarian Coordinator estimated that over 70,000 people had been displaced by the fighting since December 2010. The government restricted access to UNAMID and humanitarian organisations, preventing them from carrying out monitoring and from providing essential services to civilians.

54. As regards the Three Areas, the report stated that in May 2011 the Sudanese Armed Forces ("SAF") overran Abyei town. Those attacks forcibly displaced the entire population of the town and the surrounding villages, over 100,000 people, to South Sudan. The attack followed a series of armed clashes between the SAF and the Sudan People's Liberation Army between January and May. In June 2011 a UN Interim Security Force for Abyei was established to demilitarise the area. Its mandate was prolonged in December 2011. Conflict also erupted in Southern Kordofan in June between the SAF and an armed opposition group. The Sudanese government repeatedly carried out indiscriminate aerial bombardments, killing and wounding civilians. A report published in August 2011 by the Office of the High Commissioner for Human Rights detailed unlawful killings, mass destruction and looting of civilian property and other allegations that would amount to war crimes and crimes against humanity. In September conflict spread to Blue Nile State and President al-Bashir declared a state of emergency, replacing the governor with a military governor. People displaced by the fighting, over 300,000 from Southern Kordofan and over 55,000 from Blue Nile, were forced to seek refuge in other areas, including western Ethiopia, Yida in South Sudan's Unity State, and Upper Nile State. However, on 8 and 10 November 2011, SAF forces bombed the Upper Nile and Yida areas. The Sudanese Government denied access to international human rights and humanitarian organisations throughout the year.

55. Inter-communal violence also continued in southern Sudan. The high prevalence of small arms exacerbated clashes and human rights abuses against civilians by armed opposition groups and government forces.

56. The Human Rights Watch World Report 2013 on Sudan stated in its executive summary paragraphs that Sudan's relations with South Sudan had deteriorated in early 2012, leading to clashes along the shared border in April 2012. Although the two governments had signed an agreement in September to allow for the resumption of oil production, fighting between Sudanese government forces and rebel movements had continued in Darfur, as well as in Southern Kordofan and Blue Nile states where Sudan's indiscriminate bombardment and obstruction of humanitarian assistance had forced more than 170,000 people to flee to refugee camps in South Sudan. Student-led protests in Sudan's university towns had intensified in response to wide-ranging austerity measures and political grievances. From June to August, riot police and national security officials had violently dispersed a

wave of protests, with hundreds arrested, at least twelve protestors shot dead and others detained and subjected to harsh interrogations, ill-treatment and torture. Sudanese authorities had also harassed and arbitrarily arrested and detained other perceived opponents of the government, including suspected members of the Sudan People's Liberation Movement/North, which was banned in September 2011, members of other opposition parties, civil society leaders and journalists.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 AND ARTICLE 13 OF THE CONVENTION

57. The applicant complained that his forced transfer to Hungary would subject him to treatment contrary to Article 3 of the Convention, which reads as follows:

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

58. He further complained of a violation of Article 13 of the Convention, which provides as follows:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

A. Admissibility

59. The Government submitted that the application was inadmissible because domestic remedies had not been exhausted. Firstly, the applicant had failed to lodge an appeal with the Asylum Court against the decision of the Federal Asylum Office of 5 January 2011. The applicant could have lodged a complaint against a decision of the Asylum Court with the Constitutional Court and could have asked the Constitutional Court to grant suspensive effect to the proceedings. However, the applicant had failed to lodge an appeal against that first-instance asylum decision.

60. Secondly, the proceedings concerning the applicant's second asylum application were still pending at first instance. In that connection, the applicant had also not exhausted the domestic remedies available to him.

61. The applicant contested the Government's conclusions and stated that the reports raising awareness of the deterioration of reception conditions and detention practice in Hungary had only begun to be published from April 2011 onwards. In this respect, the applicant referred to

the relevant reports by the Hungarian Helsinki Committee of April 2011 and September 2011, the Court's judgment in *Lokpo and Touré* (cited above) of September 2011 and the letter from the UNHCR's Austrian office of October 2011. However, when that alarming information had become known to the applicant, the deadline of one week to lodge an appeal against the decision of the Federal Asylum Office of 5 January 2011 had long since passed. The Asylum Court would also only have had one week to decide on a request to grant suspensive effect, and it was unlikely that suspensive effect would have been granted to any appeal brought by the applicant on the basis of the information available at the relevant time in early 2011.

62. The applicant further maintained that the present pending asylum proceedings were not an effective domestic remedy considering the lack of protection against deportation or forced transfer.

63. The Court considers that there is a close connection between the Government's argument as to the exhaustion of domestic remedies and the merits of the complaints made by the applicant under Article 13 of the Convention. It therefore finds it necessary to join this objection to the merits. Furthermore, the Court finds that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and that no other reasons for declaring the application inadmissible have been established. It must therefore be declared admissible.

B. Merits

1. Alleged violation of Article 13 of the Convention

(a) The parties' submissions

64. The applicant observed that his second asylum application had not had suspensive effect on any steps taken in furtherance of the Dublin Regulation transfer order originating from the proceedings concerning his first asylum application. The applicant could therefore have been transferred to Hungary without any additional substantive judicial or administrative review of the case having taken place and thus without a change of circumstances being taken into account by the domestic authorities.

65. The applicant asserted that – in the course of the proceedings concerning his second asylum application – he had availed himself of every remedy available and had tried to stop his transfer to Hungary. However, on 9 January 2012 the immigration police had rejected his application by which he had sought to have them examine the lawfulness of his forced transfer to Hungary, which had proved that there had been no effective "non-*refoulement*" procedure as described by the Government (see paragraph 68 below). The decision as to whether to conduct the foregoing examination had been wholly discretionary on the part of the immigration police. Such a decision had also not been subject to judicial review.

66. The Government reiterated that in their opinion the applicant had not exhausted domestic remedies, given that he had not lodged an appeal against the decision of the Federal Asylum Office in the first set of proceedings. The Government referred to the Asylum Act 2005 and the legal remedies established therein against a decision rendered by the Federal Asylum Office at first instance. Acknowledging that an appeal lodged against such a decision had no automatic suspensive effect, but that it could be awarded such effect, they explained that even though a deportation or transfer order might be legally enforceable, the authorities were barred from executing it until the seven-day period in which the Asylum Court could award suspensive effect to an appeal lodged with it had passed. Furthermore, current Austrian law reflected the principles and provisions laid out in the Dublin Regulation itself, in particular in its Article 19 § 2. Finally as regards legal remedies, the Asylum Court had to take a decision on an appeal for which suspensive effect had been granted within two weeks. The Government concluded that the remedies provided in Austrian law successfully balanced the various interests involved and had provided the applicant with an effective avenue of appeal, one which had allowed for the award of suspensive effect if there had been a real risk of a violation of Article 3 of the Convention upon his transfer, combined with a guarantee of a speedy appeal decision.

67. Turning then to proceedings concerning second asylum applications, the Government explained that an applicant against whom a negative decision based on the Dublin Regulation had already entered into force did not benefit from *de-facto* protection against transfer when he or she filed a second asylum application in Austria. In such a case, a transfer to the responsible Member State was possible even prior to a decision on the second asylum application being taken at first instance.

68. However, the Government emphasised that the principle of non-*refoulement* had in any event to be respected by the immigration police when they sought to enforce a transfer order. Furthermore, the Federal Asylum Office and the Asylum Court had to inform the immigration police of the filing of a second asylum application and any issues concerning *de-facto* protection against transfer in order to ensure that the immigration police were informed at all times of the actual status of an applicant's case and any possible issues regarding protection against forced transfer. The Immigration Police Act therefore guaranteed an automatic examination of the issue of *refoulement* prior to any transfer being executed by the immigration police. In that examination, the authorities were also able to take into account a change of situation that could not, because of the time of its occurrence, have been taken into consideration by the asylum authorities in the prior proceedings. If the application of the principle of non-*refoulement* forbade the transfer of an applicant, the applicant's presence in Austria would be tolerated and he or she would be issued a

permit. In sum, the Government considered that the additional layer of examination concerning the issue of *refoulement* had provided the applicant with an effective remedy within the meaning of Article 13 of the Convention.

(b) The Court's assessment

(i) General principles

69. The Court has held on many occasions that Article 13 of the Convention guarantees the availability at national level of a remedy with which to enforce the substance of the Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief. The scope of the Contracting States' obligations under Article 13 varies depending on the nature of the applicant's complaint; however, the remedy required by Article 13 must be "effective" in practice as well as in law (see *Kudła v. Poland* [GC], no. 30210/96, § 157, ECHR 2000-XI; *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, § 288, ECHR 2011; and *I.M. v. France*, no. 9152/09, § 128, 2 February 2012).

70. The Court has further specified that the "effectiveness" of a "remedy" within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant. Nor does the "authority" referred to in that provision necessarily have to be a judicial authority; but if it is not, its powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective. Also, even if a single remedy does not by itself entirely satisfy the requirements of Article 13, the aggregate of the remedies provided for under domestic law may do so (see *Gebremedhin [Gaberamadhien] v. France*, no. 25389/05, § 53, ECHR 2007-V § 53; *M.S.S. v. Belgium and Greece*, cited above, § 289; and *I.M. v. France*, cited above, § 129).

71. As noted above, in order to be effective the remedy required by Article 13 must be available in practice as well as in law. In particular, this requires availability in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State (see *Çakıcı v. Turkey* [GC], no. 23657/94, § 112, ECHR 1999-IV). Article 13 requires the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision (see *Jabari v. Turkey*, no. 40035/98, § 48, ECHR 2000-VIII). Particular attention should be paid to the speed of the remedial action itself, it not being excluded that the adequate nature of a

remedy can be undermined by its excessive duration (see *Doran v. Ireland*, no. 50389/99, § 57, ECHR 2003-X).

72. Lastly, in view of the importance which the Court attaches to Article 3 of the Convention and the irreversible nature of the damage which may result if the risk of torture or ill-treatment materialises, the effectiveness of a remedy within the meaning of Article 13 imperatively requires close scrutiny by a national authority (see *Shamayev and Others v. Georgia and Russia*, no. 36378/02, § 448, ECHR 2005-III), independent and rigorous scrutiny of any claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 (see *Jabari*, cited above, § 50), and a particularly prompt response (see *Batı and Others v. Turkey*, nos. 33097/96 and 57834/00, § 136, ECHR 2004-IV (extracts)). It also requires that the person concerned should have access to a remedy with automatic suspensive effect (see *Čonka v. Belgium*, no. 51564/99, §§ 81-83, ECHR 2002-I; *Gebremedhin [Gaberamadhien]*, cited above, § 66; *M.S.S. v. Belgium and Greece*, cited above, §§ 290-293; and *I.M. v. France*, cited above, §§ 132-134).

(ii) Application of those principles to the present case

73. In the present case, the question of an effective remedy refers to a remedy that would have been able to stay the execution of the January 2011 transfer order while the claim made by the applicant after his apprehension in December 2011 that his forced transfer to Hungary would breach his rights under Article 3 of the Convention was examined on its merits. The Court notes that the Government made submissions with regard to three different parts of the proceedings and will now examine those different stages in turn.

(α) The first set of asylum proceedings

74. The Government contended that the applicant had failed to exhaust domestic remedies, as he had not lodged an appeal against the decision of the Federal Asylum Office of 5 January 2011 in which his asylum application had been rejected under the Dublin Regulation and his transfer to Hungary ordered. However, the Court notes that, as argued by the applicant (see paragraph 61 above), the criticism raised with regard to the detention practices affecting asylum-seekers in Hungary, the conditions of their detention and the problems in relation to transferees' access to asylum proceedings and the risk of *refoulement* only became widely known after the decision on the applicant's application had been rendered. The first report of the Hungarian Helsinki Committee as regards immigration detention dated from April 2011, the UNHCR Regional Office's letter from 17 October 2011 and the UNHCR report on Hungary as a country of asylum from April 2012. The Austrian Asylum Court's practice of staying transfers to Hungary and seeking an update on the country of origin information

concerning Hungary maintained by the Federal Asylum Office spanned the period from the end of October until December 2011. The Court is therefore able to subscribe to the applicant's argument that at the relevant time, when he would have been able to lodge an appeal against the first-instance asylum decision and the transfer order, he was not aware of the problems that asylum-seekers faced in Hungary which were later raised by the reports mentioned above. The Court reiterates that the only remedies which are required to be exhausted under Article 35 § 1 of the Convention are those that relate to the breach alleged and are available and effective (see *Diallo v. the Czech Republic*, no. 20493/07, § 54, 23 June 2011). In view of the specific complaints raised by the applicant in the course of the proceedings before the Court, namely the use of immigration detention in Hungary, the conditions of detention there, the treatment of detained asylum-seekers and the lack of access to appeal proceedings, an appeal against the decision of 5 January 2011 rejecting his first asylum application would clearly not have been an effective remedy. The Court therefore rejects the Government's contention that the applicant failed to exhaust domestic remedies in this regard.

75. The circumstances outlined above also lead to the result that the applicant, during the period of time in which he could have lodged an appeal in the first set of asylum proceedings, lacked an arguable claim under Article 3 of the Convention, since the criticism voiced with regard to the situation of asylum-seekers in Hungary was not widely known at that time. As the Court does not examine domestic law in the abstract (see, *mutatis mutandis*, *P., C. and S. v. the United Kingdom*, no. 56547/00, § 122, ECHR 2002-VI; *Piechowicz v. Poland*, no. 20071/07, § 168 *in fine*, 17 April 2012; and *Julin v. Estonia*, nos. 16563/08, 40841/08, 8192/10 and 18656/10, § 126, 29 May 2012), it will therefore refrain from an examination of the effectiveness of the appeal procedure in Austrian asylum proceedings in the absence of automatic suspensive effect, but seemingly in line with the relevant EU provisions.

(β) The second set of asylum proceedings

76. Next, the Court turns to the second set of asylum proceedings conducted in Austria after the applicant's apprehension and detention with a view to his forced transfer. The Court notes that that detention was based on the existing transfer order of January 2011, and that the applicant lodged a second asylum application on 30 December 2011. This second asylum application did not, according to the domestic law, grant the applicant *de-facto* protection from forced transfer. Consequently, the applicant, who now relied heavily on recent alarming information concerning the situation of asylum-seekers in Hungary and the Austrian Asylum Court's own practice in autumn 2011 of staying transfers to Hungary and seeking updated information, could have been forcibly transferred to Hungary at any

time, even though his second asylum application was still pending at first instance.

77. In this connection, the Court refers to the fact that it finds as a result of its examination of the applicant's complaint under Article 3 (see paragraph 103 below) that the applicant, at least as regards his complaints concerning the use of administrative detention and the conditions of detention in Hungary, had an arguable claim under Article 3 of the Convention.

78. In view of the applicant's arguable complaints under Article 3 of the Convention related to his forced transfer to Hungary and the lack of *de-facto* protection against such transfer in the second set of asylum proceedings, the Government's contention that the applicant had failed to exhaust domestic remedies because those proceedings were still pending at first instance must be rejected (see, *inter alia*, *Sultani v. France*, no. 45223/05, § 50, ECHR 2007-IV (extracts)). It remains to be examined whether the second asylum application can be considered an effective remedy under Article 13 of the Convention in respect of the applicant's complaint that he would be subjected to treatment contrary to Article 3 upon being forcibly transferred to Hungary.

79. The Court has found on previous occasions that accelerated asylum proceedings, as practiced in a number of European countries, make it easier for those countries to process asylum applications that are of a clearly unreasonable nature or manifestly ill-founded. In this connection, the Court has also found that if an asylum claimant has had access to a substantive examination of his asylum claim at first instance, re-examination in an accelerated procedure does not in itself deprive the claimant of a rigorous review of his or her claims in relation to Article 3 of the Convention (see, *mutatis mutandis*, *Sultani*, cited above, §§ 64-65, and *I.M. v. France*, cited above, § 142).

80. The Court acknowledges the need of EU Member States to ease the strain of the number of asylum applications received by them and in particular to find a way to deal with repetitive and clearly abusive or manifestly ill-founded applications for asylum. On the other hand, the Court has found in no uncertain terms that where an applicant makes an arguable claim under Article 3 of the Convention, he or she should have access to a remedy with automatic suspensive effect, meaning a stay on a potential deportation. The Court observes that, in the present case, the applicant had access to asylum proceedings allowing an examination of the merits within the scope of the Dublin Regulation in the course of the first set of proceedings which ended in January 2011. In that first set of proceedings, the situation in Hungary as the receiving State would have been examined in substance. However, in the applicant's case, almost a year passed until the transfer order was scheduled to be enforced and the applicant lodged a second application. Consequently, according to the reported information on

the situation of asylum-seekers' in Hungary and the Austrian Asylum Court's own practice at the relevant time, that second application cannot *prima facie* be considered abusively repetitive or entirely manifestly ill-founded. On the contrary, the Court establishes below that the applicant had – at that time – an arguable claim, as regards his complaints directed against Hungary as the receiving State.

81. In the specific circumstances of the present case, especially having regard to the period of time elapsed between the transfer order and its enforcement and the change of circumstances manifesting itself during that time, the law as it has been applied to the applicant, which did not afford protection from forced transfer and thus deprived him of a meaningful substantive examination of both the changed situation and his arguable claim under Article 3 concerning the situation of asylum-seekers in Hungary, denied the applicant access to an effective remedy against the enforcement of the order for his forced transfer.

(γ) The examination of the issue of *refoulement* by the Austrian immigration police

82. The Court now turns to the question of whether the examination of the issue of *refoulement* by the immigration police in the event of the applicant's forced transfer might counterbalance the lack of *de-facto* protection against forced transfer in the proceedings concerning the second asylum application.

83. However, the Court notes that an asylum claimant only has *locus standi* to apply to the immigration police for a formal decision on the question of *refoulement* when such an application is made during proceedings in which a deportation (or transfer) order has been rendered. After such proceedings are concluded and the case moves to the enforcement stage – as was the case as regards the applicant – an asylum claimant does not have the "right" to have the immigration police issue a formal decision on the issue of *refoulement*. It follows that that the examination provided for in the Immigration Police Act remains at the sole discretion of the authority and is not subject to any further review.

84. Consequently, the examination of the issue of *refoulement* by the immigration police at the time of a forced transfer cannot be considered an effective remedy within the meaning of Article 13 of the Convention in connection with the applicant's complaints under Article 3 linked to his forced transfer to Hungary.

(δ) Conclusion

85. It follows that in the specific circumstances of the case the applicant was deprived of *de-facto* protection against forced transfer in the course of the proceedings concerning his second asylum application while having – at the relevant time – an arguable claim under Article 3 of the Convention in

respect of his forced transfer to Hungary. There was therefore a violation of Article 13 in conjunction with Article 3 of the Convention.

2. Alleged violation of Article 3 of the Convention

(a) The parties' submissions

86. As concerns the applicant's complaint under Article 3 of the Convention, he claimed in particular that, upon being transferred to Hungary, he would be detained in detention facilities that were not appropriate for long-term detention, that he would be subjected to police violence and forced medication with tranquilisers, and that he would lack an effective avenue of appeal in any asylum proceedings in Hungary.

87. The applicant acknowledged that the Asylum Court had allowed transfers to Hungary under the Dublin Regulation to recommence (see paragraph 90 below), but nevertheless stated, referring to the UNHCR report on Hungary as a country of asylum of April 2012, that there had not in fact been any improvement in the situation of asylum-seekers who were transferred to Hungary under the Dublin Regulation. The applicant asserted that it was deplorable that the Austrian authorities continued under those circumstances to transfer asylum-seekers to Hungary whilst being aware of abusive and excessive detention practices there, inhuman conditions and the existence of a real risk of *refoulement*.

88. The Government contested those arguments and stated that in the course of proceedings under the Dublin Regulation the Austrian authorities were required to examine whether an applicant would face a real risk under Article 3 of the Convention upon a transfer. Should the authority find that there was a danger that the applicant might be exposed to human rights violations in the event of his or her transfer, it was required to make use of the sovereignty clause. The Government referred to the fact that the Austrian authorities had repeatedly made use of the sovereignty clause in practice in respect of vulnerable people.

89. The Government further noted that the situation of asylum-seekers in other EU Member States was constantly monitored and that assessments were made on the basis of current developments. There was a regular exchange of information between the Federal Asylum Office and liaison officers in Hungary, which also ensured the possibility of conducting individual investigations, where necessary. With reference to the pending proceedings concerning the applicant's second asylum claim, the Government considered that the issue of whether the applicant's transfer to Hungary would be in compliance with Article 3 of the Convention could not be answered in abstract terms.

90. Turning to the practice of the Austrian asylum authorities in autumn 2011 (see paragraphs 28–31 above), the Government firstly emphasised that the letter from the UNHCR's Austrian office dated 17 October 2011 had not

been an official position paper of the organisation. It confirmed that the Asylum Court had found in some cases – at that time – that the Federal Asylum Office as the first-instance authority had not sufficiently considered the criticism voiced in relevant reports and the UNHCR's letter. Therefore, a number of decisions rejecting asylum applications had been quashed and the proceedings referred back to the Federal Asylum Office for further investigation or retained by the Asylum Court to be dealt by it. The Government pointed out that similar decisions had been rendered by the Asylum Court between October and December 2011, while it had to be kept in mind that the Asylum Court only had eight weeks to decide on such appeals. Subsequently, the Federal Asylum Office had examined in detail whether transfers to Hungary under the Dublin Regulation were compatible with human rights standards. It had maintained close contact with the Hungarian liaison officers and had updated the relevant country information following changes to the law in Hungary. By letter of 11 November 2011 the Hungarian asylum authority had given credible assurances to the Federal Asylum Office that the information contained in the letter from the UNHCR's Austrian office had been partly based on incorrect information. The Federal Asylum Office had been left secure in its belief that the Hungarian authorities were compliant with their international obligations and with human rights standards at all stages of the proceedings. Thereupon, the Federal Asylum Office had based its decisions in respect of Hungary on the new and updated findings as regards detention conditions and proceedings in Hungary. The Asylum Court had thus decided that general concerns about transfers to Hungary were no longer justified, while examining each individual case against the background of the applicant's specific situation and the current factual and legal situation in Hungary. The Government finally observed that there was constant evaluation of the situation by the domestic asylum authority and referred to the fact that the UNHCR's report of April 2012 on Hungary as a country of asylum had not included a recommendation to refrain from transfers to Hungary.

(b) The Court's assessment

(i) General principles

91. 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).

92. 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, § 135, 11 January 2007; and *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, § 114, ECHR 2012).

93. 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, § 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, ECHR 2000-III, and *K.R.S. v. the United Kingdom* (dec.), no. 32733/08, 2 December 2008, both summarised in *M.S.S. v. Belgium and Greece*, cited above, §§ 342 et seq.).

94. 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 and 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, § 60, ECHR 2001-II).

95. 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).

96. If the applicant has not yet been removed when the Court examines the case, the relevant time will be that of the proceedings before the Court (see *Saadi v. Italy* [GC], no. 37201/06, § 133, ECHR 2008, and *A.L. v. Austria*, no. 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).

(ii) Application of those principles to the present case

97. The Court 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*.

98. It acknowledges that three main areas of deficiency were identified in those reports that relate to (i) prolonged administrative detention of asylum-seekers and the conditions of their detention, (ii) the treatment of asylum applications pending in respect of or lodged by transferees and their lack of suspensive effect, and (iii) the risk of *refoulement* to Serbia.

99. The UNHCR dedicated a large part of its April 2012 report to asylum-seekers' conditions of detention in Hungary. The Court notes with particular concern the reports of specific hygiene failings in the Debrecen facility, the seemingly systematic treatment of detained asylum-seekers with tranquilisers causing them to develop addictions, of violent abuse by guards and the practice of taking asylum-seekers handcuffed and in chains to court or administrative hearings (see paragraphs 39-42 above).

100. As regards asylum proceedings in Hungary, the Court takes particular note of reports that asylum-seekers being transferred to Hungary under the Dublin Regulation had to reapply for asylum in Hungary upon arrival and that such a renewed application was treated as a second asylum application without suspensive effect. Together with the seemingly automatic process of handing out a deportation order upon entry, this resulted in a real risk of *refoulement* without the transferee having effective access to an examination of the merits of his or her underlying asylum claim.

101. Finally, the Court observes that the Austrian Asylum Court took the information contained in the UNHCR Regional Office's letter of 17 October 2011 seriously enough to request the first-instance authority confirm or

rebut the criticism voiced in that letter and to bring its country of origin information in respect of Hungary up-to-date.

102. In view of the above, the Court acknowledges 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. Whether the applicant had a case under Article 3 of the Convention with regard to his individual situation will be examined in the following paragraphs.

(α) The applicant's complaints related to the detention of asylum-seekers in Hungary and the reception conditions

103. As regards the applicant's complaints directed against the detention practices applicable to and the reception conditions for asylum-seekers in Hungary, the Court, referring to the information before it in that respect, has no difficulty acknowledging that they were, at the very least, arguable. The Court notes the seemingly general practice of detaining asylum-seekers for a considerable time and partly under conditions that fell short of international and EU standards, which, in conjunction with the repeatedly reported deficiencies in review proceedings for administrative detention, depicted a situation raising serious concern. Note is further taken of the reports of abuse of detained asylum-seekers by officials and of forced medication.

104. The Austrian asylum authorities were made aware of those problem areas at the latest by the UNHCR Regional Office's letter dated 17 October 2011 that concisely, but clearly summarised the relevant issues as regards Hungary as a receiving country for transferees. That letter was followed by a comprehensive report on Hungary as a country of asylum in April 2012, again by the UNHCR. The Hungarian Helsinki Committee had previously remarked in April 2011 on the detention conditions in nine temporary immigration detention centres and had repeated its concerns regarding routine placement in administrative detention in December 2011.

105. However, the Court notes that the UNHCR never issued a position paper requesting European Union Member States to refrain from transferring asylum-seekers to Hungary under the Dublin Regulation (compare the situation of Greece discussed in *M.S.S. v. Belgium and Greece*, cited above, § 195). Furthermore, the Court reiterates that the time of the assessment of whether the applicant would be at a real risk of suffering treatment contrary to Article 3 of the Convention upon a transfer to Hungary is that of the proceedings before it. With that in mind, the Court refers to the most recent note issued by the UNHCR in which it appreciatively acknowledges the planned changes to the law by the Hungarian Government and makes particular reference to the fact that transferees that immediately apply for asylum upon their arrival in Hungary will no longer be subject to detention. Moreover, the UNHCR also remarked on the reported intention of the Hungarian authorities to introduce additional legal guarantees concerning detention and to ensure unhindered

access to basic facilities. It finally noted that the number of detained asylum-seekers declined significantly in 2012 (see paragraphs 48-50 above).

106. 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 report made by the UNHCR, the applicant would no longer 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.

(β) The applicant's complaints related to asylum proceedings in Hungary and possible *refoulement*

107. 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 questions.

108. The Court notes that nothing is known concerning the applicant's reasons for leaving his country of origin, Sudan, and seeking asylum in the first place. In the present case, the applicant did not submit any information or documentation that would help the Court to establish a *prima facie* reason for him to make an asylum application (see, in contrast, *M.S.S. v. Belgium and Greece*, cited above, §§ 295-296). The Court further observes that the procedure under the Dublin Regulation does not require the transferring State to conduct any analysis of the underlying flight reasons of an asylum-seeker, but only to establish whether another EU Member State has jurisdiction under the Regulation and to examine whether there are any general reasons or other obstacles concerning the Member State with jurisdiction that would require a stay of the transfer or application of the sovereignty clause.

109. The Court has no difficulty in believing that the security and human rights situation in Sudan is generally alarming and has seemingly not improved of late (see paragraphs 51-56 above). However, the Court notes that the applicant has not substantiated any individual risk of being subjected to treatment contrary to Article 3 of the Convention if returned to Sudan. While the Court has never excluded the possibility of a situation of general violence in a country of origin triggering the application, and subsequently a breach, of Article 3 upon the deportation of an applicant to the said county, such an approach would only be adopted in the most extreme cases (see, *mutatis mutandis*, *NA. v. the United Kingdom*, no. 25904/07, § 115, 17 July 2008). Under the present circumstances the Court is not in a position to assume a real risk for the applicant upon deportation to Sudan in the absence of any information of his own situation and flight reasons. The Court must therefore conclude that the applicant cannot arguably claim that his deportation to Sudan would violate Article 3 of the Convention (see, *a contrario*, *M.S.S. v. Belgium and Greece*, cited above, § 344).

110. In any event, the Court again refers to the UNHCR's recently provided information on changes to Hungarian law and practice envisaged and already brought about and notes that it would appear that transferees now have sufficient access to asylum proceedings in Hungary and may await the outcome of the proceedings in Hungary, provided that they apply for asylum immediately upon their return.

(γ) Conclusion

111. For the reasons set out above the Court therefore concludes that the applicant's transfer to Hungary would not violate Article 3 of the Convention.

II. RULE 39 OF THE RULES OF COURT

112. The Court recalls 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.

113. It considers that the indication made to the Government under Rule 39 of the Rules of Court (see paragraph 4 above) must continue in force until the present judgment becomes final or until the Court takes a further decision in this connection.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

114. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

115. The applicant claimed 5,000 euros (EUR) in respect of non-pecuniary damage.

116. The Government claimed that the applicant had not sufficiently demonstrated that there had been damage or that there was a causal link between the alleged damage and the violation of the Convention. Furthermore, the Government referred to the fact that the applicant had not in fact been transferred to Hungary, and that the Court had often found in

similar cases that an award for non-pecuniary damage would be inappropriate.

117. The Court has found above that the applicant was deprived of an effective remedy with *de-facto* protection against forced transfer in the proceedings concerning his second asylum application while having – at the relevant time – an arguable claim against his transfer to Hungary. Under these circumstances, the Court believes that the applicant must have suffered some frustration and anxiety during his apprehension and detention in Austria until the interim measure of the Court was applied. However, the Court also notes that the applicant has not in fact been transferred to Hungary (see, *a contrario*, the situation in *Diallo*, cited above, §§ 12 and 93). The Court therefore finds that the finding of a violation of Article 13 in conjunction with Article 3 of the Convention constitutes sufficient just satisfaction for the non-pecuniary damage sustained by the applicant (see, *mutatis mutandis*, *Saadi*, cited above, § 188).

B. Costs and expenses

118. The applicant also claimed EUR 12,918.78 for costs and expenses incurred both in the domestic proceedings and before the Court. This sum includes value-added tax (VAT).

119. The Government contended that the costs claimed were excessive.

120. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred, are reasonable as to quantum and concern proceedings that are related to the violation of the Convention provision found in the present case. Regard being had to the documents submitted to the Court, it finds that some of the costs that the applicant claimed to have incurred in the domestic proceedings relate to proceedings concerning his detention with a view to deportation and proceedings concerning an administrative fine. However, those proceedings are not within the scope of examination of the present application before the Court. The Court therefore finds it reasonable to award the applicant the reimbursement of the costs incurred in the domestic proceedings regarding the lifting of the deportation order and in the proceedings before the Court. It therefore awards the sum of EUR 4,868.28 covering costs under all heads. This sum includes VAT.

C. Default interest

121. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Joins to the merits* by a majority the objection raised by the Government concerning the non-exhaustion of domestic remedies and rejects it;

2. *Declares* by a majority the application admissible;

3. *Holds* unanimously that there has been a violation of Article 13 in conjunction with Article 3 of the Convention;

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

5. *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 until such time as the present judgment becomes final or until further order;

6. *Holds* unanimously that the finding of a violation constitutes sufficient just satisfaction for the non-pecuniary damage sustained by the applicant;

7. *Holds* unanimously
   (a) that the respondent State is to pay the applicant, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 4,868.28 (four thousand eight hundred and sixty eight euros and twenty-eight cents) in respect of costs and expenses. This sum includes VAT;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

8. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 6 June 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

André Wampach
Deputy Registrar

Isabelle Berro-Lefèvre
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judges Berro-Lefèvre, Laffranque, Møse is annexed to this judgment.

I.B.L.
A.M.W.

CONCURRING OPINION BY JUDGES BERRO-LEFÈVRE, LAFFRANQUE AND MØSE

1. We have voted against declaring the application admissible but accept – on the basis of the information which is presently available – that there has been a violation of Article 13 taken in conjunction with Article 3. However, the Chamber's reasons on the merits do not fully reflect the way we view the present case.

2. The applicant risks being returned from Austria to Hungary in pursuance of Council Regulation (EC) No 343/2003 (the "Dublin Regulation"). The core issue is whether his forced transfer gives rise to an arguable claim under Article 13 that this would lead to a violation of Article 3 of the Convention.

3. The applicant did not refer to the situation in Hungary during the first asylum proceedings. After the Federal Asylum Office rejected his application on 5 January 2011 the applicant did not lodge an appeal against that decision but went into hiding and thwarted an attempt to detain and forcibly transfer him on 5 May 2011 (see paragraphs 8 and 9 of the judgment). From 21 December 2011 he was detained with a view to his forced transfer.

4. The applicant's second asylum request, of 30 December 2011, made almost one year after the asylum decision, referred to the Asylum Court's practice since 31 October 2011 regarding reception conditions in Hungary. That practice was based on a report by the Austrian Office of the United Nations High Commissioner for Refugees (UNHCR), dated 17 October 2011, which advised against returning asylum-seekers to Hungary. The second asylum proceedings are still pending before the Federal Asylum Office, as are the proceedings before the Administrative Court regarding the applicant's detention with a view to his forced transfer and his application to the immigration police for the transfer order to be lifted (see paragraphs 11-16 of the judgment).

5. It follows that neither the Federal Asylum Office nor the Asylum Court has considered the applicant's second set of complaints based on the report of 17 October 2011 by the Austrian Office of the UNHCR. In other cases the Asylum Court has requested the Federal Asylum Office to investigate the issue of detention in Hungary of persons transferred there under the Dublin Regulation, including their conditions of detention, allegations of police violence in detention centres and their access to effective legal remedies (see paragraphs 28-30 of the judgment).

6. Furthermore, the domestic authorities have not had occasion to consider more recent reports issued by the UNHCR – not its Austrian Office – in April, October and December 2012 (see paragraphs 37-42 and 47-50 of the judgment). In particular, the report issued in December 2012 refers to a comprehensive package of legislative amendments adopted by the Hungarian Parliament; to the intention to introduce additional legal guarantees

concerning detention; to revised asylum proceedings; and to improvements with regard to the detention of asylum-seekers. We also consider it to be an important factor that the UNHCR has never issued a position paper advising governments to refrain from transferring asylum seekers to Hungary and take responsibility for examining the corresponding asylum applications themselves (see paragraph 105 of the judgment and, *mutatis mutandis*, *M.S.S v. Belgium and Greece*, [GC], no. 30696/09, §§ 194-95. Lastly, we note that in the present case there are no observations from the Hungarian authorities on the allegations in the report of 17 October 2011, which are formulated in quite general terms, and that the Court is unanimous in finding no violation of Article 3.

7. In our view, these factors weaken the Court's basis for deciding whether there is a violation of Article 3 or 13. Leaving aside the issue of whether any of the three sets of pending proceedings, mentioned in paragraph 3 above, should have been exhausted, additional information emerging from further consideration of the matter by the Austrian authorities may provide a more complete and updated basis for deciding the case on the merits. Following the Court's decision of 11 January 2012 to apply Rule 39 of the Rules of Court, there is no risk that the applicant will be returned to Hungary, and there is no urgency to deliver judgment now, as the application was introduced on 11 January 2012. We would therefore have preferred to wait until the Austrian authorities had examined the applicant's new submissions. This would also have ensured greater co-operation between the Court and the national authorities in terms of shared responsibility as the latter are better placed to analyse and decide such matters in the first place.

8. This said, and on the basis of the information which is presently available, we have accepted that the applicant had an arguable claim and that there was a violation of Article 13.