VERFASSUNGSGERICHTSHOF
E 2546/2020-27
22 June 2021

IN THE NAME OF THE REPUBLIC!

The Constitutional Court,

chaired by President
Christoph GRABENWARTER,

in the presence of Vice-President
Verena MADNER

and the members
Markus ACHATZ,
Sieglinde GAHLEITNER,
Andreas HAUER,
Christoph HERBST,
Michael HOLOUBEK,
Helmut HÖRTENHUBER,
Claudia KAHR,
Georg LIENBACHER,
Michael RAMI,
Johannes SCHNIZER and
Ingrid SIESS-SCHERZ

as well as the substitute member
Barbara LEITL-STAUDINGER

as voting members, in the presence of the recording clerk
Martin TRAUSSNIGG

decided today after private deliberations pursuant to Article 144 of the Constitution (*Bundes-Verfassungsgesetz, B-VG*) in the case of the complaint filed by ***, ***, ***, represented by Anton Fischer, Attorney at Law, Hockegasse 17/16, 1180 Wien, appointed to provide legal aid and represented by Clemens Lahner, Attorney at Law, Burggasse 116, 1070 Wien, against the decision by the Federal Administrative Court of 16 June 2020, Z G311 2221582-1/9E, and pronounced as follows:

I. The contested decision has neither violated any of the complainant's constitutionally guaranteed rights nor have the complainant's rights been violated through the application of an unlawful general legal norm.

II. The complaint is dismissed.

I. Reasoning

Facts, complaint and preliminary proceedings

1. The complainant, a national of the Republic of Lithuania, submitted an application for international protection on 15 April 2019. Within the framework of the first interview conducted by representatives of the public security service, the complainant stated, in summary, that he was a Lithuanian Jew, a lawyer and a human rights activist. He said that he had destroyed a commemorative plaque in Vilnius dedicated to a Lithuanian general responsible in 1941 for the rounding up of Jews in ghettos and the murder of 14,000 Jews, among them 22 relatives of the complainant. Having been detained by the police for 54 hours, he was released and charges were brought against him. He was fined to pay € 33,000.00 plus the costs of the repair of the commemorative plaque. He was told that failure to pay the fine would result in his arrest. The complainant also stated that a "Nazi group" in Vilnius intended to kill him. For these reasons, he had decided to leave Lithuania. 1

2. When questioned at the Federal Office for Immigration and Asylum about the reasons for his flight from Lithuania, the complainant stated, in summary, that in his opinion his application for asylum was justified. He had destroyed a "Nazi 2

memorial" and had therefore been convicted to a 75-day prison sentence. He pointed out that the Jewish community in Lithuania had been fighting in vain for 22 years to have the commemorative plaque removed. After he had destroyed the commemorative plaque with a hammer, he had been detained for 54 hours under impossible conditions, although detention was permitted by law for no more than 48 hours. He had been beaten and given only pork to eat, which, as a Jew, was forbidden to him for religious reasons. Moreover, he had been forced to share a 2 m² cell with another inmate without any privacy when taking a shower or using the toilet. He had not been allowed to speak to his lawyer and had been taken directly to the court without any possibility of preparing his case. He also said that Lithuanian "Nazis" frequently called for him to be killed, a fact which he reported to the police, but without any result.

3. By administrative decision dated 20 June 2019, the Federal Office for Migration and Asylum rejected the application for international protection. The complaint raised against this decision was dismissed as unfounded by the Federal Administrative Court on 16 June 2020 without oral hearing. 3

In stating the reasons for its decision, the Federal Administrative Court held that the complainant was a citizen of the European Union. The Court noted that Lithuania was regarded as a safe country of origin and has been a Member State of the European Union since 1 May 2004. Since its accession to the European Union, the Republic of Lithuania has signed all subsequent treaties. The Court further stated that the general human rights situation can be assessed to be positive on the basis of said acts of European Union law. In the Court's opinion, this conclusion can be drawn from the recitals of Protocol No. 24 to the Treaty on European Union (Protocol on Asylum for Nationals of Member States of the European Union, hereinafter also called Protocol No. 24), which explicitly state that pursuant to Article 6 paragraph 1 of the Treaty on European Union, the Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union and respects the fundamental rights pursuant to Article 6 paragraph 1 of the Treaty on European Union as well as the guarantees of the European Convention on Human Rights. As a Member State of the European Union, the Republic of Lithuania is a state under the rule of law and a democracy within the meaning of European Union law. In the Court's opinion, the fundamental ability and willingness of the Lithuanian security 4

authorities to protect the country's citizens can therefore be taken for granted. Furthermore, no treaty infringement proceedings were pending against the Republic of Lithuania. In legal terms, the conclusion to be drawn from Protocol No. 24 was that the application for asylum was unfounded. Point (d) of the Sole Article of Protocol No. 24 allows an application for protection to be examined in an individual case. However, prior to a more detailed examination of the case, it must be decided if the application – which is deemed to be manifestly unfounded – is of sufficient substance to require an examination in view of Austria's obligation to comply with the provisions of the Geneva Convention Relating to the Status of Refugees.

For this provision to apply, the asylum seeker would have to present the story of his flight credibly and plausibly in terms that correspond to the actual conditions in the country of origin. The court stated that the historical events referred to by the complainant, especially as regards General Jonas Noreika, were neither denied nor belittled. For the deciding court it was understandable that the Jewish community perceived the commemorative plaque as a provocation and an insult. Nevertheless, the court stated that it failed to see that the complainant was subject to a form of persecution that would constitute grounds for asylum within the meaning of the Refugee Convention. The complainant had been arrested in accordance with the provisions of Lithuanian penal law and convicted to a prison sentence of 75 days and payment of damages in the amount of € 2,000.00. The complainant had not been denied the right to appeal against this sentence and had exercised this right. Moreover, he had lodged an official complaint against the treatment he experienced during his arrest and detention, but the respective court decisions on this matter were still pending. As regards the human rights violations alleged by the complainant, the court stated that the latter, after exhaustion of all domestic remedies, had the right to put his case before the European Court of Human Rights. In the court's opinion, the complainant had not been subject to unlawful or arbitrary arrest or punishment for the reasons mentioned in the Refugee Convention, as the penal provision applied was not explicitly targeted at members of the Jewish community, and the sentence pronounced was not disproportionately severe. Hence, given that the case on hand did not constitute grounds for a decision within the meaning of point (d) of the Sole Article of Protocol No. 24 and did not meet the requirements of points (a) to (c) of the Sole Article of Protocol No. 24, the application for

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asylum submitted by a national of a Member State of the European Union was not allowed to be taken into consideration or processed. The court stated that the authority concerned had rightly rejected the application for asylum and the complaint therefore had to be dismissed.

4. In the present complaint, which is based on Article 144 of the Constitution (*Bundes-Verfassungsgesetz, B-VG*), the complainant, stating detailed reasons, complains against the violation of the constitutionally guaranteed right to equal treatment of non-citizens relative to one another and the absence of an oral hearing (Art. 47 FRC). In summary, he states the following: 6

According to the complainant, the contested ruling of the Federal Administrative Court is of an arbitrary nature for several reasons. He states that the Federal Administrative Court essentially bases its decision on the recitals of Protocol No. 24 on Asylum for Nationals of Member States of the European Union. According to the complainant, the court holds that Lithuania is regarded as a safe country of origin in which the rule of law and democratic conditions are to be taken for granted. The complainant does not fail to understand that Protocol No. 24 establishes the legal presumption that applications for asylum by Union citizens are to be assessed as being manifestly unfounded and therefore, as a rule, are not to be individually examined. However, he states that the fourth case mentioned in Protocol No. 24 (point (d) of the Sole Article) allows a unilateral decision by a Member State, which *a priori* is to be based on the presumption that the application is manifestly unfounded. According to the complainant, the first step within the framework of the cursory examination to be performed consists in establishing if the application for international protection is substantive enough to require a more detailed examination to comply with Austria's obligations under the Refugee Convention. Pursuant to this provision, the asylum seeker has to present the story of his flight credibly and plausibly in terms that are in line with the conditions in the country of origin. Moreover, he has to explain in plausible terms that are in line with the conditions in the country of origin why he has not availed himself of the protection by his country of origin. The complainant states that the contested decision does not meet these requirements, as no investigations whatsoever were conducted on the most essential aspects of relevance to the proceedings. If the Federal Administrative Court had investigated the situation of Jews in Lithuania and human rights 7

violations by Lithuanian security authorities, it would have had to arrive at a result more favorable for the complainant, as the presumption of manifest unfoundedness would have been refuted. The Federal Administrative Court would have had to repeal the negative decision by the authority concerned and decide pursuant to point (d) of the Sole Article of Protocol No. 24. According to the complainant, the contested decision contains neither country conditions reports nor reports on the situation in Lithuania. An examination of the complainant's submission against the background of conditions in his country of origin apparently had not taken place at all. The complainant notes that current country reports show the alarming situation of Jews in Lithuania, where locations of crucial importance for the Jewish community had been vandalized in 2020. He referred to a report by the United Nations Human Rights Committee of 26 July 2018, which expressed concern regarding the implementation of legal mechanisms to protect victims of hate crime/hate speech and explicitly referred to Jews as a group affected. The complainant pointed out that failure to conduct any investigations of his complaint concerned the central aspect of the ability and willingness of the Lithuanian state to provide protection and to have human rights violations by the Lithuanian security authorities followed up. The complainant stated that he had drawn attention to existing reports, which had, however, in no way been taken into account by the Federal Administrative Court. Moreover, he stated that the contested decision did not contain any plausible reasoning, as it essentially referred to the appraisal of evidence by the authority concerned. The complainant emphasized that there was no indication in the decision that the evidence referred to in the statement of complaint had at all been considered. As none of the evidence presented was explicitly mentioned, let alone appraised as evidence, it was impossible to understand on what grounds the Federal Administrative Court had come to the conclusion that the complainant's application was manifestly unfounded. In the complainant's opinion, essential evidence had been completely ignored and investigations on essential facts had not been carried out. Hence, the contested decision, given the severe deficiencies in its legal assessment and the investigative procedure, and the implausible or rather missing reasoning, was of an arbitrary nature and in violation of the complainant's constitutionally guaranteed right of equal treatment of non-citizens relative to one another. If the Federal Administrative Court had taken the complainant's statement of complaint into account and considered current country reports, it would have had to decide in accordance with

point (d) of the Sole Article of Protocol No. 24. Moreover, the complainant holds that pursuant to Article 47 of the FRC the Federal Administrative Court would have had to conduct oral hearings.

5. The Federal Administrative Court submitted the administrative and court files, but refrained from submitting a written statement. 8

II. The Law

Protocol No. 24 on Asylum for Nationals of Member States of the European Union, Official Journal 2880 C 115, 305, reads as follows: 9

"PROTOCOL (No. 24)

ON ASYLUM OF NATIONALS OF MEMBER STATES OF THE EUROPEAN UNION

THE HIGH CONTRACTING PARTIES,

WHEREAS, in accordance with Article 6(1) of the Treaty on European Union, the Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights,

WHEREAS pursuant to Article 6(3) of the Treaty on European Union, fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, constitute part of the Union's law as general principles,

WHEREAS the Court of Justice of the European Union has jurisdiction to ensure that in the interpretation and application of Article 6, paragraphs (1) and (3) of the Treaty on European Union the law is observed by the European Union,

WHEREAS pursuant to Article 49 of the Treaty on European Union any European State, when applying to become a Member of the Union, must respect the values set out in Article 2 of the Treaty on European Union,

BEARING IN MIND that Article 7 of the Treaty on European Union establishes a mechanism for the suspension of certain rights in the event of a serious and persistent breach by a Member State of those values,

RECALLING that each national of a Member State, as a citizen of the Union, enjoys a special status and protection which shall be guaranteed by the Member States in accordance with the provisions of Part Two of the Treaty on the Functioning of the European Union,

BEARING IN MIND that the Treaties establish an area without internal frontiers and grant every citizen of the Union the right to move and reside freely within the territory of the Member States,

WISHING to prevent the institution of asylum being resorted to for purposes alien to those for which it is intended,

WHEREAS this Protocol respects the finality and the objectives of the Geneva Convention of 28 July 1951 relating to the status of refugees,

HAVE AGREED UPON the following provisions, which shall be annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union:

Sole Article

Given the level of protection of fundamental rights and freedoms by the Member States of the European Union, Member States shall be regarded as constituting safe countries of origin in respect of each other for all legal and practical purposes in relation to asylum matters. Accordingly, any application for asylum made by a national of a Member State may be taken into consideration or declared admissible for processing by another Member State only in the following cases:

(a) if the Member State of which the applicant is a national proceeds after the entry into force of the Treaty of Amsterdam, availing itself of the provisions of Article 15 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, to take measures derogating in its territory from its obligations under that Convention;

(b) if the procedure referred to Article 7(1) of the Treaty on European Union has been initiated and until the Council, or, where appropriate, the European Council, takes a decision in respect thereof with regard to the Member State of which the applicant is a national;

(c) if the Council has adopted a decision in accordance with Article 7(1) of the Treaty on European Union in respect of the Member State of which the applicant is a national or if the European Council has adopted a decision in accordance with Article 7(2) of that Treaty in respect of the Member State of which the applicant is a national;

(d) if a Member State should so decide unilaterally in respect of the application of a national of another Member State; in that case the Council shall be immediately informed; the application shall be dealt with on the basis of the presumption that it is manifestly unfounded without affecting in any way, whatever the cases may be, the decision-making power of the Member State.

III. Considerations

1. The complaint, which is admissible, is unfounded. 10

2. For the Constitutional Court, no concerns have arisen regarding the validity of the legal provisions underlying the contested decision, in particular Protocol No. 24 on Asylum for Nationals of Member States of the European Union. 11

3. Furthermore, the complainant has not been violated in a constitutionally guaranteed right. 12

4. In accordance with the Constitutional Court's case law established since its decision *VfSlg. 13.836/1994* (cf. for example *VfSlg. 14.650/1996* and the earlier case law referred to there; also *VfSlg. 16.080/2001* and *17.026/2003*), Article I paragraph 1 of the Federal Constitutional Act on the Implementation of the International Convention on the Elimination of all Forms of Racial Discrimination, Federal Law Gazette *BGBl. 390/1976*, contains the general prohibition addressed to the legislation and the implementation to discriminate among non-citizens in the absence of materially justified reasons. This constitutional norm demands that non-citizens be treated equally relative to one another and that the principle of objectivity be observed. Hence, unequal treatment of non-citizens is only permitted if and when reasonable grounds are identified and unequal treatment is not disproportionate. 13

A decision is in conflict with this subjective right granted to a non-citizen by Article I paragraph 1 *leg.cit.* if it is based on a law that violates this provision (cf. e.g. *VfSlg. 16.214/2001*), if the administrative court has wrongly assumed that the content of the ordinary law applied, if it were contained in the law, contradicts the Federal Constitutional Act on the Implementation of the International Convention on the Elimination of All Forms of Racial Discrimination, Federal Law Gazette *BGBl. 390/1973*, (cf. e.g. *VfSlg. 14.393/1995, 16.314/2001*), or if the administrative court has acted arbitrarily in rendering its decision (e.g. *VfSlg. 15.451/1999, 16.297/2001, 16.354/2001 and 18.614/2008*). 14

Arbitrary conduct on the part of the administrative court, which encroaches upon the constitutional sphere, consists, inter alia, in a repeated misinterpreta-

tion of the law, but also in the omission of any investigation on a decisive issue or the failure to perform regular proceedings aimed at the discovery of facts, in particular by ignoring the party's submissions and by carelessly disregarding the content of the files or the specific facts of the case (e.g. *VfSlg. 15.451/1999, 15.743/2000, 16.354/2001, 16.383/2001*). 15

5. However, none of the above applies to the case in question: 16

In accordance with the Sole Article of Protocol No. 24, an application for asylum made by a national of a Member State may be taken into consideration or declared admissible for processing only if one of the exceptional facts referred to in this Article applies. The Federal Administrative Court is not to be contradicted in its assumption that the facts referred to in points (a) to (c) of the Sole Article of Protocol No. 24 *a priori* do not apply. 17

Point (d) of the Sole Article of Protocol No. 24, going beyond the preceding points, allows an individual examination of the application for protection submitted by a national of a Member State. The application is to be dealt with "on the basis of the presumption that it is manifestly unfounded". However, the asylum seeker has the possibility of invalidating this presumption of manifest unfoundedness of his application for asylum by providing evidence of the fact that exceptionally a substantive examination of his application for protection is required to comply with Austria's obligations under the Refugee Convention. 18

In order to invalidate the presumption of manifest unfoundedness of the application for asylum by a national of a Member State of the European Union, the asylum seeker's task is not only to maintain, but to justify in detail why he was unable to avail himself of the protection of his country of origin – and, in particular, of that country's courts – to escape from private or (in isolated cases) state persecution within the meaning of the Refugee Convention (cf. Supreme Administrative Court 29.5.2018, Ra 2017/20/0388). 19

6. In view of these legal provisions in effect, it is not possible to counter the Federal Administrative Court's position that the complainant, with his submission, was unable to invalidate the presumption of his application for asylum 20

being manifestly unfounded – and thus the willingness and ability of the Lithuanian (court) authorities to provide protection for him:

The Constitutional Court is not able to assess whether the treatment of the complainant by the Lithuanian security authorities – if the complainant's submission is factually correct – could have been unlawful according to national legal provisions. Pursuant to point (d) of the Sole Article of Protocol No. 24, this question is not to be examined by the Constitutional Court, as the Federal Administrative Court stated and plausibly reasoned that the Lithuanian authorities – and, in particular, their courts – were deemed to be fundamentally able and willing to provide protection. 21

With his submission, the complainant protests against his treatment by the Lithuanian security authorities. In this context, it is to be pointed out, in particular, that the complainant was able to and actually did complain about his treatment in detention and appeal against his conviction. According to the contested decision, the respective court decisions have not yet been rendered, which is not denied by the complainant in his complaint submitted to the Constitutional Court. Moreover, the complainant does not specify in his submission why, in his opinion, the Lithuanian courts are not willing or able to remedy the alleged violations of the law within the framework of the appeals procedure. 22

7. Against this background, the Federal Administrative Court was not obliged to conduct an oral hearing (Art. 47 FRC). 23

IV. Result

1. The alleged violation of constitutionally guaranteed rights did not take place. 24

2. Nor have the proceedings revealed that the complainant's constitutionally guaranteed rights invoked by him were violated. Given that no objections can be raised against the legal bases applied, a violation of the complainant's rights through the application of an unlawful general norm is ruled out. 25

3. The complaint therefore is to be dismissed. 26

4. Pursuant to Section 19 paragraph 4 of the Constitutional Court Act, this decision was permitted to be taken without an oral hearing after private deliberations. 27

Vienna, 22 June 2021
The President:
GRABENWARTER

Recording clerk:
Martin TRAUSSNIGG