U 466/11-18
U 1836/11-13
14 March 2012

IN THE NAME OF THE REPUBLIC

The Constitutional Court,
chaired by President
Gerhart HOLZINGER,

in the presence of Vice-President
Brigitte BIERLEIN

and its members
Eleonore BERCHTOLD-OSTERMANN,
Sieglinde GAHLEITNER,
Christoph GRABENWARTER,
Christoph HERBST,
Michael HOLOUBEK,
Helmut HÖRTENHUBER,
Claudia KAHR,
Georg LIENBACHER,
Rudolf MÜLLER,
Hans Georg RUPPE,
Johannes SCHNIZER

as voting judges, in the presence of the recording clerk
Petra PEYERL,

has decided today after private deliberations on the complaints filed by Fengije S. and Jie Z., both (…) Vienna, both represented by Dr. Lennart Binder LL.M., lawyer, Rochusgasse 2/12, 1030 Vienna, against the decisions of the Asylum Court of 18 January 2011, no. C4 413.019-1/2010/3E, and of 20 April 2011, no. C2 417092-1/2011/13E, pursuant to Article 144a of the Constitution as follows:

The complainants' rights have not been violated by the contested decisions, neither as regards any constitutionally guaranteed right nor as regards the application of an unlawful general norm.

The complaints are dismissed.

Reasoning

I. Complaints and Preliminary Proceedings

1. As regards U 466/11

1.1. The complainant, a citizen of the People's Republic of China, entered Austria on 29 March 2010, where she filed an application for international protection on 30 March 2010. According to the case-file of the Federal Asylum Office *(Bundesasylamt*), the complainant particularly stated during her interview that she had injured a female police officer in China and therefore could not return there.

1.2. By way of administrative decision *(Bescheid*) of 19 April 2010, the Federal Asylum Office dismissed this application pursuant to section 3 paragraph 1 Asylum Act (*Asylgesetz 2005*), Federal Law Gazette *BGBl. I 100* as amended by *BGBl. I 135/2009*, and refused to grant the complainant subsidiary protection pursuant to section 8 paragraph 1 Asylum Act 2005 regarding her state of origin, and expelled her pursuant to section 10 paragraph 1 subparagraph 2 Asylum Act 2005 from the Austrian territory to the People's Republic of China.

1.3. The complaint lodged on 29 April 2010, in which, *inter alia*, an oral hearing was requested, was dismissed by the Asylum Court by the contested decision of 18 January 2011 pursuant to sections 3, 8 and 10 Asylum Act 2005, such concurring with the Federal Asylum Office, which had rated the reasons for the complainant's flight as unlikely, since she had entangled herself in numerous factual and temporal contradictions during the proceedings, and, as stated, her claim lacked plausibility. Moreover, the general situation in China did not suggest that the complainant was at risk. After all, she had been in Austria since March 2010 only, did not speak any German, was not pursuing any permanent lawful employment and had no family members or other relatives in Austria, for which reasons her expulsion was not in contradiction to Article 8 of the European Convention for the Protection of Human Rights (hereinafter referred as "ECHR").

Referring to section 41 paragraph 7 Asylum Act 2005, the Asylum Court refrained from holding an oral hearing.

1.4. The complaint filed against this decision pursuant to Article 144a of the Constitution (*Bundes-Verfassungsgesetz*, *B-VG*) claims a violation of constitutionally guaranteed rights (to an effective remedy and a fair trial according to Article 47 of the Charter of Fundamental Rights of the European Union) and requests the contested decision to be quashed, with full compensation of costs, and for an oral hearing to be scheduled.

1.5. The Asylum Court submitted the administrative and court files and a statement asking the Court to dismiss the complaint.

2. As regards U 1836/11

2.1. The complainant, a citizen of the People's Republic of China, was seized by public security service on 3 November 2010 and applied for international protection on 4 November 2010. During his interview the complainant stated in particular that he had run into high debts in China and had heard that one could make easy money in Austria. On return, he would face imprisonment if he could not repay the money.

2.2. By way of administrative decision *(Bescheid*) of 10 December 2010, the Federal Asylum Office dismissed this application pursuant to section 3 paragraph 1 Asylum Act 2005 and refused to grant the complainant subsidiary protection pursuant to section 8 paragraph 1 Asylum Act 2005 regarding his state of origin, and expelled him pursuant to section 10 paragraph 1 subparagraph 2 Asylum Act 2005 from the Austrian territory to the People's Republic of China.

2.3. The complaint filed on 28 December 2010, in which, *inter alia*, an oral hearing was requested, was dismissed by the Asylum Court by its impugned decision of 20 April 2011 pursuant to sections 3, 8 and 10 Asylum Act 2005, such concurring with the Federal Asylum Office, which had rated the reasons for the complainant's flight as unlikely, since he had entangled himself in numerous factual and temporal contradictions during the proceedings, and, as stated, his case lacked plausibility. In addition, the general situation in China did not suggest that the complainant was at risk. After all, he had been in Austria since November 2010 only, did not speak any German, was not pursuing any permanent lawful employment, and had no family members or other relatives in Austria, for which reasons his expulsion was not in conflict with Article 8 ECHR.

Referring to section 41 paragraph 7 Asylum Act 2005, the Asylum Court refrained from holding an oral hearing.

2.4. The complaint filed against this decision pursuant to Article 144a of the Constitution claims a violation of constitutionally guaranteed rights (to an effective remedy and a fair trial according to Article 47 of the Charter of Fundamental Rights of the European Union) and requests the contested decision to be quashed, with full compensation of costs, and for an oral hearing to be scheduled.

2.5. The Asylum Court submitted the administrative and court files, but refrained however from submitting a counter statement, and referred to its reasoning in the contested decision.

II. Considerations

The complaints, which were joined for deliberation and decision, were considered by the Constitutional Court, applying *mutatis mutandis* the provisions of sections 187 and 404 Code of Civil Procedure (*ZPO*) in conjunction with section 35 Constitutional Court Act (*VfGG*):

1. Pursuant to Article 144a of the Constitution the Constitutional Court decides on complaints against decisions rendered by the Asylum Court, if the complainant is allegedly violated in a constitutionally guaranteed right by such decision or by the application of an unlawful regulation, the unlawful the re-publication of the consolidated text of a law (international treaty), an unconstitutional law or an unlawful international treaty. Under the general claim of having been violated in their constitutionally guaranteed rights, the complainants are exclusively invoking rights which they are basing on Article 47 of the Charter of Fundamental Rights of the European Union (hereinafter referred as "CFREU").

2. It must be considered whether the alleged violation of the CFREU can actually establish the Constitutional Court's jurisdiction and whether the CFREU constitutes a standard of review for proceedings according to Article 144a of the Constitution (which in this respect is identical with Article 144 of the Constitution, cf. *VfSlg 18.613/2008*). If such is the case, the complaints are at any rate admissible, since all other procedural requirements are met.

3. Proclaimed at the Nice summit in 2000, the CFREU is a part of the Lisbon Treaty, which Austria ratified on 13 May 2008. Since the entry into force of the Lisbon Treaty on 1 December 2009 (OJ 2007 C 303, p 1, consolidated version OJ 2010 C 83, p 389), the CFREU has the same legal value as the Treaties, as explicitly stipulated by Article 6(1) Treaty on European Union (TEU), and is therefore part of European Union primary law (cf. CJEU 19/01/2010, Case C-555/07, *Kücükdeveci*, [2010], ECR I-365 [paragraph 22]). From Article 51 CFREU it follows that it is immediately applicable by the Member States when implementing European Union law.

4. From the beginning, i.e. since Austria's accession to the European Union, the Austrian Constitutional Court has concurred with the case law of the Court of Justice of the European Union (CJEU 15/07/1964, Case 6/64, *Costa/ENEL*, [1964], ECR 1253; 17/12/1970, Case 11/70, *Internationale Handelsgesellschaft*, [1970], ECR 1125; 09/03/1978, Case 106/77, *Simmenthal II* [1978], ECR 629), according to which the primacy of directly applicable rules over domestic law results from the autonomous validity of Community (now: European Union) law (*VfSlg. 14.886/1997*; prior to that, implicitly already *VfGH 13/06/1995, B 877/95; VfSlg. 14.390/1995*; as regards the judicial review of laws cf. *VfSlg. 14.805/1997, 15.036/1997*). At the same time, however, the Constitutional Court found that European Union law in general is not a standard of review for its decisions.

4.1. In its decision, *VfSlg. 14.886/1997,* concerning the review of a complaint according to Article 144 of the Constitution, the Constitutional Court held that the inapplicability of a law to certain facts could also arise from directly applicable provisions of Community law:

"If domestic law is in contradiction with Community law, it will be displaced. Every national body that is to adjudicate a given case or assess the lawfulness of acts performed by other public authorities must respect the supremacy of Community law and consequently refrain from applying the national norm. However, it shall assess the conformity of the national norm with Community law for itself only if the matter is 'so obvious' as to leave no scope for any reasonable doubt. ' (CJEU Case 283/81 CILFIT, [1982], ECR 3415 et. seq., 3429, paragraph 16); otherwise the matter would have to be referred to the Court of Justice of the European Union according to Article 177 of the EC Treaty."

From this the Constitutional Court concluded:

"Such obligation would also be on the Constitutional Court if it had to assess the lawfulness of any act performed by a public authority. As set out above, the Constitutional Court, examining a case on the basis of the fundamental rights [in the former case it was the right to choose vocational training according to Article 18 Basic Act *(Staatsgrundgesetz)* and the right to education pursuant to Article 2 Protocol No. 1 to the ECHR], need not to examine whether the authority had lawfully applied [the relevant] law to the complainants. This question is therefore irrelevant for the Court's decision. Given the fact that the law applied was in conformity with the Constitution, the relevant constitutionally guaranteed rights would only be violated if the law were applied just for the sake of appearance, in other words without being based on actual fact, if it were logically inconceivable to ascribe the facts to it. Since constitutional reasons against its applicability were not submitted and did not arise otherwise and since *from the Constitutional Court's view a violation of Community law would be*

tantamount to a violation of ordinary national law, which would be for the Supreme Administrative Court to address, this would only be the case if the contradictions with Community law were obvious and could be found without any further considerations" (italics used here for emphasis, not present in original).

In its decision, *VfSlg. 15.189/1998,* the Constitutional Court found that it was inadmissible to base a regulation (in the meaning of Article 18 paragraph 2 of the Constitution) directly on Community law because the Court had no jurisdiction to review general Austrian legal norms according to the standard of Community law, and the CJEU likewise was not empowered to review legal provisions of the Member States for conformity with Community law.

In *VfSlg. 15.215/1998*, the Court generalised its argument as follows:

"The Constitutional Court, while under an obligation to observe the primacy of EC law (cf. e.g. Constitutional Court of 12/04/1997, *G 400/96, G 44/97*, of 04/10/1997, *G 322, G 323/97*, of 05/12/1997, *G 23-26/97*), must only do so in the exercise of its mandated functions. Therefore, due to the primacy of directly applicable Community law, the Court has to decide the question whether an Austrian legal norm must not be applied only if the matter is relevant for its decision, which *per se* is to be assessed according to national law (cf. also the already quoted decision of the CJEU 09/03/1978, Case 106/77, *Simmenthal* II, [1978], ECR 629 et seq., 644, paragraph 21, and the ruling of the Constitutional Court of 26/06/1997, *B 877/96*). Insofar as it is not for the Constitutional Court to decide whether an authority acted lawfully, which, given the shared judicial review function of public-law courts as regards the – here relevant – fundamental rights of integrity of property and equality of all citizens before the law, is the case here, the question whether the challenged authority should have applied ordinary national or Community law cannot be relevant for the Constitutional Court's decision."

4.2. In general, the Constitutional Court was later of the opinion that European Union (formerly Community) law was not a standard for its own judicial review (cf. e.g. *VfSlg. 15.753/2000, 15.810/2000*; as already *Öhlinger*, *Unmittelbare Geltung und Vorrang des Gemeinschaftsrechts und die Auswirkungen auf das verfassungsrechtliche Rechtsschutzsystem*, in: *Griller/Korinek/Potacs* [ed.], *Grundfragen und aktuelle Probleme des öffentlichen Rechts*, 1995, 359 [373]; *Holzinger*, *Zu den Auswirkungen der österreichischen EU-Mitgliedschaft auf das Rechtsschutzsystem der Bundesverfassung,* FS Winkler, 1997, 351 [357 et seq.]; *Korinek*, *Zur Relevanz von europäischem Gemeinschaftsrecht in der verfassungsgerichtlichen Judikatur*, FS Tomandl, 1998, 465 [467]; adverse

opinions *Walter/Mayer/Kucsko-Stadlmayer*, *Bundesverfassungsrecht*[10], 2007, point 246/27; *Griller*, *Individueller Rechtsschutz und Gemeinschaftsrecht*, in: Aicher/Holoubek/Korinek [ed.], *Gemeinschaftsrecht und Wirtschaftsrecht*, 2000, 27 [136]; *Vcelouch*, *Auswirkungen der österreichischen Unionsmitgliedschaft auf den Rechtsschutz vor dem VwGH und dem VfGH*, ÖJZ 1997, 721 [724]).

5. These decisions on European Union law rendered prior to the entry into force of the Lisbon Treaty cannot be transferred to the CFREU. In European Union law, the Charter is an area that is markedly distinct from the "Treaties" (cf. also Article 6(1) TEU: "the Charter of Fundamental Rights and the Treaties"), to which special conditions apply according to the national constitutional order (cf. 5.4. to 5.6 below):

5.1. On the basis of the cases *Rewe* (CJEU 16/12/1976, Case 33/76, *Rewe*, [1976] ECR 1989) and *Comet* (CJEU 16/12/1976, paragraph 45/76, *Comet*, [1976] ECR 2043) the CJEU developed the doctrine that, consistent with the principle of cooperation (now laid down in Article 4(3) 2nd sentence TEU), it was for national courts to ensure the legal protection which citizens derive from the direct effect of Community law. For lack of Community rules in this area, it is therefore for the domestic legal systems of the Member States to designate the courts and tribunals having jurisdiction and to lay down the procedural rules governing actions for safeguarding rights which individuals derive from the direct effect of Community (now European Union) law. However, such rules must not be less favourable than those governing similar domestic actions.

This principle, later called equality or equivalence doctrine, was summarised by the CJEU in *Levez* (CJEU 01/12/1998, Case C-326/96, *Levez*, [1998] ECR I-7835 [paragraph 18]) as follows:

"The first point to note is that, according to established case-law, in the absence of Community rules governing the matter it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law, provided, however, that such rules are not less favourable than those governing similar domestic actions (the principle of equivalence) and do not render virtually impossible or excessively difficult the exercise of rights conferred by Community law (the principle of effectiveness) (see, to that effect, Case 33/76 *Rewe v Landwirtschaftskammer Saarland* [1976] ECR 1989, paragraph 5; Case 45/76 *Comet v Produktschap voor Siergewassen* [1976] ECR 2043, paragraphs 13 and

16; Joined Cases C-430/93 and C-431/93 *Van Schijndel and Van Veen v SPF* [1995] ECR I-4705, paragraph 17; Case C-261/95 *Palmisani v INPS* [1997] ECR I-4025, paragraph 27; Case C-246/96 *Magorrian and Cunningham* [1997] ECR I-7153, paragraph 37; and paragraph 16 of the judgment of 15 September 1998 in Joined Cases C-279/96, C-280/96 and C-281/96 *Ansaldo Energia and Others* [1998] ECR I-5025)."

In *Pasquini* (CJEU 19/06/2003, Case C-34/02, *Pasquini*, ECR 2003, I-6515) it explained on the freedom of workers (paragraph 59):

"It would be contrary to the principle of equivalence for a situation arising from the exercise of a Community freedom to be classified or treated differently from a purely internal situation when they are similar and comparable, and for the situation of Community origin to be subjected to special rules less favourable to the worker than those applicable to a purely internal situation, the only reason being that difference in classification or treatment."

5.2. From this case-law the Constitutional Court concludes that under Union law, rights which are guaranteed by directly applicable Union law must be enforceable in proceedings that exist for comparable rights deriving from the legal order of the Member States. In this respect the CJEU stated in *Pontin* (CJEU 29/10/2009, Case C-63/08, *Pontin*, [2009] ECR I-10.467 [paragraph 45]):

"The principle of equivalence requires that the national rule at issue be applied without distinction, whether the infringement alleged is of Community law or national law, where the purpose and cause of action are similar (Case C-326/96 *Levez* [1998] ECR I-7835, paragraph 41). [....] . In order to verify whether the principle of equivalence has been complied with, it is for the national court, which alone has direct knowledge of the procedural rules governing actions in the field of domestic law, to verify whether the procedural rules intended to ensure that the rights derived by individuals from Community law are safeguarded under domestic law comply with that principle and to consider both the purpose and the essential characteristics of allegedly similar domestic actions (see *Levez*, paragraphs 39 and 43, and Case C 78/98 *Preston and Others* [2000] ECR I 3201, paragraph 49). For that purpose, the national court must consider whether the actions concerned are similar as regards their purpose, cause of action and essential characteristics (see, to that effect, *Preston and Others*, paragraph 57)."

5.3. For the scope of application of European law, the CFREU has now enshrined rights as they are guaranteed by the Austrian Constitution in a similar manner as constitutionally guaranteed rights. As emphasized in the preamble to the CFREU, it reaffirms "with due regard for the powers and tasks of the Community and the

Union and the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court of Justice of the European Communities and of the European Court of Human Rights".

The ECHR is directly applicable in Austria and has the rank of constitutional law (cf. Federal Law Gazette *BGBl. 59/1964*). The rights it ensures are rights that are guaranteed by constitutional law within the meaning of Articles 144 and 144a of the Constitution and must be protected by the Constitutional Court. According to the explanations to the CFREU, several of its rights are modelled, both in wording and intention, on the corresponding rights laid down in the ECHR.

5.4. In light of the principle of equivalence, it must therefore be examined in which manner and in which proceedings the rights laid down in the CFREU can be enforced on the basis of the domestic legal situation.

5.5 According to Article 144 of the Constitution it is for the Constitutional Court to review last-instance administrative decisions as to whether they violate constitutionally guaranteed rights; Article 144a of the Constitution states the corresponding jurisdiction for asylum proceedings. Article 133 paragraph 1 of the Constitution exempts complaints claiming a violation of constitutionally guaranteed rights from the jurisdiction of the Supreme Administrative Court. The system of legal protection set out in the Constitution provides in general for a concentration of claims for violation of constitutionally guaranteed rights with one instance, i.e. the Constitutional Court, which also is the only instance to adjudicate on such violations through general norms, i.e. statutes and regulations, and the only instance that has power to set aside such norms.

As expressed in its Article 51, the CFREU contains "rights" and "principles", yet it remains to be specified which of its provisions qualify as one or the other, and what the significance of this differentiation is. As set out earlier, the CFREU has at any rate for the scope of application of Union law the same function in many of its provisions – the "rights" – as the constitutionally guaranteed rights have for

the (autonomous) area of Austrian law. Largely overlapping areas of protection emerge from this intended near-identity in substance and similarity in wording of the CFREU and the ECHR, whose rights are constitutionally guaranteed rights in Austria. It would be contrary to the idea of a centralised constitutional jurisdiction as provided for in the Austrian Constitution if the Constitutional Court were not empowered to adjudicate on largely congruent rights such as those contained in the CFREU.

The Constitutional Court therefore comes to the conclusion that, based on the domestic legal situation, it follows from the equivalence principle that the rights guaranteed by the CFREU may also be invoked as constitutionally guaranteed rights pursuant to Articles 144 and 144a respectively of the Constitution and that they constitute a standard of review in general judicial review proceedings in the scope of application of the CFREU, in particular under Articles 139 and 140 of the Constitution. In any case, this is true if the guarantee contained in the CFREU is similar in its wording and purpose to rights that are guaranteed by the Austrian Constitution.

In fact, some of the individual guarantees afforded by the CFREU totally differ in their normative structure, and some, such as e.g. Article 22 or Article 37, do not resemble constitutionally guaranteed rights, but "principles". One would therefore have to decide on a case-by-case basis which right of the CFREU constitutes a standard of review for proceedings before the Constitutional Court.

5.6. The result that the CFREU is a standard of review of proceedings before the Constitutional Court is not contradictory to the fact that – according to the case law of the CJEU – the fundamental rights as they result from the constitutional traditions common to the Member States or from conventions on the protection of human rights under international law, in the conclusion of which the Member States were involved or which they acceded to, existed as general principles of law that governed the implementation of European Union law even before the CFREU entered into force (and according to Article 6(3) TEU continue to do so) – so that no measures can be held lawful which are incompatible with the fundamental rights protected by the constitutions of the Member States (cf. CJEU 14/05/1974, Case 4/73, *Nold*, [1974] ECR 491; 13/07/1989, Case 5/88,

Wachauf, [1989] ECR 2609; 13/04/2000, Case. C-292/97, *Karlsson*, [2000] ECR I-2737; 03/09/2008, Case C-402/05 P and C-415/05 P, *Kadi*, [2008] ECR I-6351).

In this respect, all institutions rendering decisions within the scope of application of European Union law had to respect the fundamental rights within the framework of general legal principles even before the entry into force of the CFREU (cf. e.g. *VwGH* 23/10/2000, 99/17/0193). However, the applicability of a detailed catalogue of rights and obligations as set out in the CFREU is not comparable to the derivation of legal positions from general legal principles. As constitutionally guaranteed rights, the rights guaranteed by the CFREU are therefore a standard of review in proceedings before the Constitutional Court.

5.7. For the jurisprudence of the Constitutional Court in the scope of application of the CFREU (Article 51(1)), the case law of the CJEU is relevant, which in turn looks at the case law emanating from the European Court of Human Rights (ECtHR), as does the Constitutional Court.

This means that the Constitutional Court – as it has done so far (cf. *VfSlg 15.450/1999, 16.050/2000, 16.100/2001*) – will refer a matter to the CJEU for a preliminary ruling if there are doubts on the interpretation of a provision of Union law, including also the CFREU. If such doubts do not arise, in particular in light of the ECHR and pertaining case law of the ECtHR and other supreme courts, the Constitutional Court will decide without seeking a preliminary ruling. In matters relating to the CFREU, the Constitutional Court is held by Article 267(3) TFEU to bring them to the CJEU, so that the Asylum Court does not violate the right to a lawful judge (*Recht auf den gesetzlichen Richter*) according to the Constitutional Court's case law (*VfSlg. 14.390/1995, 14.889/1997, 15.139/1998, 15.657/1999, 15.810/2000, 16.391/2001, 16.757/2002*) if it refrains from asking the CJEU for a preliminary ruling.

However, this does not affect the power of all courts and tribunals to refer questions on the interpretation of the Treaties and on the validity and interpretation of the acts of the organs, institutions and other bodies of the Union to the CJEU for a preliminary ruling according to Article 267 TFEU, provided the court deems a ruling thereon necessary for rendering its judgment. This is contradicted neither by the shared competences of the Supreme

Administrative Court and the Constitutional Court when it comes to reviewing the lawfulness of administrative decisions taken by administrative authorities and of decisions taken by the Asylum Court, nor by the concentration of judicial review at the Constitutional Court (see 5.5. above) .

In the context of a constitutional review of a law implementing a European Directive, the CJEU has held that Article 267 TFEU prevent interlocutory proceedings for the review of the constitutionality of national laws, provided that the other courts in the proceedings are free, at whatever stage of the proceedings they consider appropriate, even after the end of the interlocutory procedure, to refer to the Court of Justice for a preliminary ruling any question which they consider necessary, to adopt any measure to ensure provisional judicial protection, and to misapply the national legislative provision at issue if it is considered to be contrary to EU law (CJEU 22/06/2010, Case C-188/10, C-189/10, *Melki*/*Abdeli,* [2010] ECR I-5665, paragraph 57). Here it is relevant that the CJEU is not denied the possibility of reviewing secondary law relating to the requirements of primary law and of the Charter as having the same legal value as the Treaties (paragraph 55).

5.8. In summary, this means that the Constitutional Court, if applicable, after having referred a matter for a preliminary ruling to the CJEU according to Article 267 TFEU, takes the CFREU in its scope of application as a standard for national law (Article 51(1) CFREU) and sets aside contradicting general norms according to Article 139 and/or Article 140 of the Constitution. In this manner, the Constitutional Court fulfils its obligation to remove provisions incompatible with Community law from the domestic legal order, which is also postulated by the CJEU (cf. CJEU 02/07/1996, Case C-290/94, *Commission v Greece*, [1996], ECR I-3285; 24/03/1988, Case 104/86, *Commission v. Italy*, [1988] ECR 1799; 18/01/2001, Case C-162/99, *Commission v. Italy*, [2001] ECR I-541; see also CJEU 07/01/2004, Case C-201/02, *Wells*, [2004] ECR I-723; 21/06/2007, Case C-231/06 - C-233/06, *Jonkman*, [2007] ECR I-5149).

5.9. It remains to be emphasised that there is no duty to bring a matter to the CJEU for a preliminary ruling if the issue is not relevant for the decision (cf. CJEU 06/10/1982, Case 283/81, *Cilfit*, [1982] ECR 3415; 15/09/2005, Case C-495/03, *Intermodal*, [2005] ECR I-8151), meaning that the answer, whatever it is, can

have no impact on the decision of the case. Concerning the CFREU, this is the case if a constitutionally guaranteed right, especially a right of the ECHR, has the same scope of application as a right of the CFREU. In such a case, the Constitutional Court will base its decision on the Austrian Constitution without there being a need for reference for a preliminary ruling under the terms of Article 267 TFEU.

In this context one must point out (specified in detail under item 7 for the complaint proceedings at issue), that according to Article 52(4) CFREU, fundamental rights which are recognized in the Charter as they result from the constitutional traditions common to the Member States, must be interpreted in accordance with those traditions. In so far as the Charter contains rights which correspond with rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention (Article 52(3) CFREU). This provision does not prevent Union law from providing more extensive protection. Moreover, Article 53 CFREU guarantees that the level of protection of existing fundamental right guarantees is not lowered by the Charter.

From this the Constitutional Court concludes that the fundamental rights resulting from the national constitutions, international treaties, and from the CFREU, must be interpreted as consistently as possible.

6. However, the provisions of the CFREU are applied to acts of the bodies and institutions of the Member States only when they are "implementing European Union law" (Article 51(1), CFREU), i.e. when the case of a complaint in which a right of the CFREU is invoked falls within the scope of application of Union law (cf. VfSlg. 15.139/1998, 15.456/1999, 17.225/2004, 18.541/2008). According to case law by the CJEU, the latter is to be interpreted broadly. It covers the implementation of directly applicable Union law by courts or administrative authorities of the Member States (CJEU 14/07/1994, Case C-351/92, *Graff*, [1994] ECR I-3361 [paragraph 17]), as well as the enforcement of Member States' implementing regulations (CJEU 15/05/1986, Case 222/84, *Johnston*, [1986] ECR I-1651 [paragraph 18 et seq.]).

While the interpretation of Article 51(1) CFREU is controversial in individual cases as regards the scope of application of the CFREU, the Asylum Court was at any rate "implementing Union law" in the proceedings that rendered the contested decisions: The complainants are seeking international protection within the meaning of the Asylum Act 2005. During the proceedings, their legal status is guaranteed under Union law by Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ L 304, p. 12-23 (status directive). As another legislative act of the European Union, Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ L 326, p 13-34 (procedural directive) governs asylum proceedings. The CJEU has likewise held that the CFREU is generally applicable to asylum proceedings (CJEU 28/07/2011, Case C-69/10, *Brahim Samba*, ECR [2011] [paragraphs 48 and 49]).

Hence, asylum proceedings in general, and the two proceedings that rendered the contested decisions, fall within the scope of application of the CFREU.

7. Article 47 CFREU reads:

> "Right to an effective remedy and to a fair trial
>
> Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.
>
> Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.
>
> Legal aid shall be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice".

The explanations to Article 47 CFREU (OJ 2007 C 303, pp. 29.) state as follows

"The first paragraph is based on Article 13 of the ECHR:

[...]

However, in Union law the protection is more extensive since it guarantees the right to an effective remedy before a court. The Court of Justice enshrined that right in its judgment of 15 May 1986 as a general principle of Union law (Case 222/84 *Johnston* [1986] ECR 1651; see also judgment of 15 October 1987, Case 222/86 *Heylens* [1987] ECR 4097 and judgment of 3 December 1992, Case C-97/91 *Borelli* [1992] ECR I-6313). According to the Court, that general principle of Union law also applies to the Member States when they are implementing Union law. The inclusion of this precedent in the Charter has not been intended to change the system of judicial review laid down by the Treaties, and particularly the rules relating to admissibility for direct actions before the Court of Justice of the European Union. The European Convention has considered the Union's system of judicial review including the rules on admissibility, and confirmed them while amending them as to certain aspects, as reflected in Articles 251 to 281 of the Treaty on the Functioning of the European Union, and in particular in the fourth paragraph of Article 263(4). Article 47 applies to the institutions of the Union and of Member States when they are implementing Union law and does so for all rights guaranteed by Union law.

The second paragraph corresponds to Article 6(1) of the ECHR […]:

[...]

In Union law, the right to a fair hearing is not confined to disputes relating to civil law rights and obligations. That is one of the consequences of the fact that the Union is a community based on the rule of law as stated by the Court in Case 294/83, *'Les Verts' v European Parliament* (judgment of 23 April 1986, [1988] ECR 1339). Nevertheless, in all respects other than their scope, the guarantees afforded by the ECHR apply in a similar way to the Union.

[…]"

Article 52(3) CFREU states that "Insofar as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection."

7.1. According to Article 53 CFREU, "Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection

of Human Rights and Fundamental Freedoms, and by the Member States' constitutions".

Article 52(1) CFREU contains a reservation which – in the light of Article 52(3) and Article 53 CFREU in particular – basically applies to all rights under the Charter and such also to Article 47(2) CFREU.

7.2. In the field of application of Article 6 ECHR, Article 47(2) CFREU has the same scope and meaning as the former. Beyond that, the guarantees of Article 6 ECHR apply to the scope of application of Article 47(2) CFREU accordingly (as set forth in the explanations to the CFREU, OJ 2007 C 303, p. 30). In this context it has to be noted that the guarantees apply differently depending on the matter, the issue at stake, and the stage of the proceedings, which in turn are governed by the principle of proportionality. The strictest requirements apply in criminal cases; in civil proceedings the Constitutional Court and the ECtHR accept limitations, in particular as regards the oral hearing, or the degree of judicial review in administrative proceedings which merely affect civil law positions (*VfSlg*. *11.500/1987*).

7.3. Applying these considerations to that part of the scope of application of the guarantees afforded by the Charter which does not affect civil rights and criminal proceedings, it can be concluded, also for that part, that further restrictions (beyond those in criminal proceedings) are admissible. Yet, since case law of the ECtHR on Article 6 ECHR, cannot be directly drawn on in this point, the extent of assurance of individual guarantees is ultimately determined by Article 52(1) CFREU, in other words by the principle of proportionality. In order to assess whether it is admissible to desist from an oral hearing it is therefore relevant whether restrictions to conduct an oral hearing are required based on section 41(7) Asylum Act 2005 and actually meet the objectives recognised by the Union and serving the common interest or the requirements of protecting the rights and freedoms of others.

7.3.1. According to Article 6(1) ECRH, everyone is entitled to a fair and public hearing in the determination of his civil rights and obligations. It follows that whenever a hearing is requested, a general right to a public oral hearing exists (cf. ECtHR, 28 May 1997, *Pauger v. Austria*, Appl. 16717/90, paragraph 60).

7.3.2. As regards access to court, Article 6 ECHR – according to case law of the ECtHR – is subject to the (implied) reservation of proportionate limitation (starting with ECtHR 21 February 1975, *Golder v. The United Kingdom*, Appl. 4451/70, paragraph 38). The exclusion of the public from hearings is governed by the explicit reservation of proportionate limitations. Regarding other guarantees as well, the implicit limitations are based on considerations of proportionality (e.g. on full jurisdiction, ECtHR 21 September 1993, *Zumtobel v. Austria*, Appl. 12235/86, paragraph 29; on witness examination and a fair trial, ECtHR 13 October 2005, *Bracci* case, Appl. 36822/02, paragraph 49 et seq.; the significance of the applicant's matter is a crucial consideration for the length of the proceedings, ECtHR 16 September 1996 [GC], *Süßmann v. Germany*, Appl. 20024/92, paragraph 61). Recent case law of the ECtHR has also linked questions regarding the scope of application with the criteria for fundamental rights (ECtHR, 19 April 2007 [GC], *Eskelinen and Others v. Finland*, Appl. 63235/00, paragraph 62).

7.3.3. Proceedings rendering decisions on asylum and on the residence of aliens in the territory of a state do not fall within the scope of application of Article 6 ECHR (e.g. ECtHR 5 October 2000, *Maaouia v. France*, Appl. 39652/98). From Article 47(2) CFREU one can, however, derive a right to an oral hearing also in those cases where such requirement does not directly follow from the inapplicability of Article 6 ECHR. In light of the fact that Article 47(2) CFREU recognises a fundamental right which is derived not only from the ECHR but also from constitutional traditions common to the Member States, it must be noted also when interpreting the constitutionally guaranteed right to effective legal protection (as an emanation of the duty of interpreting national law in line with Union law and of avoiding situations that discriminate nationals). Conversely, the interpretation of Article 47(2) CFREU must heed the constitutional traditions of the Member States and therefore the distinct characteristics of the rule of law in the Member States. This avoids discrepancies in the interpretation of constitutionally guaranteed rights and of the corresponding Charter rights.

7.4. According to the case law of the ECtHR, an oral hearing may be dispensed with in proceedings according to Article 6(1) ECHR if justified by exceptional circumstances. Such circumstances may apply in decisions on social security claims, which exclusively deal with points of law and complex technicalities. In

such cases, the court may decide against an oral hearing, in due consideration of procedural economy and effectiveness, if the case can be adequately resolved on the basis of the case-file and the parties' written observations (ECtHR 12 November 2002, *Döry v. Sweden*, Appl. 28394/95, paragraph 37 et seq.; ECtHR 8 February 2005, *Miller v. Sweden*, Appl. 55853/00, paragraph 29).

Furthermore, in light of Article 6(1) ECHR, the nature of the issues to be resolved for assessing the concerns raised against the contested administrative decision is relevant. Given the possibilities of participation in administrative procedures, an oral hearing according to Article 6(1) ECHR may routinely be dispensed with if the plea submitted suggests that the holding of an oral hearing will not further clarify the bases of decision-making. If an asylum seeker has already brought certain circumstances or issues before the Federal Asylum Office, or if such circumstances or issues become known only afterwards, an oral hearing before the Asylum Court must be held if the questions already raised by the asylum seeker in the administrative proceedings or in the complaint to the Asylum Court – supported by supplementary investigations as appropriate – cannot be resolved based on the case-file, and in particular if the established facts need to be supplemented or if the evaluation of evidence is inadequate.

Based on the ECtHR's case law on the public hearing requirement in appellate proceedings, it is furthermore relevant in such a context how significant and necessary a hearing is for taking and assessing evidence as well for resolving points of law (ECtHR 29 October 1991, *Helmers v. Sweden*, Appl. 11826/85, paragraph 37).

7.5. In fact, the ECtHR has explicitly recognised that for some types of proceedings not all of the guarantees of Article 6(1) ECHR need to be fulfilled in an equal manner. For example, in interim relief proceedings the guarantees of Article 6(1) ECHR are applicable only to the extent that this can be reconciled with the nature of the interim measures (ECtHR 15 October 2009 [GC], *Micallef v. Malta*, Appl. 17056/06, paragraph 86). Regarding proceedings before a constitutional court, case law recognises that the guarantees of Article 6 ECHR are applied in a modified manner (e.g. on excessive length of proceedings, ECtHR 16 September 1996 [GC], *Süßmann v. Germany*, Appl. 20024/92).

8. In light of this case law, the Constitutional Court neither holds any reservations as to the constitutionality of section 41(7) Asylum Act 2005, nor does it find that the Asylum Court subsumed an unconstitutional content under this provision by not holding a hearing. Refraining from holding a hearing in cases in which the facts seem to be clear from the case-file in combination with the complaint, or where investigations reveal beyond doubt that the plea submitted is contrary to the facts, is consistent with Article 47(2) CFREU, if preceded by administrative proceedings in the course of which the parties were heard.

9. The complainants' rights under Article 47 (2) CFREU have therefore not been violated.

III. Result and related observations

1. Hence, there was no violation of constitutionally guaranteed rights as alleged.

2. Nor was it found in the complaint proceedings that the complainants were violated in a constitutionally guaranteed right which they had not invoked; and just as much, this complaint did not give rise to constitutional objections against the legal provisions underlying the contested decisions. Equally, the complainants' rights were thus not violated by the application of any unlawful general norm.

3. Therefore, the complaints had to be dismissed as unfounded.

4. Pursuant to section 19 paragraph 4, first sentence, Constitutional Court Act, this decision was handed down in private without the need for a hearing.

Vienna, 14 March 2012
The President:
HOLZINGER

Recording clerk
PEYERL