

Field:

BVerwGE: Yes

Asylum law

Professional press: Yes

Sources in Law:

Asylum Procedure Act	Section 28 (1a)
Residence Act	Section 60 (1)
Basic Law	Article 16a
ECHR	Article 3, Article 9, Article 15
Directive 2004/83/EC	Article 4 (3), Article 9, Article 10

Headwords:

Asylum; refugee status; Qualification Directive; act of persecution; reason for persecution; severe violation of human rights; freedom of religion; religious subsistence level; religious activity in public; physical freedom; alternative refuge in cases of emigration; conditions created by individual after leaving country of origin.

Headnotes:

1. Even under Directive 2004/83/EC, not every restriction of religious freedom results in persecution within the meaning of asylum law. Whether a measure is tied to religion as a reason for persecution proceeds from Article 10 of the Directive; but what right is protected, and to what extent, proceeds from Article 9 of the Directive.

2. Interference in the core area of religious freedom represents a severe violation of a basic human right within the meaning of Article 9 (1) of the Directive. Whether, and under what conditions, religious activity in public is also included here, is a matter of uncertainty under Community law that must ultimately be clarified by the European Court of Justice.

Decision of the 10th Division of 5 March 2009 – Federal Administrative Court 10 C 51.07

I. Wiesbaden Administrative Court, 04.12.2003

– Case No.: VG 2 E 160/02.A (1) -

II. Kassel Higher Administrative Court, 12.07.2007

– Case No.: VGH 8 UE 3339/04.A -



FEDERAL ADMINISTRATIVE COURT

IN THE NAME OF THE PEOPLE

DECISION

Federal Administrative Court 10 C 51.07
Higher Administrative Court 8 UE 3339/04.A

Released
on 5 March 2009
Ms. Röder
as Clerk of the Court

in the administrative case

Translator's Note: The Federal Administrative Court, or *Bundesverwaltungsgericht*, is the Federal Republic of Germany's supreme administrative court. This unofficial translation is provided for the reader's convenience and has not been officially authorised by the *Bundesverwaltungsgericht*. Page numbers in citations of international texts have been retained from the original and may not match the pagination in the parallel English versions.

the Tenth Division of the Federal Administrative Court
upon the hearing of 5 March 2009
Federal Administrative Court Justice Dr. Mallmann sitting as Presiding Justice,
with Federal Administrative Court Justices Richter, Beck, Dr. Kraft and Fricke

decides:

The judgment of the Hessian Higher Administrative Court
of 12 July 2007 is set aside.

The matter is remanded to the Higher Administrative Court
for further hearing and a decision.

The disposition as to costs is reserved for the final judgment.

Reasons:

I

- 1 The Complainant asks the court to order the Respondent to recognize her as entitled to asylum, and to grant her refugee status.

- 2 The Complainant, born in 1974, is a Chinese national. She worked as a teacher in a state school in China, and in March 1999 joined an evangelical home church or 'underground church' that was not officially registered, and that was therefore viewed as illegal by the authorities. She participated in Bible study classes and services. The meetings of congregation members were repeatedly observed by the police. The Complainant encountered difficulties for that reason; for example, in October 1999 she was arrested and detained overnight; in September 2000 she lost her position as a teacher. She moved to a different town and changed jobs, avoided all contact with a church, and in February 2001 flew to Germany from Shanghai, with a passport and visitor visa. Here she sought asylum. The Federal Office for the Recognition of Foreign Refugees – now the Federal Office for Migration and Refugees – (the 'Federal Office') rejected her application in a decision of 15 January 2002, finding that neither the requirements of Section 51 (1) of the Aliens Act nor the impediments to deportation under Section 53 of that Act were present, and threatening her with deportation to China. The Administrative Court rejected the appeal against the Federal Office's decision.
- 3 In her appeal of the Administrative Court's decision, the Complainant stated that in Germany she has again joined an evangelical (Chinese) congregation. In Frankfurt in January 2006, together with seven other Chinese nationals, she founded a congregation of a Christian denomination that is active worldwide, especially in the United States. This founding, she said, was made public on a Web site that also identified her by name and with a photograph. She says that she works actively in this church.
- 4 In a decision of 12 July 2007, the Higher Administrative Court upheld the appeal. It called 'very dubious' the question of whether the complainant had emigrated from China after having previously been persecuted, but ultimately left the matter open. The adduced reasons prior to leaving her country of origin, the court found, were fundamentally credible. Despite their stringency, said the court, it was quite possible that the measures taken by the authorities lacked sufficient intensity. In addition, at her new place of residence in China the Complainant might well have had an alternative option for refuge within the country.

However, the court found, her religious activities after her flight had so massively exposed her to danger that she should be recognized as entitled to asylum and to refugee status. The court found that there was a considerable probability that in the event of a return to China, she would be recognized and persecuted there as a now-leading member of a Chinese underground church on account of her activities abroad in the Federal Republic of Germany, particularly because of her participation in founding and building up a church congregation in Frankfurt. The court found that she would have to expect to be charged with a violation of Section 300 of the Chinese Criminal Code, and that she would be sentenced to imprisonment. Since the church she helped found actually set a priority on provoking the Chinese authorities with its Web site, and on calling attention to itself, there was a great probability that the Chinese authorities concerned would already be aware or would become aware of these activities by way of the Chinese investigative resources abroad. The probability of harsh sanctions was particularly great in the Complainant's case, the court found, because even before she had left China, she was not a 'blank page' to the authorities there in regard to religion, but rather had attracted attention as a member of a prohibited home church.

- 5 In their appeals to this Court, by authorization from the Higher Administrative Court, the Respondent and the Federal Officer for Asylum Affairs substantially assert that the court below employed too narrow a basis of fact in reaching its conviction of the Complainant's endangerment on account of her activities after leaving her country of origin.

II

- 6 The appeals to this Court by the Respondent and the Federal Officer for Asylum Affairs have merit. The decision of the court below is founded on inadequate findings of fact, and is therefore contrary to federal law (Section 137 (1) No. 1 of the Code of Administrative Court Procedure). Because this Court cannot reach a final decision in the matter because of the insufficient findings of fact, the proceedings must be remanded to the court below for further hearing and a deci-

sion (Section 144 (3) sentence 1 No. 2 of the Code of Administrative Court Procedure).

- 7 1. The present appeal concerns the recognition of refugee status sought by the Complainant under Section 3 (1) and (4) of the Asylum Procedure Act, Section 60 (1) of the Residence Act (see 2. below), the entitlement to asylum under Article 16a of the Basic Law (see 3. below), and, alternatively, a sought finding of prohibitions on deportation. The present appeal must consider changes in the law that have been enacted since the appealed decision was handed down if the court below – if it were now to decide in place of the present Court – would have to take those changes into account (settled case law; see, for example, the decision of 1 November 2005 – Federal Administrative Court 1 C 21.04 - Buchholz 402.25 Section 73 Asylum Procedure Act No. 15). The court below would now have to take the current state of law into account, in accordance with Section 77 (1) of the Asylum Procedure Act. For that reason, in regard to recognition of refugee status, Section 3 (1) and (4) of the Asylum Procedure Act, Section 60 (1) of the Residence Act and Section 28 (1a) of the Asylum Procedure Act as amended by the Directive Implementation Act of 19 August 2007 (BGBl I p. 1970) would have to be applied, which, among other measures, implemented Articles 9 and 10 of Council Directive 2004/83/EC of 29 April 2004 regarding the 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 conferred; Official Journal L 304 of 30 September 2004 p. 12; corr. Official Journal L 204 of 5 August 2005, p. 25 – known as the ‘Qualification Directive’ (see Section 60 (1) sentence 5 Residence Act).
- 8 2. In its approach, the court below correctly assumed that the Complainant should be recognized as a refugee if, on account of her religious activity in Germany, she would be threatened with persecution upon her return to China, within the meaning of Section 60 (1) sentence 1 of the Residence Act. Both Section 60 (1) sentence 1 of the Residence Act and Article 10 (1) b of the Directive, following the lines of Article 1 A 2 of the Geneva Convention on Refugees, consider religion a significant reason for persecution, and therefore a triggering

characteristic for persecution. In that Article 10 (1) b of the Directive makes it clear that the term 'religion' includes participation in formal worship not only in private but in public, as well as other religious acts or expressions of view, or forms of conduct based on or mandated by any religious belief, this does not automatically constitute – contrary to a widespread view in the case law and literature – an expansion of refugee protection. Article 10 (1) b of the Directive defines what is meant by religion as a reason for persecution – i.e., what religious beliefs or activities an act of persecution must be linked with in order to be significant under asylum law. Even under the previous case law, religious activity as a reason for persecution was not limited to the realm of what is known as the 'religious subsistence level' – i.e., religious activity in the private sphere, communicating among neighbours. If – as in the Complainant's assertions to date – the question is whether persecution is threatened because of a past exercise of religious faith, even under earlier law a grant of asylum or refugee status was not limited to the private sphere if there was a threat of encroachment on life, limb or liberty (see, for example, the decision of the Ninth Division of 13 May 1993 – Federal Administrative Court 9 C 49.92 - BVerwGE 92, 278 <280 et seq.> = Buchholz 402.25 Section 1 Asylum Procedure Act No. 161).

- 9 The assessment of whether a foreigner is to receive refugee status is governed by Article 9 (1) a of the Directive (letter b is irrelevant in the present case). It defines as persecution within the meaning of the Geneva Convention on Refugees those acts which are sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15 (2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms – the ECHR. Thus a grant of refugee status is contingent on an act of persecution which – drawing upon the reasons for persecution stated in Article 10 of the Directive – severely violates a basic human right. Thus ultimately it is not Article 10, but Article 9 of the Directive that decides the operative scope of protection for granting refugee status. It is Article 9 that indicates what right is protected, and to what extent.

- 10 a) In examining whether an act constitutes a serious violation of a basic human right within the meaning of Article 9 (1) a of the Directive, we must first determine which human right is being interfered with. In connection with religious activity it makes a considerable difference – just as it did formerly – whether we are concerned with danger to life, limb or liberty, or an interference with religious freedom because the believer is being required to restrict or abandon his or her faith.
- 11 In cases of interference with life, physical integrity or physical freedom, the case law to date has assumed, without restriction, that significant persecution exists if the interference is substantial and is associated with characteristics relevant to asylum (see, for example, the decision of 25 October 1988 – Federal Administrative Court 9 C 37.88 – BVerwGE 80, 321 <324>). Article 9 of the Directive does not entail any change here. Under Section 1 a of that Article, the basic human rights whose serious violation always results in an assumption of persecution particularly include the rights from which, under Article 15 (2) in conjunction with Article 15 (1) of the ECHR, no derogation is permitted, even in time of war or other public emergency. These rights that persist even in public emergencies include the right to life under Article 2 of the ECHR (except in respect of deaths resulting from lawful acts of war), the prohibition on torture and on inhuman or degrading treatment or punishment under Article 3 of the ECHR, the prohibition on slavery and servitude under Article 4 (1) of the ECHR, and the prohibition on convictions for criminal offences without a proper legal basis under Article 7 ECHR. In the event of interference with physical integrity or physical freedom, significant persecution is to be assumed automatically, provided the interference is covered by Article 3 of the ECHR. In any case, the right to physical integrity and physical freedom is a fundamental human right. If an interference with this right is not covered by Article 3 ECHR, persecution must be assumed if the violation of a right is severe within the meaning of Article 9 (1) a of the Directive. The referral in that Article to the rights listed in Article 15 (2) of the ECHR is not limiting, as can be deduced from the wording ‘in particular’ in Article 9 (1) a of the Directive.

- 12 The court below assumed that because of her religious activity in Germany, the Complainant was at risk of being sentenced in China to years of imprisonment. Assuming a viable prognosis of endangerment, this would indeed be a severe violation of the right to physical freedom protected under Article 9 (1) a of the Directive (this will be discussed under c) immediately below).
- 13 b) If, in connection with religious activity, the matter at issue is not an interference with life, physical integrity or physical freedom, it must be examined whether there is an interference with religious freedom, which constitutes persecution within the meaning of Article 9 (1) a of the Directive. Although religious freedom is not among the rights protected even in emergencies under Article 15 (2) of the ECHR, it too is one of the basic human rights protected under Article 9 (1) a of the Directive – in addition to the rights that are protected even in emergencies. The European Court of Human Rights has repeatedly emphasized in its case law the fundamental importance of religious freedom to a democratic society (see, for example, the decision of 5 April 2007 - 18147/02 - Scientology/Russia, NJW 2008, 495 et seq.). The multifarious protection of religious freedom at the national, Community and international level also makes it clear that this right is of central importance among human rights (Article 4 (1) and (2) Basic Law, Article 9 ECHR, Article 10 (1) European Union Charter of Fundamental Rights, Article 18 UN Universal Declaration of Human Rights of 1948, Article 18 International Covenant on Civil and Political Rights of 1966). The 9th Division of the Federal Administrative Court as well, in its case law on protection from deportation under Section 53 (4) of the 1990 Aliens Act (now: Section 60 (5) Residence Act), has assumed that under Article 9 of the ECHR, religious freedom is among the human rights guaranteed as basic by all Treaty States (see, for example, decision of 24 May 2000 – Federal Administrative Court 9 C 34.99 - BVerwGE 111, 223 <229 et seq.>; see, furthermore, decision of 20 January 2004 - Federal Administrative Court 1 C 9.03 - BVerwGE 120, 16 <24>).
- 14 In any case, a severe violation of religious freedom exists if a believer is so seriously impeded from practicing his faith that the right to religious freedom is violated in its core. The core of religious freedom is indispensable to the personal dignity and development of any human being, and is therefore belongs to

the minimum standard of human rights. According to settled case law, it is inalienable, and, according to Article 9 (2) of the ECHR, it cannot be limited (regarding details, see for example Federal Constitutional Court, decision of 1 July 1987 – Federal Constitutional Court 2 BvR 478/86, 2 BvR 962/86 - BVerfGE 76, 143 <158 et seq.> and Federal Administrative Court, decision of 20 January 2004 - Federal Administrative Court 1 C 9.03 - BVerwGE 120, 16 <19 et seq.>; each with further authorities). In any case, if this core area is violated, a severe violation of rights within the meaning of Article 9 (1) a of the Directive must be affirmed and refugee status must be granted accordingly. Whether, as in the case of the entitlement to asylum under Article 16a of the Basic Law, this means only the so-called religious subsistence level – in other words, the exercise of faith in private or in communion with neighbours – or whether and under what circumstances refugee status under the Directive also covers religious activity in public, is a matter of uncertainty under Community law that must ultimately be decided by the European Court of Justice – ECJ. For the case at issue here, this question cannot be pursued further in the present appeal proceedings, and a reference to the ECJ for a preliminary ruling does not come under consideration. This is because – including with regard to any future religious activity by the Complainant in China – the court below did not reach adequate findings of fact that make it possible to examine a potential violation of the Complainant's religious freedom.

- 15 c) In regard to interference with life, limb or physical integrity, the court below first of all correctly assumed that a material subjective state of affairs has arisen since leaving her country of origin if the Complainant is threatened in China with years of imprisonment or a comparable serious restriction of her physical freedom because of her religious activity in Germany. In initial proceedings in asylum law – as here – there is no limitation on the recognition of subjective reasons that arise after leaving the country of origin (see Section 28 (1a) Asylum Procedure Act and Article 5 (2) of the Directive; see, previously, decision of 18 December 2008 - Federal Administrative Court 10 C 27.07 - Copy of the Decision p. 8 juris Marginal No. 14). According to the findings of the court below, moreover, the Complainant already practiced her faith in her country of origin, and attracted the attention of the authorities there as a member of a prohibited

home church (see Article 4 (3) d in conjunction with Article 5 (2) of the Directive).

- 16 However, it is not consistent with federal law when the court below states that the Complainant must expect arrest and punishment, and particularly a conviction under Section 300 of the Chinese Criminal Code, because of her religious activities after leaving China (Copy of the Decision p. 21 et seq.). As the present appeals correctly assert, these comments are founded on too narrow a basis of fact, and therefore do not meet the requirements under which the court must satisfy itself as to the facts under Section 108 (1) Sentence 1 of the Code of Administrative Court Procedure. This constitutes a breach of substantive law. As regards the possible criminal conviction, the court below bases its prognosis of endangerment primarily on the wording of the Criminal Code, which provides for a minimum sentence of three years of imprisonment, with the resulting 'possibility of imposing penal sanctions on virtually any religious activity that is not officially registered and thereby accepted' (Copy of the Decision p. 24). The court below does not adequately examine how the penal provision is concretely handled in China (concerning the requirement to investigate not merely the abstract situation of law, but most significantly also the concrete legal practice in the persecuting state, see, for example, decision of 10 December 2004 - Federal Administrative Court 1 B 12.04 - Buchholz 310 Section 130a Code of Administrative Court Procedure No. 67 with further authorities). In the matter of state sanctions against underground Christian churches and their members, moreover, the court below mentions 'regional differences' without pursuing the matter further or explaining how these differences will have an effect, with reference to the Complainant (Copy of the Decision p. 23). The court below states that in the event of her return to China, the Complainant would be identified and persecuted as a now-leading member of an 'underground Chinese church' because of her collaboration in the founding and development of the congregation in Frankfurt (Copy of the Decision p. 21), but it does not make clear to what extent the Chinese authorities' measures against home churches or underground churches and their members in China are directed in the same way against religious activity in other countries. The court below furthermore makes no findings as to whether and in what way Chinese authorities obtain knowledge of such

activities abroad. The reference to the official mission of the Office for Religious Affairs is not sufficient for this purpose (Copy of the Decision p. 25). Accordingly, there are no viable findings as to whether, if she returned to China, the Complainant would in fact face sentencing to years of imprisonment or similar severe sanctions – for example, confinement in a re-education camp – on account of her religious activity in Germany (see Copy of the Decision p. 22 and 23). Since to that extent the appealed decision also does not prove correct for other reasons (Section 144 (3) No. 2 Code of Administrative Court Procedure), the matter must be remanded to the court below.

- 17 d) If on re-examination it is found that the Complainant is not threatened with danger relevant to asylum law on account of her religious activities after leaving China, the court below will have to again address the question of prior persecution. The court below called prior persecution of the Complainant ‘very doubtful’ (Copy of the Decision p. 10), but did not find in detail whether the Complainant was in fact assured a religious subsistence level in China. If the Complainant was already persecuted before leaving China, or was directly threatened with persecution, moreover, the assumption of prior persecution under Article 4 (4) of the Directive does not depend on the existence of an internal alternative refuge at the time when she left the country (see this Division’s decision of 19 January 2009 - Federal Administrative Court 10 C 52.07 – to be published in the BVerwGE collection).
- 18 If the court below arrives at the conclusion that the Complainant cannot adduce either significant reasons prior to leaving her country, or significant reasons after leaving her country, it will furthermore have to clarify to what extent the Complainant will continue to be religiously active in China, and if applicable whether, in regard to Article 9 and 10 of the Directive, this might make recognition of asylum status imperative. If this in turn depends on the matter of uncertainty under Community law described above, the court below must authorize an appeal of its decision to this Court, so that the Federal Administrative Court can refer this question to the European Court of Justice.

- 19 3. It is likewise not possible to arrive at any final decision as to whether the court below properly declared the Complainant entitled to asylum under Article 16a of the Basic Law.
- 20 In this connection as well, the court below first of all correctly assumed that the Complainant would be entitled to asylum if her religious activity in Germany caused her to be threatened with political persecution within the meaning of Article 16a of the Basic Law. This is not opposed by the fact that this danger is founded on circumstances resulting from the Complainant's own decision after leaving her country of origin. Given the conduct that she already displayed in China, that decision of hers is plainly in line with a firm conviction she clearly acted on while still in her country of origin (see Section 28 (1) Asylum Procedure Act). However, the court below is in error in assuming that with regard to religious activity, the Directive expanded not only the applicability of refugee status, but also the scope of protection of the fundamental right of asylum (Copy of the Decision p. 25 et seq.). Aside from the fact that according to the findings of the court below, what is primarily at issue is not an interference with the Complainant's freedom of religion, but with her physical freedom, this Court has already decided previously that there is no basis for concluding that Section 60 (1) Sentence 5 and Section 60 (11) of the Residence Act were supposed to expand the scope of protection of the right of asylum on a purely statutory basis (decision of 29 May 2008 – Federal Administrative Court 10 C 11.07 - BVerwGE 131, 186 <190 et seq.> = Buchholz 451.902 *Europäisches Ausländer- und Asylrecht* No. 21; in the same sense, Mannheim Higher Administrative Court, decision of 20 November 2007 - A 10 p 70/06 - InfAuslR 2008, 97; see also Bundestag publication 16/5065 p. 153). There is also no expansion of the basic right of asylum in regard to Article 3 of the Directive. That provision concerns cases in which Member States adopt more favourable standards for refugee status than in the Directive or the Geneva Convention on Refugees, and might thus frustrate the Directive's fundamental goal of making asylum policy uniform and achieving a common European system for asylum (see this Court's reference for a preliminary ruling of 14 October 2008 – Federal Administrative Court 10 C 48.07 – to be published in the BVerwGE collection). Given the configuration of the present case, one might at best consider the possibility that the claim

to refugee status under the Directive might take precedence over the claim to asylum under national constitutional law.

- 21 However, the court below founded its prognosis of endangerment on too narrow a basis of fact again in this regard. The comments under 2. c) above on the Complainant's refugee status apply in this connection as well. Thus the matter is not ripe for a decision in this regard either, and must be remanded to the court below so that it can add the necessary findings as to the prognosis of endangerment.
- 22 4. The disposition as to costs is reserved for the final decision.

Dr. Mallmann

Richter

Beck

Prof. Dr. Kraft

Fricke