FEDERAL ADMINISTRATIVE COURT

IN THE NAME OF THE PEOPLE

DECISION

BVerwG 10 C 21.08
VGH 3 UE 460/06.A

Released
on 5 May 2009
by 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 May 2009
Federal Administrative Court Justice Dr. Mallmann sitting as Presiding Justice,
with Federal Administrative Court Justices Richter, Beck, Prof. Dr. Kraft, and Fricke

decides:

The appeals by the Respondent and the Federal Officer against the Decision of the Hessian Administrative Court of 9 April 2008 are denied.

The Respondent and the Federal Officer shall each bear half of the cost of these appeal proceedings.

R e a s o n s :

I

1 The Complainants, a married couple of Russian nationality from Chechnya, seek to be granted refugee status.

2 The husband of the couple, born in 1975, is of Armenian ethnicity and Christian religious affiliation; his wife, born in 1979, is of Chechnyan ethnicity. They entered Germany in August 2001 and applied for asylum.

3 They based their application for asylum on the following grounds: Together with the husband's brother, they said, they had previously been detained by Russian military personnel in February 2000 and severely mistreated. The wife, who was pregnant at the time, thereupon suffered a miscarriage. In April 2001 members of the Russian security forces accused the husband and his brother of being terrorists, and put them in a 'filtration camp', where they were mistreated. The husband and his brother had been able to escape, they said, by bribery.

4 In a decision of 24 June 2002, the Federal Office for the Recognition of Foreign Refugees (now the Federal Office for Migration and Refugees) – the 'Federal Office' – rejected the application for asylum, finding that the requirements of Section 51 (1) of the Aliens Act had not been met and there were no impediments to deportation under Section 53 of the Aliens Act, and it threatened the Complainants with deportation to the Russian Federation.

5 In the action that was then lodged, the Administrative Court ordered the Respondent, in a decision dated 2 June 2004, to grant the Complainants asylum, together with protection from deportation under the provisions of asylum law. The court based its decision on a group persecution of Chechens that prevailed in Chechnya; it found that there was no internal flight alternative in the other regions of the Russian Federation.

6 The Respondent and the Federal Officer for Asylum Matters – the ‘Federal Officer’ – appealed this decision. In the proceedings for that appeal the Complainants withdrew their action insofar as it sought a grant of asylum status under Article 16a of the Basic Law.

7 By a decision of 9 April 2008, the Higher Administrative Court terminated the proceedings insofar as the action had been withdrawn, and otherwise denied the appeals. As grounds, the court explained in essence that the Complainants were entitled to asylum. Their life and freedom had been directly threatened at the date of their emigration, solely because of their membership in the group of Caucasians originating from Chechnya. Additionally, however, the Complainants had also previously been persecuted for individual reasons. The measures they endured could not be justified as a legitimate combating of terrorism. Upon the taking effect of Article 4 (4) of Directive 2004/83/EC, an additional examination of the possibility of internal protection at the date of emigration was no longer relevant. The court was satisfied that now the Complainants could no longer return to Chechnya or to other territories of the Russian Federation, because there was no good reason to believe that they would not again be threatened with such persecution. In the case of the husband, who escaped only through bribery, it had to be assumed that he could be sought and arrested as a terrorist by the Russian security forces; the same applied to his wife. In the event of a detention by the internal intelligence service on suspicion of terrorism, it could not be excluded with the requisite certainty that there might be new abuses by the security authorities.

8 In their appeals to this Court, by authorisation from the Higher Administrative Court, the Federal Office and the Federal Officer claim that the existence of a domestic alternative for protection at the date of emigration is relevant even now that the Qualification Directive applies. The Federal Office furthermore objects that the court below also extended the prognostic standard, and thus the presumption under Article 4 (4) of Directive 2004/83/EC, to embrace internal protection as well; thus the two components of the recognition of refugee status were impermissibly confused. The Federal Officer claims that the prognosis of

the court below regarding return was based on assumptions; in this connection he complains of both a violation of substantive law and procedural defects.

9 The representative of the federal interests has intervened in the proceedings. It is his opinion that the plan for review in the appealed decision is unobjectionable. However, he says, the court below did not distinguish with sufficient clarity between the provisions of Article (4) and Article 8 of Directive 2004/83/EC. If the Complainants were threatened nationwide with individual state persecution, an internal alternative for protection was out of the question.

II

10 The appeals by the Respondent and the Federal Officer for Asylum Affairs – the Federal Officer – are denied. The court below affirmed the Complainants' entitlement to asylum status without violating appealable law (Section 137 (1) No. 1 Code of Administrative Procedure). There is no objection relevant to this stage of appeal to that court's finding that in the case of the husband, who was to be viewed as previously persecuted, there was no good reason why he would not be threatened with such persecution again upon his return to Chechnya, and there was also no possibility of internal protection in other regions of the Russian Federation (1.). For the wife, refugee status at this stage of the proceedings already proceeds from Section 26 (1) in conjunction with Section 26 (4) of the Asylum Procedure Act (2.).

11 1. The controlling provisions in the legal assessment of an application for refugee status are Section 3 (1) and (4) of the Asylum Procedure Act as amended in the notification of 2 September 2008 (BGBl I p. 1798) and Section 60 (1) of the Residence Act as amended in the notification of 25 February 2008 (BGBl I p. 162). In the appealed decision of 9 April 2008, in accordance with Section 77(1) Sentence 1 Clause 2 of the Asylum Procedure Act, the Higher Administrative Court correctly took account of the amendments that were enacted in the Act for the Transposition of European Union Directives on Residence and Asylum Law of 19 August 2007 (BGBl I p. 1970) – the Directive Transposition

Act – with effect as of 28 August 2007, and that were recognised in these notifications.

12 The court below recognised the refugee status of the husband Complainant in part because he had twice been detained and mistreated by Russian security forces in Chechnya. As he had previously suffered persecution, the court could not exclude with the requisite certainty that in the event of a return, he might be arrested again on suspicion of terrorism due to a continuing registration as a (potential) Chechnyan combatant, and in such a case, there would again be abuses on the part of the security forces. Nor did he have any option for internal protection in other regions of the Russian Federation at the time of the appellate decision, the court found. This justification, at which the decision of the court below arrives irrespective of the discussion of group persecution, withstands the review of this Court.

13 Under Section 3 (1) of the Asylum Procedure Act, a foreigner is a refugee within the meaning of the Convention Relating to the Status of Refugees of 28 July 1951 – the ‘Geneva Convention on Refugees’ – if in the country of his citizenship or the country in which he habitually resides as a stateless person, he faces the threats listed in Section 60 (1) of the Residence Act. Under Section 60 (1) Sentence 1 of the Residence Act, in application of this Convention, a foreigner may not be deported to a state in which his or her life or liberty is under threat on account of his or her race, religion, nationality, membership of a certain social group, or political convictions. In establishing whether a case of persecution pursuant to Sentence 1 applies, Article 4 (4) and Articles 7 through 10 of 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) – the ‘Qualification Directive’ – are additionally to be applied (Section 60 (1) Sentence 5 of the Residence Act).

14 a) According to the findings of fact by the court below, against which the Appellants have lodged no procedural complaints, and by which this Court is bound (Section 137 (2) Code of Administrative Procedure), the husband Complainant

was arrested twice and consequently became the victim of extremely serious physical abuse by the Russian security forces. The application of physical violence in such a severe form represents a serious violation of fundamental human rights – here, the prohibition on inhuman or degrading treatment within the meaning of Article 3 of the European Convention on Human Rights – and thus meets the definition of an act of persecution (Article 9 (1) a in conjunction with Article 9 (2) a of Directive 2004/83/EC). Here the persecution emanated from Russian security forces, and thus directly from the state (Section 60 (1) Sentence 4 Letter a of the Residence Act in conjunction with Article 6 (a) of the Directive). The court below correctly ruled out the existence of atypical excesses by public officials, in light of the great number of abuses that have not been sanctioned.

15 b) Section 60 (1) Sentence 1 of the Residence Act furthermore presupposes that legally protected rights must have been threatened on account of race, religion, nationality, membership of a certain social group, or political convictions. Under Community law as well, an act of persecution is relevant to refugee status only if connected to one of the reasons for persecution listed in Article 10 of Directive 2004/83/EC (Article 9 (3) of the Directive). Here the concept of race particularly includes considerations of colour, descent, or membership of a particular ethnic group (Article 10 (1) a of the Directive). The concept of nationality is not confined to citizenship or the lack thereof, but in particular also includes membership in a group that is determined by its cultural, ethnic, or linguistic identity, common geographical or political origins or its relationship with the population of another state (Article 10 (1) c of the Directive); this must be taken into account in interpreting the concept of ‘nationality’ in Section 60 (1) Sentence 1 of the Residence Act in accordance with Community law, as required. The term political conviction must in particular be understood as meaning that the applicant holds an opinion, thought or belief on a matter relating to the potential actors of persecution mentioned in Article 6 of the Directive and to their policies or methods, whether or not that opinion, thought or belief has been acted upon by the applicant (Article 10 (1) e of the Directive). In examining the reasons for persecution, it is sufficient if these characteristics are only attributed to the applicant by the actor of persecution (Article 10 (2) of the Directive).

16 According to the findings of the court below, the individual persecution suffered by the husband Complainant was connected solely with his ‘Caucasian appearance’ (labelling as ‘black’ or ‘dark-skinned’, copy of the decision p. 24) or his membership in a Caucasian group (copy of the decision p. 33). Among the Russian security forces – with no concrete reason or accusation of an act – this triggered a generalised suspicion that the Complainant was a Chechen fighter. From the viewpoint of the actor of persecution – here, the Russian security forces – which is the deciding factor for a finding of reasons for persecution, their disparagement connected with skin colour is clearly expressed in the defamation of the Caucasians (Chechens, Armenians, etc.) originating from Chechnya as ‘black-arses’, as found by the court below. We may set aside whether the characteristic of membership in a certain social group is satisfied on the basis of these findings, as the court below assumes, because in any case a combination of race and political conviction is present as reasons for persecution.

17 The security forces’ measures far exceeded a legitimate combating of terrorism and separatism. The severity of the physical abuse suffered by the husband Complainant cannot be justified as a pursuit of reasonable security interests and as a protection of legal rights by the state (see decision of 25 July 2000 – Federal Administrative Court 9 C 28.99 – BVerwGE 111, 334 <340 f.>).

18 c) The prognosis of persecution at which the court below arrives for the husband Complainant cannot be overturned by this Court, as it is primarily an assessment by the court judging on matters of fact.

19 Since the husband Complainant was persecuted individually and left his homeland shortly thereafter, he benefits – nor does this point depend on the comments by the court below on the group persecution of Caucasians from Chechnya – from the facilitated standard of proof under Article 4 (4) of Directive 2004/83/EC. According to that provision, the fact that an applicant has already been subject to persecution or to direct threats of such persecution is a serious indication of the applicant’s well-founded fear of persecution, unless there are

good reasons to consider that such persecution will not be repeated. Contrary to the present Appellants' interpretation, under this provision a previous persecution cannot be denied because of the existence at the date of emigration of an alternative for protection in another part of the country of origin; this Court has already decided that point in its decision of 19 January 2009 – Federal Administrative Court 10 C 52.07 - juris Marginal No. 29 (to be published in the BVerwGE collection). In other words, in the context of recognising refugee status, the less strict standard of proof applies even if at the time of emigration the situation was not fully devoid of alternatives nationwide.

20 The court below was satisfied that there were no good reasons why the husband Complainant would not again be threatened with state persecution by the Russian security forces upon his return to Chechnya. This prognosis is founded on the Higher Administrative Court's assumption that because of the escape he achieved from a 'filtration camp' only through bribery, the Complainant is still registered with the Russian security forces as a potential Chechnyan fighter. The procedural objections raised by the Federal Officer in this connection only in the filing of 29 April 2009, and thus after the deadline for stating reasons for the appeal (Section 139 (3) Sentence 1 of the Code of Administrative Procedure), are tardy and therefore inadmissible. To that extent, the court below also did not decide on too narrow a basis of fact. To be sure, its decision mentions 'presumptive registrations as a person suspected of terrorism' (copy of the decision p. 37), but it is sufficiently clear from the context of these remarks that the Higher Administrative Court was assuming that the Complainant had been registered by the security authorities (see copy of the decision p. 35). Thus that court's prognosis is based on a finding of fact that still suffices for the requirements of Section 108 (1) Sentence 1 of the Code of Administrative Procedure. Where the judge as to the facts decides on that basis that it cannot be ruled out that the Complainant will still be subject to the accusation of terrorism, would be seized by Russian security forces upon his return, and would then be abused, this seems not speculative but logically comprehensible. The Higher Administrative Court founded its assessment on multiple sources and adequately stated its reasons; there is no objection to be raised to it in the present proceedings.

21 Since, according to the findings of the court below, the husband Complainant suffered persecution by Russian security forces, and would again have to fear that persecution in the event of his return, this Court does not need to decide whether, in the wording ‘such persecution’, Article 4 (4) of Directive 2004/83/EC presupposes an internal connection between established previous persecution and threatened persecution (on this point see this Court’s referral to the ECJ for a preliminary ruling, dated 7 February 2008 – Federal Administrative Court 10 C 33.07 – Buchholz 451.902 *Europ. Ausl.- u. Asylrecht* [European Laws on Aliens and Asylum] No. 19 Marginal No. 41).

22 d) The court below assumed that the husband Complainant had no possibility for internal protection in other regions of the Russian Federation. Since, as a previously registered person suspected of terrorism, he belonged to the especially endangered groups, the court found, it could not be assumed with the certainty required under Article 4 (4) of Directive 2004/83/EC that upon his return to his homeland – irrespective of whether he went to Chechnya or other regions of the Russian Federation – he would not be threatened again with such persecution. This assumption too withstands scrutiny by this Court.

23 In Section 60 (1) Sentence 5 of the Residence Act, the Federal Republic of Germany exercised the option offered to Member States in Article 8 of Directive 2004/83/EC, of taking account of internal protection as part of assessing refugee status. Under Article 8 (1) of the Directive, as part of the assessment of the application for international protection, Member States may determine that an applicant is not in need of international protection if in a part of the country of origin there is no well-founded fear of being persecuted or no real risk of suffering serious harm and the applicant can reasonably be expected to stay in that part of the country. Paragraph 2 requires that in examining whether a part of the country of origin is in accordance with paragraph 1, Member States at the time of taking the decision on the application must have regard to the general circumstances prevailing in that part of the country and to the personal circumstances of the applicant.

24 We may set aside the question of whether internal protection must be examined at all in the present case, where the court below assumed that the Complainant was threatened with persecution by the State nationwide. The court below has already found that the first requirement of Article 8 (1) of the Directive (requiring that there is some part of the country of origin where no well-founded fear of persecution exists) was not met. In so doing, it allowed the Complainant to benefit from the facilitated standard of proof under Article 4 (4) of Directive 2004/83/EC. The Respondent objects that this approach impermissibly confuses the elements of recognising refugee status. This Court does not agree.

25 That the standards should be treated in different ways is refuted by the very wording of Article 4 (4) and Article 8 (1) of Directive 2004/83/EC, which is consistent in this regard and in both provisions refers to a well-founded fear of persecution. This prognostic standard also remains unchanged in cases of previous persecution, because the facilitated standard of proof under Article 4 (4) of the Directive, in the form of a refutable presumption, is recognizably intended, in terms of the rules of evidence, to privilege those who have already actually experienced persecution personally in their homeland, either because they have suffered that persecution themselves or because they were directly threatened with it (decision of 19 January 2009 – Federal Administrative Court 10 C 52.07 – loc. cit., Marginal No. 29). In view of the intended normative purpose to provide a less strict standard of proof, it seems insensible that an examination of internal protection as an expression of the subsidiarity of refugee protection should be subject to a stricter standard than the systematically earlier stage of the prognosis of persecution. The teleology behind the facilitated standard of proof – the humanitarian character of asylum – prohibits burdening a person seeking protection, who has already suffered the experience of persecution once, with the risk of a repeat of such persecution.

26 2. At this stage of the proceedings, the refugee status of the wife Complainant already proceeds from Section 26 (1) and (4) of the Asylum Procedure Act.

27 Under that provision, the spouse of a foreigner is accorded refugee status if the recognition of the original entitled individual’s refugee status is incontestable,

the couple was already married in the country where the refugee is politically persecuted, the spouse has filed an asylum application before or at the same time as the recognised refugee, or immediately after entry, and there is no reason to repeal or withdraw the recognition of refugee status. This does not apply to spouses who meet the requirements of Section 60 (8) Sentence 1 of the Residence Act or Section 3 (2) of the Asylum Procedure Act.

28 In the wife Complainant's regard, the requirements of law for refugee protection for families are certainly present, except for the incontestable refugee status of her husband as required in Section 26 (1) No. 1 in conjunction with Section 26 (4) of the Asylum Procedure Act. Under the previous version of this provision, the Federal Office and the courts could confer family asylum simultaneously with the legal status of the person originally entitled to protection (decision of 21 January 1992 – Federal Administrative Court 9 C 66.91 - BVerwGE 89, 315 <317>). The insertion of the word 'incontestable' by Article 2 No. 4 of the Act Amending Provisions of Law on Aliens and on Asylum Procedure of 29 October 1997 (BGBl I p. 2584) tightened the provision to avert differences in status within the family that might result from different decisions by the authorities in regard to the person originally entitled to protection. The legislature has now given this goal priority over simplyfing the process for the authorities and the courts by arriving simultaneously at a positive decision on the asylum application of e.g. the other spouse, , in cases where at least one spouse's entitlement is recognised, without having to examine the other person's reasons for asylum (see decision of 29 September 1998 – Federal Administrative Court 9 C 31.97 - BVerwGE 107, 231 <233 f.>).

29 In regard to this purpose of the law, a final and absolute obligation to recognise the status of the originally entitled individual, imposed by the courts on the Federal Office, is equivalent to incontestable recognition of the status of the person entitled to protection, under Section 26 (1) No. 1 in conjunction with Section 26 (4) of the Asylum Procedure Act. Moreover, in ultimate appeal proceedings, by exception, this requirement is also met according to the letter and intent of the provision, as well as for reasons of procedural economy, if the Federal Administrative Court simultaneously renders a final and absolute judgment on the asy-

lum applications of the spouses, and the obligation to recognise the status of the originally entitled individual becomes final and absolute at the same time as the decision on the spouse's asylum application. Since the legal status conferred under Section 26 (1) or (4) of the Asylum Procedure Act is identical with the original status, it follows in these cases as well that the person having a derivative entitlement cannot demand an examination of his or her asserted individual danger of being persecuted (decisions of 25 June 1991 – Federal Administrative Court 9 C 48.91 - BVerwGE 88, 326, of 28 April 1998 – Federal Administrative Court 9 C 1.97 - BVerwGE 106, 339 <343>, and of 13 November 2000 – Federal Administrative Court 9 C 10.00 - Buchholz 402.25 § 26 Asylum Procedure Act No. 7).

30 The disposition as to costs is based on Section 154 (2) of the Code of Administrative Procedure. No court costs under Section 83b of the Asylum Procedure Act are imposed. The value at issue proceeds from Section 30 of the Act on Attorney Compensation.

Dr. Mallmann Richter Beck

Prof. Dr. Kraft Fricke

Field: BVerwGE: No

Asylum law Professional press: Yes

Sources in Law:

Asylum Procedure Act	Section 3 (1), Section 26 (1) and (4)
Residence Act	Section 60 (1) Sentence 1 and Sentence 5
Code of Administrative Procedure	Section 108 (1), Section 137 (2), Section 139 (3)
Directive 2004/83/EC	Article 4 (4), Article 8, Article 9, Article 10

Headwords:

Facilitated standard of proof; reversal of burden of proof; refugee protection for families; recognition of refugee status; refugee status; internal protection; internal flight alternative; nationality; political conviction; prognosis; race; prevention of terrorism; act of persecution; reason for persecution; prognosis of persecution; previous persecution.

Headnotes:

1. An asylum applicant who has been previously persecuted within the meaning of Section 60 (1) Sentence 5 of the Residence Act in conjunction with Article 4 (4) of Directive 2004/83/EC also benefits from the facilitated standard of proof under the latter provision in the examination of whether he has no well-founded fear of persecution within the territory of an internal alternative for protection under Article 8 (1) of Directive 2004/83/EC.

2. a) A final and absolute obligation to recognise the status of the originally entitled individual, imposed by the court on the Federal Office for Migration and Refugees, is equivalent to an incontestable recognition of the status of the originally entitled individual, as necessary under Section 26 (1) No. 1 of the Asylum Procedure Act in order to grant family asylum and refugee protection for families to that person's spouse (see Section 26 (4) of the Asylum Procedure Act).

b) By exception, this requirement is also sufficiently met in ultimate appeal proceedings if the Federal Administrative Court simultaneously renders a final and absolute judgment on the spouses' asylum applications, and the obligation to recognise the status of the originally entitled individual becomes final and absolute simultaneously with the decision on the asylum application of the spouse.

Decision of the Tenth Division of 5 May 2009 – Federal Administrative Court
10 C 21.08

I. Kassel Administrative Court, 02.06.2004 – Case No.: VG 2 E 1588/02.A -
II. Kassel Higher Administrative Court, 09.04.2008 – Case No.: OVG 3 UE 460.06.A -