

Field: BVerwGE: Yes
Asylum law Professional press: Yes

Sources in law:

Residence Act	Section 60 (2) through (7)
Asylum Procedure Act	Section 15 (1) and (2) nos. 1 and 7; Sections 16, 24 (1); Sections 26a, 30 (3) no. 2; Section 31 (1); Sections 32, 33 (1); Section 34; Section 77 (1); Section 81
Directive 2005/85/EC	Article 10 (1), Article 11 (1), Article 20 (1); Article 23 (4), Article 28 (2)
Eurodac Regulation	Article 4
Code of Administrative Court Procedure	Section 137 (1); Section 144 (3) sentence 1 no. 2

Headwords:

Fingerprinting; action to set aside decision; information about travel route; cause for request to pursue proceedings; analysability; instruction; pursuit of proceedings; request to pursue proceedings; Dublin Procedure; acquiescence; discontinuation of asylum proceedings; identification procedure; Eurodac; manipulation; one-month deadline; relevant date; obligations to cooperate; manifestly unfounded; papillary lines; regeneration of skin cells; decision on merits; written information; translation.

Headnotes:

1. The obligation of an asylum seeker to undergo identification procedures under Section 15 (2) no. 7 of the Asylum Procedure Act includes the obligation to refrain from all conduct that might compromise the analysability of the asylum seeker's fingerprints in advance of planned fingerprinting. However, there is no obligation under Section 15 of the Asylum Procedure Act to guarantee that fingerprints can be analysed by the Federal Office.
2. A manipulation of the fingertips that compromises taking analysable fingerprints may result in discontinuation of the asylum proceedings under Sections 32, 33 (1) of the Asylum Procedure Act.

Judgment of the 10th Division of 5 September 2013 – BVerwG 10 C 1.13

- I. Regensburg Administrative Court of 13 December 2011 – Case: VG RN 7 K 10.30552 –
- II. Munich Higher Administrative Court of 14 January 2013 – Case: VGH 20 B 12.30300 –



FEDERAL ADMINISTRATIVE COURT

IN THE NAME OF THE PEOPLE

JUDGMENT

BVerwG 10 C 1.13
VGH 20 B 12.30300

Released
on 5 September 2013
Ms Thiele
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.

When citing this decision, it is recommended to indicate the court, the date of the decision, the case number and the paragraph: BVerwG, Judgment of 5 September 2013 – BVerwG 10 C 1.13 – para. ...

the Tenth Division of the Federal Administrative Court
upon the hearing of 5 September 2013
by Presiding Federal Administrative Court Justice Prof. Dr Berlit and Federal
Administrative Court Justices Prof. Dr Dörig, Prof. Dr Kraft, Fricke and Dr
Maidowski

decides:

On appeal by the Respondent, the judgment of the Bavarian Higher Administrative Court of 14 January 2013 is set aside. The matter is remitted to the Higher Administrative Court for further hearing and a decision.

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

Reasons:

- 1 The Complainant, by his own account a Somali national, is appealing the discontinuation of his proceeding for asylum under Sections 32 and 33 (1) of the Asylum Procedure Act.
- 2 He applied for asylum status on 23 August 2010. On that same date, his fingerprints were taken by the Federal Office for Migrations and Refugees – the ‘Fed-

eral Office'. At that time it was found that no analysis for identification purposes was possible. The employee of the Federal Office taking the fingerprints noted in a file memorandum that the Complainant's fingertips showed signs of manipulation (e.g., injuries to the skin). The Complainant disputed this. The Complainant was thereupon requested in a letter dated 23 August 2010 to pursue his asylum proceeding, first of all, by appearing within one month at the Federal Office's field office to have 'analysable fingerprints' taken. Second, he was to explain in writing what countries he had stayed in since leaving his country of origin; whether he had already applied for asylum there; and if so, whether that asylum had been refused. At the same time, with a reference to Section 33 of the Asylum Procedure Act, he was notified that his application for asylum would be deemed withdrawn if he did not pursue proceedings within a month, and in that case a decision would be made, on the basis of the record as it then stood, concerning the existence of obstacles to deportation under Section 60 (2) through (5) or (7) of the Residence Act. He was provided with a translation of the letter into the Somali language.

- 3 At a further appointment – held on 8 September 2010, according to the Federal Office – the Complainant again had his fingerprints taken, but according to a report from the Federal Criminal Police Office dated 8 October 2010 these again were not usable.
- 4 In a decision dated 27 October 2010, the Respondent found that the application for asylum was deemed withdrawn, and that the asylum proceeding had been suspended (Item 1). It furthermore found that there were no obstacles to deportation under Section 60 (2) through (7) of the Residence Act (Item 2). Finally, the Complainant was ordered to leave the Federal Republic of Germany within one week after service of the decision, on pain of deportation to his country of origin (Item 3). In substance, the Federal Office based its decision on the fact that the Complainant had not complied with the request to pursue proceedings. Usable fingerprints could not be taken either on 23 August 2010 or at the subsequent appointment. The Complainant had not submitted the requested written declarations (about his travel route). There could be no finding on obstacles to deportation under Section 60 (2) through (7) of the Residence Act, if only be-

cause it had not been possible to determine a country of origin for the Complainant.

- 5 In his court action, the Complainant sought to have this decision set aside, or alternatively, to have the Respondent ordered to find obstacles to deportation under Section 60 (2) through (7) of the Residence Act with respect to Somalia. As grounds, he claimed there was no cause to issue a request to pursue proceedings. Furthermore, he had pursued his proceeding by undergoing a further identification procedure.
- 6 In the course of the court action, the Federal Office, in a letter dated 26 October 2011 and addressed to his legal counsel, requested the Complainant once again to pursue proceedings by appearing at the Federal Office and having his fingerprints taken. For that purpose he would receive a summons, with a date, from the Federal Office. The obligation to acquiesce in identification procedures, the Federal Office said, also included the obligation to refrain during the period prior to the renewed taking of fingerprints from any conduct that might impair or frustrate the possibility of analysing the fingerprints. This letter was served on the Complainant's counsel on 28 October 2011.
- 7 In a letter dated 9 November 2011, the Complainant was again summoned to appear for identification procedures on 24 November 2011. He appeared at that time; the fingerprints again proved to be insusceptible to analysis. According to a file memorandum, the Federal Office employee taking the fingerprints noted on the Complainant's fingertips abrasions, scarring, extensive callusing, hardening, exceptionally dry fingers, and extremely weak papillary lines. The Complainant denied having manipulated his fingertips.
- 8 The Administrative Court set aside the decision of the Federal Office. The Higher Administrative Court denied the Respondent's appeal of this ruling in a judgment dated 14 January 2013. As grounds, it stated in essence that the application for asylum was not to be considered withdrawn under Section 33 (1) sentence 1 of the Asylum Procedure Act. According to Section 15 (2) no. 7 of the Asylum Procedure Act, the court found, the Complainant was not obliged to

provide fingerprints that were usable by the Eurodac system. Rather, he had fulfilled his statutory obligation to cooperate by complying with all requests by the Respondent to acquiesce in identification procedures under Section 15 (2) no. 7 of the Asylum Procedure Act, and by permitting his fingerprints to be taken. If the legislature limits cooperation in the case of an identification procedure to the duty to acquiesce in the procedure, the court held, the Federal Office was not permitted to demand, by an official order, further acts of cooperation above and beyond that cooperation, or to sanction failure to comply with that order by discontinuing proceedings. In the absence of any statutory obligation to provide usable fingerprints, the court held, it did not matter whether the Complainant had to answer for the unsuitability of his fingerprints for analysis. With regard to the further grounds for the discontinuation order that, in defiance of the request to pursue proceedings, the Complainant had furnished no information about his travel route or about any applications for asylum that he had already submitted, the Federal Office had not heard him on these points. In this respect the court held as well that therefore the requirements of Section 33 of the Asylum Procedure Act had not been met.

9 In its appeal to this Court by leave of the court below, the Respondent complains that the interpretation of Section 15 of the Asylum Procedure Act by the court below contravenes Federal law. It argues that Section 15 (2) no. 7 of the Asylum Procedure Act, or as a fall-back, paragraph 1 of that provision, establishes a duty to refrain from any intentional action that might frustrate the success of an identification procedure. According to the concept of the law, which had been significantly influenced by Union law, the Federal Office must give priority to clarifying the question of whether the Federal Republic of Germany, as a Member State of the European Union, is responsible for examining the request for protection. Even if Germany is responsible, it must still clarify whether, and if applicable with what results, an applicant for asylum has pursued asylum proceedings previously, because any further application for asylum would constitute a secondary application.

10 In keeping with the judgments of the courts below, the Complainant believes he is not obliged to furnish usable fingerprints. He furthermore complains that the

request to pursue proceedings of 23 August 2010 provided only insufficient instruction, and in particular did not point out that discontinuing the proceeding would immediately result in the issuance of a deportation warning under Section 34 of the Asylum Procedure Act. The request to pursue proceedings dated 26 October 2011 and addressed to his legal counsel had not included a translation.

- 11 The representative of the Federal interests before the Federal Administrative Court largely concurs with the Respondent's interpretation of the law. In the representative's opinion, the Federal Office cannot be asked to assess the fact of a manipulation of the fingertips only when reviewing the requirements for rejecting an application for asylum as manifestly unfounded under Section 30 (3) no. 2 of the Asylum Procedure Act. The request to pursue proceedings, the representative said, served specifically to clarify whether the requirements for a decision on the merits were met, or whether the foreigner should be transferred to another Member State of the European Union where the Complainant (if eligible) could claim international protection.

II

- 12 The Respondent's appeal is admissible and meets with success. The court below affirmed the setting aside of the challenged discontinuation order on grounds that are incompatible with Federal law (Section 137 (1) Code of Administrative Court Procedure). The Higher Administrative Court was indeed correct in deciding that Section 15 (2) no. 7 of the Asylum Procedure Act imposes no obligation on an applicant for asylum to guarantee that his fingerprints are analysable. However, contrary to the opinion of the court below, the duty of cooperation established in that provision does include the obligation not to frustrate the possibility of analysing fingerprints during the time before they are taken. Because the court below improperly objects to the request to give an account of travels in the request to pursue the case dated 23 August 2010, and improperly, in contravention of Section 77 (1) sentence 1 of the Asylum Procedure Act, failed to take account of the second request to pursue proceedings dated 26 October 2011 and the Complainant's conduct in connection with the third identi-

fication procedure of 24 November 2011, this Court cannot itself reach a final decision for or against the Complainant, for lack of sufficient findings of fact in the appellate decision. Therefore the matter must be remitted to the Higher Administrative Court (Section 144 (3) sentence 1 no. 2 Code of Administrative Court Procedure).

- 13 The legal assessment of the Complainant's application is governed by the Asylum Procedure Act in the version promulgated on 2 September 2008 (Federal Law Gazette I p . 1798), as last amended by the Act Implementing Residence Directives of the European Union and Conforming National Terms of Law to the EU Visa Code of 22 November 2011 (Federal Law Gazette I p. 2258).
- 14 1. The court below correctly held that the present action for annulment is admissible. Through the means of discontinuing proceedings by an administrative act as governed by Sections 32 and 33 of the Asylum Procedure Act, the legislature made available to the Federal Office for Migration and Refugees – the Federal Office – an option for action against which the individual concerned can obtain redress only by way of an action for annulment. If the Federal Office exercises this legal power in error, the court cannot decide whether the application for asylum and refugee status is well-founded and at the same time annul the decision made under Sections 32 and 33 of the Asylum Procedure Act. Rather, the decision on the merits is initially reserved for the Federal Office under the terms of the Asylum Procedure Act. The asylum seeker must obtain an annulment of this decision if he wishes to obtain a decision on his asylum application (as found previously in the judgment of 7 March 1995 – BVerwG 9 C 264.94 – Buchholz 402.25 Section 33 Asylum Procedure Act no. 12 sentence 2).
- 15 2. According to Section 33 (1) of the Asylum Procedure Act, an application for asylum that also includes an application for refugee status under Section 13 (1) and (2) of the Asylum Procedure Act is to be deemed withdrawn if the foreigner has failed to pursue it for a period exceeding one month, despite a request from the Federal Office (sentence 1). The request must inform the foreigner of the consequences resulting from sentence 1 (sentence 2). If the requirements for an (imputed) withdrawal of an application are met, the Federal Office can no

longer decide on the merits of the application for asylum. Rather, according to Section 32 of the Asylum Procedure Act, it must indicate in its decision that the asylum proceeding has been discontinued and whether there are any obstacles to deportation pursuant to Section 60 (2) through (5) or (7) of the Residence Act (sentence 1). In the cases listed in Section 33 of the Asylum Procedure Act, a decision is to be made on the basis of the record as it stands (sentence 2). The Federal Office must furthermore issue a deportation warning; the deadline to be set for the foreigner to leave the country is one week, according to Sections 34 and 38 (2) of the Asylum Procedure Act.

- 16 The provisions for the imputed withdrawal of the application for asylum in an administrative proceeding in the event that the proceedings are not pursued further, as well as the associated decision by the Federal Office to discontinue proceedings, were incorporated into the Asylum Procedure Act by the Act Amending Asylum Procedure of 26 June 1992 (Federal Law Gazette I p. 1126). The provision in Section 33 of the Asylum Procedure Act is based on the imputed withdrawal of an action that applies in court proceedings (Section 81 Asylum Procedure Act) (cf. Bundestag Printed Paper 12/2062 p. 33). It is intended to prevent foreigners from protracting the asylum proceedings by intentionally failing to pursue them. In view of this provision's nature as an exception, as well as its far-reaching consequences, the requirements that a person seeking protection must express his or her continuing interest in the authorities' decision on the merits must not be overstretched (cf. on the request to pursue a case in court proceedings: Federal Constitutional Court, order of 27 October 1998 – 2 BvR 2662/95 – DVBl 1999, 166; Federal Administrative Court, order of 18 September 2002 – BVerwG 1 B 103.02 – Buchholz 310 Section 92 VwVG no. 16). These standards, which formerly applied only for requests to pursue proceedings in court, are also transferable to Section 33 of the Asylum Procedure Act (concurring, Funke-Kaiser in: GK-AsylVfG, version: January 2010, Section 33 at 6).
- 17 The request within the meaning of Section 33 (1) of the Asylum Procedure Act presupposes a definite cause that can give rise to doubts as to the existence or persistence of an interest in a decision on the merits. Such doubts may also

arise from a neglect of procedural obligations to cooperate; in that case, the request to pursue proceedings serves as a way of emphatically alerting the foreigner to these obligations (cf. judgment of 23 April 1985 – BVerwG 9 C 48.84 – BVerwGE 71, 213 <219> = Buchholz 402.25 Section 33 Asylum Procedure Act no. 3 p. 12; order of 18 September 2002, op. cit.). But justified doubts may be prompted only by a breach of an obligation to cooperate that is founded in law. Moreover, the content of the request to pursue proceedings may itself be directed only to compliance with an obligation to cooperate that is founded in law. Precisely in such cases as well, the instrument of a request to pursue proceedings represents a suitable response to a neglect of legal obligations to cooperate when a foreigner fails to cooperate adequately in clarifying the German authorities' responsibility for deciding on the merits of the application for asylum.

- 18 The general obligations of cooperation incumbent upon applicants for asylum and foreigners seeking refugee status within the meaning of Section 3 (1) and (4) of the Asylum Procedure Act proceed from Section 15 of the Asylum Procedure Act. That provision was likewise incorporated into the Asylum Procedure Act by the 1992 Act Amending Asylum Procedure. According to Section 15 (1) sentence 1 of the Asylum Procedure Act, foreigners are personally required to cooperate in establishing the facts of their case. Section 15 (2) of the Asylum Procedure Act provides examples ('in particular') of specific, especially important obligations to cooperate (Bundestag Printed Paper 12/2062 p. 30). Accordingly, foreigners are required, for example, to provide the necessary information orally, and on request also in writing, to the authorities responsible for implementing the Act (no. 1); to comply with statutory and official orders requiring them to report to specific authorities or institutions or to personally appear there (no. 3); and to undergo the required identification measures (no. 7).
- 19 3. A cause to issue a request to pursue proceedings may consequently arise from a breach of the obligation to undergo required identification measures that is incumbent upon the asylum seeker under Section 15 (2) no. 7 of the Asylum Procedure Act. It is true that no obligation to guarantee the analysability of fingerprints can be derived from this provision. However, the obligation to cooperate established in Section 15 (2) no. 7 of the Asylum Procedure Act also em-

braces the obligation of an asylum seeker to refrain, in advance of a planned fingerprinting, from any conduct that could compromise or frustrate the analysability of his or her fingerprints.

- 20 The content and significance of the foreigner's obligation to cooperate in identification procedures under Section 15 (2) no. 7 of the Asylum Procedure Act proceed from the connection of the provision's intent with Section 16 of the Asylum Procedure Act and the provisions of Union law on determining which Member State has responsibility under Council Regulation (EC) no. 343 of 18 February 2003 (OJ EU L no. 50 of 25 February 2003 p. 1) – known as the Dublin Regulation – and the Regulation of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention (OJ EU L 316/1) – the 'Eurodac Regulation'. In accordance with their nature, scope and purposes, the identification procedures required under Section 16 of the Asylum Procedure Act must be acquiesced even if the asylum seeker is not himself directly addressed by this provision. Section 16 of the Asylum Procedure Act, as well, was incorporated into the Asylum Procedure Act by the Act Amending Asylum Procedure of 26 June 1992 (Federal Law Gazette I p. 1126). This provision governs which means of establishing identity are permissible, who is responsible for them, who is to provide assistance, in what context the gathered data may be used, stored and transmitted, and when they must be deleted. Section 16 (1) sentence 1 of the Asylum Procedure Act provides for an obligation of the responsible authority to establish the identity of a foreigner applying for asylum by means of identification measures unless the foreigner is under 14 years of age. According to Section 16 (1) sentence 2 of the Asylum Procedure Act, only photographs and prints of all ten fingers may be taken to establish identity as provided in sentence 1. According to sentence 3, in order to determine the foreigner's country or region of origin, the foreigner's oral statements may be recorded on audio and data media. Here, the background materials to the Act indicate that the legislature's aim was to counteract, with a general identification procedure, the risk that asylum seekers might file a further application for asylum simultaneously or successively, under different names and concealing that an asylum proceeding was

pending or had been completed elsewhere (Bundestag Printed Paper 12/2062 p. 30).

- 21 Additionally, Section 16 of the Asylum Procedure Act serves to comply with Member States' obligation under Union law as a result of the Eurodac Regulation (Bundestag Printed Paper 14/7386 p. 59; in general, p. 36). Under Article 4 (1) of the Eurodac Regulation, the Federal Republic of Germany is obliged to promptly take the fingerprints of all fingers of every applicant for asylum of at least 14 years of age and send them to the Eurodac Central Unit. Under Article 4 (3) of the Regulation, the Central Unit will compare them with the fingerprint data transmitted by other Member States and already stored in the central database, and on request also with fingerprint data previously transmitted by the same Member State (Article 4 (4) of the Regulation). The purpose of the Eurodac System is to facilitate the application of the Dublin Convention in determining which Member State is to be responsible for examining an application for asylum (Article 1 (1) of the Eurodac Regulation). To meet the obligations of the Federal Republic of Germany under the Eurodac Regulation, the Federal Office must obtain fingerprints from asylum seekers in a quality that permits a data comparison within the Eurodac System.
- 22 If Section 16 of the Asylum Procedure Act in any case also serves to meet obligations under the Eurodac Regulation, and if Section 15 (2) no. 7 of the Asylum Procedure Act requires a foreigner to acquiesce in the identification procedures whose content is defined in more detail in Section 16 of the Asylum Procedure Act, this means the following for taking fingerprints: Section 15 (2) no. 7 of the Asylum Procedure Act is formulated only as an obligation to acquiesce. But the intent of that obligation is to enable the authorities to perform identification procedures within the meaning of Section 16 (1) of the Asylum Procedure Act that are suitable for analysis in the Eurodac System. Although the obligation to acquiesce in these identification procedures does not place an asylum seeker under an obligation to guarantee that the fingerprints he or she provides can be analysed in the Eurodac System, nevertheless, under Section 15 (2) no. 7 in conjunction with Section 16 (1) of the Asylum Procedure Act, he or she is obliged to refrain from any steps that might impede or frustrate an identification

on the basis of the requirements of law – including the Eurodac check (similarly, Funke-Kaiser in: GK-AsylVfG, Section 33, version: May 2011, at 21.3). This content of the asylum seeker's legal obligation proceeds with sufficient clarity from an interpretation oriented to the intent and purpose of the requirement of law, with no need – as the court below opines – for any statutory amendment or clarification.

- 23 The obligation imposed on the asylum seeker under Section 15 (2) no. 7 of the Asylum Procedure Act to acquiesce in having fingerprints taken and to refrain from any steps that impede or frustrate the usability of the fingerprints for purposes of identification is compatible with Article 11 of Directive 2005/85/EC of 1 December 2005 (the Asylum Procedures Directive). That version of the Procedures Directive continues to apply in the present proceedings, under the transitional provision in Article 52 of Directive 2013/32/EU of 26 June 2013. Under Article 11 (1) of Directive 2005/85/EC, Member States may impose upon applicants for asylum obligations to cooperate with the competent authorities insofar as these obligations are necessary for the processing of the application. It is true that the catalogue of obligations that may be imposed on asylum seekers under Article 11 (2) of the Directive does not include the obligation to acquiesce in fingerprinting. But that is also not necessary, because these are only general examples ('in particular'). However, the imposition of an obligation to cooperate in fingerprinting is covered by the general clause of Article 11 (1) of the Directive, under which Member States may impose upon applicants for asylum obligations to cooperate with the competent authorities insofar as these obligations are necessary for the processing of the application. After all, taking fingerprints that are suitable for data matching in the Eurodac System belongs to the obligations necessary for processing the application. This is also emphasised by Article 23 (4) (n) of the directive, which presupposes that an obligation for applicants to subject to fingerprinting is at least possible under Community or national law. It is also evident from the Member States' obligation to take fingerprints under the Eurodac Regulation that the Member States may to that extent oblige applicants to acquiesce in having their fingerprints taken.

- 24 Any further obligation to provide fingerprints that are also analysable cannot be derived from Section 15 (1) of the Asylum Procedure Act. Granted, the obligations specifically governed by paragraph 2 of the provision are not exhaustive ('in particular'). Moreover, inasmuch as obligations concerning identification procedures are not supposed to be governed exhaustively by Section 15 (2) no. 7 of the Asylum Procedure Act, an obligation to ensure that the fingerprints taken are analysable would be an unreasonable demand on the asylum seeker; not least of all this would also make the asylum seeker responsible for a lack of analysability which is beyond his or her control.
- 25 4. A request to pursue proceedings may be used as a response to a breach of the obligation to cooperate in identification. This is not excluded by any terms of either national or Union law governing the handling of applications for asylum.
- 26 Section 30 (3) no. 2 of the Asylum Procedure Act, under which an unfounded asylum application must be rejected as manifestly unfounded if the asylum seeker misrepresents his or her identity or refuses to provide that information, does not constitute an exhaustive provision. Section 30 (3) no. 2 of the Asylum Procedure Act presupposes an asylum application that is to be rejected as unfounded, and therefore that the Federal Office has the authority to examine the merits of the application. This is an option independent of and equal to the possibility of requiring an asylum seeker under Section 33 of the Asylum Procedure Act to cooperate in providing identification by way of an associated request to pursue the proceedings, in order to determine this authority, and in the event that the proceedings are not pursued, to discontinue the proceedings without examining the merits. The present case offers no cause to define the relationship between these two provisions in any further detail. At any event in the circumstances of the case at hand, an approach under Sections 32 and 33 (1) of the Asylum Procedure Act (request to pursue proceedings, and if applicable, discontinuation of the proceedings) comes closer to the legislative goal of avoiding multiple grants of asylum and mutually contradictory decisions on the merits of asylum applications within the EU. If there were no option to discontinue proceedings under Sections 32 and 33 of the Asylum Procedure Act, the Federal Office would have to make a decision on the merits about granting refugee sta-

tus when there was insufficient cooperation in establishing identity, even though the Federal Office is prohibited from doing so, under Section 60 (1) sentence 6 in conjunction with sentence 2 of the Residence Act, if the person has already been granted foreign refugee status outside of the Federal Republic of Germany in accordance with the Convention relating to the Status of Refugees. By contrast, the possibility of discontinuing proceedings under Sections 32 and 33 (1) of the Asylum Procedure Act ensures that no decision will be reached on the content of an applicant's application if the asylum seeker prevents his or her identity from being established, in a way for which he or she can be held responsible.

27 Union law also allows room for a request to pursue proceedings under Section 33 of the Asylum Procedure Act in cases of the present kind. Article 20 (1) of Directive 2005/85/EC (the Asylum Procedures Directive) expressly opens up the possibility of both discontinuing proceedings and rejecting the application, as alternative responses in the event that the applicant for asylum does not pursue proceedings further. It is true that Article 28 (2) in conjunction with Article 23 (4) (n) of the Asylum Procedures Directive also permits Member States to reject an application for asylum as manifestly unfounded if the applicant refuses to comply with the obligation to have fingerprints taken in compliance with the pertinent requirements of law. But this is only one of various possibilities for how the Member States may respond to a breach of the obligation to cooperate. It is evident that there is no exhaustive provision in this regard, if only from the fact that Article 23 (4) of the Asylum Procedures Directive refers to the basic principles and guarantees of Chapter II of the Directive, which include the possibility of discontinuing the examination of the application under Article 20 (1) of the Directive in the event that the proceedings are not pursued further. If one were disinclined to follow these lines, a decision on the merits would have to be made even if the identity of the asylum applicant were uncertain. But this would contravene the aim under Union law of determining one – and only one – Member State that is responsible for the asylum decision under Article 3 (1) sentence 2 of the Dublin Regulation.

- 28 Nor does the judgment of the French Cour Nationale du Droit d'Asile of 21 February 2012 (no. 11032252) imply anything else. According to that judgment, it is contrary to French law to reject a foreigner's application for asylum because of a lack of identification documents and of usable fingerprints, without addressing the individual circumstances of the petition for protection. Specifically, the grounds for this decision refer not to Union law, but solely to the terms of national law that apply in France, which precisely do not provide for a discontinuation of proceedings equivalent to Sections 32, 33 of the Asylum Procedure Act.
- 29 5. However, justified doubts as to the existence of an interest in a decision in the matter do not derive from the mere fact that fingerprints taken from an asylum seeker are not usable. The fact that fingerprints are unusable does not necessarily proceed from an intentional manipulation. It may also be caused, for example, by a genetic predisposition or illness of the person concerned (on the rarity of a congenital absence of papillary ridges see Bettina Burger et al., The 'Immigration Delay Syndrome' in: HAUT 2011 p. 25 et seq.) or be attributable to the consequences of chemotherapy. Furthermore, it may be caused by deficiencies in fingerprinting and/or the analysis of fingerprints on the part of the authorities. An atypical accumulation of defects in quality in the case of certain countries of origin also does not per se constitute an adequate cause. The situation is different, however, if above and beyond the mere fact that the fingerprints are not usable, there is specific reason to believe at the time of fingerprinting that there the fingertips have been manipulated, for example because they present visible anomalies (e.g., abrasions, scarring, sanding marks, the absence of papillary ridges or conspicuously low papillary ridges) and the person concerned cannot provide a coherent explanation for these. The same applies if fingerprints are repeatedly unusable, with different defects. In these cases it may reasonably be suspected that the asylum seeker may have taken action to frustrate the usability of his or her fingerprints, so as to conceal his or her true identity. Such conduct may provide grounds to doubt the seriousness of his or her asylum application. The Federal Office is then well advised to adequately document the evidence suggesting manipulation, as well as the testimony of the person concerned, so that in the event of a dispute, the justified doubts about the existence of an interest in a decision on the case can be documented.

- 30 If there is a sufficient cause to issue a request to pursue proceedings, that request must meet the following standards. No particular form is prescribed for a request to pursue proceedings. As an order directing the proceedings, in the absence of any equivalent prescription the request need not be served formally, as is prescribed under Section 31 (1) of the Asylum Procedure Act for decisions on asylum applications (see judgment of 7 March 1995 – BVerwG 9 C 264.94 – Buchholz 402.25 § 33 Asylum Procedure Act no. 12 p. 6). Because of the one-month deadline that begins to run at the time of its service, however, there must be documentation that, and on what date, the request was in fact served on the person concerned. Furthermore, because of the severe consequences of the statutory imputation of a withdrawal, special requirements must be met with respect to the specificity of the content of a request to pursue proceedings. Both the cause triggering the request to pursue proceedings and the conduct expected from the asylum seeker must be so fully individualised and specified in the request that the asylum seeker can see with sufficient clarity why there is doubt as to the existence of an interest in a decision on the merits. Finally, it must be clearly evident what specific acts of cooperation the person concerned is required to perform within one month in order to prevent the statutory imputation of a withdrawal after one month from taking effect. Here the authorities must bear the burden of any ambiguities about the nature and scope of the specific conduct expected from the foreigner in order to avoid the imputation of a withdrawal.
- 31 Furthermore, the asylum seeker must be instructed about the imputation of withdrawal that will be incurred by law (Section 33 (1) sentence 2 of the Asylum Procedure Act). This includes that the person must be correctly and unmistakably notified of the one-month deadline under Section 33 of the Asylum Procedure Act within which the requested cooperation must be provided, and after which the application will be deemed withdrawn if the person does not comply with the request (order of 1 March 2002 – BVerwG 1 B 403.01 – Buchholz 402.25 § 81 Asylum Procedure Act no. 1). Furthermore, the principle of fair procedure (see Federal Administrative Court, order of 10 March 1994 – 2 BvR 2371/93 – DVBl 1994, 631) requires that the asylum seeker must be instructed

that in the event that the proceeding is terminated, the Federal Office may decide about any obstacles to deportation on the basis of the record as it stands, with no further hearing (Section 32 Asylum Procedure Act). However – contrary to the Complainant’s opinion – in the event of a negative decision on obstacles to deportation, no further reference is required about the issuance of a deportation warning under Section 34 of the Asylum Procedure Act that is regularly associated with an order discontinuing proceedings. Even an asylum seeker who is not represented by legal counsel can recognise that a discontinuation of his or her asylum proceedings for breach of a cooperation obligation incumbent on him or her, combined with a simultaneous negative decision on obstacles to deportation, would lead to the initiation of measures to terminate the person’s residence. Finally, the Federal Office must inform the asylum seeker of the content of the request issued to him or her, and the necessary instruction as to the one-month deadline and the consequences of failing to meet that deadline – at any event, in cases where the person has no legal representation and the request to pursue proceedings is served on the person directly – in a language that is understandable to the person, for example by way of a translation of the request to pursue proceedings (see Section 24 (1) sentence 2 of the Asylum Procedure Act).

- 32 In terms of content, a request to pursue proceedings must be directed to obtaining fulfilment of an obligation to cooperate established by law. Furthermore, the requested act must be necessary for the further conduct of the asylum proceedings, and must in fact be possible and reasonable for the asylum seeker. If the asylum seeker is required to cooperate in the taking of fingerprints, the request to pursue proceedings – on the grounds explained in further detail above (at 22, 24) – may refer only to the obligation established directly by law to refrain from all prior conduct that might compromise or frustrate the ability to analyse the asylum seeker’s fingerprints. However, the request cannot be directed to the success of analysing the fingerprints.

- 33 The asylum seeker may also be requested to provide written information about his or her previous sojourns and any asylum applications that have already been lodged. Such a cooperation obligation proceeds from Section 15 (2) no. 1 of the Asylum Procedure Act, under which the foreigner is obliged to provide the Federal Office with the necessary information orally, and on request also in writing. The necessary information, according to Section 25 (1) sentence 2 of the Asylum Procedure Act (inter alia), also includes information concerning travel routes, time spent in other countries, and whether asylum proceedings have been initiated or completed there. The Federal Office needs this information in order to determine its responsibility for processing the case under the Dublin Regulation, and to clarify such matters as whether the foreigner has already obtained protection in a safe third country, or has entered Germany from such a state (see Section 26a et seqq. of the Asylum Procedure Act).
- 34 6. A review of the requests to pursue proceedings dated 23 August 2010 and 26 October 2011 on the basis of the above requirements, as a preliminary question concerning the lawfulness of the challenged decision to discontinue proceedings, leads to the result that the appellate court's decision rests on contraventions of Federal law in several regards. This Court itself is not able to determine whether the suspicion of manipulation of the Complainant's fingertips constituted sufficient cause to issue the requests to pursue proceedings, or whether the Complainant did not pursue the proceedings because he violated his obligation to cooperate under Section 15 (2) no. 1 or no. 7 of the Asylum Procedure Act.
- 35 6.1 However, the court below correctly held that the obligation to permit 'analysable fingerprints' to be taken, imposed on the Complainant in the request to pursue proceedings of 23 August 2010, is unlawful and invalid. As has already been explained above (at 24), no obligation to guarantee the analysability of fingerprints can be derived from Section 15 (2) no. 7 of the Asylum Procedure Act.
- 36 6.2 Nevertheless, the appellate decision does contravene Federal law in holding that the recognisably independent obligation, contained in the request to pursue

proceedings of 23 August 2010, to give a written account of the travel route and of submissions of applications for asylum was invalid for lack of a hearing by the Federal Office (copy of the decision, at 30). This obligation is founded on Section 15 (2) no. 1 of the Asylum Procedure Act and its content is unobjectionable (see above at 33). The information was needed in order to continue the asylum proceedings, and there is no evident reason why compliance would not have been possible and reasonable for the Complainant. The request also includes a reference to the fact that in accordance with Section 33 (1) sentence 2 of the Asylum Procedure Act, not pursuing the proceedings would have the consequence that the application would be deemed withdrawn. It furthermore points out that in this case, a decision would have to be made about the existence of obstacles to deportation under Section 60 (2) through (5) or (7) of the Residence Act, without a personal hearing, on the basis of the record as it stood. The request to pursue proceedings was translated for the Complainant (Section 24 (1) sentence 2 of the Asylum Procedure Act), and he confirmed receipt of the letter by his signature on 23 August 2010. But he did not comply with the request.

- 37 However, this would trigger the legal imputation that the asylum application had been withdrawn, in accordance with Section 33 (1) sentence 1 of the Asylum Procedure Act, only if the identification procedure on 23 August 2010 had in fact provided the Federal Office with sufficient cause to proceed as provided in Section 33 of the Asylum Procedure Act. Such a cause would have existed if at that time the Complainant's fingertips had in fact shown signs of manipulation in the form of injuries to the skin as well as poor detectability of, and damage to, the papillary lines, and the Complainant had not been able to explain this coherently, as was recorded in a file memorandum of the same date by the Federal Office employee assigned to take the fingerprints (Federal Office Record, folio 18). As the Higher Administrative Court – logically enough, in light of its own legal viewpoint – did not make any findings of fact in this regard, this Court is required to set aside the appellate decision and remit the matter to the court below (Section 144 (3) sentence 1 no. 2 of the Code of Administrative Court Procedure).

- 38 6.3 Furthermore, the court below contravened Section 77 (1) sentence 1 of the Asylum Procedure Act because it took no account of the request to pursue proceedings of 26 October 2011 in assessing the lawfulness of the challenged decision to discontinue proceedings. A review of that decision depends crucially on whether the requirements of Sections 32 and 33 of the Asylum Procedure Act were met at the date of the last hearing before the court below. This proceeds from Section 77 (1) sentence 1 clause 1 of the Asylum Procedure Act, according to which in disputes resulting from the Act, the court is to base its decision on the factual and legal situation at the time of the last oral proceedings. As a consequence the assessment of the lawfulness of the challenged decision to discontinue proceedings of 27 October 2010 must take account not only of the request to pursue proceedings of 23 August 2010, but also the request to pursue proceedings of 26 October 2011, which was issued only after the challenged decision. Even if the first request to pursue proceedings had been issued wrongfully, and the subsequent decision by the Federal Office to discontinue proceedings had originally been unlawful, it might have subsequently been rendered lawful by noncompliance with the obligation to cooperate as called for in the request to pursue proceedings of 26 October 2011. The proceedings would then have been discontinued on expiration of a month after service of the second request to pursue proceedings on 28 October 2011.
- 39 The request to pursue proceedings of 26 October 2011 – provided that there was a justified cause, which still remains to be clarified – complies with the requirements of law. It identifies with sufficient specificity the cooperative action expected from the Complainant: appearance at the Federal Office’s field office for another fingerprinting. It also provides instruction once again that the asylum application will be deemed withdrawn if, in spite of the request, the Complainant fails to pursue proceedings within one month. It does not compromise the clarity of the instruction about the one-month deadline that in the request to pursue proceedings the Complainant is simultaneously notified of a summons to appear at an appointment for fingerprinting. First of all, the date of the appointment (24 November 2011), which was set in a separate letter, was within the one-month time period. Second, the notice of the appointment does not cause any unclarity as to the applicable one-month deadline. The recipient is not given the

impression that the appointment shortens the statutory one-month deadline for pursuing the proceedings. Contrary to the Complainant's legal opinion, the request to pursue proceedings did not have to be translated again, because it was directed to his legal counsel for the proceedings. This does not violate the principles of fair procedure, if only because on 23 August 2010 the Complainant had already been informed in a language he could understand about the one-month deadline and the consequences of failing to pursue proceedings. Nor do any further obligations to provide a translation proceed from Article 10 (1) of Directive 2005/85/EC. A reference to the decision on obstacles to deportation that would be associated with a discontinuation of proceedings, under Section 60 (2) through (5) or (7) of the Residence Act, did not have to be repeated, if only because a negative decision already had been reached in this regard at the time when the second request to pursue proceedings was issued.

40 Substantively, the request to pursue proceedings of 26 October 2011 was directed to an act of cooperation that is supported by law (Section 15 (2) no. 7 of the Asylum Procedure Act). In addition to the obligation to acquiesce in fingerprinting it merely pointed out to the Complainant that in advance of the planned fingerprinting he should refrain from any conduct that might compromise or frustrate the fingerprints' analysability. Compliance with this obligation to refrain from conduct, which proceeds directly from the law and is included under the core obligation to cooperate, was necessary for the further conduct of the asylum proceedings, and there is no evident reason why compliance should not be possible and reasonable for the Complainant.

41 In this regard as well, however, there are no findings of fact from the court below as to whether there was sufficient cause for this request to pursue proceedings. If the Federal Office's suspicion of manipulation dated 23 August 2010 bears out, issuing the request to pursue proceedings of 26 October 2011 would also be justified. This is because according to the record as it stands, the further fingerprinting – which according to the Federal Office took place on 8 September 2010 – also did not result in an analysable result.

42 7. The Higher Administrative Court will now have to clarify whether there was sufficient cause to issue the two notices to pursue proceedings. In so doing, it will in particular have to clarify whether at the time of the fingerprinting on 23 August 2010, the reasons to believe there had been a manipulation of the fingertips, as documented in the file memorandum of the same date, had in fact existed, and the Complainant had provided no plausible reasons. In general, there is no need for a dermatological examination for the assumption of a sufficient cause to issue a request to pursue proceedings in such cases. The situation would be different only if the asylum seeker furnished plausible reasons for the damage to his fingertips, their particular smoothness, or an especially minimal distinguishability of the papillary ridges. In this regard, one must also consider the regeneration time of the skin cells, which according to the sources before this Court (and generally available) is as a rule four weeks (see Moll, *Dermatologie*, 7th ed., 2010, p. 6 top – ‘turn-over time’ of twice two weeks). If the suspicion of manipulation is confirmed, the requirements for a lawful request to pursue proceedings to present a written explanation of previous sojourns and any prior applications for asylum have been met. As the Complainant has provided no such information, the asylum proceedings would then already have been discontinued one month after service of the request to pursue proceedings of 23 August 2010. If the court below arrives at the conclusion that there was no sufficient cause before the first request to pursue proceedings was issued, it will furthermore have to examine whether at least the second request to pursue proceedings resulted in a discontinuation of the proceedings. This would presuppose that there was sufficient cause for issuing this request to pursue proceedings, and that to the full satisfaction of the court, the Complainant did not pursue the proceedings because of manipulation of his fingertips. In the event that the Complainant's complaint on the main application does not meet with success, finally, the court will also have to decide on the Complainant's alternative application for a finding that there are obstacles to deportation.

- 43 8. The disposition as to costs is reserved for the final decision. No court costs will be imposed, in accordance with Section 83b of the Asylum Procedure Act. The amount at issue proceeds from Section 30 of the Act on Attorney Compensation.

Prof. Dr Berlit

Prof. Dr Dörig

Prof. Dr Kraft

Fricke

Dr Maidowski