

Unofficial translation from German



FEDERAL ADMINISTRATIVE COURT

DECISION

BVerwG 10 C 33.07
OVG 16 A 4354/05.A

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 authorized 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 7 February 2008
Federal Administrative Court Justice Dr. Mallmann sitting as Presiding Justice,
assisted by Federal Administrative Court Justices Prof. Dr. Dörig, Richter, Beck,
and Fricke

decides:

The proceedings are stayed.

Pursuant to Article 234 (1) and (3) and Article 68 (1) of the EC Treaty, a preliminary ruling is sought from the European Court of Justice on the following questions:

1. Is Article 11 (1) e of Council Directive 2004/83/EC of 29 April 2004 to be construed as indicating that – in deviation from Article 1 C No. 5 Sentence 2 of the Convention Relating to the Status of Refugees of 28 July 1951 (the Geneva Refugee Convention) – refugee status expires as soon as the refugee's well-founded fear of persecution within the meaning of Article 2 c of the Directive, because of which that status was recognised, no longer exists and the individual also need not fear persecution for other reasons, within the meaning of Article 2 c of the Directive?
2. In the event that Question 1 is answered in the negative: Does the cessation of refugee status pursuant to Article 11 (1) e of the Directive furthermore presuppose that in the country of which the refugee is a citizen,
 - a) An actor of protection within the meaning of Article 7 (1) of the Directive is present, and in this case is it sufficient if protection can be provided only with the assistance of multi-national troops,
 - b) The refugee is not threatened with serious harm within the meaning of Article 15 of the Directive that results in the accordence of subsidiary protection under Article 18 of the Directive, and/or
 - c) The security situation is stable, and general living conditions ensure the minimum basis for a livelihood?
3. In a situation in which the previous conditions under which the individual was recognised as a refugee no longer exist, should new circumstances that establish persecution of a different nature

a) Be measured by the standard of probability that applies for the recognition of refugees, or should another standard be applied in the individual's favour,

b) Be assessed by applying the easier standard of evidence under Article 4 (4) of the Directive?

Reasons:

I

- 1 The Complainant appeals the withdrawal of his refugee status.
- 2 The Complainant, born in 1982 in Kirkuk (Central Iraq), is an Iraqi citizen of Kurdish ethnicity and is a member of the Islamic faith. In April 2001 he immigrated to Germany and applied for asylum. As grounds, he cited problems with two members of the ruling Baath Party. In a decision dated 8 May 2001, the Federal Office for the Recognition of Foreign Refugees (now the Federal Office for Migration and Refugees) – the 'Federal Office' – declined to recognise that the Complainant was entitled to asylum under Article 16a of the German Basic Law, but found that the Complainant did meet the requirements for recognition of refugee status under Section 51 (1) of the Aliens Act (now Section 3 (1) of the Asylum Procedure Act in conjunction with Section 60 (1) of the Residence Act). In November 2004, because of the changed political conditions in Iraq, the Federal Office initiated proceedings for withdrawal, and after hearing the Complainant, withdrawn the recognition of refugee status in a decision of 22 August 2005. At the same time, the Federal Office found that there were no prohibitions of deportation under Section 60 (2) through (7) of the Residence Act.
- 3 In the proceedings on the original complaint, the Administrative Court reversed the Federal Office's decision to withdraw, in a decision of 19 October 2005. Given the highly unstable situation in Iraq, the court reasoned, a durable, stable change in political conditions cannot be presumed, such as would justify withdrawal.

- 4 On appeal by the Respondent, the Higher Administrative Court modified the decision at the first instance, and found against the Complainant, in a decision of 27 July 2006. As grounds, the court found in essence that the withdrawal had been legitimate. The matter could be let rest, it said, as to whether the Complainant had left Iraq under the pressure of persecution, either experienced or directly threatened, by Saddam Hussein's Baath regime, because now the Complainant was sufficiently safe from such persecution. Saddam Hussein's regime had definitively lost its political and military dominance over Iraq in the military action, led by the United States, that began in March 2003. Given the current power structure, a return of the regime was as much out of the question as the formation of a structure that would again (recurringly) persecute persons who had been viewed as opponents by the former regime. Nor was there any substantial probability that the Complainant would be threatened again with persecution of any kind. Current knowledge offered no tangible indication of encroachments of significance for asylum purposes on the part of the new Iraqi government or forces otherwise attributable to the Iraqi state, including the multi-national forces and the Kurdish parties in Northern Iraq. Here the question could be let rest as to whether with the new government, a power structure had arisen that was capable of political persecution, in the sense that it displays a certain stability and has the ability to establish and maintain an overall order of peace. The Complainant's arguments also produced nothing supportive regarding non-state agent persecution. To the extent that there were still terrorist attacks, in particular, and ongoing open clashes between a militant opposition and regular security forces and coalition forces, it was not evident that such events were tied to characteristics of significance for asylum in regard to the Complainant. Nor were there legal reservations against the decision to withdraw, with regard to Directive 2004/83/EC, because this Directive had no direct effect before the deadline for its transposal had expired, and did not alter the core content of Section 60 (1) of the Residence Act. Nor could the Complainant lay claim to a finding of prohibitions against deportation under Section 60 (2) through (5) and (7) of the Residence Act.
- 5 In the appeal on points of law, which this Court has limited to the withdrawal of the recognition of refugee status, the Complainant is seeking to have the judg-

ment at the first instance reinstated. He argues, among other points, that the withdrawal is in breach of Directive 2004/83/EC, which has now been implemented, and of Article 1 C of the Geneva Refugee Convention (the 'GRC'). According to unanimous state practice, he says, the scope of protection of these provisions is not limited to protection against political persecution. Withdrawal of refugee status, he argues, presupposes that the minimum conditions are present in the country of origin for a state-established order of peace and for an existence consistent with human dignity. He argued that an assessment from a broad perspective was needed, taking account of the general conditions. Sufficient findings of fact for this purpose were lacking. Moreover, he argued, the standard of probability applied by the appellate court were contrary to international and Community law.

6 The Complainant asks this Court

to modify the decision of the Higher Administrative Court for the State of North Rhine-Westphalia of 27 July 2006 insofar as concerns the withdrawal of the recognition of refugee status, and to that extent to deny the Respondent's appeal.

7 The Respondent has opposed this appeal. The representative of the federal government's interests before the Federal Administrative Court has not participated in these proceedings.

II

8 The proceedings are to be stayed, and a preliminary ruling is to be sought from the European Court of Justice (Article 234 (1) and (3) and Article 68 (1) EC Treaty) on the interpretation of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees, or as persons who otherwise need international protection, and on the substance of the protection to be granted (Official Journal L 304 p. 12; corr. Official Journal L 204 p. 24). Since the interpretation of Community law is concerned, the European Court of Justice is the court of competent jurisdiction (1.). The submitted questions on the interpretation of the

Directive are material to the decision (2.) and are in need of clarification by the European Court of Justice (3.).

- 9 1. The matter at issue is whether the Complainant's recognition as a refugee was rightly withdrawn after the change in the circumstances of fact in his native country, Iraq, that were material to the recognition of refugee status. However, in this Court's view, if only for reasons of Community law, the withdrawal does not fall under the pertinent provisions of Article 14 (1) of Directive 2004/83/EC regarding withdrawal of, ending of or refusal to renew refugee status, and the provisions of Article 11 of the Directive regarding the cessation of refugee status, to which Article 14 (1) refers. This is because Article 14 (1) of the Directive applies only to petitions for international protection that are submitted after the effective date of the Directive, or in other words, after 20 October 2004 (Article 39 of the Directive). The petition for protection on which the withdrawal at issue is based was filed by the Complainant before that date. Therefore Article 14 in conjunction with Article 11 of the Directive does not apply directly to the withdrawal (see decision of 20 March 2007 - BVerwG 1 C 21.06 - BVerwGE 128, 199 <210> at Marginal No. 24).
- 10 Nevertheless, the withdrawal must still be measured against the aforementioned provisions of the Directive. Under the Act to Implement Residence- and Asylum-Related Directives of the European Union of 19 August 2007 (German Federal Law Gazette I p. 1970) – hereinafter the Directive Implementation Act – which took effect on 28 August 2007, with the amended version of Section 73 of the Asylum Procedure Act the German legislature also implemented Article 14 and Article 11 of the Directive without limiting the applicability of their provisions in regard to time.
- 11 In such cases of an overreaching national implementation – which is not required under Community law – the European Court of Justice has also affirmed its jurisdiction for a preliminary ruling. Neither the wording of Article 234 of the EC Treaty nor the purpose of the procedure established by that article indicates that the authors of the Treaty intended to exclude such proceedings for preliminary rulings from the jurisdiction of the European Court of Justice, if they relate

to a provision of Community law in the specific case where the national law of a Member State refers to the substance of that provision of Community law in order to determine the rules applicable to a purely internal situation. If a provision is applicable to matters subject to both internal law and Community law, there is an indisputable common interest in uniformly interpreting the provisions adopted from Community law, irrespective of the conditions under which those provisions are to apply, so as to avert future divergences in interpretation (see ECJ, decision of 16 March 2006 - Rs C-3/04, Poseidon Chartering – [2006] ECR I-2505, at Marginal No. 14 et seq., with further authorities).

- 12 This Court believes that we have here such a case of an overreaching implementation of a Directive by a national legislature. Paragraph 1 of the new version of Section 73 of the German Asylum Procedure Act, regarding withdrawal, which under national procedural law applies to the withdrawal review in the present appeal proceedings, reads as follows:

Recognition of entitlement to asylum and refugee status shall be withdrawn without delay if the conditions on which such recognition is based have ceased to exist. In particular, this shall be the case if, after the conditions on which his recognition as being entitled to asylum or refugee status is based have ceased to exist, the foreigner can no longer refuse to claim the protection of the country of which he is a citizen, or if he, as a stateless person, is able to return to the country where he had his usual residence. The second sentence shall not apply if the foreigner has compelling reasons, based on earlier persecution, for refusing to return to the country of which he is a citizen, or, if he is a stateless person, in which he had his usual residence.

- 13 By adding the new Sentence 2 to the provision, the legislator incorporated a condition that recognisably and expressly harkens back to the reasons for withdrawal under Article 11 (1) e and f of the Directive. Even though the German wording in its turn is equivalent to the provision of Article 1 C No. 5 and 6 of the GRC, and even though under the prior law, decisions of the Federal Administrative Court had already consistently found that Section 73 (1) sentence 1 of the Asylum Procedure Act was to be construed and applied within the intent of this 'Ceased Circumstances Clause' (see decision of 1 November 2005 - BVerwG

1 C 21.04 - BVerwGE 124, 276), the current incorporation of this clause into Section 73 of the Asylum Procedure Act by the Directive Implementation Act plainly also intended a final adaptation of the national rules regarding withdrawal to fit the wording of the Directive. Since the Act does not include a transitional provision in this regard – for example along the lines of Article 14 (1) of the Directive – it is evidently supposed to apply to all petitions for protection, and therefore also to those filed before 20 October 2004. In this Court’s opinion, the legislator thus expanded the circumstances for withdrawal under Community law pursuant to Article 11 (1) e and f of the Directive – overreachingly – to circumstances that were not included in the Directive itself, namely to petitions for protection filed before 20 October 2004.

- 14 2. The present questions are material to the decision. The withdrawal does not violate other provisions of German law. In particular, it is not unlawful merely because of the absence of an exercise of discretion by the agency involved. The question – which is relevant to whether the appeal can lie – of whether the withdrawal required a discretionary decision (formerly under Section 73 (2a) sentence 3; now under Section 73 (2a) sentence 4 Asylum Procedure Act) is clarified by the clarifying new provision under Section 73 (7) of the Asylum Procedure Act as amended under the Directive Implementation Act. Accordingly, in cases – such as the present one – in which the decision on recognition as a refugee became final before 1 January 2005, the examination under Section 73 (2a) sentence 1 of the Asylum Procedure Act must take place no later than 31 December 2008. Thus the legislator did incorporate a transitional provision for existing recognitions (that became final before 1 January 2005), and made clear the date by which they were to be examined for the possibility of withdrawal. It follows that before such an examination and a denial of conditions for withdrawal (negative decision) no discretionary decision can fundamentally come under consideration (concurring, the decision of 20 March 2007, loc. cit., at Marginal No. 12 et seq. concerning the previous status of the law). The appealed withdrawal also is not vexed by other formal defects.
- 15 Finally, withdrawal is not precluded because of the existence of the conditions under Section 73 (1) sentence 3 of the Asylum Procedure Act. According to that

provision, the conditions for cessation under Section 73 (1) sentence 2 of the Asylum Procedure Act, in conformity with Article 1 C No. 5 sentence 2 and No. 6 sentence 2 of the Convention Relating to the Status of Refugees of 28 July 1951 (the Geneva Refugee Convention – GRC), do not apply if the foreigner has compelling reasons, based on earlier persecution, for refusing to return to his country of origin. This ground for exclusion is not satisfied here, since according to the findings of the appellate court below – which are binding upon this Court of higher appeal (Section 137 (2) of the Code of Administrative Court Procedure) – the Complainant cannot cite repercussions of earlier acts of persecution as reasons for refusing to return to Iraq. Consequently the case must be decided on the basis of whether the Complainant meets the requirements of Article 11 (1) e of Directive 2004/83/EC as implemented by Section 73 (1) sentence 2 of the Asylum Procedure Act, and therefore whether, since the conditions that led to his recognition as a refugee no longer exist, he can no longer refuse to avail himself of the protection of the country of which he is a citizen.

- 16 a) The critical circumstances of fact for recognition as a refugee changed significantly and not just temporarily in Iraq with the elimination of Saddam Hussein's regime. According to the findings of fact of the appellate court below, which are not to be examined in these higher appeal proceedings and are binding on this Court, that regime has durably lost its political and military dominance over Iraq, and under the current power conditions a return of the regime is as much out of the question as the establishment of a structure that would again (recurringly) persecute persons viewed as opponents by the previous regime. According to the findings of the appellate court below, the Complainant is also not threatened with persecution – of whatever kind – for other reasons. However, in this connection the appellate court below let lie the question of whether with the new Iraqi government, a power structure has arisen that displays a certain stability and is able to create and maintain an overall order of peace; that court bases its doubts primarily on the extremely limited capability of the Iraqi military and police forces.

- 17 Thus the appellate court below held that refugee status already ceases if the refugee's well-founded fear of persecution, on which recognition was based, no longer exists, and if the refugee also need have no reason to fear persecution for other reasons. If Question 1 is answered in the affirmative, the decision of the appellate court below would be unobjectionable on this point. If it is answered in the negative, however, the decision on the case would first of all hinge on what additional conditions the cessation of refugee status depends upon. Question 2 is based on potential linking points. If the European Court of Justice establishes further conditions for cessation of refugee status here – and there is no answer regarding these on the basis of the findings of fact of the appellate court below – then the decision of the appellate court below would have to be reversed and the case would have to be remanded to that court for further clarification of the facts. This is particularly the case if the answer to Question 2 a is affirmative, since the appellate court below expressly voiced doubts as to whether the Iraqi state displays a certain stability and is able to establish and maintain an overall order of peace. However, further clarification would also be needed if Question 2 b is answered in the affirmative, because the appellate court below proceeded on the assumption that further terrorist attacks and continuing open conflict between the militant opposition and regular security forces and coalition forces will occur in Iraq. Since the time period for transposal of the Directive had not yet expired when the decision of the appellate court below decision was handed down, in this connection that court did not examine whether the Complainant should be granted subsidiary protection under Article 18 of the Directive because he is threatened with serious harm within the meaning of Article 15 c of the Directive. Likewise, if Question 2 c is answered in the affirmative, further clarification would also be needed, since the appellate court below – in its comments on the non-existence of a prohibition on deportation under Section 60 (7) of the Residence Act – merely alluded to the ongoing tense security situation and the existence of supply bottlenecks, but made no further findings in this regard.
- 18 b) The appellate court additionally left open the issue of whether the Complainant left Iraq under the pressure of the experience or the direct threat of persecution by Saddam Hussein's Baath regime, since the court found that he was suf-

ficiently safe from a revival of such persecution, and that there was a substantial probability that he was also not threatened with new persecution. Thus the appellate court below – consistently with the present Court’s past decisions – assumed that following the cessation of the conditions on the basis of which the Complainant was recognised as a refugee, new and other conditions establishing persecution should be measured using the standard of probability that applies for the recognition of refugees – especially because in this case no other standard applies in the individual’s favour. Moreover, in the present appellate proceedings after the expiration of the implementation period, the question arises whether in this situation the easier standard of proof under Article 4 (4) of Directive 2004/83/EC should apply in regard to new and different conditions.

- 19 If the answer to Question 3 is that when refugee status ceases, neither a different standard of probability nor an easier standard of proof under Article 4 (4) of the Directive applies in regard to new, different circumstances establishing persecution, then the appellate decision would also not be objectionable on this point. However, if it must be assumed that another standard of probability and/or an easier standard of proof under Article 4 (4) of the Directive is to be applied in the individual’s favour, the appellate decision would have to be reversed, and the matter would have to be remanded for a final clarification of the facts. The appellate court below would then have to make the necessary findings as to whether even under a more favourable standard of probability and/or the easier standard of proof under Article 4 (4) of the Directive, the Complainant still has no fear of persecution within the meaning of Article 2 c of the Directive owing to new and different circumstances establishing persecution.
- 20 3. The presented questions on the interpretation of Directive 2004/83/EC are in need of clarification by the European Court of Justice.
- 21 a) Questions 1 and 2 concern the conditions for cessation of refugee status governed by Article 11 (1) e of Directive 2004/83/EC. This provision is equivalent in wording to the ‘Ceased Circumstances Clause’ in Article 1 C No. 5 sentence 1 of the GRC. Since all Member States of the European Union are parties to the Geneva Refugee Convention, and since Directive 2004/83/EC also as-

sumes an unrestricted and comprehensive application of the Geneva Refugee Convention (see Consideration 2), and regards the Convention as an integral part of the international legal framework for the protection of refugees (see Consideration 3), and sets minimum standards for determining refugee status and the characteristics of that status in light of the need for common criteria for recognising applicants for asylum as refugees within the meaning of Article 1 of the GRC (see Consideration 17), so as to guide the cognisant internal authorities of the Member States in applying the Geneva Refugee Convention (see Consideration 16), it must therefore be assumed that Article 11 (1) e of the Directive is also equivalent in substance to Article 1 C No. 5 sentence 1 of the GRC. In this Court's view, Article 11 (1) e of the Directive is therefore in accordance with Article 1 C No. 5 of the GRC, and must thus be construed taking into account the principles applicable for the interpretation of this international treaty. Specifically, the rules of interpretation under Article 31 et seq. of the Vienna Convention on the Law of Treaties of 23 May 1969 – the VCLT – must be taken into account, although these are not to be applied directly, but rather as an expression of general rules of international law (see Article 4 VCLT). Under Article 31 (1) of the VCLT, a treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

- 22 aa) However, doubts arise as to when specifically, in application of these principles, it should be assumed that refugee status has ceased. A variety of opinions have been argued on this point, which are tied to the characterising fact of cessation of the circumstances on the basis of which recognition was granted, as well as the characterising fact that the refugee can no longer refuse to avail himself of the protection of his country of origin. There is unanimity that in any case – as is the basis for Question 1 – it is necessary for conditions in the country of origin to have changed fundamentally and durably, and thus the refugee's well-founded fear of persecution, on which the recognition was based, must have ceased, and the refugee also need not fear persecution for other reasons. There appears to be a need for clarification whether the cessation of refugee status depends on further conditions above and beyond these, especially in light of the comments of the European Commission in the grounds for its pro-

posal for the Directive. The same applies for the associated question of what significance should be assigned in this context to the linking points on which Question 2 is based.

- 23 The decisions of this Court have consistently proceeded on the assumption that a cessation of refugee status under the Geneva Refugee Convention because of ceased circumstances can come under consideration only if the conditions in the country of origin that were determinative in recognising refugee status have since then changed significantly, and not merely temporarily, in such a way (see also Article 11 (2) of the Directive) that if the foreigner returns, there is a sufficient certainty that within the foreseeable future there will be no repetition of the acts of persecution that caused him to flee, and that he will not be threatened with persecution again for other reasons upon his return. If the refugee claims that in the event of a return to his country of origin, he will now be threatened with an entirely new and different persecution, here the general standard of substantial probability (real risk) must be applied (on this, see the further comments under 3 b). Here the Court deduces from the phrase ‘protection of the country’ in Article 1 C No. 5 sentence 1 of the GRC that only a well-founded fear of renewed persecution, and not the foreigner’s fear of other risks – for example in the sense of Question 2 b and c – is of concern. Specifically, the term ‘protection of the country’ in Article 1 C No. 5 of the GRC does not differ in meaning from ‘protection of that country’ in Article 1 A No. 2 of the GRC, which defines refugee status. Here protection refers to persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion. Since Article 1 C No. 5 sentence 1 of the GRC governs the cessation of rights as a refugee proceeding from Article 1 A No. 2 of the GRC, ‘protection’ can only mean protection against persecution. This is because the ‘Ceased Circumstances Clause’ is founded on the consideration that owing to changes in the country of persecution, international (refugee) protection is no longer justified, since the reasons that caused a person to become a refugee no longer exist (see No. 115 of the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status of September 1979, New Edition, UNHCR Austria, December 2003) and thus the reasons for according refugee status and for inter-

national protection have now ceased (see decision of 1 November 2005, loc. cit.).

- 24 By contrast, general risks (e.g., because of war, natural disasters or poor economic conditions) are not covered by protection under Article 1 A No. 2 of the GRC, according to the letter and intent of this provision, nor are they covered by Article 1 C No. 5 sentence 1 of the GRC. Thus according to Section 73 (1) of the Asylum Procedure Act, there is to be no examination of whether the foreigner can reasonably be expected to return because of general risks in his country of origin. To this extent, protection can be granted under the general provisions of the German laws on aliens (see particularly Section 60 (7) sentence 2 and Section 60a (1) sentence 1 Residence Act). Moreover, the withdrawal of recognition of asylum and refugee status does not automatically result in a loss of a residence permit. If the refugee already holds a permanent residence permit – which according to the concept of the residency law that has been in effect since 2005 is regularly the case three years after recognition of refugee status (absent grounds for withdrawal) (Section 26 (3) Residence Act) – then according to Section 52 (1) sentence 1 No. 4 of the Residence Act, the permanent residence permit may be withdrawn by the foreigners authority only on the basis of a discretionary decision in which the public interest in the event of a possible termination of residence must be weighed in the individual case against the foreigner's private interest in remaining in Germany.
- 25 The European Commission is of the opinion that the change of conditions in the country of origin, consistently with the UNHCR Handbook and state practice, must be so fundamental and durable as to eliminate the refugee's well-founded fear of persecution. The Commission holds that it must be examined whether there has been a fundamental change of substantial political or social significance that has produced a stable power structure different from that under which the refugee had a well-founded fear of persecution. A complete political change, in the Commission's view, is the most obvious example of a profound change of circumstances, although the holding of democratic elections, the declaration of an amnesty, repeal of repressive laws, or the dismantling of former services may also be evidence of such a transition (see the Proposal of the

European Commission for a Council Directive on Minimum Standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection, of 12 September 2001 –COM(2001) 510 final – p. 26 et seq.). The requirement of a stable power structure presumably indicates that in the Commission’s opinion, with regard to Question 2 a, the presence of certain – statal or quasi-statal – power structures may be necessary. However, the Commission furthermore points out that a change in the situation that continues to show signs of volatility is by definition not durable. In this connection, the Commission requires objective and verifiable evidence that human rights are generally respected in the country, and in particular that the factors which gave rise to the refugee’s well-founded fear of being persecuted have been durably suppressed or eliminated (see Commission Proposal, p. 27). This might indicate that in the Commission’s opinion, the cessation of refugee status might depend on further requirements, although it is unclear whether the reference to the general respect for human rights is meant to have only a certain indicative effect with regard to the durability of the change, or whether this is an autonomous requirement that would stand in opposition to a cessation of refugee status even if – as in the Complainant’s case – it is clear that the factors that gave rise to the well-founded fear of persecution have been durably eliminated, and persecution for other reasons is also not to be expected. It is also not evident from the proposal for the Directive what criteria should serve as a basis for a finding of general respect for human rights. In evaluating this comment, moreover, it should presumably be taken into account that the proposal from the Commission was amended in many important points over the course of consultations, so that it may be that the reasons stated by the Commission can only be considered to a limited degree in interpreting the Directive. Thus, for example, the Commission’s further ideas about protection against violations of human rights in the context of subsidiary protection were not adopted.

- 26 The comments of the UNHCR on the interpretation of the cessation clauses of the Geneva Refugee Convention also do not offer a uniform picture in this connection. In its Handbook, the UNHCR points out that the cessation clauses of Article 1 C No. 5 and 6 of the GRC are based on the consideration that interna-

tional protection is no longer justified on account of changes in the country where persecution was feared, because the reasons for a person becoming a refugee have ceased to exist (see UNHCR Handbook No. 115, loc. cit.). This indicates an extensive symmetry of the requirements for the establishment and cessation of refugee status, which the present Court's decisions have consistently assumed, as indicated above. By contrast, the comments of the UNHCR in its Guidelines of 10 February 2003 give the impression that in the UNCHR's view, the cessation of refugee status depends on further conditions – independent from persecution – even after the fear of persecution no longer exists. Above and beyond mere physical security or safety, the requirements include the existence of a functioning government and basic administrative structures, as evidenced for instance through a functioning system of law and justice, as well as the existence of adequate infrastructure to enable residents to exercise their rights, including their right to a basic livelihood. According to the Guidelines, the general human rights situation is an important indicator here. The following criteria are also of special weight in such an assessment: the level of democratic development in the country, including the holding of free and fair elections, adherence to international human rights instruments, and access for independent national or international organisations freely to verify respect for human rights. There is no requirement that the standards of human rights achieved must be exemplary. However, significant improvements must have been made. The minimum requirements for this are respect for the right to life and liberty and the prohibition of torture; marked progress in establishing an independent judiciary, fair trials and access to courts; as well as protection amongst others of the fundamental rights to freedom of expression, association and religion. Important, more specific indicators include declarations of amnesties, the repeal of oppressive laws, and the dismantling of former security services (see No. 15 and 16 of the UNHCR Guidelines on International Protection: Cessation of Refugee Status under Article 1 C (5) and (6) of the 1951 Convention relating to the Status of Refugees (the 'Ceased Circumstances' Clauses) of 10 February 2003, NVwZ-Beilage No. I 8/2003, 57).

- 27 bb) In the event that Question 1 is answered in the negative, it must next be clarified whether the cessation of refugee status presupposes the existence of

an actor of protection within the meaning of Article 7 (1) of the Directive (Question 2 a). This Court has thus far been able to leave open the matter of whether protection from renewed persecution implies that at least one – statal or quasi-statal – authority must exist in the sense of an order with the power in principle to protect and to persecute, as this Court's decisions have found necessary for political persecution within the meaning of Article 16a (1) of the German Basic Law (see decision of 20 March 2007, *loc. cit.*, at Marginal No. 22). According to this Court's decisions, such an authority requires the existence of an overall peaceful order with, in principle, a monopoly of power supported by an adequately organised, effective and stable territorial authority in a definable (core) territory. This presupposes, most significantly, a certain continuity and durability of governance, primarily embodied in the enforcement capability and durability of the established power structure. In this connection, particular significance attaches to the period of time during which the ruling organisation has already existed. The longer a power structure holds up, the more readily it must be considered a durable territorial authority with the power to protect and to persecute. In addition to the time factor, moreover, the number, size, and weight in terms of power politics, of autonomous or unpacified territories out of reach of the ruling organisation may be of significance. By contrast, factors that are not decisive are the legitimacy of exercise of power, its acceptance by all or a majority of those subject to it, the rulers' freedom from arbitrariness, observance of a minimum standard of human rights, and the capacity to be held liable under international law. The only deciding factor is whether a *de facto* territorial authority is present which in fact has established an order with a certain degree of stability and having the power in principle to protect and to persecute. The primary characteristic of this situation is the achievement of an extensive – as is also typical of states – *de facto* internal monopoly of protection and power, without which a communally oriented peaceful order is not viable. By contrast, it is less important through what organisational and legal forms, establishments or institutions the authority is exercised; and it is certainly not indispensable that certain administrative structures or civilising accomplishments in the general interest, such as educational or cultural institutions or a functional health care system, should exist. However, if such structures do exist, they argue in favour of a consolidated, durably established overall law enforcement entity (decision of 20

February 2001 - BVerwG 9 C 20.00 - BVerwGE 114, 16 <22 et seq.>, following the German Federal Constitutional Court, decision of 10 August 2000 - 2 BvR 260/98 and 2 BvR 1353/98 - NVwZ 2000, 1165). In application of these principles, this Court proceeded on the presumption, in the case of Afghanistan, that the transitional government elected in October 2004 was able de facto to exercise territorial authority in the sense of an overall order having in principle the power to protect and to persecute, at least in the greater Kabul region, even if the government's power was (also) based on the International Security Assistance Force (ISAF) mandated by the United Nations, whose task was to ensure security in Kabul and its environs, and in other regions that might be specified (see decision of 1 November 2005, loc. cit., p. 286). For Iraq, consulting the mandate of the multinational forces extended to the end of 2007 by the Security Council of the United Nations in Resolution 1723 of 28 November 2006 (and by another year in Resolution 1790 of 18 December 2007), this Court concluded that, at least with these forces' help, the Iraqi government has an effective statal or quasi-statal authority in portions of its territory (see decision of 20 March 2007 - BVerwG 1 C 34.06 - at Marginal No. 19).

- 28 As concerns cessation of refugee status under the 'Ceased Circumstances Clause' of Article 1 C No. 5 sentence 1 of the GRC, which is equivalent in substance to Article 11 (1) e of the Directive, the characteristic of 'protection of the country' argues that fundamentally there must be a state. This interpretation is also the most consistent with the concept of reasonableness underlying the Geneva Refugee Convention. A refugee is in need of international protection against persecution only so long as he refuses the protection of the state of which he is a citizen. Once he again finds protection against persecution there, he can no longer refuse to avail himself of that protection. This is also consistent with the principle of subsidiarity of international protection to the protection by the state of which the person is a citizen, as expressed both in the definition of a refugee under Article 1 A No. 2 of the GRC and in the cessation clause of Article 1 C No. 5 of the GRC. Just as international protection under the convention intervenes when the state affords insufficient protection from political persecution, so too – in a symmetric consideration – the need for international protection ceases and thus so does refugee status, once changes in circumstances

mean that protection against persecution is again provided in the country of origin. Here, however, it may well be necessary to take into account that the era when the Geneva Refugee Convention was created was one of nation states. Anyone who did not have state protection had no protection. Since that time, it has been found and is generally recognised that quasi-statal and also international protection may be of equivalent worth. Directive 2004/83/EC, too, proceeds on the assumption that protection may be offered not only by a state, but also by parties or organisations, including international organisations, that meet the Directive's requirements and control a region or rather large territory within the territory of the state (see Consideration 19). Logically, then, Article 7 (1) of the Directive proceeds on the assumption that states are not the only potential guarantors of protection to be considered. This may well argue for an affirmative answer to Question 2 a, in which case it may also be essentially sufficient if a state or state-like authority – as this Court has hitherto assumed in regard to the Iraqi government – may afford the necessary protection, albeit with the assistance of multinational protection troops.

- 29 However, further requirements, such as the UNHCR sets forth in its Guidelines of 10 February 2003 and as are stated in Question 2 b and c, may well go beyond the concept of the Geneva Convention, which focuses on protection from persecution. Accordingly too, the comments of the Commission in its proposal for a Directive of 12 September 2001 should quite possibly be understood as indicating that the situation of human rights in the country of origin may have a certain indicator effect for the durability of changes, but does not constitute an independent prerequisite for cessation. If the fear of persecution for the reasons stated in the Geneva Refugee Convention is no longer well-founded because of subsequent changes in the country of origin, the foreigner no longer needs refugee protection under the Geneva Refugee Convention.
- 30 The loss of refugee status after the cessation of the risk of persecution, moreover, does not leave the foreigner unprotected from other dangers. If he is in danger of serious harm within the meaning of Article 15 of the Directive upon returning to his country after the well-founded fear of persecution ceases, under the Directive's concept of protection he is entitled to recognition of subsidiary

protection under Article 18. This is an autonomous protection status to be kept separate from refugee status. To that extent, the Directive is founded on the concept that persons who actually need protection should be granted at least a minimum of protection (see Consideration 6). For this reason, the rules for refugee protection were supplemented with provisions for subsidiary protection (Consideration 24). These provisions tie into the obligations of Member States in the area of human rights under international law, and into established practice (see Consideration 25), and they also apply in the event of a cessation of refugee status. Consequently, upon cessation of refugee status, the foreigner loses only his status as a refugee. If instead he meets the requirements for subsidiary protection under Article 18 of Directive 2004/83/EC, he must be granted the associated protection in Germany through a finding of an according prohibition of deportation (see Section 60 (2), (3) and (7) sentence 2 Residence Act), in conjunction with a residence permit under Section 25 (3) Residence Act. Nor should the cessation of refugee status depend on whether the security situation in the country of origin is stable in general, independently from a risk of persecution, and whether general living conditions ensure a basic livelihood. If the requirements were set so broadly, the defining circumstances for cessation would in practice be largely futile (see, moreover, Consideration aa) above regarding the grant of protection under the German laws on aliens because of general danger).

- 31 The interpretation that results from Article 31 (3) b of the VCLT is no different. According to that Convention, in interpreting international treaties account is to be taken of any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation. In this sense, in the present case there is no indication whatsoever of a uniform state practice contrary to German case law in the application of the cessation clauses of the Geneva Refugee Convention. To that extent, a practice can be definitive only if it is understood as an implementation precisely of the treaty obligation under international law; a subsequent practice must therefore be related to the treaty in order to be taken into account in the interpretation. Additionally, the agreement of all parties to the treaty must be recognisable. In this sense, one cannot assume a uniform practice of the treaty states in the application of the 'Ceased

Circumstances Clauses' of Article 1 C of the GRC such as would influence the interpretation. This is already evident from the fact that, at least in Germany, the clauses have always been applied in the sense set forth above. But apart from that consideration, there are also no indications that these clauses have been interpreted uniformly in a different sense in the other treaty states.

- 32 As of 1 December 2006, 144 states had acceded to the Geneva Refugee Convention. However, in international state practice, there are few decisions on the cessation clauses. This may be because many states that acceded to the Convention assume in practice not the definition of a refugee under the Convention, but rather a broader definition that also includes subsidiary protection and other violations of human rights. But on the basis of an expanded definition of a refugee, the requirements for cessation would necessarily increase, so that in these cases it would not be possible to draw conclusions about the interpretation of the Geneva Refugee Convention from actual state practice, if only because the relationship to the treaty that is necessary for a finding of a subsequent practice would be absent. Indications for a broader definition of a refugee in practice are offered for example by Article I No. 2 of the Organisation of African Unity Convention on Regulating the Specific Aspects of Refugee Problems in Africa – the 'OAU Convention' – which took effect in 1974; under that Convention, a refugee is also every person 'who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order' is compelled to seek refuge in another place. An equivalent definition of a refugee is also found in the 'Cartagena Declaration on Refugees' of 1984. The 1994 'Arab Convention on Regulating Status of Refugees in the Arab Countries' of the League of Arab States additionally defines as refugees those persons who have fled the 'occurrence of natural disasters' (Article 1 No. 2). Moreover, these conventions fundamentally exclude any deportation of refugees against their will (see, for example, Article V No. 1 of the OAU Convention), so that in practice there is presumably little reason to withdraw refugee status once it has been granted. The UNHCR as well concedes that in the past many states have not undertaken periodic reviews of individual cases on the basis of fundamental changes in the country of origin (see No. 18 of the UNHCR Guidelines of 10 February 2003, loc. cit.). Amid this setting, there is much to argue that in many signatory states

of the Geneva Refugee Convention no treaty-related practice at all has evolved as yet for the application of the 'Ceased Circumstances Clauses'.

- 33 The Complainant as well has cited only three decisions on practice in other treaty states – exclusively in Europe – in support of a 'unanimous' state practice contrary to German case law; but these decisions are concerned with other procedural constellations and, most importantly, do not apply a uniform standard. Thus the decision of the Austrian Independent Federal Asylum Commission of 5 December 2006 (224.674/0-VI/42/01) is not a proceeding about withdrawal, but one about recognition. Here the court found collaterally that once refugee status has been obtained, it is not lost if conditions in the applicant's home region have not changed so fundamentally and durably that it can be assumed that international protection is dispensable. This was denied in the case of an Afghan refugee, but the reasons for the decision indicate that there had not even been a cessation of the situation of persecution that resulted in the recognition of refugee status. The decision of the United Kingdom House of Lords of 10 March 2005 (2005 UKHL 19) also concerned proceedings not for a withdrawal, but for a recognition. To be sure, there it was emphasised that the assessment of refugee status under Article 1 A No. 2 of the GRC does not precisely correspond to the assessment that is to be performed for a withdrawal under Article 1 C No. 5 of the GRC. But this was not commented upon further. Only the decision of the Swiss Refugee Appeals Board of 5 July 2002 (EMARK 2002/8 p. 53 <64>) concerns proceedings for withdrawal. This decision will ultimately reflect only Swiss practice, insofar as it proceeds on the assumption that irrespective of the reasons for persecution that led to recognition, a fundamental improvement of the situation within the meaning of Article 1 C No. 5 of the GRC cannot be assumed at least so long as the United Nations believe there is a need for an international protective force, and supports this finding with the argument that granting asylum and withdrawal cannot be opposed to one another as symmetric acts, but rather that more stringent requirements must be set for the conditions in the country of origin that justify withdrawal, and a stabilisation of a new political situation must be awaited.

34 The various statements from the UNHCR likewise provide no indication of an existence of uniform national practices. In particular, Conclusion No. 69 (XLIII) of the Executive Committee makes no concrete statements on the point, but simply emphasises – in general, and more in the way of an appeal – that in any decision on the application of the cessation clauses, the treaty states should carefully weigh the fundamental character of the changes in the country of origin or nationality, including the general human rights situation and the particular cause for the fear of persecution, in order to ensure in an objective and verifiable manner that the situation that justified the recognition of refugee status no longer exists. At the same time, the Conclusion explicitly points out that the application of the cessation clause(s) lies solely within the jurisdiction of the treaty states. It cannot be seen from the Conclusion that these states apply the clauses uniformly in practice. Nor is anything different apparent from the UNHCR Guidelines of 10 February 2003 (*loc. cit.*). According to the preamble, these are intended ‘to provide legal interpretive guidance’. To the extent that they point out that the framework for substantive analysis takes account of ‘State practice’ (see No. 5), here too there is no indication of the actual existence of a uniform state practice. Instead, it is emphasised that in its Conclusion No. 69 the Executive Committee developed ‘guidelines’ (see No. 8). The subsequent requirements, which reach far beyond Conclusion No. 69 (see No. 15), also contain no indication of such a state practice. Instead, it is conceded that in practice hitherto there has largely been no periodic review of individual cases on the basis of fundamental changes in the country of origin (see No. 18). Given this situation, however, a uniform state practice would have difficulty developing. Finally, there is also no help to be found in the ‘Supplemental Position Paper of the UNHCR on the Requirements for Cessation of Refugee Status under Article 1 C (5) 1 of the 1951 Convention Relating to the Status of Refugees (Geneva Refugee Convention)’ of October 2005, submitted by the Complainant. Insofar as this document states that the Conclusions of the Executive Committee reflect state practice, there is no evidence to that effect. Rather, in this connection the UNHCR itself points out that only 68 (and thus less than half) of the Member States of the Geneva Refugee Convention belong to the Executive Committee. Moreover, the fact that Conclusion No. 69 does not even reflect the state practice of the states that are members of the Executive Committee is

shown by the fact that Germany belongs to the committee, yet according to the UNHCR Germany has never conformed to its requirements in practice.

- 35 b) Question 3 serves to clarify which requirements must be posed for the exclusion of new, different circumstances of persecution in a case of cessation of refugee status under Article 11 (1) e of the Directive. According to Article 11 (2) of the Directive, in considering the circumstances for cessation under Article 11 (1) e and f, the Member States must assess whether the refugee's fear of persecution can no longer be regarded as well-founded. This ties directly to the concept of a 'well-founded' fear of persecution, which under the Geneva Refugee Convention (Article 1 A No. 2 GRC) and Directive 2004/83/EC (Article 2 c) is a core component of the definition of a refugee. Neither the Geneva Refugee Convention nor Directive 2004/83/EC specifies in more concrete detail when a fear of persecution is well-founded, or – in regard to the cessation of refugee status – can no longer be considered well-founded. In particular, neither the Convention nor the Directive provides any standard as to how probable the risk of persecution must be in order for the refugee's fear to be considered well-founded. Article 4 (4) of the Directive includes only an easier standard of proof for the recognition of applicants who have already been persecuted or directly threatened with persecution.
- 36 aa) In cases of withdrawal, this Court has hitherto proceeded on the assumption that a refugee's fear of persecution can no longer be considered well-founded if the material circumstances in his country of origin at the time of recognition have subsequently changed substantially and non-temporarily, in such a way that a repetition of the acts of persecution that were crucial to his flight can be ruled out with sufficient certainty for the foreseeable future, and there is also no substantial probability of an entirely new and different persecution for other reasons upon his return (see decisions of 18 July 2006 - BVerwG 1 C 15.05 - BVerwGE 126, 243 at Marginal No. 26, and of 20 March 2007, loc. cit. at Marginal No. 20). Here fundamentally all reasons for persecution asserted in the recognition proceedings – irrespective of whether or not they were taken into account in the recognition decision – must be considered from the viewpoint of a potential connection with a danger inherent in returning, before the applicabil-

ity of a facilitated standard of sufficient safety from persecution can be excluded (see decision of 12 June 2007 - BVerwG 10 C 24.07 - InfAuslR 2007, 401). In practice, this approach may ultimately lead to the same results as the easier standard of proof under Article 4 (4) of the Directive.

- 37 In these decisions, this Court ties into the standards of probability developed in Germany for granting asylum under Article 16a of the Basic Law, and later transferred to recognition of refugee status under the Geneva Refugee Convention. According to these decisions, different standards apply in the recognition proceedings, depending on whether the person seeking asylum left his country of origin in flight from experienced or directly threatened persecution, or emigrated without having been persecuted. If the asylum seeker has emigrated without being persecuted, a risk of persecution, and thus a well-founded fear of persecution, exists if a judicious – namely, objective – assessment of all the circumstances of his case indicates a substantial probability that he is threatened with persecution, so that he cannot reasonably be expected to remain in his country, or to return there. Here a ‘qualifying’ approach must be adopted, in the sense of a weighting and weighing of all ascertained circumstances and their significance. The crucial matter is whether in view of these circumstances, a reasonable-minded, prudent human being in the applicant’s position could have a fear of persecution. A well-founded fear of an event in this sense can exist even if from a ‘quantitative’ or mathematical viewpoint there is less than a 50% probability that the event will occur. Therefore a substantial probability of persecution must be assumed when, in the required ‘summary assessment of the life circumstances under examination’, the circumstances arguing for persecution have greater weight, and therefore prevail over the facts arguing to the contrary. Thus, the crucial factor is ultimately the aspect of reasonableness. Reasonableness is the primary qualitative criterion to be applied in assessing whether the probability is ‘substantial’. The deciding factor is whether from the viewpoint of a prudent and reasonable-minded person in the asylum seeker’s position, a return to the native country seems unreasonable after weighing all known circumstances. This may be the case even if the mathematical probability of political persecution is less than 50%. In such a case, to be sure, the mere theoretical possibility of persecution is not sufficient. A reasonable-minded per-

son will ignore such a possibility. But if the overall circumstances of the case indicate a real risk of persecution, a judicious person will also not take the risk of returning to his native country. In weighing all circumstances, a judicious observer will additionally make certain allowances in his considerations for the particular severity of the feared encroachment. Though in quantitative terms there may be only a low mathematical probability of persecution, even from the viewpoint of a prudent and reasonable-minded person who is considering whether he can return to his country it makes a substantial difference whether, for example, he is risking only a month in prison or the death penalty (decision of 5 November 1991 - BVerwG 9 C 118.90 - BVerwGE 89, 162 <169 et seq.> with further authorities).

- 38 By contrast, in its decisions this Court has consistently applied the lower standard of probability of sufficient safety from persecution if there is an internal connection between experienced persecution and the risk of renewed persecution asserted in the petition for asylum, such that a revival of the original persecution can be expected upon the person's return, or an increased risk of the same kind of persecution exists. In this case, high standards must be met for the probability that renewed persecution can be excluded, because of the generally severe and lasting consequences – including psychological ones – of the persecution that has already been experienced. It must be more than just largely probable that the asylum seeker will be safe from acts of persecution in his native country. On the other hand, the risk of persecution need not be ruled out with a probability verging on certainty, such that even slight doubts about the asylum seeker's safety from persecution would have to help his petition toward success. But if serious reservations cannot be assuaged, under this standard they work in the asylum seeker's favour, and lead to his recognition (decision of 18 February 1997 - BVerwG 9 C 9.96 - BVerwGE 104, 97 <99 et seq.> with further authorities).
- 39 Since Directive 2004/83/EC establishes no standards of probability of its own, and Germany's proposal that its standards of prognosis should be adopted (see the record of the result of deliberations on 25 September 2002 – Case No. 12199/02 - p. 8) has not been accepted, in a cessation of refugee status no

other standard (such as the lower standard of probability of adequate safety from prosecution) can presumably apply in the individual's favour under Community law. Question 3 a clause 2 is therefore presumably to be answered in the negative, with the consequence that in assessing whether the change in circumstances under Article 11 (2) of the Directive is significant and non-temporary, so that the refugee's fear of persecution can no longer be considered well-founded, new and different circumstances establishing persecution must be judged by the same standard of probability as applies for the recognition of refugees.

- 40 bb) There is furthermore a need for clarification as to whether the easier standard of proof under Article 4 (4) of the Directive applies in such a situation – in other words, in cases in which there is no internal connection between the circumstances under which the individual was recognised as a refugee, and the alleged danger inherent in return. This is the substance of Question 3 b. Under Article 4 (4) of the Directive, the fact that an applicant has already been subject to persecution or other serious harm, or to direct threats of such persecution or such harm, is a serious indication of the applicant's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated.
- 41 In this Court's opinion, the restrictive wording 'such persecution' – in German, 'solcher Verfolgung' – which is also found in the English ('such persecution') and French ('cette persécution') versions, indicates that the easier standard of proof does not apply in all cases of experienced or directly threatened persecution, but rather presupposes an internal connection between an experienced or directly threatened persecution and the circumstance that could lead to a repeat of persecution in the event of a return. Further arguing for this position is the fact that the justification for the presumption that persecution is still threatened or will be threatened again, with the associated reversal of the burden of proof, ultimately does not lie in the fact that the individual has already been persecuted, but rather in that under the same circumstances, persecution already experienced or directly threatened indicates the risk of a renewed persecution. This presumption ceases when the circumstances under which the refugee

was recognised have ceased. In these cases, the previous persecution has no indicative effect at the factual level with regard to new, different risks of persecution which are associated with other reasons, and possibly also inflicted by other persecutors (for example, persecution by private individuals in the course of religious disputes, instead of a former state persecution because of behaviour critical of the regime), and which has no connection with the previous persecution. Accordingly, the Joint Position of the Council of 4 March 1996, which preceded the Directive, on the harmonised application of the definition of the term 'refugee' in Article 1 of the Geneva Convention of 28 July 1951 relating to the status of refugees (Official Journal L 63 p. 2), contains the mention that the fact that an individual has already been subject to persecution or to direct threats of persecution is a serious indication of the risk of persecution, unless a radical change of conditions has taken place since then in the applicant's country of origin or in his relations with his country of origin. The Commission's later draft initially provided, in Article 7 c, only that in assessing the applicant's fear of persecution or other serious, unjustified harm, the Member States should also take into account whether the applicant had already been persecuted, or had suffered other serious unjustified harm, or had been directly threatened with persecution or with other serious harm, since this is a serious indication of an objective possibility that the applicant could be persecuted further or suffer such harm in the future. However, the reservation that this does not apply when conditions have radically and relevantly changed since then in the applicant's country of origin, or in his relations with his country of origin, was reflected in the Commission's reasons (see p. 16). On the evidence of the minutes of the deliberations on 25 September 2002 (Doc. 12199/02, p. 9) this reservation was added later in Article 7 (4) ('The fact that ... , is a serious indication of the applicant's well-founded fear of persecution or real risk of suffering serious and unjustified harm, unless a radical change of conditions has taken place since then in the applicant's country of origin or in his relations with his country of origin'), but on the evidence of the minutes of 12 November 2002 (Doc. 14083/02, p. 9) the wording was amended again, and the present wording was adopted instead. It is not clear from the materials why this happened. However, from the course of the deliberations it may be assumed that the word 'such' was not added by

chance, but rather quite intentionally, and thus a connection was to be established with a specific persecution, whether experienced or directly threatened.

42 If it is assumed that the easier standard of proof under Article 4 (4) of the Directive presumes an internal connection between an experienced or directly threatened persecution and the conditions that could result in persecution upon a return, it may be held that the provision does not apply when the adduced fear of persecution has no link of any kind to a persecution experienced or directly threatened earlier, but rather is based on new and different circumstances giving rise to persecution. In this case Question 3 b would have to be answered in the negative. If, however, Article 4 (4) of the Directive also applies in cases where there is no internal connection, it would have to be clarified further whether the provision also applies to a cessation of refugee status, or whether to this extent Article 14 (2) of the Directive contains a special provision that supersedes the general provision of Article 4 (4) of the Directive. This is because according to Article 14 (2) of the Directive, without prejudice to the duty of the refugee in accordance with Article 4 (1) of the Directive to disclose all relevant facts and provide all relevant documentation at his disposal, the Member State, which has granted refugee status, shall on an individual basis demonstrate that the person concerned has ceased to be or has never been a refugee in accordance with Article 14 (1) of the Directive. This indicates that the burden of proof for the cessation of refugee status lies with the Member State (this was the Commission's interpretation in its Proposal for the Directive, see p. 27), but that it is irrelevant whether the individual was or was not persecuted when he left his country of origin, but rather that in each individual case, it must be established in a new prognostic decision, taking the changed circumstances into account, that the fear of persecution can no longer be considered well-founded.

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Richter

Beck

Fricke

Field:

BVerwGE: No

Asylum law

Professional press: Yes

Sources in law:

Asylum Procedure Act	Section 73 (1), (2a) and (7)
Residence Act	Section 52 (1) sentence 1 No. 4, Section 60 (1), (2), (3) and (7), Section 60a (1) sentence 1
Aliens Act	Section 51 (1)
Basic Law	Article 16a (1)
GRC	Article 1 A No. 2, Article 1 C No. 5 and 6
Act on Administrative Law Procedure	Section 48 (4), Section 49 (2) sentence 2
EC Treaty	Article 68 (1), Article 234 (1) and (3)
VCLT	Article 31 (1) and (3) b
Directive 2004/83/EC	Article 2 c, Article 4 (4), Article 7 (1), Article 11 (1) e and f and (2), Article 14 (1) and 2, Article 15, 18, 38 (1) sentence 1, Article 39

Headwords:

Withdrawal of recognition of refugee status (Iraq); preliminary ruling; overreaching implementation; existing recognition; discretion; immediacy; year's grace period for withdrawal; fear of persecution; new, different persecution; actor of protection; subsidiary protection; protection from deportation; prior persecution; standard for prognosis; easier standard of proof.

Headnote:

Request for a preliminary ruling from the European Court of Justice to clarify the requirements for cessation of refugee status under Article 11 (1) e of Directive 2004/83/EC.

Decision of the 10th Division of 7 February 2008 - BVerwG 10 C 33.07

I. Cologne Administrative Court, 19.10.2005 – Case No.: VG 18 K 5073/05.A -
II. Münster Higher Administrative Court, 27.07.2006 – Case No.: OVG 16 A 4354/05.A -