

Field:

Asylum law

Sources in law:

Asylum Procedure Act	Sections 2(1), 3(2), 30(4), 73(1), 77
Residence Act	Section 60(8) sentence 2
Aliens Act 1990	Section 51(3) sentence 2
ECHR	Article 3
Basic Law	Articles 16a(1), 23(1)
GRC	Article 1(F)(b) and (c)
Directive 2004/83/EC	Articles 3, 12(2) and (3), Article 14(3)
Treaty on the Functioning of the European Union	Article 288(3)

Headwords:

Asylum; refugee status; revocation; change in circumstances; standard of likelihood; change in law; exclusion; grounds for exclusion; undeserving of asylum; serious non-political crime; purposes and principles of the United Nations; United Nations, purposes and principles of ~; terrorism; support; PKK; threat of recurrence; proportionality; protection of legitimate expectation; protection from deportation; interpretation in compliance with Union law; priority of application of Union law.

Headnotes:

1. Section 73(1) sentence 1 of the Asylum Procedure Act, in view of the mandatory observance of the grounds for exclusion from refugee status under Article 12(2) and Article 14(3) of Directive 2004/83/EC, must be interpreted in compliance with Union law as meaning that where such grounds for exclusion exist, it is permissible and indeed imperative to revoke refugee status or an entitlement to asylum granted before the rules for exclusion took effect.

2. Exclusion from refugee status under Section 3(2) sentence 1 no. 2 and 3 of the Asylum Procedure Act does not presuppose that the foreigner must represent a present danger to the security of the Federal Republic of Germany or the general public. Nor, so far as the conditions of fact establishing these grounds for exclusion are concerned, does it presuppose any assessment of proportionality for the particular case (following ECJ, judgment of 9 November 2010 – case C-57/09 and C-101/09 – NVwZ 2011, 285).

3. Acts contrary to the purposes and principles of the United Nations within the meaning of Section 3(2) sentence 1 no. 3 of the Asylum Procedure Act, at least in the case of acts of international terrorism, may also be committed by persons who did not hold a position of power in a Member State of the United Nations or an organisation similar to a state (following ECJ, judgment of 9 November 2010 – case C-57/09 and C-101/09 – NVwZ 2011, 285).

4. The mere fact of a person's membership of an organisation that attempts to achieve its goals with (in part) terrorist means does not automatically justify the presumption of a ground for exclusion under Section 3(2) sentence 1 no. 2 or 3 of the Asylum Procedure Act. Rather, the exact circumstances of fact must be assessed in each case individually to determine whether the acts committed by the organisation constitute serious non-political crimes or acts contrary to the purposes and principles of the United Nations within the meaning of these grounds for exclusion, and whether an individual responsibility for the acts can be attributed to the person concerned (following ECJ, judgment of 9 November 2010 – case C-57/09 and C-101/09 – NVwZ 2011, 285).

5. Because the legal status of a person entitled to asylum under Article 16a of the Basic Law may be confused with that of a refugee within the meaning of Directive 2004/83/EC, the requirements of Article 3 of the Directive forbid under Union law that a person excluded from refugee status under Article 12(2) of the Directive can be recognised as a person entitled to asylum, or that such an entitlement can be maintained (as in judgment of 31 March 2011 – BVerwG 10 C 2.10).

Judgment of the 10<sup>th</sup> Division of 7 July 2011 – BVerwG 10 C 26.10

I. Gelsenkirchen Administrative Court, 29 Nov. 2005 – Case: VG 14a K 2880/04.A -

II. Münster Higher Administrative Court, 27 Mar. 2007 – Case: OVG 8 A 5118/05.A -



# FEDERAL ADMINISTRATIVE COURT

## IN THE NAME OF THE PEOPLE

### JUDGMENT

BVerwG 10 C 26.10  
OVG 8 A 5118/05.A

Released  
on 7 July 2011  
Ms Werner  
as Clerk of the Court

In the administrative case

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

The Tenth Division of the Federal Administrative Court  
upon the hearing of 7 July 2011  
by Presiding Federal Administrative Court Justice Prof. Dr Berlitz and  
Federal Administrative Court Justices Prof. Dr Dörig,  
Beck, Prof. Dr Kraft and Fricke

decides:

On appeal by the Respondent, the judgment of the Higher  
Administrative Court for the State of North Rhine-  
Westphalia of 27 March 2007 is set aside.

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

The disposition as to costs is reserved for the final deci-  
sion.

#### Reasons :

I

- 1 The Complainant appeals the revocation of his entitlement to asylum and his refugee status.
- 2 The Complainant, born in 1968, is a Turkish national of Kurdish ethnicity. In May 2001 he entered Germany by air from Iran and applied for asylum. As grounds, he stated: He feared persecution from both the Turkish state and the Kurdish Workers' Party (PKK). He had already been arrested three times and tortured during his studies at Istanbul University, at the end of the 1980s, for his

advocacy of a right of self-determination for the Kurds. He had then been released each time for lack of evidence. In 1990 he had fled to the mountains to join the PKK. There he had been a guerrilla fighter and a high officer of the PKK. At the end of 1998, the PKK sent him into Northern Iraq. Because of political differences with the leadership of the PKK, in May 2000 he separated from that organisation and has been threatened by the PKK ever since as a defector. He had remained for approximately another year in Northern Iraq, but had not been safe there, either. For that reason, in May 2001 he fled to Germany by way of Iran.

- 3 The Federal Office for the Recognition of Foreign Refugees (now the Federal Office for Migration and Refugees) – the ‘Federal Office’ – thereupon recognised the Complainant’s entitlement to asylum in May 2001 and found that he met the requirements under Section 51(1) of the Aliens Act with regard to Turkey (refugee status under the law at that time).
  
- 4 In January 2002, the German legislature enacted the Act to Combat Terrorism, introducing new grounds for exclusion from recognition of an entitlement to asylum and refugee status, which were based on the grounds for exclusion set forth in Art. 1(F) of the Geneva Convention on Refugees (GRC). In the light of this change in the legislation, the Federal Criminal Police Office asked the Federal Office to institute proceedings against the Complainant for a revocation or withdrawal of status. According to the criminal office’s findings, it was true that in 1990 the Complainant joined the PKK and had been a guerrilla fighter and a high officer of the PKK, known as a ‘cadre’. He had been a member of the 41-member executive body since at least February 1999, and possibly since as early as 1995, and therefore had a comprehensive shared responsibility for the PKK’s terrorist activities. In August 2000, Interpol Ankara made the Complainant the subject of an international wanted person alert, on the basis of an arrest warrant from a state security court. The particular subject matter of the request for the alert was attacks in which 126 persons were said to have been killed, together with an involvement in the murder of two PKK guerrilla fighters through the PKK’s internal penal system. The dates of the crimes were between 1993 and 1998.

- 5 Thereupon, in a decision dated 6 May 2004, the Federal Office revoked the Complainant's entitlement to asylum and his refugee status. It found that revocation was required under Section 73(1) of the Asylum Procedure Act, since the conditions on which recognition was based had ceased to exist. The introduction of the grounds for exclusion had resulted in a subsequent change in the law, with the consequence that the Complainant was now excluded from protection through asylum or as a refugee. He satisfied the second and third alternatives of the exclusionary provision (at the time: Section 51(3) sentence 2 of the Aliens Act; subsequently: Section 60(8) sentence 2 of the Residence Act; now: Section 3(2) of the Asylum Procedure Act). This was because there was good reason to believe that before being admitted as a refugee, he had committed a serious non-political crime outside the territory of the Federal Republic of Germany, and had acted contrary to the purposes and principles of the United Nations. Through his involvement as a guerrilla fighter and by virtue of his position at the executive level of the PKK, the Complainant had acted to support the PKK's terrorist activities, and was therefore criminally liable for the commission of very serious crimes. Moreover, on the basis of the Turkish arrest warrant and by his own account in the asylum proceedings, there was good reason to suspect that he had supported the PKK through his own contributions of violence, to the point of killing numerous people. He therefore satisfied both of the above conditions for exclusion.
  
- 6 The Administrative Court set aside the revocation decision in a judgment of 29 November 2005.
  
- 7 The Higher Administrative Court rejected the Respondent's appeal against the lower court's judgment, in a judgment dated 27 March 2007. As grounds, it stated in substance: The revocation had been unlawful. It could not be founded on a change in the situation either of fact or of law. Contrary to the Respondent's arguments in the appeal proceedings, there had been no decisive change in the circumstances in Turkey that were relevant to the Complainant's status. The Complainant, who had emigrated after previous persecution, was still not sufficiently safe from a renewal of persecution. Despite extensive efforts at reform,

particularly the 'zero tolerance' policy against torture, acts of persecution of a nature and intensity relevant to asylum, and attributable to the Turkish state, continued to occur in Turkey. Because of the arrest warrant outstanding against the Complainant, it could be assumed that in the event of his return, he would be arrested and interrogated about the crimes of which he was accused, as well as his activities within German Federal territory and any contacts with organisation members both in Germany and elsewhere. In this regard, there was the danger that abuses of a type relevant to asylum would occur. Moreover, the court found, the revocation was not justified on the basis of a subsequent change in the situation in law. The conditions under the exclusionary clauses were not met in the Complainant's case. Only the second alternative ground for exclusion governed by Section 60(8) sentence 2 of the Residence Act was to be considered. Even if there might be good reason to believe that during his many years of involvement in the PKK, as a fighter and – for a time – as an officer in a prominent position, the Complainant was involved in terrorist acts by the PKK and therefore committed acts which, in their nature and severity, should be considered serious non-political crimes, this ground for exclusion would not apply. This is because, under the Geneva Convention on Refugees, by an interpretation in accordance with Union law and the German constitution, this ground should be understood as serving not merely to sanction a serious non-political crime committed in the past, but also to avert danger, and requires a comprehensive assessment of the particular case, oriented to the intent and purpose of the provision and the principle of proportionality. Therefore the ground for exclusion could be inapplicable if the foreigner no longer posed a danger, for example because it was established that he had renounced all former terrorist activities. This, the court said, was the case with the Complainant.

- 8 In its appeal to this Court, the Respondent seeks to have the complaint denied. It argues: The revocation of the recognition of the entitlement to asylum and of refugee status was lawful. The prerequisites of fact for the grounds for exclusion stated in the appealed decision are met. Contrary to the opinion of the court below, neither ground for exclusion presupposes either a continuing threat of danger from the foreigner or an assessment of proportionality for the particular case.

- 9 In a decision of 25 November 2008 – BVerwG 10 C 46.07 – this Court stayed the proceedings and submitted various questions to the European Court of Justice for a preliminary ruling, with regard both to the interpretation of the grounds for exclusion under Union law, which are now governed by Art. 12(2)(b) and (c), and to Art. 3 of Council Directive 2004/83/EC of 29 April 2004 – known as the ‘Qualifications Directive’. The Court of Justice answered the referred questions in a judgment of 9 November 2010 (cases C-57/09 and C-101/09 – NVwZ 2011, 285).
- 10 The Respondent believes its interpretation has been confirmed by the Court of Justice’s decision. The representative of the Federal interests before the Federal Administrative Court concurs in that opinion.
- 11 The Complainant defends the judgment of the court below, and also argues that a revocation would be impermissible because the Respondent was already aware of his activities and position within the PKK from the Complainant’s own account in the recognition proceedings, and nothing had changed since then. Finally, he argues, there is also no finding of his personal responsibility for specific terrorist acts by the PKK.

## II

- 12 The Respondent’s appeal is procedurally allowable and has merit. The appealed decision is founded upon a contravention of Federal law (Section 137(1)(1) Code of Administrative Court Procedure). The court below denied the existence of grounds for exclusion under Section 3(2) sentence 1 of the Asylum Procedure Act (formerly: Section 60(8) sentence 2 of the Residence Act/Section 51(3) sentence 2 of the Aliens Act 1990), and therefore also the lawfulness of the revocation of the Complainant’s refugee status, on grounds that are incompatible with Federal law. It incorrectly held that an exclusion under Section 3(2) sentence 1 no. 2 and 3 of the Asylum Procedure Act presupposes that the individual concerned must also pose at present a threat of a further commission of

crimes or acts within the meaning of those provisions (1.). This defective understanding of the grounds for exclusion on the part of the court below also affects the legal assessment of the revocation of recognition of entitlement to asylum (2.). For lack of sufficient findings by the court below, this Court could not itself decide finally whether the Complainant's activities in the PKK brought about a ground for exclusion under Section 3(2) sentence 1 no. 2 or 3 of the Asylum Procedure Act (3.). The proceedings were therefore to be remanded to the court below for further hearing and a decision (Section 144(3) sentence 1 no. 2 Code of Administrative Court Procedure).

- 13 1. a) To begin with, the court below correctly held that the revocation of refugee status in the decision of 6 May 2004 was formally unobjectionable (see, specifically, this Court's decision of 25 November 2008 – BVerwG 10 C 46.07 – Buchholz 451.902 Europ. Ausl.- u. Asylrecht no. 24 = NVwZ 2009, 592, at 15).
- 14 b) The assessment of the revocation of refugee status under substantive law is governed by the new legal situation that has been in force since the Act to Implement Residence- and Asylum-Related Directives of the European Union of 19 August 2007 (BGBl I p. 1970) – the Directive Implementation Act – took effect on 28 August 2007. According to the settled case law of the Federal Administrative Court, changes in law that take place after an appealed decision is handed down must be taken into account by this Court if the court below would have to take them into account if it were to decide now (see judgment of 11 September 2007 – BVerwG 10 C 8.07 – BVerwGE 129, 251, at 19). Since the present case is a dispute under asylum law in which the court below regularly must decide, according to Section 77(1) of the Asylum Procedure Act, on the basis of the situation of fact and law at the time of its last hearing or decision, it would have to take the current status of law as a basis if it were to decide now (see, most recently, this Court's judgment of 24 February 2011 – BVerwG 10 C 3.10 – to be published in the BVerwGE collection, juris, at 7, with further authorities).
- 15 c) The basis in law for the revocation of refugee status is Section 73(1) of the Asylum Procedure Act. Under sentence 1 of that provision, recognition of refu-

gee status is to be revoked without delay if the conditions on which such recognition is based have ceased to exist. Accordingly, the conditions for recognition must have ceased to exist after the fact – in other words, as a rule, after recognition has been granted.

- 16 aa) In the present case, the court below ultimately found correctly that the conditions for recognition had not ceased to exist because of a subsequent change in the circumstances of fact. According to the court below's findings of fact, which are binding upon this Court (Section 137(2) Code of Administrative Court Procedure), there has been no material change in the situation for persecution in Turkey such as would justify a revocation of the recognition of refugee status for the Complainant, who left the country after having been persecuted previously.
- 17 However, in view of the Complainant's previous persecution, in examining whether there had been a material change in the circumstances in Turkey relevant to an assessment of the threat of persecution, the court below adopted the reduced standard of probability of sufficient protection against persecution (copy of the judgment, p. 12), as has been developed in the case law of the Federal Constitutional Court and the Federal Administrative Court on the fundamental right of asylum in cases of previous persecution and subsequently transferred to refugee status. This concept in substantive law of different standards of probability in deciding the likelihood of persecution is unknown to Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ EU L 304 of 30 September 2004 p. 12, corr. OJ EU L 204 of 5 August 2005 p. 24). Instead, the Directive proceeds from a uniform standard of likelihood that is equivalent to the standard of considerable probability under prior German law, and adopts an evidentiary approach that is expressed in the Member States' duty of demonstration under Article 14(2) and the presumption of actual persecution under Article 4(4) of the Directive. In the Directive Implementation Act of 19 August 2007, the German legislators therefore abandoned the former different standards of probability under German law, and adopted the

evidentiary approach from the Directive (on the above, in detail, see this Court's judgment of 1 June 2011 – BVerwG 10 C 25.10 – to be published in the BVerwGE collection, with further authorities).

- 18 All the same, on review by this Court the appealed decision is ultimately unobjectionable on this point as well. The court below's individual findings of fact (copy of the decision, p. 13 ff.) support the conclusion that even with the adoption of the now-applicable uniform standard of likelihood under Union law, the change in the circumstances in Turkey is not of such a significant and non-temporary nature that the previously persecuted Complainant's fear of persecution on the same grounds can no longer be regarded as well-founded (see Article 11(2) of Directive 2004/83/EC and this Court's judgment of 24 February 2011, *op. cit.*, at 17, 19, to be published in the BVerwGE collection, following ECJ, judgment of 2 March 2010 – case C-175/08 *et al.*, *Abdulla et al.* – *InfAusIR* 2010, 188). Thus, amongst other points, the court below notes that because of the arrest warrant issued against the Complainant, it must be assumed that in the event of his return, he will be arrested and interrogated about the crimes of which he is accused, as well as his activities within German Federal territory and any contacts with members of the organisation both in Germany and elsewhere, and in this regard there is a danger that the interrogation will be associated with abuses that are of relevance in asylum law (copy of the decision, p. 17). This specifically does not find – as would be necessary for a revocation under Article 11(2) of Directive 2004/83/EC – that the factors because of which the refugee's fear of persecution was well-founded, and that resulted in recognition of his refugee status, have been eradicated, and that this eradication can be considered non-temporary.
- 19 Since the Complainant has also not given rise to a reason for the cessation of the conditions for recognition through his own conduct since his recognition, for example by subsequently bringing about a condition for exclusion, a revocation of refugee status because of changes in the situation of fact is not applicable.
- 20 bb) However, a revocation of refugee status because of a subsequent change in the situation of law, owing to the introduction of the grounds for exclusion now

governed by Section 3(2) of the Asylum Procedure Act since the effective date of the Directive Implementation Act, does come under consideration. By this provision, the legislature implemented the requirements under Union law from Article 12(2) and (3) of Directive 2004/83/EC, which in turn are founded on the grounds for exclusion listed in Article 1 (F) of the GRC (BTDrucks 16/5065 p. 214). If, through his activities in the PKK, the Complainant brought about one of these grounds for exclusion, a revocation would be permissible and indeed required, under Section 73(1) sentence 1 of the Asylum Procedure Act, because of this change in the situation of law since his status was recognised.

21 In any case, since the transposition of Directive 2004/83/EC into national law by the Directive Implementation Act, the provision must be interpreted in conformity with Union law, with regard to Article 14(3)(a) of the Directive, as meaning that where grounds for exclusion exist, recognitions that were already declared before the introduction of these grounds for exclusion must be revoked because the consideration of these grounds for exclusion is now mandatory under Union law. According to Article 14(3)(a) of the Directive, Member States are to revoke, end or refuse to renew refugee status if, after refugee status has been granted, it is established by the Member State that the person should have been or is excluded from being a refugee in accordance with Article 12 of the Directive. Unlike Article 14(4) of the Directive, this provision is in mandatory form, and in the opinion of the European Court of Justice, it also results in a revocation of refugee status in cases of applications made or decisions taken before the Directive entered into force, because there are no transitional arrangements (ECJ, judgment of 9 November 2010, *op. cit.*, at 73 et seq.). Inasmuch as under German law, refugee status can be withdrawn after an original lawful recognition only by way of a revocation, Section 73(1) of the Asylum Procedure Act, in which the wording is left open in this regard, must be interpreted in compliance with Union law to mean that, at least insofar as is imposed by mandatory provisions of Directive 2004/83/EC – such as Article 14(3) in this case – a revocation because of this change of the legal situation is permitted and required.

22 This interpretation prescribed by the European Court of Justice also does not conflict with the principle of the protection of legitimate expectations under Un-

ion law, which is to be applied as a standard in this regard. According to the case law of the European Court of Justice, this principle applies primarily when rules of substantive Union law are to apply to matters that were decided before the rules took effect. But the scope of application of this principle cannot be extended to the point of generally preventing new rules from applying to the future effects of situations which arose under the earlier rules (see, e.g., ECJ, judgment of 14 January 2010 – case C-226/08, *Stadt Papenburg – NVwZ* 2010, 310, at 46 with further authorities). Because the revocation of a refugee status recognised before the transposition of Article 14(3) of Directive 2004/83/EC into national law does not result in a withdrawal of refugee status in the past, but leads only to a cessation of the future continuance of recognition of refugee status, the rule does not represent a retroactive reassessment of settled matters. Rather, it pertains only to the future effects of matters that arose under the applicability of earlier rules. Given that situation, the individual's legitimate expectation of being able to retain refugee status into the future, even though grounds for exclusion within the meaning of the Geneva Convention on Refugees have come into being, is not deserving of protection. Moreover, the adverse effects for the individual concerned as a consequence of the interpretation of Section 73(1) of the Asylum Procedure Act in compliance with Union law are also limited, because the termination of refugee status is not associated with any decision regarding deportation to the persecuting state, but rather in the event that treatment threatened there violates Article 3 of the European Convention on Human Rights, there is in any case a prohibition on deportation in accordance with the obligations incumbent on Member States under international law.

- 23 cc) Accordingly, if the Complainant's refugee status must be revoked in the event that a ground for exclusion under Section 3(2) of the Asylum Procedure Act is brought about by the Complainant, the crucial question is whether the Complainant fulfilled a ground for exclusion under Section 3(2) of the Asylum Procedure Act through the activities in the PKK attributed to him before he left the country. The comments of the court below that deny the existence of such a ground for exclusion in the Complainant's case do not withstand this Court's review on points of law.

24 The court below considered only the ground for exclusion of a serious non-political crime, as now governed by Section 3(2) sentence 1 no. 2 of the Asylum Procedure Act (formerly by Section 60(8) sentence 2 alt. 2 of the Residence Act), which is equivalent to the ground for exclusion under Article 12(2)(b) of Directive 2004/83/EC and Article 1(F)(b) of the GRC. Under that provision, a foreigner is not a refugee if there is good reason to believe that he committed a serious non-political crime outside the Federal territory before being admitted as a refugee, in particular a brutal act, even if it was supposedly intended to pursue political aims. This provision also applies to foreigners who have incited others to commit the crimes listed there or otherwise been involved in such crimes (Section 3(2) sentence 2 of the Asylum Procedure Act, implementing Article 12(3) of Directive 2004/83/EC). The court below interpreted this provision to mean that the ground for exclusion serves not only to sanction a serious non-political crime committed by the foreigner in the past, but also to avert danger, and calls for a comprehensive assessment of the particular case on the basis of the intent and purpose of the provision and the principle of proportionality. It therefore found that the ground for exclusion might not apply if the foreigner no longer represented a danger by any measure of consideration, for example because it was established that he had renounced all former terrorist activities or was no longer able, for health reasons, to engage in political activities (copy of the decision, p. 19 f.). On that basis, the court denied that the ground for exclusion applied in the Complainant's case. Even if he committed serious non-political crimes by participating in terrorist acts by the PKK, there was no reason to believe at present that he would again participate in comparable acts (copy of the decision, p. 44). Following this Court's request for a preliminary ruling from the European Court of Justice in these proceedings, this legal starting point cannot be adopted.

25 According to the European Court of Justice judgment of 9 November 2010 (*op. cit.*, at 104 et seq.), exclusion from refugee status pursuant to Article 12(2)(b) of the Directive is not conditional on the foreigner's representing a present danger to the host state. According to the ECJ's reasoning, which refers as well to the ground for exclusion of being guilty of acts contrary to the purposes and principles of the United Nations (Article 12(2)(c) of the Directive, Section 3(2) sen-

tence 1 no. 3 of the Asylum Procedure Act), the grounds for exclusion were introduced with the aim of excluding from refugee status persons who are deemed to be undeserving of the protection which that status entails and of preventing that status from enabling those who have committed certain serious crimes to escape criminal liability. Within the system of Directive 2004/83/EC, any danger which a refugee may currently pose to the Member State concerned is to be taken into consideration, not under Article 12(2) of the Directive, but under Article 14(4) and Article 21(2) of the Directive (see Section 3(4) and Section 73(1) sentence 1 of the Asylum Procedure Act, each in conjunction with Section 60(8) sentence 1 of the Residence Act). By contrast, in accordance with their wording, the grounds for exclusion under Article 12(2)(b) and (c) of the Directive are intended as a penalty for acts committed in the past (ECJ, judgment of 9 November 2010, *op. cit.*, at 101 et seq.). Therefore exclusion is not conditional on a continuing, current danger represented by the person concerned.

- 26 According to the ECJ's judgment, moreover, there is also no need for a (subsequent) assessment of proportionality in relation to the particular case. If the conditions laid down in the grounds for exclusion are met, the person is necessarily and without exception excluded from refugee status. Exclusion under Article 12(2)(b) and (c) of the Directive is linked to the seriousness of the acts committed, which must be of such a degree that the person concerned cannot legitimately claim the protection attaching to refugee status within the meaning of the Directive. Since in the assessment of the seriousness of the acts committed by the person concerned and of that person's individual responsibility, account has already been taken of all the circumstances surrounding those acts and the situation of that person, a further assessment of proportionality cannot be required in addition (ECJ, judgment of 9 November 2010, *op. cit.*, at 107 ff.).
- 27 The judgment of the court below also does not withstand review by this Court in regard to the ground for exclusion of acting contrary to the purposes and principles of the United Nations, which is now governed by Section 3(2) sentence 1 no. 3 of the Asylum Procedure Act, as the transposition into national law of Article 12(2)(c) of Directive 2004/83/EC. The court below did not give further consideration to this ground for exclusion in the Complainant's case, because it

adopted the opinion of the UNHCR on the interpretation of the equivalent ground for exclusion in Article 1(F)(c) of the GRC, according to which such violations can be committed only by persons who have been in a certain position of power in a Member State of the United Nations and who have directly contributed to their state's violation of the purposes and principles of the United Nations (copy of the decision, p. 29, 34 f., with reference to UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status, Geneva, September 1979, no. 163). This restrictive interpretation can no longer be adopted since the European Court of Justice judgment of 9 November 2010 (*op. cit.*, at 82 et seq.), at least so far as acts of international terrorism are concerned.

- 28 The purposes and principles of the United Nations relevant for an exclusion under Section 3(2) sentence 1 no. 3 of the Asylum Procedure Act are set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations, and are, amongst others, embodied in the United Nations Resolutions relating to measures combating terrorism, which declare that 'acts, methods and practices of terrorism are contrary to the purposes and principles of the United Nations', and that 'knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations' (see Recital 22 of Directive 2004/83/EC). As is evident from UN Resolutions 1373 (2001) and 1377 (2001) the UN Security Council takes as its starting point the principle that international terrorist acts are, generally speaking and irrespective of any State participation, contrary to the purposes and principles of the United Nations. From this, the ECJ concludes that this ground for exclusion may also apply to persons who, in the course of their membership of an organisation which is on the list forming the Annex to Common Position 2001/931, have been involved in terrorist acts with an international dimension (ECJ, judgment of 9 November 2010, *op. cit.*, at 82 through 84). Consequently violations within the meaning of Section 3(2) sentence 1 no. 3 of the Asylum Procedure Act may also be committed, at any rate in the case of activities of international terrorism, by persons who have no position of power in a Member State of the United Nations, or at least in an organisation similar to a state. Nor does this ground for exclusion presuppose either a present danger or a (subsequent) assessment of proportionality (ECJ, judgment of 9 November 2010, *op. cit.*, at 105 and 111).

- 29 2. With regard to the revocation of the Complainant's entitlement to asylum, the appealed decision is likewise founded on a contravention of Federal law. If, through his activities in the PKK, the Complainant brought into existence a ground for exclusion within the meaning of Section 3(2) of the Asylum Procedure Act, it would be lawful to revoke not only his refugee status, but also his entitlement to asylum under Article 16a of the Basic Law, in accordance with Section 73(1) of the Asylum Procedure Act.
- 30 a) The basis in law for the revocation of the Complainant's entitlement to asylum, just as for the revocation of his refugee status, is Section 73(1) sentence 1 of the Asylum Procedure Act in the version promulgated with the Directive Implementation Act. In the case of an entitlement to asylum as well, the provision must be interpreted in compliance with Union law as meaning that in the case of an entitlement to asylum that was recognized before the grounds for exclusion were introduced, the provision permits and indeed requires a revocation, if only because of this change in the law, given that observance of the grounds for exclusion is mandatory under Union law.
- 31 To be sure, the constitutional fundamental right of asylum guaranteed by Article 16a of the Basic Law is not directly addressed by Directive 2004/83/EC. However, as is evident from the European Court of Justice judgment of 9 November 2010 (*op. cit.*, at 113 et seq.), the Directive does affect the national fundamental right of asylum, in that the reservation in Article 3 of the Directive precludes a Member State from introducing or retaining provisions granting refugee status to persons who are excluded from that status pursuant to Article 12(2) of the Directive (*op. cit.*, at 115). All the same, Member States may grant protection for reasons other than the need for international protection. Examples are a grant of protection for family or humanitarian reasons (*op. cit.*, at 118). However, this different form of protection, which Member States have discretion to grant, must not be confused with refugee status within the meaning of the Directive (*op. cit.*, at 119). Accordingly, national rules that grant a right of asylum to persons excluded from refugee status within the meaning of the Directive do not infringe the system established by that directive only insofar as the rules permit a clear

distinction to be drawn between national protection and protection under the Directive (op. cit., at 120).

32 As this Court has already stated in its judgment of 31 March 2011 – BVerwG 10 C 2.10 – (to be published in the BVerwGE collection, juris headnote 3 and marginal no. 53), the purely statutory configuration of the right of asylum under Article 16a of the Basic Law is a national protected status that is largely equivalent to the legal status of a refugee within the meaning of the Directive, and therefore gives rise to a danger of confusion within the meaning of the case law of the European Court of Justice. The entitlement to asylum under Article 16a of the Basic Law is not a protected status of a different nature from refugee status – one founded, for example, on family or humanitarian reasons. Rather, a person entitled to asylum under Section 2(1) of the Asylum Procedure Act enjoys within the Federal territory the legal status of a refugee within the meaning of the Geneva Convention on Refugees; contrary to the Complainant’s interpretation of the law, the entitlement to asylum under Article 16a of the Basic Law also cannot be differentiated from refugee status to such a degree that there is no longer any danger of confusion, by a change in the conditions and legal consequences under Section 2(1) of the Asylum Procedure Act,. At any rate, *de lege lata* the legal position of a person entitled to asylum is also equivalent within Germany to the status of refugees under Union law, as configured by Directive 2004/83/EC (see Hailbronner, ZAR 2009, 369 <371 ff.>). Consequently it would be contrary to the reservation in Article 3 of the Directive if Germany granted or maintained a legal status largely equivalent to refugee status for persons who are excluded from that status under Article 12(2) of the Directive. Therefore the requirements of Union law demand that the grounds for exclusion under Article 12(2) of the Director should also be applied to persons entitled to asylum, and that their status should be revoked under Article 14(3)(a) of the Directive if grounds for exclusion arise subsequently (judgment of 31 March 2011, op. cit.). They furthermore demand that recognitions of status granted before these grounds for exclusion were introduced can no longer be maintained if grounds for exclusion arose before the status was granted. Since the transposition of the Directive into national law by German legislation, this must be duly taken into

account by an appropriate interpretation of Section 73(1) sentence 1 of the Asylum Procedure Act in accordance with Union law.

- 33 b) It follows at the same time that where there are compelling grounds for exclusion relating to refugee status under Article 12(2) of Directive 2004/83/EC, the conditions for recognition of an entitlement to asylum under Article 16a of the Basic Law also no longer exist. Here we may leave open the question as to whether, in the purely statutory transposition of these grounds for exclusion under refugee law to the entitlement to asylum under Article 16a of the Basic Law, the German legislators accurately and with sufficient specificity reflected the inherent constitutional bounds of the basic right of asylum in Section 30(4) and Section 73(2)(a) sentence 4 last clause of the Asylum Procedure Act (see also Federal Constitutional Court, decision of 12 March 2008 – 2 BvR 378/05 – juris, at 23 et seq.), or whether these bounds should be defined differently than under the Geneva Convention on Refugees (on this see the decision of 14 October 2008 – BVerwG 10 C 48.07 – BVerwGE 132, 79, at 36 et seq., and the judgment of 31 March 2011, *op. cit.*, at 45 et seq.). This is because the purely statutory extension of the exclusion clauses to the entitlement to asylum under Article 16a of the Basic Law is constitutionally unobjectionable if only because the German legislators thereby complied with their obligation to transpose Union law into national law. Compliance with mandatory requirements of a Directive, under Article 288(3) of the Treaty on the Functioning of the European Union, is consistent with the legal principles enunciated in Article 23(1) of the Basic Law so long as the case law of the European Court of Justice furnishes effective protection of fundamental rights against the Union's sovereign power in general that can be considered substantially the same as the equivalent protection of fundamental rights that is imperative under the Basic Law (see Federal Constitutional Court, decision of 13 March 2007 – 1 BvF 1/05 – BVerfGE 118, 79 <95 ff.>). In view of the right of asylum guaranteed under Article 18 of the Charter of Fundamental Rights of the European Union, and the provisions of Directive 2004/83/EC that are committed to the standard of protection of the Geneva Convention on Refugees (see, for example, Recitals 3 and 17 of the Directive), it cannot be assumed that this inalienable protection of fundamental rights is not generally guaranteed at the Union level with regard to the right of asylum. To be

sure, the priority of application of Union law does not nullify contrary national law. Nevertheless, within the sphere of application of Union law, contrary national laws of a Member State are fundamentally inapplicable (see Federal Constitutional Court, decision of 6 July 2010 – 2 BvR 2661/06 – NJW 2010, 3422). However, the priority of application applies in Germany only by virtue of the imperative to apply the law as imposed by the Act Consenting to the Treaties. For the exercise of sovereign power in Germany, it therefore extends only as far as the Federal Republic of Germany has consented, and was allowed to consent, to this rule on the conflict of laws (see Federal Constitutional Court, judgment of 30 June 2009 – 2 BvE 2/08 et al. – BVerfGE 123, 267 <343>).

Within those bounds, however, Union law must also be observed in interpreting the Basic Law. The consequence here is that following the transposition of Directive 2004/83/EC into national law, the fundamental right of asylum must be interpreted in compliance with the Directive, and the exclusion clauses are to be observed, even in the case of a conflict that cannot be resolved by interpreting or extending that fundamental right in compliance with the Directive, if only through the priority of application of Union law, which the national legislators have transposed into purely statutory law (judgment of 31 March 2011, *op. cit.*, at 54).

34 3. Even if the appealed judgment is founded, accordingly, on a contravention of Federal law, this Court cannot itself decide as to the lawfulness of the revocation of refugee status and the entitlement to asylum. The findings of fact by the court below do not permit a final assessment of whether the Complainant has brought about a ground for exclusion under Section 3(2) sentence 1 no. 2 or 3 of the Asylum Procedure Act.

35 The existence of a ground for exclusion under Section 3(2) sentence 1 no. 2 of the Asylum Procedure Act presupposes that there is good reason to believe that the individual committed a serious non-political crime before entering the Federal territory, or incited others to commit such a crime, or was otherwise involved in such a crime (Section 3(2) sentence 2 of the Asylum Procedure Act). Amongst the crimes to be regarded as serious in this sense, as the European Court of Justice has emphasised (ECJ, judgment of 9 November 2010, *op. cit.*,

at 81), are terrorist acts which are characterised by their violence toward civilian populations, even if committed with a purportedly political objective. However, the mere fact that a person has been a member of an organisation which – like the PKK in this case – is listed because of its terrorist acts in the so-called ‘EU Terror List’ (Annex to the Council Common Position of 17 June 2002 updating Common Position 2001/931/CFSP on the application of specific measures to combat terrorism and repealing Common Position 2002/340/CFSP – 2002/462/CFSP – OJ EU L 160 of 18 June 2002 p. 32), and that that person has actively supported the armed struggle waged by that organisation, does not automatically constitute a ground for exclusion under this provision. Rather, an assessment on a case-by-case basis of the specific facts must be conducted to determine whether the acts committed by the organisation concerned constitute serious non-political crimes within the meaning of the ground for exclusion, and whether individual responsibility for carrying out those acts can be attributed to the person concerned, regard being had to the standard of proof required under the Directive (ECJ, judgment of 9 November 2010 *op. cit.*, at 99). This also applies if the person concerned – like the Complainant in the present instance – occupied a prominent position within an organisation which uses terrorist methods. To be sure, in the opinion of the Court of Justice, one is entitled to presume on this basis that that person has individual responsibility for acts committed by that organisation during the relevant period, but it nevertheless remains necessary to examine all the relevant circumstances before a decision excluding that person from refugee status can be adopted (ECJ, judgment of 9 November 2010, *op. cit.*, at 98). Similar considerations apply under the Court of Justice’s case law for the ground for exclusion of acting contrary to the purposes and principles of the United Nations under Section 3(2) sentence 1 no. 3 of the Asylum Procedure Act in conjunction with Article 12(2)(c) of Directive 2004/83/EC (ECJ, judgment of 9 November 2010, *op. cit.*, at 99), which was not examined more closely by the court below.

- 36 By that standard, the findings to date by the court below do not suffice, even allowing for the applicable (lowered) standard of proof, to affirm the existence of a ground for exclusion under Section 3(2) sentence 1 no. 2 or no. 3 of the Asylum Procedure Act in the Complainant’s case. The court below left open the

question of whether there was justification for the criminal charge on which the Turkish criminal prosecutors' request for an international wanted person alert was based (attacks in which 126 people were killed and an involvement in the murder of two PKK fighters in the period from 1993 to 1998) (copy of the decision, p. 43). Even if it can be held, according to the findings of the court below, that the PKK is a terrorist organisation because it is included in the EU Terror List, and that the Complainant was a high officer of that organisation for a certain time, this by itself does not automatically justify the presumption of a serious non-political crime to be attributed to the Complainant. First of all, there are no specific findings as to when and for how long the Complainant actually belonged to the 41-member executive body of the PKK (by his own account, four months beginning in February 1999), and what specific terrorist crimes the PKK committed or planned during this period, as would be necessary for the presumption of an individual responsibility of the Complainant because of his prominent position in the PKK, according to the judgment of the European Court of Justice. Furthermore, however, even if this presumption were valid, it would still be necessary to examine all material facts of the specific case, also taking account of special aspects that might weaken the presumption. The findings by the court below to date, which in its opinion were moreover not material to a decision, are insufficient for such an examination.

- 37 In the further proceedings, the court below will have to review the matter with a view to clarifying the grounds for exclusion both of a severe non-political crime, and also of acting contrary to the purposes and principles of the United Nations, and in so doing, it will have to determine and take into account, in assessing the seriousness of the acts committed and the Complainant's individual responsibility, all facts that are characteristic of these acts and of the Complainant's situation.
- 38 In examining the ground for exclusion under Section 3(2) sentence 1 no. 2 of the Asylum Procedure Act, it must be taken into account that the individual responsibility required by the Court of Justice entails responsibility in the sense of criminal law, although here as well a lower standard of proof ('if there is good reason to believe') must be observed than in criminal law (on this standard of

proof, see judgment of 31 March 2011, *op. cit.*, at 26). Here, for lack of uniform international criteria (see the country reports in: Sieber/Cornils, *Nationales Strafrecht in rechtsvergleichender Darstellung*, Sub-volume 4, *Tatbeteiligung*, Berlin 2010), generally an orientation to the rules of national criminal law regarding perpetration and participation initially suggests itself. Such a consideration includes both the perpetrator and the instigator of a serious non-political crime. Someone who otherwise participates is also responsible for a serious non-political crime if he has aided and abetted the crime in a manner relevant under criminal law. However, even where there has been aid and abetment, the abetment of the crime must be of equivalent weight to a serious non-political crime within the meaning of this provision. This is because the provision on instigating or otherwise participating, under Article 12(3) of Directive 2004/83/EC and Section 3(2) sentence 2 of the Asylum Procedure Act, was not intended to expand the ground for exclusion under Article 1(F) of the GRC, which does not include such a provision, but only to make it more specific with regard to the difference in understanding of perpetration, instigation and other forms of participation in the criminal codes of the Member States (so too, UK Supreme Court, judgment of 17 March 2010, [2010] UKSC 15, at 33). The court below will therefore have to examine whether there is good reason in the present case to believe that during his membership of the PKK the Complainant committed a serious non-political crime, as a perpetrator or participant. Here it will have to take account of both the charges underlying the Turkish criminal prosecutors' request for an international wanted person alert and the Complainant's prominent position within the PKK.

- 39 For the ground for exclusion under Section 3(2) sentence 1 no. 3 of the Asylum Procedure Act, which may also be brought about by persons who did not hold a position of power in a state or an organisation similar to a state, at least if there have been acts of terrorism with an international dimension (see above, at 28), the defining circumstances do not necessarily presuppose the perpetration of a criminal act (so too in regard to Article 1(F)(c) GRC: UK Court of Appeal, judgment of 24 March 2009, [2009] EWCA Civ 226, at 30). The UN Resolutions relating to measures combating terrorism, which pertain here (see recital 22 of Directive 2004/83/EC), emphasising the fact that any act of international terror-

ism constitutes a threat to world peace and international security, expressly declare that 'acts, methods and practices of terrorism are contrary to the purposes and principles of the United Nations and that knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations' (Resolution 1373 [2001] of the Security Council of 28 September 2001, no. 5). From this it proceeds that acts of international terrorism in general are contrary to the purposes and principles of the United Nations, irrespective of their relevance in criminal law. This ground for exclusion may also include persons who provide acts of support in advance of such terrorist activities. In addition, however – to do justice to the function of the ground for exclusion – it will be necessary in each case to examine whether the individual contribution is of sufficient weight to correspond to the grounds for exclusion in Section 3(2) sentence 1 no. 1 and 2 of the Asylum Procedure Act.

- 40 The disposition as to costs is reserved for the final judgment. No court costs are imposed in accordance with Section 83b of the Asylum Procedure Act. The amount at issue proceeds from Section 30 of the Attorneys' Compensation Act.

Prof. Dr Berlitz

Prof. Dr Dörig

Beck

Prof. Dr Kraft

Fricke