

Field: BVerwGE: yes
Asylum law Professional press: yes

Sources in law:

Asylum Procedure Act	Section 3(1), (4)
Residence Act	Section 60(1)
Foreigners Act	Section 51(1), Section 53
ECHR	Articles 3, 9, 15(2)
GCR	Article 1 A
EU Charter of Fundamental Rights	Article 10(1)
Basic Law	Article 4, 16a
Treaty on the Functioning of the European Union	Article 267
Directive 2004/83/EC	Article 2(c), Articles 9, 10
Universal Declaration of Human Rights	Article 18
International Covenant on Civil and Political Rights	Article 18

Headwords:

Asylum; refugee status; act of persecution; reason for persecution; religion; religious freedom; core aspects; practice of faith; forum internum; forum externum; refraining from conduct; relinquishment; religious identity; threat to life, limb, and physical freedom; preliminary ruling.

Headnote:

Request to the European Court of Justice for a preliminary ruling to clarify the preconditions required for persecution on account of violation of religious freedom under Directive 2004/83/EC.

Decision of the 10th Division of 9 December 2010 – BVerwG 10 C 19.09

I. Dresden Administrative Court, 13 July 2007 – Case No.: VG A 12 K 30537/04 -

II. Bautzen Higher Administrative Court, 13 November 2008 – Case No.: OVG A 1 B 559/07 -



FEDERAL ADMINISTRATIVE COURT

DECISION

BVerwG 10 C 19.09
OVG A 1 B 559/07

Released
on 9 December 2010
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 9 December 2010
by Federal Administrative Court Justices Prof. Dr. Dörig,
Richter, Beck, Prof. Dr. Kraft and Fricke

decides:

The proceedings are stayed.

Pursuant to Article 267 of the Treaty on the Functioning of the European Union, the European Court of Justice is asked for a preliminary ruling on the following questions:

1) Should Article 9(1)(a) of Directive 2004/83/EC be construed as meaning that not every interference with freedom of religion that violates Article 9 of the ECHR is an act of persecution within the meaning of the Directive, but rather that a severe violation of freedom of religion, as a fundamental human right, exists only if the violation goes to the core aspects of that freedom?

2) If Question 1 is answered in the affirmative:

a) Are the core aspects of religious freedom limited to a profession of faith and the practice of one's faith within the sphere of the home and immediate community, or can an act of persecution within the meaning of Article 9(1)(a) of Directive 2004/83/EC also consist in that practising one's faith in public results in a danger to life, limb or physical freedom in the country of origin, thereby causing the applicant to refrain from that practice?

b) If the core aspects of religious freedom also extend to certain practices of one's faith in public:

In this case, does it suffice to constitute a severe violation of freedom of religion that the applicant feels that this practice of his faith is indispensable for him personally, in order to preserve his religious identity,

or is it additionally necessary that the religious community to which the applicant belongs must view this religious practice as a central tenet in the teachings of its faith,

or may further restrictions result from other circumstances, such as general conditions in the country of origin?

3) If Question 1 is answered in the affirmative:

Does a well-founded fear of being persecuted within the meaning of Article 2(c) of Directive 2004/83/EC exist if it is established that after returning to his country of origin, the applicant will engage in certain religious practices – falling outside the core aspects – even though they will result in danger to life, limb or physical freedom, or can the applicant reasonably be expected to refrain from such future practices?

Reasons:

I

- 1 The Complainant, a Pakistani national, seeks refugee status and, alternatively, a finding of a prohibition of deportation with reference to Pakistan.
- 2 The Complainant, born in Pakistan in 1977, entered Germany in August 2003 and sought asylum here. As grounds, he stated that he had left Pakistan because he belongs to the Ahmadiyya religious community, and had been abused and imprisoned for that reason.
- 3 In a decision dated 8 July 2004 the Federal Office for the Recognition of Foreign Refugees (now the Federal Office for Migration and Refugees) – the ‘Federal Office’ – rejected the application for asylum under article 16a of the Basic Law (Item 1) and found that the requirements under Section 51(1) of the Aliens Act (protection of refugees) were not met (Item 2). At the same time, the Fed-

eral Office found that there were no impediments to deportation under Section 53 of the Aliens Act (Item 3), and it threatened the Complainant with deportation to Pakistan (Item 4).

- 4 In a judgment dated 13 July 2007, the Administrative Court rejected the Complainant's complaint on the merits. It found that the Complainant had not left Pakistan because of a well-founded fear of persecution. The situation of the Ahmadis in Pakistan, the court found, did not yet justify the assumption of a persecution on religious grounds.
- 5 On appeal, the Higher Administrative Court amended the Administrative Court's judgment in a new judgment of 13 November 2008, and ordered the Respondent to find that the Complainant's person met the requirements of Section 60(1) of the Residence Act (prohibition on deportation as refugee) with reference to Pakistan. In its reasons, it explained in substance that although the Complainant had not made an adequate prima facie case that he had been threatened with individual persecution in Pakistan before he left the country, nevertheless now, as an active Ahmadi, he was exposed in Pakistan to a danger of persecution affecting him collectively, within the meaning of Section 60(1) of the Residence Act. The court found that if he returned to Pakistan he would not be able to continue his religious practice, which entails a public effect, without concrete danger to life and limb.
- 6 According to the findings of the Higher Administrative Court, the Ahmadiyya community was founded in 1889 in what today is the Indian state of Punjab. The court found that the group considers itself a revivalist movement within Islam, while from the viewpoint of orthodox Muslims the Ahmadis are apostates and have forfeited their lives. Some one to two million Ahmadis live in Pakistan, although at most 500,000 to 600,000 of these are professing members. A very large majority of the Pakistani population is Sunni or Shiite Muslims. Islam, the court noted, was declared the state religion in Pakistan in the constitution of 1973. According to the constitution, the Ahmadis are to be considered non-Muslims, and are categorised as a religious minority. Under the Pakistani Penal Code, members of the Ahmadiyya faith are punishable with up to three years of

imprisonment or a fine if they claim to be Muslims, indicate Islam as their religion, or preach or propagate their faith or invite others to join it (Section 298 C of the Criminal Code). Under Section 295 C of the Criminal Code, moreover, anyone who defiles the name of the prophet Mohammed may be punished with death or life imprisonment, and also a fine. It is claimed that since the introduction of this blasphemy provision, directed specifically against the Ahmadis, some 2,000 criminal prosecutions have been initiated against Ahmadis. On passports, Ahmadis are identified as 'non-Muslim', contrary to their own view of their religion.

- 7 The court noted that Ahmadis are prohibited from holding public assemblies or religious meetings and conferences, particularly including those events at which prayer is performed in public. By contrast, it is generally not impossible for them to gather in their houses of prayer. However, the court found that they are repeatedly impeded from communally practising their faith by the arbitrary closure of houses of prayer or the prevention of their construction, and because houses of prayer or places of assembly are raided by extremists. In contrast to other minority religions, said the court, the Ahmadis are strictly forbidden from proselytising for their faith in any way with the aim of moving others to join their religious community, and such proselytisation is regularly subject to criminal prosecution. To an especially conspicuous degree, the court found, Ahmadis have been the victims of religiously motivated violence for years, committed by religious extremists from among the majority population, while the police forces decline to provide effective protection against such violence.

- 8 In the opinion of the Higher Administrative Court, the situation thus described represents a severe violation of religious freedom for an Ahmadi in Pakistan who feels a close and committed tie with his faith, and whose convictions also include living out his faith in public. Given the substantial threatened punishments and the numerous unimpeded attacks by extremist groups, the court found that for an Ahmadi with common sense it was an obvious idea to refrain from all religious practices that have a public effect, or to restrict them severely, and in particular to refrain from any public dissemination of his own faith. On the basis of the questioning of the Complainant for information at the hearing, and

of the documentation he submitted, the Higher Administrative Court is satisfied that the Complainant feels a close commitment to his faith, and lived out his faith actively in a leading position in Pakistan. He continues to practise his faith in Germany as well.

- 9 In their appeal by leave of this Court, the Respondent and the Federal Officer object that the Higher Administrative Court over-broadened the protective scope for religious freedom under Article 9 and Article 10(1)(b) of Directive 2004/83/EC. They point to the case law that prevailed in Germany prior to the transposal of Directive 2004/83/EC, according to which persecution relevant to asylum could be assumed only in cases of interference with the core aspects of a religious belief, but not in cases of restrictions on the public exercise of a faith. They argue that the restrictions for Ahmadis in Pakistan regarding the practice of their faith in public do not represent an interference with the core aspects of religious freedom. Moreover, the findings of the Higher Regional Court on the question of how the Complainant practises his faith in Germany do not indicate in any way that he finds actions indispensable that extend beyond the core aspects of religious activity.

II

- 10 The case must be stayed. A preliminary ruling must be sought from the European Court of Justice (hereinafter the ECJ) regarding the questions raised in the operative part of this decision (Article 267 Treaty on the Functioning of the European Union). The questions concern the interpretation of Article 2(c) and Article 9 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 the content of the protection granted (OJ L 304 of 30 September 2004 p. 12; corr. OJ L 204 of 5 August 2005 p. 24). Because this is a matter of interpretation of European Union law, the ECJ has jurisdiction. It is pointed out that the questions have been raised in an additional request for a preliminary ruling

having the same wording (see decision of 9 December 2010 – BVerwG 10 C 21.09).

- 11 1. According to Section 77(1) sentence 1 of the Asylum Procedure Act, the legal assessment of a petition for an order to recognise refugee status must be based on the factual and legal situation at the time of the last hearing before the Higher Administrative Court, on 13 November 2008. Accordingly, the legal framework of this dispute is formed by the following provisions of national law, which still apply unamended at present in so far as they are pertinent here:
- 12 Section 3(1) and (4) of the Asylum Procedure Act of 27 July 1993 (Federal Law Gazette I p. 1361) in the version of the Announcement of 2 September 2008 (Federal Law Gazette I p. 1798):

Section 3 Recognition of refugee status

(1) A foreigner is a refugee within the meaning of the Convention related to the status of refugees if in the country of his citizenship or in which he habitually resided as a stateless person he faces the threats listed in Section 60(1) of the Residence Act.

(2) and (3) ...

(4) A foreigner who is a refugee under (1) shall be recognised as having refugee status unless he fulfils the prerequisites of Section 60(8) first sentence of the Residence Act.

- 13 Section 60(1) of the Residence Act of 30 July 2004 (Federal Law Gazette I p. 1950) in the version of the Announcement of 25 February 2008 (Federal Law Gazette I p. 162):

Section 60 Prohibition of deportation

(1) In application of the Convention of 28 July 1951 relating to the Status of Refugees (Federal Law Gazette 1953 II, p. 559), a foreigner may not be deported to a state in which his or her life or liberty is under threat on account of his or her race, religion, nationality, membership of a certain social group or political convictions. This shall also apply to persons who are entitled to asylum and to for-

eigners who have been incontestably granted refugee status or who enjoy the legal status of foreign refugees on other grounds in the Federal territory or who have been granted foreign refugee status outside of the Federal territory in accordance with the Convention relating to the Status of Refugees. When a person's life, freedom from bodily harm or liberty is threatened solely on account of their sex, this may also constitute persecution due to membership of a certain social group. Persecution within the meaning of sentence 1 may emanate from

- a)
the state,
- b)
parties or organisations which control the state or substantial parts of the national territory, or
- c)
non-state parties, if the parties stated under letters a and b, including international organisations, are demonstrably unable or unwilling to offer protection from the persecution, irrespective of whether a power exercising state rule exists in the country,

unless an alternative means of escape is available within the state concerned. Article 4(4) and Articles 7 to 10 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 require international protection and the content of the protection granted (Official EU Journal no. L 304, p. 12) shall additionally be applied in establishing whether a case of persecution pursuant to sentence 1 applies. Where the foreigner cites the ban on deportation pursuant to this sub-section, the Federal Office for Migration and Refugees shall establish in an asylum procedure whether the conditions stated in sentence 1 apply and the foreigner is to be granted refugee status, except in cases covered by sentence 2. The decision by the Federal Office shall only be appealable subject to the provisions of the Asylum Procedure Act.

- 14 2. The referred questions are material to a decision and are in need of clarification by the ECJ.
- 15 The Complainant seeks recognition of refugee status under Section 3(1) and (4) of the Asylum Procedure Act in conjunction with Section 60(1) of the Residence

Act. These provide that a foreigner must be recognised as a refugee if in the country of his or her citizenship, his or her life or liberty is under threat on account of his or her race, religion, nationality, membership of a certain social group or political convictions. Under Section 60(1) sentence 5 of the Residence Act, Article 4(4) and Articles 7 to 10 of Council Directive 2004/83/EC are additionally to be applied in determining whether persecution under sentence 1 exists. Under Article 9(1)(a) of the Directive, acts of persecution within the meaning of Article 1 A of the Geneva Convention are those which are sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). Under Article 9(1)(b) of the Directive, an act of persecution may also be an accumulation of various measures, including violations of human rights, which is sufficiently severe as to affect an individual in a similar manner as mentioned in Article 9(1)(a). Therefore a recognition of refugee status presupposes an act of persecution that severely violates a human right and is connected with the reasons for persecution listed in Article 10 of the Directive (Article 9(3) of the Directive).

- 16 Since there is no finding of a previous persecution of the Complainant within the meaning of Article 4(4) of Directive 2004/83/EC, the matter at hand concerns whether in his country of origin he will be threatened in the future with a real risk of persecution. A central question here is under what conditions acts connected with religion as a reason for persecution should be deemed so severe that they have the character of an act of persecution within the meaning of Article 9(1) of Directive 2004/83/EC. This question becomes material to a decision, first of all, if a foreigner refrains from religious activity under the pressure of the threat of danger to life and limb or physical freedom (below: Questions 1 and 2). But it also arises if it is established that a foreigner will practise his or her religion in the country of origin, in spite of the threat of sanctions, and is therefore threatened with danger to life and limb or physical freedom (below: Question 3). The Higher Administrative Court holds that the Complainant would be threatened with persecution that is relevant to refugee law whether he does or does not refrain from practising his religion, but it does not establish how the Complain-

ant would actually conduct himself. Thus both alternatives for action are material to a decision.

- 17 Specifically, the following Referred Questions 1 through 3 arise in this connection. They are in need of clarification by the European Court of Justice, since that court has jurisdiction to decide questions requiring interpretation with regard to Directive 2004/83/EC, which pertains here.
- 18 First Referred Question:
- 19 If the present case is concerned with the question of which specific interferences with freedom of religion within the meaning of Article 9 of the ECHR may result in according refugee status to the Complainant, it must first be clarified whether every form of interference with freedom of religion that violates Article 9 of the ECHR constitutes an act of persecution within the meaning of Article 9(1)(a) of Directive 2004/83/EC, or whether a qualified form of interference that violates the core aspects of religious freedom is required for this purpose.
- 20 This Court is of the opinion that interference with religious freedom may constitute a severe violation of human rights within the meaning of Article 9(1)(a) of Directive 2004/83/EC. To be sure, this provision is in particular intended to cover violations of human rights from which there is no possibility of derogation under Article 15(2) of the ECHR. Freedom of religion does not count among these. However, the referral in Article 9(1)(a) of Directive 2004/83/EC to the rights listed in Article 15(2) of the ECHR is not exhaustive, as the phrase 'in particular' indicates. In its case law, the European Court of Human Rights (ECtHR) has repeatedly emphasised the fundamental significance of religious freedom to a democratic society (see, for example, judgment of 5 April 2007 – 18147/02, *Scientology v. Russia* – Marginal No. 71, NJW 2008, 495 et seq.). It is also evident from the diverse protection of this right on the national, European Union, and international levels that freedom of religion is of central human rights importance. For example, freedom of religion is guaranteed as a human right not only by numerous national constitutions (see, in Germany, Article 4(1) and (2) of the Basic Law), but also under Article 10(1) of the Charter of Fundamental Rights of

the European Union (EU Charter of Human Rights), Article 18 of the United Nations Universal Declaration of Human Rights of 1948, and Article 18 of the International Covenant on Civil and Political Rights of 1966. For that reason, even before Directive 2004/83/EC took effect, this Court's settled case law has held that violations of religious freedom – at least if they concern a core aspect that is essential to an individual's religious identity – justify the assumption of a persecution that is relevant in asylum law (see judgment of 20 January 2004 – BVerwG 1 C 9.03 – BVerwGE 120, 16 <24> with further authorities). It has also so held in regard to Article 9(1)(a) of the Directive (judgment of 5 March 2009 – BVerwG 10 C 51.07 – BVerwGE 133, 221 Marginal No. 13 et seq.). This Court has furthermore held, in its case law on protection from deportation in cases of a violation of the ECHR (now Section 60(5) of the Residence Act), that a severe violation of religious freedom may be grounds for a prohibition of deportation under Article 9 of the ECHR (see judgment of 24 May 2000 – BVerwG 9 C 34.99 – BVerwGE 111, 223 <229 et seq.>).

- 21 Under Article 9(1)(a) of Directive 2004/83/EC, acts may constitute persecution relevant in asylum law only if they constitute a severe violation of basic human rights. This means that not every restriction of religious freedom within the meaning of Article 9 of the ECHR is sufficient; a severe violation of that right is required. Such a severe violation presumably exists if religious freedom is affected in its core aspects.

- 22 First of all, one must automatically exclude from consideration those acts which do constitute an interference with religious freedom within the meaning of Article 9(1) of the ECHR, but are not a violation of that right because they are justified under Article 9(2) of the ECHR. Thus, although the ECtHR viewed a prohibition on wearing a head scarf at a university as a restriction of the religious freedom of the student concerned, it denied that there was a violation of Article 9 of the ECHR because the interference was justified in order to preserve the religious neutrality of the State and religious peace within the university (judgment of 10 November 2005 – Grand Chamber – No. 44774/98, *Leyla Sahin v. Turkey* – Marginal Nos. 106 through 116, NVwZ 2006, 1389). The ECtHR likewise viewed penalising Jehovah's Witnesses for proselytisation as an interference

with freedom of religion, but deemed that interference justified if it serves to protect the faith and dignity of others against being influenced by objectionable means (judgment of 25 May 1993 – No. 14307/88, *Kokkinakis v. Greece* – Marginal No. 48, Col. 1996-IV p. 1364).

- 23 Moreover, actions that violate Article 9 of the ECHR, but that are not so severe as a violation of those human rights from which there can be no derogation under Article 15(2) of the ECHR, also do not constitute an interference with the core aspects of religious freedom. In a judgment of 7 December 2010, the ECtHR held that religious freedom was violated in a case in which a Mahayana Buddhist who was serving an eight-year sentence in Poland for rape was denied the vegetarian diet prescribed by his religious teachings (No. 18429/06, *Jakobski v. Poland* – Marginal No. 54 et seq.). It also viewed it as a violation of religious freedom that Turkish citizens must indicate their religious affiliation on their national identity cards, because it is incompatible with the freedom not to disclose one's faith, even if card holders are given the option of leaving the 'Religion' field blank (judgment of 2 February 2010 – No. 21924/05, *Sinan Isik v. Turkey*). Moreover, the Grand Chamber of the ECtHR will soon have to decide whether it is a violation of the state's obligation of neutrality and the rights of school children to have or not have a religion, solely because children in Italy are taught in classrooms where a crucifix is hung on the wall (see Chamber judgment of 3 November 2009 – No. 30814/06, *Lautsi v. Italy*). In the present Court's opinion, the above acts of violation are not of such a weight that the parties would justifiably be recognised as refugees within the meaning of Directive 2004/83/EC if they were to flee to another country. The acts do not constitute an interference with the core aspects of religious freedom. In no case in its case law to date – so far as can be discerned – has the ECtHR viewed a violation of religious freedom as so severe that the court has granted protection from deportation to a foreigner on that basis alone. Rather, it has granted foreigners protection from deportation only in cases where they were threatened with a violation of other human rights – particularly under Article 3 of the ECHR – in their country of origin.

- 24 Nor can anything else be construed from the broad definition of religion as a reason for persecution in Article 10(1)(b) of the Directive. That definition refers to a reason for persecution with which an act of persecution within the meaning of Article 9(1) of the Directive must be connected. But an act of persecution under Article 9(1)(a) of the Directive presupposes not only an interference with the broad scope of protection under Article 9(1) of the ECHR, but also an absence of justification for the interference (see Article 9(2) of the ECHR), and a violation that is severe.
- 25 Second Referred Question:
- 26 If Question 1 is to be answered in the affirmative, the question then arises of defining the content of the core aspects of religious freedom that must be violated in order for the violation to qualify as an act of persecution under Article 9(1)(a) of Directive 2004/83/EC.
- 27 Some initial indications on this point may be deduced from Article 9 of the ECHR and the case law of the ECtHR. Article 9(1) of the ECHR, first of all, protects freedom of individual conscience (ECtHR, judgments of 25 May 1993 – No. 14307/88, *Kokkinakis v. Greece* – Marginal No. 31, and of 10 November 2005 – Grand Chamber – No. 44774/98, *Leyla Sahin v. Turkey* – Marginal No. 105). Freedom of individual conscience embraces having or forming a belief, choosing new beliefs, and changing beliefs. It also protects having no belief. But the protection of Article 9(1) of the ECHR also extends to the freedom to manifest one's religion alone or in community with others, in public and within the circle of those whose faith one shares (ECtHR, judgment of 10 November 2005, *loc. cit.*). Unlike religious freedom of conscience, the freedom to manifest and practise one's religion in public is subject to the restrictions of Article 9(2) of the ECHR. If only for this reason, it is evident that not every restriction on the practice of a religion in public can be considered a severe violation of religious freedom, such as is required for the assumption of an act of persecution under Article 9(1)(a) of Directive 2004/83/EC. Referred Questions 2a and 2b seek a more concrete definition of the protected core aspects, as being material to a decision in the present case.

28 Referred Question 2a:

29 a) According to the findings of the Higher Regional Court, the Complainant is threatened with restrictions on the public practice of his religion. To be sure, these restrictions do not make it impossible for Ahmadis to meet in their houses of prayer in general, even when such meetings are perceptible to and perceived by the public. However, the communal exercise of faith is repeatedly hampered by the fact that houses of prayer are shut for arbitrary reasons, or their construction is impeded. Nevertheless, the Complainant was able to practise his faith in his home region, go to the mosque repeatedly during the day, pray, and take part in religious festivals. The Higher Regional Court did not find that the penal sanctions and religiously motivated attacks on Ahmadis by extremists also interfered with the Ahmadis' right to profess their faith and to manifest it alone or in community with others, away from the public eye. According to that court's findings, interference does however occur in the area of the public practice of religion, including proselytising those with other beliefs. The Complainant, as a member of the Ahmadis, cannot propagate his religion in public or invite others to accept this faith. If he does so, he commits a crime. Proselytising others is regularly subject to criminal prosecution. The Ahmadis are forbidden from holding assemblies in public, specifically those at which prayers are held. The Higher Administrative Court came to the conclusion that if the Complainant returned to Pakistan, he would not be able to continue his public religious activity without a concrete danger to life and limb. Given the threatened significant penalties and the numerous unimpeded attacks by extremist groups, according to the findings of the Higher Administrative Court, common sense would suggest that an Ahmadi should refrain from, or largely restrict, any public religious action, and particularly any public proselytisation for his own faith.

30 An interference with religious freedom that strongly suggests refraining from manifesting one's faith in public is also not justified under Article 9(2) of the ECHR, the court said. On the contrary, the Higher Administrative Court concluded that the government measures taken against Ahmadis do not serve to protect public order. This is because the Pakistani state is not conducting itself

neutrally, but rather is unilaterally interfering with the members of the Ahmadiyya community in their religious self-determination.

- 31 It is therefore material to a decision whether it can constitute a severe violation within the meaning of Article 9(1)(a) of Directive 2004/83/EC if the right to practise one's faith in public is restricted in a manner not justified under Article 9(2) of the ECHR, even when the believer refrains from practising his religion in public under the pressure of the threat of danger to life, limb and physical freedom.
- 32 b) Before Directive 2004/83/EC took effect, this Court held in its case law that a persecution relevant to asylum law could derive only from acts that interfered with a person's minimum religious subsistence level (see judgment of 20 January 2004 – BVerwG 1 C 9.03 – BVerwGE 120, 16 <19 et seq.>). This case law conforms to that of the Federal Constitutional Court in regard to the constitutional entitlement to asylum (see, for example, Federal Constitutional Court, decision of 1 July 1987 – 2 BvR 478, 962/86 – BVerfGE 76, 143 <158 et seq.>). According to that case law, the indispensable and inalienable core of a religious person's private sphere, also known as the 'forum internum', comprises religious conviction *per se*, together with the practice of religion out of the public eye and in personal community with others of the same belief in a place that one can in good faith consider to be private. Accordingly, an act of persecution that is relevant in asylum law owing to interference with freedom of religion would exist, for example, if the members of a religious group are expected to deny or even abandon their belief, under threat of sanctions against life, limb, or physical freedom, or if they are prevented from practising their belief, as they understand it, in the private sphere and among themselves. According to this interpretation, religious practices in public, including proselytisation (the 'forum externum'), do not belong to the minimum religious subsistence level. It was generally expected that a qualifying interference with freedom of religion would have to affect believers with a degree of severity similar to interference with freedom from bodily harm or physical freedom (judgment of 25 October 1988 – BVerwG 9 C 37.88 – BVerwGE 80, 321 <324>).

- 33 By contrast, since Directive 2004/83/EC took effect, the Higher Administrative Court in the present case and other lower and higher administrative courts in Germany have held that above and beyond adverse effects on the ‘forum internum’ protected under previous case law, impairments of the ‘forum externum’ may also constitute serious violations within the meaning of Article 9 of Directive 2004/83/EC. Among the reasons cited is the broad definition of freedom of religion under Article 10(1)(b) of the Directive, which also includes the public practice of religion (see Mannheim Higher Regional Court, judgments of 20 May 2008 – A 10 S 72/08 – AuAS 2008, 213 Marginal No. 121, and of 27 September 2010 – A 10 S 689/08 – juris Marginal No. 33 et seq.; Munich Higher Regional Court, judgment of 23 October 2007 – 14 B 06.30315 – InfAuslR 2008, 101 <102>). Under Directive 2004/83/EC, these courts have held, a religious person can no longer reasonably be expected to refrain from participating in publicly practised rites of his religious community – such as religious services or processions – in order to avoid state sanctions. A member of the faith, they have found, is also persecuted if he is forced to engage in unreasonable avoidance conduct in order to avoid state repression (see Münster Higher Administrative Court, decision of 30 July 2009 – 5 A 982/07.A – juris Marginal No. 34; Kassel Administrative Court, judgment of 12 July 2007 – 8 UE 3339/04.A – juris Marginal No. 83).
- 34 Case law in the United Kingdom likewise does not limit refugee protection against interference with religious freedom to the ‘forum internum’. Rather, it examines whether upon his return to his country of origin the applicant for asylum will also be threatened with persecution in the event that he practises his religion in public, for example if an Ahmadi were to proselytise in conformity with the teachings of his faith (see Court of Appeal for England and Wales, judgment of 5 November 1999 – *Iftikhar Ahmed v. Secretary of State for the Home Department* [1999] EWCA Civ 3003). Under a more recent judgment of the Supreme Court of the United Kingdom regarding persecution for homosexuality, being forced to refrain from living openly as a gay person may also result in recognition of refugee status (judgment of 7 July 2010, *HJ (Iran) (FC) v. Secretary of State for the Home Department* [2010] UKSC 31 Marginal No. 82). If a court concludes that a material reason for an applicant living discreetly on his

return is a fear of the persecution which would follow if he were to live openly as a gay man, his fear of persecution would be well-founded. If one transfers the above case law to restrictions on the public practice of freedom of religion, those restrictions might be construed as acts of persecution within the meaning of Article 9(1)(a) of Directive 2004/83/EC, if the interference is serious and the foreigner would therefore refrain from practising his religion in public.

- 35 By contrast, the case law in the United Kingdom for granting protection from deportation under the ECHR is more restrictive. The Court of Appeal's judgment of 16 December 2002, in *Ullah v. Secretary of State for the Home Department* ([2002] EWCA Civ 1856 Marginal No. 64), stated the position that protection from deportation with reference to a country of origin where freedom of religion as defined in Article 9 of the ECHR is not respected may be granted only if the restriction on freedom of religion is such severity that it simultaneously constitutes a violation of Article 3 of the ECHR. In that case – which also concerned an Ahmadi from Pakistan – the court rejected the action for protection against deportation. The House of Lords affirmed the results of that decision in its judgment of 16 June 2004 ([2004] UKHL 26). However, it denied that the interference had been sufficiently severe, because the right under Article 9 of the ECHR had not been entirely denied, which represents a barrier of at least equal height ('only in such a case – where the right will be completely denied or nullified in the destination country' – Marginal No. 24 of the judgment of 16 June 2004).
- 36 Whether the scope of protection of Article 9(1) of the Directive is limited, in the case of freedom of religion, to affirming one's faith and practising it in the home and immediate community, or whether it extends to the practice of religion in public, is a question that must be answered by the European Court of Justice.
- 37 Referred Question 2b:
- 38 If the core aspects of religious freedom also include certain practices of religion in public, it must be further clarified under what conditions a forced relinquishment of such practices constitutes a severe violation of religious freedom under

the terms of Article 9(1)(a) of Directive 2004/83/EC. This may be the case if the applicant or the religious community to which he belongs perceives as indispensable the concrete practice of religion that the applicant is prohibited from engaging in.

- 39 a) According to the findings of the Higher Regional Court, the Complainant led a religiously oriented life in Pakistan as a member of the Ahmadiyya community, visiting the mosque multiple times each day, praying and participating in religious festivals. He also professed his faith in public and actively supported it as a spokesman in public arguments with radical Muslim residents in his home village. The Higher Administrative Court therefore made the finding of fact that the Complainant perceives the public manifestation of his faith, as he has practised it heretofore, as obligatory for him in order to maintain his religious identity. But the court did not find with sufficient comprehensibility that such an active public manifestation of faith is also viewed as a central element of its religious teachings by the Ahmadiyya community.
- 40 b) In this Court's opinion, the question of under what circumstances a forced relinquishment of practising one's religion in public constitutes a severe violation of religious freedom under Article 9(1)(a) of Directive 2004/83/EC can be decided on the basis of what significance is attached to the act in question by the applicant's religious community, on the one side, and by the applicant personally, on the other side. It may well be a minimum prerequisite that the practice of the faith concerned here must conform to the applicant's religion, and the applicant must also wish to engage in that practice because he perceives it as indispensable for himself in order to maintain his religious identity. If this is not firmly established, then if only for that reason alone, there is no violation of Article 9 of the ECHR, and thus also no violation of human rights under Article 9(1) of Directive 2004/83/EC.
- 41 The United Nations High Commissioner for Refugees (UNHCR), in his Guidelines on International Protection (concerning Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees, HCR/GIP/04/06, Section 16 – publication date: 28 April

2004) notes that in determining the severity of an interference with religious freedom due to a forced relinquishment of a certain religious practice the 'importance or centrality' of the suppressed practice within the religion and to the individual personally is also relevant. If the restricted practice is important to the religion but not to the individual, then the interference is unlikely to rise to the level of persecution, unless there are additional factors. By contrast, if the religious practice is not so significant to the religion, but is particularly important to the individual, interference may still constitute persecution on the basis of his or her conscience or belief.

- 42 In the UK, the Court of Appeal focuses on whether religious teaching imposes a certain religious practice in public, and the individual also feels this is personally obligatory for him or her (for proselytisation by Ahmadis in Pakistan, see Court of Appeal for England and Wales, judgment of 5 November 1999 – *Iftikhar Ahmed v. Secretary of State for the Home Department* [1999] EWCA Civ 3003).
- 43 With regard to the legal situation before Directive 2004/83/EC took effect, the Federal Administrative Court held that the suppressed religious practice must be indispensable to the religious community, according to its own understanding, and also to the individual believers themselves (see judgment of 20 January 2004, loc. cit. <25>). Under Directive 2004/83/EC, however, this Court is inclined to think that it may be sufficient if the applicant for asylum feels that the suppressed religious practice of his faith is obligatory for himself in order to preserve his religious identity. However, the applicant would have to prove this to the full satisfaction of the court in each case. In this regard, the fact that the practice of the faith is a fundamental principle of faith as understood by the religious community to which the applicant belongs will have an indicative effect, but not a compelling one. Rather, the deciding factor may be how the individual believer lives out his faith, and what religious practices are indispensable to him personally according to his understanding of his religion. By contrast, it might well not be sufficient if the religious community views a concrete practice of the faith as a central component of its religious teaching (such as proselytisation), but the individual applicant feels no inner obligation to practise this portion of his religious teaching in order to maintain his identity.

44 In this Court's opinion, however, other circumstances, such as general conditions in the country of origin, may also result in further restrictions. For example, it may raise the threshold for a serious violation of religious freedom if the population in the country of origin in general must accept certain restrictions on the public practice of religion in consideration of a state religion anchored in the country's constitution, or must contend with religiously motivated tensions between various population groups.

45 Referred Question 3:

46 Referred Question 3 is intended to clarify whether the applicant's fear of persecution is also well-founded if it is established that he will undertake certain religious practices – outside the core aspects – after returning to his country of origin, even though they will result in danger to life, limb or physical freedom, or whether in this case the applicant may reasonably be expected to refrain from such future activities.

47 a) The Higher Administrative Court did not find whether in the event of a return to Pakistan, the Complainant will refrain from certain forms of religious practice in public. It found only, with reference to adherents of the Ahmadiyya community in general, that given the threat of danger to life, limb and freedom, common sense would suggest refraining from all public religious practices, or heavily restricting them, particularly any public proselytisation for one's own faith. If recognition of refugee status is contingent on whether, in view of the dangers threatening him, the Complainant will refrain from religious practices, or will engage in certain religious practices nevertheless, the Higher Administrative Court will have to further clarify this matter, following the guidance of the ECJ's answers.

48 b) Under German case law, the fear of persecution is also well-founded if based on a religious practice above and beyond the core aspects, if there is an immediate threat of interference with life, limb or physical freedom on that account.

- 49 Here the act of persecution (see Article 9 of Directive 2004/83/EC) interferes not just with religious freedom, but also, and especially, with the applicant's life, limb, or physical freedom. If this interference rises to the necessary severity, it is irrelevant whether religious freedom is affected in its core aspects or only marginally. For that reason, the Federal Administrative Court has affirmed persecution relevant for asylum in the case of an Ahmadi from Pakistan on whom a life sentence was imposed for using the Muslim call to prayer and wearing the *ka-lima* (judgment of 13 May 1993 – BVerwG 9 C 49.92 – BVerwGE 92, 278 <279 et seq.>).
- 50 However, under German case law to date, the public practice of religion beyond the core aspects of religious freedom is protected only if the religious practice resulting in the danger has already taken place, and thus, for example, the foreigner has already proselytised. By contrast, if an applicant for asylum only adduces that future actions to be expected after his return to the country of origin will result in persecution, the requisite immediacy of the danger to life, limb or physical freedom is lacking. This is because the realisation of the danger still depends on a voluntary act by the applicant which cannot be predicted reliably. Accordingly, the foreigner is expected to avoid the danger unless this violates the core aspects of his religious freedom. However, if this core is violated, the ever-difficult task of predicting how the individual will behave after returning to his homeland becomes irrelevant.
- 51 In the present case, according to the findings of the Higher Administrative Court, the Complainant has hitherto practised his faith only in a way that did not result in individual persecution. That court does, however, expect such a persecution in the event of the Complainant's return. In this connection, the question arises as to whether he can be expected to refrain from practising his religion outside of its core aspects.
- 52 British case law takes a different view than German case law of the materiality of potential avoidance conduct. In British law, the sole deciding factor is how the applicant would actually behave after returning to the country of origin. If there is a justified prognosis that he will indeed behave as he alleges, and if that be-

haviour would result in persecution, he is to be accorded refugee status. It is no impediment to this if his conduct appears unreasonable. The fact that he could avoid persecution by refraining from the conduct that results in danger does not defeat his claim to protection as a refugee if he would in fact engage in this conduct, in spite of the dangers associated with it. That was the finding of the Court of Appeal in its judgment of 5 November 1999 – Iftikhar Ahmed v. Secretary of State for the Home Department ([1999] EWCA Civ 3003), which concerned intended proselytising by an Ahmadi in Pakistan.

- 53 The immateriality of possibly refraining from certain conduct is also evident in British case law from the judgment of the Supreme Court of the United Kingdom of 7 July 2010 (HJ (Iran) (FC) v. Secretary of State for the Home Department [2010] UKSC 31 Marginal No. 82), concerning a case of homosexuality. It found that an applicant's fear of persecution was well-founded if he would live openly as a gay person in his home country and would therefore be exposed to the threat of persecution, even if he could avoid danger by practising his sexual orientation discreetly.

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