Field:

BVerwGE: yes
Trade press: yes

Asylum law

Sources in law:

Asylum Act, Sections 27a, 31, 34, 34a, 71a, 77
Residence Act, Section 59□
Code of Administrative Court Procedure, Sections 86, 108, 113(1)
Administrative Procedure Act, Sections 47, 51
Dublin II Regulation, Articles 2, 3, 5, 6, 10, 13, 15, 16, 17, 18, 19, 20
Dublin III Regulation, Article 49(2)□
Charter of Fundamental Rights, Articles 24, 51□
Directive 2005/85/EC, Article 25

Title line:

Secondary application for asylum lodged by an unaccompanied minor

Headwords:

Asylum application; international responsibility; original responsibility; unaccompanied minor; family member; guardian; presence; competing asylum applications; successive asylum applications; identical asylum applications; transfer of responsibility; taking back; authority's right to intervene; organisational provision; protection of minors; best interests of the child; subjective right; matter at issue; reinterpretation; secondary application; subsequent application; deportation order; deportation warning.

Headnotes:

1. The provisions on responsibility for unaccompanied minors in Article 6 of the Dublin II Regulation are protective of the individual, as they not only govern relationships between the Member States, but (also) serve to protect fundamental rights.

2. An unlawful rejection of an asylum application as inadmissible because responsibility lies with another country under Section 27a of the Asylum Act cannot be reinterpreted as a (negative) decision on a secondary application under Section 71a of the Asylum Act, because of the more adverse legal consequences.

Judgment of the First Division of 16 November 2015 – BVerwG 1 C 4.15

I. Saarlouis Administrative Court, 20 July 2012
   Case: VG 6 K 457/11
II. Saarland Higher Administrative Court, 9 December 2014
   Case: OVG 2 A 313/13

FEDERAL ADMINISTRATIVE COURT

IN THE NAME OF THE PEOPLE

JUDGMENT

BVerwG 1 C 4.15
OVG 2 A 313/13

Released
on 16 November 2015
Ms …
As clerk of the court

In the administrative matter

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

When citing this decision, it is recommended to indicate the court, the date of the decision, the case number and the paragraph: BVerwG, Judgment of 16 November 2015 – BVerwG 1 C 4.15 – para. …

the First Division of the Federal Administrative Court
upon the oral hearing of 16 November 2015
by Presiding Federal Administrative Court Justice Prof. Dr Berlit and Federal Administrative Court Justices Prof. Dr Dörig, Prof. Dr Kraft, Fricke and Dr Rudolph

finds:

The Respondent's appeal against the judgment of the Saarland Higher Administrative Court of 9 December 2014 is denied.

The Respondent is to bear the costs of these proceedings.

Reasons:

I

1 The Complainant, by his own account an Iraqi national born on 7 November 1993, appeals the rejection of his asylum application as inadmissible, together with the ordering of his deportation to Belgium.

2 The Complainant entered the Federal Territory from Belgium in March 2010 and applied for asylum. As grounds, at his personal hearing by the Federal Office for Migrations and Refugees – the 'Federal Office' – he stated that he had left his homeland in 2008 because of the insecure situation there and had unsuccess-

fully filed two asylum applications, in Belgium and elsewhere, prior to entering Germany.

3 In January 2011 the Complainant's brother, who lives in the federal territory, was appointed his guardian. In response to a request from the Federal Office to this effect, Belgium declared in February 2011 that it consented to take back the Complainant. In a decision of 29 April 2011, the Federal Office decided that the asylum application was inadmissible because international responsibility lies with another country under Section 27a of the Asylum Procedure Act (point 1), and ordered the Complainant deported to Belgium (point 2). The Complainant brought an action against this decision and order. In June 2012 he converted from Islam to the Christian faith. The Administrative Court granted preliminary legal protection, and reversed the decision of the Federal Office in a judgment of 20 July 2012.

4 The Higher Administrative Court denied the Respondent's appeal in a judgment of 9 December 2014, on the following grounds: The requirements for rejecting the asylum application as inadmissible because another country is responsible had not been met. According to Article 5(2) of Regulation (EC) No. 343/2003 – the Dublin II Regulation – which is the version that applies here, the Member State responsible for conducting the asylum proceedings is to be determined on the basis of the situation obtaining when the application was first lodged. The court was in no doubt, it said, that the Complainant had still been a minor when he filed his – further – asylum application in Germany, even though in Belgium he had stated 1989 as his birth year. Responsibility for unaccompanied minors is governed by Article 6 of the Dublin II Regulation, the court held. Under Article 6(2) of that Regulation, the Member State responsible is the one where the minor has lodged his or her application for asylum. If there are multiple applications for asylum, according to the case law of the CJEU the conclusive factor is not the first asylum application filed in a Member State, but rather responsibility lies with the State where the minor is present after filing an asylum application there. This also applies, said the court, for an identical asylum application within the meaning of Article 25(1) of Directive 2005/85/EC. That provision, the court found, only grants the Member States the additional authority to treat an appli-

cation for international protection as inadmissible after a final decision, so that no unaccompanied minor can compel a Member State to examine a new, identical asylum application in the same matter. Belgium's acceptance of the request to take back the applicant did not result in a transfer of responsibility, said the court. Nor does Belgium's consent constitute an exercise of a right to intervene.

5 In its appeal to this Court, the Respondent complains of a procedural error in determining the applicant's age, and substantively, of a breach of Article 6 of the Dublin II Regulation and Section 71a of the Asylum Act. At least in cases of identical further applications, it argues, Article 6(2) of the Dublin II Regulation does not establish any responsibility of the state where the applicant is present. Furthermore, it argues, the decision is lawful even if one were to assume the existence of such a responsibility. According to the national legal system, this constitutes a secondary application for which a further asylum proceeding for a substantive examination can be conducted only subject to the requirements of Section 71a of the Asylum Act.

6 The Complainant defends the challenged decision.

II

7 The Respondent's appeal is without merit. The judgment of the court below does not violate law subject to review by this Court (Section 137(1) Code of Administrative Court Procedure). The court below correctly held that the action challenging the inadmissibility decision under point 1 of the decision of the Federal Office for Migration and Refugees – the Federal Office – of 29 April 2011 is allowed (1.). The complaint has merit because the decision as a whole is unlawful and violates the Complainant's rights (Section 113(1) Code of Administrative Court Procedure). The requirements for inadmissibility of the asylum application because another country is responsible have not been met (2.). Contrary to the Respondent's interpretation, under Article 6(2) of the Dublin II Regulation Germany has the responsibility for deciding on the (further) application for asylum lodged by the Complainant in the federal territory (2.1). The Complainant also

has a subjective right to compliance with this provision, which serves for the (individual) protection of minors (2.2). The Federal Office's decision cannot be upheld on any other legal basis; in particular, the requirements are not met for a reinterpretation as a decision not to conduct a further asylum procedure pursuant to Section 71a of the Asylum Act (formerly: the Asylum Procedure Act) (2.3). The deportation order issued in point 2 of the challenged decision is likewise unlawful (3.).

8 The legal assessment of the Complainant's request is governed by the new Asylum Act, which took the place of the old Asylum Procedure Act while the present proceedings were in progress, with effect from 24 October 2015, as a consequence of the Asylum Procedure Acceleration Act of 20 October 2015 (BGBl. I p. 1722). According to the established case law of the Federal Administrative Court, changes in the law that take place after the appellate court's decision must be taken into account if the appellate court – if it were deciding in place of the Federal Administrative Court – would for its part have to take those changes into account (see Federal Administrative Court, judgment of 11 September 2007 – 10 C 8.07 – BVerwGE 129, 251 para. 19). The instant case is a dispute in asylum law in which, according to Section 77(1) of the Asylum Act, the appellate court must regularly rely on the state of the facts and law at the date of the last oral hearing, and therefore if that court were to decide now it would have to found its decision on the new situation of law, unless – as in the instant case, with reference to the relevant Dublin provision – an exception is required for reasons of substantive law.

9 1. The court below correctly held that the challenge action brought by the Complainant is the only form of action allowed, not only with regard to the deportation order, but also with regard to the decision on the inadmissibility of the asylum application because international responsibility lies with another country (Federal Administrative Court, judgment of 27 October 2015 – 1 C 32.14 – para. 13 et seq.).

10 2. The complaint also has merit. In point 1 of the challenged decision – irrespective of the wording ('The asylum application is inadmissible') – the Federal Of-

fice made a decision structuring rights within the meaning of Section 31(6) of the Asylum Act concerning the rejection of the asylum application as inadmissible (Federal Administrative Court, judgment of 17 September 2015 – 1 C 26.14 – juris para. 12).

11 The requirements of Section 27a of the old Asylum Procedure Act (now the Asylum Act) cited by the Federal Office in support of this decision have not been met. According to these, an asylum application is inadmissible if another state, under terms of European Community law or an international treaty, is responsible for conducting the asylum procedure.

12 The court below correctly held that in the instant case the assessment of international responsibility is still governed by Council Regulation (EC) No. 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (OJ L 50 p. 1) – the Dublin II Regulation. This proceeds from the transitional provision under Article 49(2) of Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (OJ L 180 p. 31) – the Dublin III Regulation – which went into force on 19 July 2013. According to that clause, the Dublin III Regulation is applicable only to applications for international protection lodged as from 1 January 2014; from that date, it furthermore applies to any request to take charge of or take back applicants, irrespective of the date on which the application was made. In the instant case, both the asylum application and the request to take back were made before that date.

13 2.1 According to the criteria established in the Dublin II Regulation, Germany is responsible for examining the Complainant’s asylum application. Germany’s original responsibility proceeds from Article 6(2) of the Dublin II Regulation (a). Responsibility was not transferred subsequently to Belgium (b).

14 a) According to Article 3(1) of the Dublin II Regulation, an asylum application is to be examined by a single Member state, which is to be the one which the criteria set out in Chapter III indicate is responsible. Here, according to Article 5(1) of the Regulation, the criteria for original responsibility are to be applied in the order in which they are set out in Chapter III (the hierarchy of criteria; see CJEU, judgment of 6 June 2013 – C-648/11 [ECLI:EU:2013:367], MA et al. – para. 44), and according to Article 5(2) of the Dublin II Regulation, the responsible Member State is to be determined on the basis of the situation obtaining when the asylum seeker first lodged his application with a Member State (what is known as the 'set in stone' clause; see CJEU, judgment of 6 June 2013 – C-648/11 – para. 45).

15 Article 6 of the Dublin II Regulation provides that for unaccompanied minors, the Member State responsible for examining the application is the state where a member of his or her family is legally present, provided that this is in the best interest of the minor (first paragraph). In the absence of a family member, the Member State responsible for the application is to be the state where the minor has lodged his or her application for asylum (second paragraph). According to the definition in Article 2(h) of the Dublin II Regulation, 'unaccompanied minor' means unmarried persons below the age of eighteen who arrive in the territory of the Member States unaccompanied by an adult responsible for them whether by law or custom, and for as long as they are not effectively taken into the care of such a person; it includes minors who are left unaccompanied after they have entered the territory of the Member states. 'Family members', according to the definition in Article 2(i) of the Dublin II Regulation, are the listed members of the applicant's family who are present in the territory of the Member States, insofar as the family already existed in the country of origin. This also includes a guardian in the case of applicants who are a minor and unmarried.

16 According to the findings of the court below, the Complainant was born in 1993; consequently when his further application was filed in Germany he was still a minor. This finding by the judge of fact is not open to objection by this Court. Insofar as the Respondent complains of an inadequate investigation of the facts by the court below (Section 86(1) Code of Administrative Court Procedure), its

own arguments do not even meet the formal requirements for demonstrating this procedural error. There is no discussion as to which purportedly suitable and necessary investigative measures would have to be considered in order to determine age, or as to what findings of fact would presumably have been made if the omitted investigation had been carried out. Nor is it shown that any efforts had already been made towards a further investigation of the facts in the proceedings before the appellate court, or that even without such efforts, it should have been obvious to the appellate court on its own initiative that further investigations were needed (Federal Administrative Court, judgment of 19 August 1997 – 7 B 261.97 – Buchholz 310 Section 133 <new version> Code of Administrative Court Procedure no. 26 with further references). Likewise, there is no further argument for a violation against the procedural obligations that result from the principle that the court must rule in accordance with its free conviction (Section 108(1) first sentence Code of Administrative Court Procedure). Moreover, in substantive law, the findings of the court below concerning the Complainant's age are not based on too narrow a foundation of fact. It is true that the Complainant stated a different birth date in Belgium. But the court below has explained in comprehensible terms why it nevertheless is in no doubt that the Complainant's present statement that he was not born until 1993 is correct.

17 It is immaterial that the Complainant has come of age in the meantime. According to Article 5(2) of the Dublin II Regulation, the Member State responsible is to be determined on the basis of the situation obtaining when the asylum seeker first lodged his application. Because of the priority of application of Union law, this manner of setting the point in time takes precedence over Section 77(1) of the Asylum Act. Since, according to the findings of the court below, the Complainant was still a minor when his last asylum application was filed, this Court can leave aside the question of how to interpret the further specification in Article 5(2) of the Dublin II Regulation, according to which the situation applies that obtained at the time when the asylum seeker 'first lodged his application with a Member State'. In particular, we do not need to decide here whether this refers only to the case of multiple competing asylum applications, or also – as in the case to be decided here – to a new application after the conclusion of one or

more asylum proceedings in another Member State. It is also not material to a decision that because of the former information given by the Complainant, the Belgian authorities held that he was of age, because that assessment has no binding effect in the present proceedings.

18 The court below correctly held that it is true that the Complainant does not meet the further requirements under Article 6(1) of the Dublin II Regulation. His brother legally present in Germany was not appointed his guardian until the beginning of 2011. Thus at the relevant time of the application, there were no family members legally present in the territory of a Member State within the meaning of Article 2(h) of the Dublin II Regulation. But if the requirements of Article 6(1) of the Dublin II Regulation for responsibility are absent, then under the subsidiary provision of Article 6(2) of the Regulation, the Member State is responsible where the minor has lodged his or her application for asylum.

19 On the interpretation of this provision, in the judgment of 6 June 2013 – C-648/11 – consulted by the court below – which concerned cases in which minors had, in multiple Member States, filed applications for asylum that had not yet been decided (competing asylum applications), the Court of Justice of the European Union (CJEU) found that in these circumstances the provision must be interpreted as meaning that the Member State in which the minor is present after having lodged an asylum application there is to be the Member State responsible (para. 66). The court founded this on the open wording of the provision, on a systematic comparison with the terms of Articles 5(2) and 13 of the Dublin II Regulation, on the objective of the provision – according to which minors, as particularly vulnerable persons, are especially deserving of protection – and on the requirement to give special consideration to the child's best interests under Articles 24(2) and 51(1) of the Charter of Fundamental Rights and the 15th recital of the Dublin II Regulation (para. 49 et seq.). At the same time – having regard to the situation of successive asylum applications that is relevant here – it pointed out, however, that its interpretation of Article 6(2) of the Dublin II Regulation, according to which the Member State has responsibility where the minor is present after lodging an asylum application there, does not mean that an unaccompanied minor whose application for asylum has already been sub-

stantively rejected in one Member State can subsequently compel another Member State to examine an application for asylum (para. 63). It founded this reasoning on Article 25 of Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (OJ L 326 p. 13) – the Asylum Procedure Directive (old version). According to that provision, 'in addition to cases in which an application is not examined in accordance with Regulation (EC) No 343/2003', Member States are in particular not required to examine whether the applicant is a refugee where an application is considered inadmissible because the asylum applicant has lodged an 'identical application' after a final decision has been taken against him (para. 64).

20 Insofar as the Respondent derives from these comments a restriction – to be taken into account at the level of responsibility – on the scope of application of Article 6(2) of the Dublin II Regulation, at least in the case of identical applications, this Court is unable to concur. The Dublin II Regulation is directly applicable secondary Union law, whose content conclusively governs the responsibility to examine an asylum application filed in a Member State. The provision of Article 25 of the old version of the Asylum Procedure Directive that the CJEU cited merely authorises the (responsible) Member State to consider an asylum application inadmissible for certain other reasons, for example if the asylum applicant has lodged an identical application after a final decision (Article 25(2)(f) of Directive 2005/85/EC). Consequently the two provisions have different regulatory contents, which complement but do not influence one another. Nor does anything else proceed from the CJEU's reference.

21 b) Germany's responsibility to examine the Complainant's asylum application is not opposed by Belgium's acceptance of Germany's request to take back the applicant in the letter of 16 February 2011. This acceptance did not subsequently transfer responsibility to Belgium.

22 In addition to the criteria for (original) responsibility in Chapter III, the Dublin II Regulation also contains, among the provisions on taking charge and taking back in Chapter V, provisions that provide for a transfer of responsibility from

the Member State receiving a request to the Member State making the request (see Article 17(1) of the Dublin II Regulation in the case of a tardy request to take charge, and Articles 19(4) and 20(2) of the Dublin II Regulation, where transfer does not take place on time under a request to take charge or take back). The court below correctly held that, on the contrary, according to the wording of the relevant provisions, the mere acceptance, by the recipient Member State, of a request to take charge or take back does not result in a transfer of responsibility, but merely in an obligation to take charge or take back (see Articles 18(7) and 20(1)(d) of the Dublin II Regulation). It is also evident from the CJEU decision of 6 June 2013 – C-648/11 – where the court deals in detail with the interpretation of Article 6 of the Dublin II Regulation, that within the scope of application of that provision of the Regulation, the mere acceptance of a request to take charge or take back does not result in a transfer of responsibility, even though in all three cases submitted to the court, the States in which the minor complainants had already lodged an asylum application had expressly declared themselves willing to take the applicant back. If this alone had resulted in a transfer of responsibility to the requested Member States, any further comment on the (original) responsibility of the State where the applicant is present under Article 6 of the Dublin II Regulation would have been superfluous.

23 Insofar as the court below furthermore finds that Belgium's consent also does not constitute an exercise of the right to intervene (establishing responsibility) under Article 3(2) of the Dublin II Regulation, this Court also sees no cause for objection. The Dublin II Regulation distinguishes amongst the criteria for (original) responsibility in Chapter III, the Member States' (optional) right to intervene under Articles 3(2) and 15(2) of the Dublin II Regulation, and the procedure for taking charge or taking back under Chapter V. By its acceptance of the request to take back, which was expressly founded on Article 16(1)(e) of the Dublin II Regulation, Belgium merely declared itself willing to take back the Complainant. One cannot deduce from this a decision to examine the Complainant's asylum application – independently of the responsibility criteria laid down in the Dublin II Regulation – by way of an intervention, quite irrespective of the question whether such an intervention would be permissible in the first place. There is also no

reason to believe there was an implicit exercise of the right to intervene. Purely procedural acts do not regularly suffice for such a purpose.

24 2.2 The Complainant is entitled to have his asylum application examined in Germany. For an expeditious processing of asylum applications, the Union legislators specified organisational rules in the Dublin II Regulation for determining which Member State is responsible for examining an asylum application. These rules are protective of the individual if they not only govern relationships between Member States, but (also) serve to protect fundamental rights. If that is the case, the asylum seeker has a subjective right to have his asylum application examined by the Member State that has responsibility under such rules, and he can successfully challenge a decision by the Federal Office that is not consistent with them.

25 In this sense, the provisions on responsibility for asylum applications lodged by unaccompanied minors – unlike, for example, the rules governing setting deadlines for making a request to take charge under Article 17(1) of the Dublin II Regulation (see Federal Administrative Court, judgment of 27 October 2015 – 1 C 32.14 – para. 17 et seq.) – are protective of the individual, and consequently confer a subjective right on the person concerned. In its judgment of 6 June 2013 (C-648/11), which concerned responsibility for asylum applications by unaccompanied minors who had already lodged an asylum application in another Member State that was willing to take them back, the CJEU interpreted the relevant provision on responsibility in Article 6(2) of the Dublin II Regulation in the light of Article 24(2) of the Charter of Human Rights, according to which in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests are to be a primary consideration (para. 57). From this one must conclude that the provisions on responsibility for unaccompanied minors in in Article 6 of the Dublin II Regulation (furthermore) serve to protect the fundamental rights of the person concerned.

26 2.3 Contrary to the Respondent's interpretation, the rejection of the asylum application as inadmissible under point 1 of the challenged decision cannot be upheld as a decision under Section 71a of the Asylum Act not to conduct a fur-

ther asylum procedure. If a foreigner files an asylum application (secondary application) in the federal territory after having unsuccessfully applied for asylum in a safe third country (Section 26a) in which European Community law on the responsibility for processing asylum applications applies, or which has concluded an international agreement with the Federal Republic of Germany, then under Section 71a(1) of the Asylum Act a further asylum procedure is to be carried out only if the Federal Republic of Germany is responsible for carrying out the asylum procedure and the conditions of Section 51(1) to (3) of the Administrative Procedure Act are met; this is to be examined by the Federal Office.

27 Here we may leave aside the question of whether the Federal Office would accordingly have to refuse to carry out a further asylum procedure. If the Federal Republic of Germany is responsible under the Dublin rules for examining the asylum application, the Federal Office's rejection of the asylum application as inadmissible, improperly founded on Section 27a of the Asylum Act, in the absence of a formal amendment by the Federal Office and in the absence of the cooperation of the Complainant in the current court proceeding, would be invulnerable to rescission by a court only it ultimately proved lawful for other reasons given the same matter at issue (a), or if it can be replaced by another – lawful – provision by way of a reinterpretation under Section 47 of the Administrative Court Procedure Act (b). Neither requirement is met here.

28 a) Under Section 113(1) first sentence of the Code of Administrative Court Procedure, an administrative act may be rescinded by a court insofar as the act is unlawful and the Complainant's rights have been violated. This expresses the administrative courts' obligation to examine whether a challenged administrative act is consistent with objective law, and if it is not, whether it violates the Complainant's rights. In this examination, the administrative courts must take account of all relevant provisions of law and – under the duty to investigate pursuant to Section 86(1) of the Code of Administrative Court Procedure – all legally relevant facts, irrespective of whether or not the norms and facts have been adduced by the ordering authority as grounds for the administrative act. But this applies only if and insofar as this approach does not alter the essence of the challenged administrative act (Federal Administrative Court, judgment of 27

January 1982 – 8 C 12.81 – BVerwGE 64, 356 <357 f.>). That limitation is exceeded if – as in the instant case – a change of the basis in law would procedurally alter the matter at issue.

29 It is true that neither Section 27a nor Section 71a of the Asylum Act involves a review of the content of the asylum application. But the law attaches different legal consequences to the two decisions, so that procedurally, different matters at issue must be presumed. Section 27a of the Asylum Act concerns the handling of an asylum application in the case where another Member State of the Common European Asylum System has the responsibility. The consequence of a decision founded on this legal basis is that the applicant is transferred to the state responsible for carrying out the asylum procedure, and for that purpose, he is served with a warning of deportation to that state under the terms of Section 34a of the Asylum Act. By contrast, in the decision under Section 71a of the Asylum Act, an examination is carried out, on the basis of the responsibility of the Federal Republic of Germany, of whether the asylum procedure must be resumed for the secondary application, and if there are grounds for such a resumption, whether there is an entitlement to asylum. If the Federal Office refuses to conduct a (further) asylum procedure on that legal basis, all that remains is to decide whether there are national prohibitions of deportation under Section 60(5) and (7) of the Residence Act (see Hailbronner, Ausländerrecht, Section 71a Asylum Procedure Act, status 10 August 2010, para. 27), and after a deportation warning has been issued, the person concerned – provided there is no national prohibition of deportation – can be deported to any state which he or she is permitted to enter or which is obliged to admit him or her (see Section 34(1) Asylum Act in conjunction with Section 59(2) Residence Act).

30 b) The inadmissibility decision founded on Section 27a of the Asylum Act also cannot be reinterpreted, under Section 47 of the Administrative Court Procedure Act, as a decision under Section 71a of the Asylum Act. In a reinterpretation (*Umdeutung*) (conversion), a provision ordered in an administrative act is not merely set upon a different legal foundation, but is replaced by a different (lawful) provision. Assuming the requirements of Section 47 of the Administrative Court Procedure Act are met, not only the authorities but the administrative

courts are empowered for this purpose (see, *inter alia*, Federal Administrative Court, judgments of 23 November 1999 – 9 C 16.99 – BVerwGE 110, 111 <114> and 26 July 2006 – 6 C 20.05 – BVerwGE 126, 254 para. 101 with further references). This does not involve a violation of the principle of effective legal protection (Federal Administrative Court, decision of 9 April 2009 – 3 B 116.08 – juris para. 4). A reinterpretation is also possible in a procedure for appeal on points of law only, provided that the findings of the judge of fact – which are binding on the court deciding the appeal on points of law – are sufficient, the persons concerned are granted a fair hearing, and they are not impeded in conducting their legal defence (Federal Administrative Court, judgments of 14 February 2007 – 6 C 28.05 – Buchholz 442.066 Section 150 Telecommunications Act No. 3 and of 29 October 2008 – 6 C 38.07 – Buchholz 442.066 Section 10 Telecommunications Act No. 2).

31 Under Section 47(1) of the Administrative Court Procedure Act, an erroneous and therefore unlawful administrative act may be reinterpreted as a different administrative act if it is directed to the same objective, if it could have been issued lawfully by the issuing authority in the procedure and form that actually took place, and if the requirements for issuing that act are fulfilled. According to Section 47(2) of the Administrative Court Procedure Act, this does not apply if the administrative act into which the erroneous administrative act is to be interpreted would contradict the recognisable intent of the issuing authority, or if its legal consequences for the person concerned would be more adverse than those of the erroneous administrative act (first sentence). A reinterpretation is furthermore impermissible if the erroneous administrative act cannot be withdrawn (third sentence). Under Section 47(3) of the Administrative Court Procedure Act, a decision that can be made only as a legally compulsory decision cannot be reinterpreted as a discretionary decision. Under Section 47(4) of the same Act, Section 28 of the Act is to be applied *mutatis mutandis*.

32 There is also no need in this context to decide whether, under Section 71a of the Asylum Act, the requirements for a decision denying the pursuit of a further asylum procedure are present in light of the fact that by his own account, the Complainant has indeed completed two unsuccessful asylum procedures in

Belgium, and relied in filing his (secondary) application in the federal territory only on the conditions in his country of origin in general, yet on the evidence of the record converted to Christianity while the court proceedings were in progress. A reinterpretation fails because of the simple fact that the legal consequences of a decision under Section 71a of the Asylum Act would be more adverse for the Complainant. Here one must consider not only the direct legal consequences of the decision, but its indirect effects. Consequently it must be taken into account that a decision under Section 27a of the Asylum Act results only in a transfer of the asylum seeker to another ‘safe’ Dublin State that is responsible for examining his asylum application. By contrast, a decision refusing to conduct a further asylum procedure under Section 71a of the Asylum Act would have the consequence that the asylum application could also not be examined further by any other state, and the person concerned – after the issuance of a deportation warning to this effect, and subject to the absence of a national prohibition of deportation – could be deported to any state willing to take charge of him, including his country of origin. The provision in point 1 of the challenged decision, finally, can also not be reinterpreted into a different (lawful) decision.

33 3. If the Federal Office has wrongfully rejected the asylum application as inadmissible under Section 27a of the Asylum Act and if the decision is to be rescinded to that extent, the requirements for a deportation order under Section 34a of the Asylum Act are also not met.

34 4. The disposition as to costs proceeds from Section 154(2) of the Code of Administrative Court Procedure. No court costs are levied, in accordance with Section 83b of the Asylum Act. The value at issue proceeds from Section 30 of the Act on Attorney Compensation. There are no grounds for an exception under Section 30(2) of that Act.

Prof. Dr Berlit Prof. Dr Dörig Prof. Dr Kraft

Fricke Dr Rudolph