Field:	BVerwGE: Yes
Asylum law	Professional press: Yes

Sources in law:

TFEU	Article 78 (2) (a) and b
Residence Act	Section 59 (3); Section 60 (1) sentence 1 und 2, (2) sentence 2, (5), (7) and (10)
Asylum Procedure Act	Section 4 (1); Sections 13, 15 (2); Section 25 (1); Sections 29, 32, 33 (1); Sections 34, 38, 77 (1)
Directive 2013/32/EU	Article 2 (i); Article 33 (2) (a)
Dublin II Regulation	Articles 13 and 20
Dublin III Regulation	Articles 13, 23 (2); Article 49 (2)
Code of Administrative Court Procedure	Section 91 (1); Section 92 (3); Section 161 (2)
Administrative Procedure Act	Section 47 (1)

Headwords:

Fingerprinting; deportation warning; prohibition of deportation; information on travel routes; reason for request to pursue proceedings; application for asylum; foreign refugee status; analysability; instruction; request to pursue proceedings; binding effect; Dublin procedure; discontinuance of asylum procedure; settlement; international protection; amendment of complaint; obligations to cooperate; national protection from deportation; subsidiary protection under Union law; reinterpretation; further migration of refugees; destination state of deportation.

Headnotes:

1. An asylum procedure under Sections 32 and 33 (1) of the Asylum Procedure Act may be discontinued on the basis of the fact that the applicant for asylum did not comply in a timely manner with a justified request to present a written account of his travel routes before arriving in Germany, and of any applications for asylum that may have been lodged in other countries (expanding on the concepts of the judgment of 5 September 2013 – BVerwG 10 C 1.13 – BVerwGE 147, 329).

2. Refugee status granted in another country has a binding effect in Germany in that by law, there is a prohibition of deportation within the meaning of Section 60 (1) of the Residence Act (Section 60 (1) sentence 2 of the Residence Act). This does not, however, give rise to an entitlement to a new decision on recognising refugee status or to the granting of a residence title in Germany (see Section 60 (1) sentence 3 of the Residence Act).

3. A demand for a grant of subsidiary protection under Union law is inadmissible if the foreigner has already been granted the legal status of a refugee or of a

person entitled to subsidiary protection in another country pursuant to Section 4 of the Asylum Procedure Act.

4. The Dublin III Regulation applies, at any event in respect of the procedure to be followed, to requests to take charge or take back applicants that are made after the Regulation went into force, irrespectively of the date of the application for asylum (Article 49 (2)).

Judgment of the 10th Division of 17 June 2014 – BVerwG 10 C 7.13

I. Regensburg Administrative Court of 13 December 2011 – Case: VG RO 7 K 10.30468 –
II. Munich Higher Administrative Court of 17 January 2013 – Case: VGH 20 B 12.30347 –

FEDERAL ADMINISTRATIVE COURT

IN THE NAME OF THE PEOPLE

JUDGMENT

BVerwG 10 C 7.13
VGH 20 B 12.30347

In the administrative case

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

When citing this decision, it is recommended to indicate the court, the date of the decision, the case number and the paragraph: BVerwG, Judgment of 17 June 2014 – BVerwG 10 C 7.13 – para. …

the 10th Division of the Federal Administrative Court
on 17 June 2014
by Presiding Administrative Court Justice Prof. Dr Berlit and Federal Administrative Court Justices Prof. Dr Dörig, Prof. Dr Kraft, Fricke and Dr Maidowski

without further oral hearing decides:

> The proceeding is discontinued insofar as the complaint is directed against the failure to exclude Somalia as the destination state for deportation under Item 3 of the decision of the Federal Office for Migration and Refugees of 22 October 2010 (deportation warning). The judgment of the Bavarian Higher Administrative Court of 17 January 2013 and the judgment of Regensburg Administrative Court of 13 December 2011 are to that extent without effect.
>
> For the remainder, on appeal by the Respondent, the judgment of the Bavarian Higher Administrative Court of 17 January 2013 and the judgment of Regensburg Administrative Court of 13 December 2011 are amended. The complaint is denied.
>
> The Complainant shall bear two-thirds of the cost of the litigation at all levels of the proceedings, and the Respondent shall bear one-third.

Reasons:

I

1 The Complainant is an applicant for asylum from Somalia. He challenges the discontinuance of his asylum procedure by the Federal Office for Migration and Refugees.

2 The Complainant lodged an application for asylum in mid-August 2010, and in that connection, stated for the record on 9 September 2010 that he was a Somali national born in Mogadishu on 1 January 1981. The Federal Office for Migration and Refugees – the ‘Federal Office’ – took his fingerprints for identification; these later proved unusable. The employee taking the fingerprints noted

even at the time of fingerprinting that the Complainant's fingertips showed signs of changes that would presumably cause the taken fingerprints to be unusable. The Complainant denied having manipulated his fingertips.

3 In a letter dated 9 September 2010, the Federal Office notified the Complainant that the damage to his fingertips was grounds for the suspicion that the Complainant was unwilling to cooperate in the investigation of his identity. He was therefore requested to pursue his asylum procedure, first of all, by appearing within one month at the Federal Office's field office to have 'analysable fingerprints' taken. Second, he was to state in writing what countries he had stayed in since leaving his country of origin; whether he had already applied for asylum there; and if so, whether that asylum had been refused. At the same time, with a reference to Section 33 of the Asylum Procedure Act (old version), he was notified that his application for asylum would be deemed withdrawn if he did not pursue the procedure within a month, and in that case a decision would be made on the basis of the record as it then stood concerning the existence of obstacles to deportation under Section 60 (2) through (5) or Section 60 (7) of the Residence Act (old version). The letter was accompanied by a translation into the Somali language. The Complainant had his fingerprints taken at a further appointment, but these again were not usable. He provided no information within the one-month deadline concerning his travel routes and the question of further applications for asylum.

4 In a decision dated 22 October 2010, the Respondent ruled that the application for asylum was to be deemed withdrawn, and that the asylum procedure had been discontinued (Item 1). It furthermore found that there were no obstacles to deportation under Section 60 (2) through (7) of the Residence Act (old version) (Item 2). Finally, the Complainant was ordered to leave the Federal Republic of Germany within one week after service of the decision, on pain of deportation to his 'country of origin' (Item 3). In substance, the Federal Office based its decision on the fact that the Complainant had not complied with the request to pursue the procedure. He had provided neither analysable fingerprints nor the requested written information about his travel routes and any previous asylum procedures. There could be no finding concerning obstacles to deportation un-

der Section 60 (2) through (7) of the Residence Act (old version), if only because it had not been possible to determine a country of origin for the Complainant.

5 In his court action, the Complainant seeks to have this decision set aside, or in the alternative, to be granted subsidiary protection under Union law pursuant to Section 4 (1) of the Asylum Procedure Act (old version), and further in the alternative, to obtain a finding of national protection from deportation under Section 60 (5) and (7) of the Residence Act (new version) in respect of Somalia, together with the revocation of the deportation warning that had been issued against him. In a submission dated 2 November 2010, he applied to the Federal Office to be restored to his previous status, by discussing his travel routes and stating that he had lodged no other applications for asylum.

6 During the court proceedings, the Federal Office again asked the Complainant, in a letter dated 26 October 2011 addressed to his counsel of record, to pursue the procedure by appearing at the Federal Office and having his fingerprints taken. It was pointed out that the obligation to acquiesce in identification procedures also included the obligation to refrain during the period prior to the new taking of fingerprints from any conduct that might impair or frustrate the possibility of analysing the fingerprints. The Complainant – owing to tardiness, by his own account – did not appear at the appointment set by the Federal Office for this purpose on 15 November 2011, but asked the Federal Office for a new appointment in a submission from his counsel dated 18 November 2011. No such appointment was granted, however.

7 The Administrative Court set aside the decision of 22 October 2010. In the course of the appeal proceedings, the Federal Office learned that the Complainant had been apprehended and processed for identification in a police search operation in October 2012. The identification procedure showed that the Complainant had been resident in Germany as early as October 2009 under a different identity, and that his fingerprints had been taken in connection with a take-back request. At the same time, a comparison with the Eurodac database yielded a match. According to that information, the Complainant had previously

applied for asylum in Italy on 18 April 2009 and 23 October 2009, and in Sweden on 22 February 2010. In a letter dated 14 December 2010, the Italian Ministry of the Interior informed the Swedish authorities that the Complainant had already been granted refugee status in Italy, and the Dublin proceedings had been concluded.

8 The representative of the Federal Office then declared at the hearing before the Higher Administrative Court that he was revoking the first sentence in Item 1 of the challenged decision (‘The application for asylum is deemed withdrawn’). He was furthermore revoking the warning of deportation to the country of origin in the second sentence of Item 3 of the decision. Instead, the Complainant was warned of deportation to Italy. Thereupon the Complainant’s representative stated, in respect of the warning of deportation to Italy, that an action would be brought as soon as a decision of the Federal Office to that effect had been served. At the same time, he declared that the litigation was for the main part settled insofar as the Federal Office had revoked the decision of 22 October 2010. The Respondent’s representative consented to the declaration that the main matter had been settled, insofar as the first sentence in Item 1 of the challenged decision had been revoked.

9 The Higher Administrative Court found that the main issue had been settled in respect of the warning of deportation to the country of origin (Item 3 of the decision of 22 October 2010), and otherwise denied the Respondent’s appeal. The court based its decision primarily on the following grounds: The discontinuance of the proceedings in Item 1 of the decision had been unlawful, inasmuch as this legal consequence was provided under the first sentence of Section 32 of the Asylum Procedure Act only for the cases of a withdrawal of an asylum application or a waiver under Section 14a (3) of that Act. An appropriate response to the recognition of refugee status in another EU Member State would be, for example, to deny the asylum application as impermissible under Article 25 (2) (a) of Directive 2005/85/EC (the Asylum Procedure Directive 2005). It was not possible, the court ruled, to reinterpret the discontinuance of proceedings as a different form of terminating proceedings without deciding on the substance of the matter, in accordance with Section 47 of the Administrative Procedure Act.

10 The court held that the finding under Item 2 of the decision that there were no prohibitions of deportation under Section 60 (2) through (7) of the Residence Act (old version) could not be upheld because it had been known since October 2012 that the Complainant had been granted refugee status in Italy. Insofar as the Federal Office revoked the warning of deportation to the Complainant's country of origin in Item 3 of its order, and replaced it with a warning of deportation to Italy, the litigation had been settled on its main point. The Complainant's petition for a declaratory judgment could be granted because the Federal Office had amended its decision in Item 3 by the warning of deportation to Italy, but the Complainant had not introduced this new administrative act into the proceedings by way of an objective amendment of his complaint. Instead, the Complainant's representative had declared at the hearing that an action would be brought when a corresponding decision from the Respondent had been served in respect of the warning of deportation to Italy.

11 The Respondent's appeal on points of law, which this Court has admitted, is directed against that judgment. The Respondent bases its appeal in substance on the following grounds: The Higher Administrative Court should first have examined whether the procedure had been discontinued prior to the declarations issued at the hearing, pursuant to Sections 32 and 33 (1) of the Asylum Procedure Act (old version), because the Complainant had not complied with a lawful request to pursue his procedure. In that case, the court would have had to find against the Complainant. The Federal Office argues that it is indeed empowered to discontinue an asylum procedure without deciding on the merits if – as in the instant case – it was found that the applicant for asylum had already been granted refugee status in another country. It argues that Section 60 (1) sentence 3 in conjunction with sentence 2 of the Residence Act (new version) expressly provides that the Federal Office is no longer required to conduct any (further) asylum procedure if asylum has been granted in another country. This, it argues, is consistent with Article 33 (2) (a) of Directive 2013/32/EU, according to which Member States may consider an application for asylum inadmissible in such cases. Although it is true that the German legislature has made no specific provision for this situation, the regulatory omission can be remedied by the pos-

sibility of terminating a procedure on the basis of Section 32 of the Asylum Procedure Act. In that case Item 1 of the decision of 22 October 2010 can also be reinterpreted accordingly. No settlement had been reached on Item 3 of the challenged decision by changing the destination state of the deportation. The mention of the country of origin had no dispositive effect, so that the Complainant was also not burdened by it. Even if prohibitions of deportation had been affirmed, the deportation warning would have been unaffected otherwise.

12 Following the hearing before this Court on 8 May 2014, in a supplementary decision of 15 May 2014 the Respondent specified Italy as the destination state of the impending deportation (Item 1) and ordered that the Complainant could not be deported to Somalia (Item 2). The Complainant lodged an action for reversal of the supplementary decision with the Administrative Court. Insofar as the action was directed against the failure to exclude Somalia as the destination state of a deportation in Item 3 of the decision of 22 October 2010 at issue, the parties agreed in declaring the dispute settled in the present proceedings.

II

13 This Court is able to decide without a further hearing because the parties have declared their consent to proceeding in this manner (Section 101 (2) Code of Administrative Court Procedure).

14 The Respondent's appeal is well-founded insofar as the Higher Administrative Court affirmed the revocation of Items 1 and 2 of the challenged decision of 22 October 2010. In that respect the judgment of the court below is founded on a contravention of federal law (Section 137 (1) No. 1 Code of Administrative Court Procedure). However, the appeal generally does not meet with success insofar as it is directed against the finding concerning the deportation warning in Item 3 of the decision. It is true that the Higher Administrative Court incorrectly held that the deportation warning without a designation of the target state had been set aside. That warning must be affirmed instead. However, the court was correct in holding that the subsequent specification of Italy as the destination state for deportation had not been incorporated into the present proceedings. Insofar

as the parties declared the dispute about the deportation warning settled, that declaration is based on the legally required subsequent designation of Somalia as a state to which the Complainant cannot be deported. To that extent, the Respondent has complied with the Complainant's petition for revocation, and the proceedings were to be discontinued.

15 The legal assessment of the Complainant's petition is governed by the Asylum Procedure Act in the version promulgated on 2 September 2008 (BGBl I p. 1798) and the Residence Act in the version promulgated on 25 February 2008 (BGBl I p. 162), both as last amended by the Act Transposing Directive 2011/95/EU of 28 August 2013 (BGBl I p. 3474). According to the established case law of the Federal Administrative Court, a court hearing an appeal on law only must give consideration to changes in the law that take place after an appealed decision, if the court below would have to consider those changes if it were to decide now (see judgment of 11 September 2007 – BVerwG 10 C 8.07 – BVerwGE 129, 251 = Buchholz 402.242 Section 60 (2) et seq. of the Residence Act Nr. 30, each at para. 19). As the present matter is a dispute about asylum procedure law in which the court below, in accordance with Section 77 (1) of the Asylum Procedure Act, must regularly focus on the situation of fact and law at the date of its last hearing or decision, if that court were to decide now it would have to take the new situation of law as a basis unless – as in the instant case – a derogation is required for reasons of substantive law.

16 1. The Higher Administrative Court upheld the Administrative Court's setting aside of the challenged discontinuance order under Item 1 of the challenged decision on grounds that conflict with federal law (Section 137 (1) Code of Administrative Court Procedure). Contrary to the Higher Administrative Court's opinion, the procedure is discontinued under Sections 32 and 33 (1) of the Asylum Procedure Act (old version), because the conditions for non-pursuit of the procedure have been met. The Complainant did not provide the written information about his travel routes and about applications for asylum in other countries within the time period set for him.

17 Under Section 33 (1) of the Asylum Procedure Act (old version), an application for asylum that according to Section 13 (1) and (2) of the Asylum Procedure Act (old version) also includes an application for refugee status, but does not yet seek subsidiary protection under Section 4 of the Asylum Procedure Act (new version), is deemed to have been withdrawn if the foreigner has failed to pursue it for a period exceeding one month, despite a request from the Federal Office (sentence 1). The request is to inform the foreigner of the consequences resulting from sentence 1 (sentence 2). If the requirements for a (fictive) withdrawal of an application are present, the Federal Office can no longer decide on the substance of the application for asylum. Instead, according to Section 32 of the Asylum Procedure Act, the Federal Office must indicate in its decision that the asylum procedure has been discontinued and must state whether there are any obstacles to deportation pursuant to Section 60 (2) through (5) or 7 of the Residence Act (old version) (sentence 1). In the cases under Section 33 of the Asylum Procedure Act (old version), the case is to be decided on the basis of the record as it stands (sentence 2). The Federal Office is furthermore to issue a deportation warning; the deadline for the foreigner to leave the country under Sections 34 and 38 (2) of the Asylum Procedure Act (old version) is one week. The effective content of the present decision must be assessed on the basis of the state of the law at the date when it was issued, as any subsequent expansion of its suspensive effect to include the acknowledgement of subsidiary protection under Union law would constitute a genuine retroactive effect of the new statutory provision under Section 33 (1) of the Asylum Procedure Act (new version), and this would be incompatible with the legal system (see judgment of 13 February 2014 – BVerwG 10 C 6.13 – NVwZ-RR 2014, 487, at para. 12).

18 1.1 It was not permissible for the court below to refrain from examining the requirements for discontinuance under Sections 32 and 33 (1) of the Asylum Procedure Act because of the declarations made by the Respondent’s representative at the hearing. It is true that the representative declared that he was revoking the first sentence of Item 1 of the decision of 22 October 2010 (‘The application for asylum is deemed withdrawn’). However, the declared revocation was without meaning. According to the configuration of the law under Section 33 and Section 32 of the Asylum Procedure Act, the Federal Office’s declaration of the

fictive withdrawal of the application for asylum has no effective content of its own. The validity of the withdrawal is not in need of any ruling by the Federal Office; it is merely a question preliminary to the finding to be made under Section 32 sentence 1 of the Asylum Procedure Act that the asylum procedure has been discontinued. The Federal Office has adhered to that finding. Moreover, the Federal Office could not retroactively revoke a suspensive effect that had already taken effect by law.

19 1.2 The request to pursue the procedure under Section 33 (1) of the Asylum Procedure Act was justified. It presupposes a specific occasion that is capable of arousing doubt as to the existence or continuation of an interest in having the matter decided. Such doubts may result from a neglect of procedural obligations to cooperate. These include the duty of the applicant for asylum to refrain in advance of a planned fingerprinting from any conduct that might impair or frustrate the ability to analyse the fingerprints (see judgment of 5 September 2013 – BVerwG 10 C 1.13 – BVerwGE 147, 329, at 19). According to the principles established in that judgment, such justified doubts did exist here, because reasons for the prospective inability to use the fingerprints were already noted and documented in the first procedure to establish identity, yet the Complainant stated no substantiated position on the matter.

20 1.3 However, the request to pursue the procedure did not result in a discontinuance of the procedure insofar as the Complainant was requested to cooperate in providing his fingerprints. This is because Item 1 of the request to pursue the procedure of 9 September 2010 asked him to give ‘analysable fingerprints’, and therefore did not comply with the requirements of law under Section 15 (2) (7) of the Asylum Procedure Act (on this, see the judgment of 5 September 2013, op. cit., at paras. 24 and 35). Subsequently the request of 26 October 2011 did comply with the requirements of law, because it only asked the Complainant to refrain in advance of the new fingerprinting from any conduct that might impair or frustrate the ability to analyse his fingerprints (see judgment of 5 September 2013, op. cit., at 39). The Complainant also did not comply with this second request to pursue the procedure, because he did not appear for the appointment set by the Federal Office for the new fingerprinting on 15 November 2011. De-

spite this delinquency, however, there was no failure to pursue the procedure, because the Complainant, through counsel, asked for a new appointment for the procedure to establish identity on 18 November 2011. The delinquency in cooperating therefore could still have been remedied within the established deadline for pursuing the procedure. But the Federal Office did not provide the Complainant with an opportunity to do so.

21 1.4 The suspensive effect of Section 32 sentence 1 of the Asylum Procedure Act did arise, however, in that the Complainant did not comply in a timely manner with his independent obligation to submit a written account of his travel routes and of any other applications for asylum that might have been lodged previously (No. 2 of the request to pursue proceedings of 9 September 2010).

22 Under Section 15 (2) (1) of the Asylum Procedure Act, the Complainant was obliged to provide the information requested by the Federal Office. The information that may be requested from an applicant for asylum, according to Section 25 (1) sentence 2 of the Asylum Procedure Act, also includes information about travel routes, time spent in other countries, and asylum procedures initiated or completed there (see judgment of 5 September 2013, op. cit., at 33). The request of 9 September 2010 to pursue proceedings by providing the appropriate written information is also in compliance here with the further requirements of Section 33 (1) of the Asylum Procedure Act.

23 The Complainant did not provide the requested written information within the one-month deadline under Section 33 (1) of the Asylum Procedure Act. It is true that counsel for the Complainant attempted to make up for this with a letter dated 2 November 2010, after the one-month deadline had expired. However, the letter does not reveal any reasons why the Complainant was not at fault for failing to meet the deadline (on the application of Section 32 of the Administrative Procedure Act to the one-month period under Section 33 (1) of the Asylum Procedure Act, see Bundestag Printed Paper 12/2062, p. 33). According to that letter, the failure to meet the deadline was caused by a mistake on the Complainant’s part. The Complainant is said to have believed that he thought he had met his obligation under the request to pursue the procedure by appearing at

the field office of the Federal Office on 7 October 2010 and permitting his fingerprints to be taken again. He had understood that he would now be asked soon by the Federal Office about his reasons for asylum, his travel routes, and his applications for asylum in other countries. But it does not proceed from this argument that the deadline was missed for no fault of the Complainant. The request to pursue the procedure of 9 September 2010 refers to two mutually independent acts: (1) fingerprinting, and (2) the written information about the travel routes and about a possible application for asylum. The Complainant was not entitled to assume that by cooperating in being fingerprinted he had also complied with his obligation to provide the requested written information. The fact that the one-month period also applies to the written information mentioned in the request to pursue the procedure is evident from the instructions given as to the legal consequences of failing to pursue the procedure, in which the one-month period recognisably refers to both acts of cooperation. In view of the unmistakable nature of the indication of the legal consequences of failing to meet the deadline, which referred to both acts of cooperation, there was no need for an additional mention of the one-month deadline in the request to provide written information, as was given in the request to cooperate in fingerprinting. The Complainant was also in a position to understand this because the decision was delivered to him on 9 September 2010 not only in German, but in a version translated into Somali.

24 1.5 If the asylum procedure has been discontinued pursuant to Sections 32 and 33 (1) of the Asylum Procedure Act, there is no need for a decision on the question, which the Higher Administrative Court considered material, of whether the discontinuance can be reinterpreted as a decision on whether the asylum application is impermissible under Section 60 (1) sentences 2 and 3 of the Residence Act, or as a decision as to the immateriality of that application under Section 29 of the Asylum Procedure Act.

25 1.6 The Respondent also had an international responsibility for the discontinuance of the procedure. There is no responsibility of another Member State of the European Union.

26 We may leave aside the question of whether the Union's provisions on responsibility under the regulations concerning what is known as the Dublin Procedure, which also applies to decisions on the discontinuance of asylum proceedings under Sections 32 and 33 (1) of the Asylum Procedure Act, can be applied to an asylum application from a foreigner who – as in the instant case – has already been granted refugee status in another Member State. However, this Court inclines to the opinion that the provisions for the Dublin Procedure are not applicable to foreigners who have been granted refugee status in another Member State. Nevertheless, even if these provisions should prove to be applicable, Germany would have become the Member State responsible for deciding, without any point of doubt that would necessitate a reference to the European Court of Justice on the matter.

27 According to the transitional provision of Article 49 (2) of Regulation (EU) No. 604/2013 of 26 June 2013 (OJ EU No. L 180 p. 31 – Dublin III Regulation), the Dublin III Regulation is applicable for the first time to applications for international protection lodged as from the first day of the sixth month following its entry into force, or in other words, from 1 January 2014. The application here was lodged as long ago as August 2010, and therefore prior to the relevant starting date, so that in general, it would fall under Regulation (EC) No. 343/2003 of 18 February 2003 (OJ EC No. L 50 p. 1 – the Dublin II Regulation). However, the Dublin III Regulation additionally applies to requests to take charge or take back applicants, irrespective of the date of their application. In the instant case, the responsibility of Italy in lieu of Germany would come under consideration, because the Complainant had already lodged an application for asylum there in 2009, and refugee status was granted to him there (see Article 13 of the Dublin II Regulation and Dublin III Regulation). A transfer of the Complainant to Italy for review of the further application lodged afterwards in Germany would be possible only by way of taking the applicant back (Article 20 Dublin II Regulation, Article 23 et seq. Dublin III Regulation). In any event, the Dublin III Regulation applies to the procedure to be followed for take-back requests, if they had not already been lodged prior to 1 January 2014. That provision requires that take-back requests must now be made within two or three months, as the case may be, according to Article 23 (2) of the Dublin III Regulation (so held as well by

Mannheim Administrative Court, judgment of 16 April 2014 – A 11 S 1721/13 – juris at 31). That time period expired in the instant case without the Federal Office's having addressed a take-back request to Italy. Therefore, according to Article 23 (3) of the Dublin III Regulation, Germany is responsible for examining the (new) application lodged here, if the Dublin regulations are held to apply to the present application for asylum.

28 2. The Complainant cannot prevail with his alternative claim to subsidiary protection under Union law pursuant to Section 4 (1) of the Asylum Procedure Act (new version). It is true that this claim is not already covered by the discontinuance of the asylum procedure under Sections 32 and 33 (1) of the Asylum Procedure Act (old version) (see judgment of 13 February 2014 – BVerwG 10 C 6.13 – NVwZ-RR 2014, 487). But under Section 60 (2) sentence 2 in conjunction with Section 60 (1) sentence 3 of the Residence Act in the version that has been in force since 1 December 2013 (BGBl I S. 3474), the assertion of that claim is inadmissible, because the Complainant has already been recognised as a refugee outside the Federal territory under the terms of the Convention on the Status of Refugees.

29 It is true that recognising a foreigner as a refugee or as someone entitled to subsidiary protection in another country does not have the same effect in international law as a decision on status by German authorities, and in that sense has no comprehensive binding effect for the Federal Republic of Germany (on this see also Marx, InfAuslR 2014, 227 <232>). The Geneva Convention on Refugees of 28 July 1951 defines uniform criteria for qualification as a refugee, but establishes no requirement under international law for one Treaty State to be bound by another Treaty State's decision on status (see Federal Constitutional Court, decision of 14 November 1979 – 1 BvR 654/79 – BVerfGE 52, 391 <404>; Federal Administrative Court, judgment of 29 April 1971 – BVerwG 1 C 42.67 – BVerwGE 38, 87 <89 et seq.> = Buchholz 402.24 Section 28 Foreigners Act No. 2 sentence 4 et seq.). Nor does such a binding effect proceed from Union law. It is true that Article 78 (2) (a) and (b) TFEU does establish an authorisation to enact legislative measures that provide for an asylum status that is valid throughout the Union, and for uniform subsidiary protected status for

third country nationals, but the relevant Directive 2011/95/EU of 13 December 2011 makes no provision for a status decision that is valid for the entire Union. However, the Federal Republic of Germany has exercised the opportunity that is still available under international and Union law to attribute a limited degree of legal effect in its own country, through a national provision, to other countries' decisions on recognition (see for example the recommendation in this regard by the UNHCR in resolution No. 12 of its Executive Committee from 1978). In Germany, refugees recognised in other countries have enjoyed the same protection from deportation as those recognised here ever since the Foreigners' Act of 1990 went into force (under its Section 51 (2) sentence 1 No. 2), without the requirement to conduct a new assessment procedure. Through Section 60 (1) sentence 2 of the Residence Act (new version), national law provides that foreign recognitions of refugee status have a binding effect, limited to protection from deportation (similarly, Treiber, in: GK-AufenthG, status: July 2011, Section 60 at para. 205.3). However, there is specifically no entitlement to a re-recognition of refugee status or to a finding of subsidiary protection (see Section 60 (1) sentence 3, (2) sentence 2 of the Residence Act, new version) or an associated grant of a title for residence in Germany. Rather, where there has been a foreign decision on recognition, the Federal Office is neither obliged nor authorised to establish subsidiary protection or to recognise (anew) refugee status in Germany. Any petition lodged despite this fact is inadmissible. This Court has already so decided on the provision of Section 60 (1) sentences 2 und 6 of the Residence Act (old version) that was in force until 30 November 2013 (decision of 26 October 2010 – BVerwG 10 B 28.10 – Buchholz 402.242 Section 60 (1) of the Residence Act No. 43). This was equivalent to the provision that now applies under Section 60 (1) sentences 2 and 3 of the Residence Act. It is at any rate compatible with Union law in the case of the recognition of international protection by another Member State. This is because Article 33 (2) (a) of Directive 2013/32/EU – the Asylum Procedure Directive 2013 – opens up the possibility for national legislatures to treat an application for international protection as inadmissible if the foreigner has already been granted international protection by another Member State, i.e., if that state has granted either refugee status or subsidiary protection status under Union law (see Article 2 (i) of the Directive).

30 The Act Transposing Directive 2011/95/EU of 28 August 2013 (BGBl I p. 3474) has now also extended the inadmissibility of a new recognition procedure to the recognition of subsidiary protection under Section 4 of the Asylum Procedure Act (new version) (Section 60 (2) sentence 2 of the Residence Act). This enactment derives the logical consequence from the redefinition of the substance of the asylum application in Section 13 (1) of the Asylum Procedure Act (new version), which – consistently with Union law – now encompasses not only an application for recognition of refugee status, but also an application for the recognition of subsidiary protection under Union law (see Bundestag Printed Paper 17/13063 p. 25 on Section 60 (2) of the Residence Act). This has the procedural consequence that an application for recognition of subsidiary protection status under Union law is impermissible if the foreigner has already been granted the legal status of a refugee or of a person entitled to subsidiary protection in another country, within the meaning of Section 4 of the Asylum Procedure Act (new version) (on this see already the judgment of 13 February 2014 – BVerwG 10 C 6.13 – NVwZ-RR 2014, 487 para. 16). As the Complainant in this case has already been granted refugee status in Italy, he can no longer apply for recognition of an entitlement to subsidiary protection in Germany (Section 60 (2) sentence 2 of the Residence Act).

31 The Complainant lacks the need for protection of a legal interest for an isolated reversal of the negative decision concerning protection from deportation under Union law according to the state of the law that prevailed before 1 December 2013, under Item 2 of the challenged decision, because he cannot benefit from that reversal in any way, inasmuch as his application for subsidiary protection status under Union law is inadmissible under the law as it now applies.

32 3. The claim that the Complainant asserts in the alternative, for a finding that there is national protection from deportation to Somalia, is also inadmissible. The Complainant is already entitled by statute to national protection from deportation to Somalia on the grounds of his foreign refugee status, under Section 60 (1) sentence 2 of the Residence Act (see para. 29 above). Here the Complain-

ant lacks the need for protection of a legal interest that is required for a finding of national protection from deportation on a further basis of law.

33 The Complainant also lacks the need for protection of a legal interest in respect of an isolated reversal of the negative decision as to national protection from deportation in Item 2 of the challenged decision, because he already enjoys the protection from deportation that he seeks in Germany because of the refugee status he was granted in Italy, as already explained above.

34 4. The dispute about the lawfulness of the deportation warning in Item 3 of the challenged decision has not been settled by the declarations made in the hearing before the Higher Administrative Court. The Higher Administrative Court's opinion to the contrary (copy of the decision, para. 29) conflicts with federal law.

35 It is true that the replacement of the warning of deportation to the Complainant's country of origin by a warning of deportation to Italy, as was made by the Respondent's representative at the appeal hearing of 14 January 2013, has not been introduced into these proceedings by the Complainant by way of an amended complaint under Section 91 (1) of the Code of Administrative Court Procedure. In an administrative proceeding, under the principles governing disposition of the case – and in contrast to Section 68 of the Code of Fiscal Court Procedure and Section 86 of the Social Court Procedure Act – that is a matter for his choice alone. A reinterpretation under Section 47 (1) of the Administrative Procedure Act fails because the substitution of the destination state constitutes an extensive change in the substance of the deportation warning. But the Complainant's petition challenging the deportation warning has not been disposed of by the failure to include the new designation of the destination state in the proceedings. This is because counsel for the Complainant declared the dispute on the principal matter settled only to the extent that the Respondent revoked the decision of 22 October 2010. Yet in the deportation warning, the Respondent merely revoked the designation of the destination state, 'to his country of origin', and not the deportation warning per se. The deportation warning still retains its administrative nature even without a designation of the destination country (see judgment of 13 February 2014, op. cit., para. 25). The declaration

of settlement is meaningless to that extent, for ‘to his country of origin’, a non-specific designation of a destination state, did not constitute an administrative act – any more than did its revocation – that was capable of being challenged, because it has no dispositive effect.

36 In its version achieved by Item 2 of the supplementary decision of 15 May 2014, the deportation warning at issue meets the requirements for lawfulness under Section 34 (1) and Section 38 (2) of the Asylum Procedure Act. However, in its original version it was unlawful insofar as contrary to Section 60 (10) sentence 2 of the Residence Act, it did not designate Somalia as the country to which the Complainant could not be deported. The Respondent was required to make that designation because of the binding effect of the Italian refugee status that was granted because of the Complainant’s Somali nationality. The Respondent corrected this legal defect by subsequently designating Somalia as the country to which the Complainant cannot be deported, under Item 2 of the supplementary decision of 15 May 2014. The designation of the country to which an individual cannot be deported constitutes a partial provision that is capable of being treated as independent, according to the concept behind Section 59 (3) and Section 60 (10) sentence 2 of the Residence Act. The parties have acknowledged the change in the situation of fact by concurring declarations of settlement. Therefore the dispute with regard to this partial provision of the deportation warning must be discontinued, under a corresponding application of Section 92 (3) of the Code of Administrative Court Procedure in conjunction with Section 141 and Section 125 (1) of the Code of Administrative Court Procedure. The prior decisions on this aspect are declared without force or effect, in accordance with Section 173 sentence 1 of the Code of Administrative Court Procedure in conjunction with Section 269 (3) sentence 1 of the Code of Civil Procedure. For the remainder, the complaint against the deportation warning was to be denied.

37 5. Insofar as the dispute has been decided by litigation, the disposition as to costs proceeds from Section 155 (1) sentence 1 Code of Administrative Court Procedure. Insofar as proceedings were discontinued, costs were to be adjudicated as the court sees fit, taking account of the status of the facts and of the dispute to date, in accordance with Section 161 (2) of the Code of Administra-

tive Court Procedure. As the Complainant did not prevail concerning the discontinuance of the asylum procedure under Sections 32 and 33 (1) of the Asylum Procedure Act, and also concerning subsidiary protection under Union law and national protection from deportation, this Court finds it appropriate – including in respect of the cost of the discontinued part of the proceedings to be borne by the Respondent – to allocate the imposition of costs such that the Complainant is to assume two-thirds and the Respondent is to assume one-third of the costs of the dispute.

38 No court costs are imposed, in accordance with Section 83b of the Asylum Procedure Act. The value at issue proceeds from Section 30 of the Act on Attorney Compensation; there are no grounds for a derogation under Section 30 (2) of the Act on Attorney Compensation.

Prof Dr Berlit Prof Dr Dörig Prof Dr Kraft

Fricke Dr Maidowski