FEDERAL ADMINISTRATIVE COURT

IN THE NAME OF THE PEOPLE

DECISION

BVerwG 10 C 27.07
OVG 11 LB 75/06

Released
on 18 December 2008
by Ms. Röder
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 Administrative Court
upon the hearing of 18 December 2008
Federal Administrative Court Justice Dr. Mallmann sitting as Presiding Justice
and Federal Administrative Court Justices Prof. Dr. Dörig, Richter, Dr. Kraft and Fricke

decides:

On appeal by the Complainant, the judgment of the Higher Administrative Court of 18 July 2006 is set aside.

The case is remanded to the Lower Saxony Higher Administrative Court for further hearing and a decision.

The disposition as to costs is reserved for the final judgment.

Reasons:

I

1 The Interested Party, a Turkish national of Kurdish ethnicity, seeks to be granted refugee status.

2 The Interested Party first applied for asylum in November 1998. Among the grounds he cited were the fact that he had supported HADEP in Turkey. Following the arrest of friends with whom he had worked politically, he had fled to relatives in Istanbul. Because he was being sought in his home town, he said he left Turkey in October 1998 by air. Only when challenged did he acknowledge that he had already attempted to enter German territory by land in mid-June 1998 under an alias. During the asylum proceedings, the Interested Party published articles in the periodical Özgür Politika under a pseudonym. The Federal Office for the Recognition of Foreign Refugees (now the Federal Office for Migration and Refugees) – the ‘Federal Office’ – rejected his application for asylum in a decision of 23 November 1998, as being manifestly unfounded. The subsequent appeal was unsuccessful. In regard to the adduced post-flight reasons, it can be

gathered from the grounds of the now-incontestable administrative court decision of 9 December 1999 that there is no continuity between the conduct displayed in the Interested Party's country of origin and his post-flight conduct.

3 On 15 October 2003, the Interested Party filed a follow-up application for asylum, stating that he had left the Federal Republic of Germany in mid-June 2000, and had then stayed in Istanbul under a false name. From August 2002 onward, he had become politically active again, he said, and had maintained contact with Özgür Politika via telephone calls and e-mails. In that paper, under his own name, he had published an interview with a Kurdish singer (April 2003) and an article (September 2003) about the singer. After being arrested in June 2003, in September 2003 he was able only with difficulty to avoid another arrest. Because he was being sought both in Istanbul and in his home town under both a false name and his true name, he decided again to flee to Germany.

4 By a decision of 5 March 2004, the Federal Office rejected the Interested Party's application for asylum status. At the same time, the Federal Office found that the conditions under Section 51 (1) of the Aliens Act existed in regard to Turkey. Even if doubts existed about the information provided by the Interested Party, it was clear that he had appeared by name as a journalist in the newspaper Özgür Politika, which is affiliated with the PKK (KADEK) and banned in Turkey.

5 The Federal Officer for Asylum Matters (the 'Federal Officer') appealed this decision to the Administrative Court, but met with no success. The Federal Officer appealed that initial decision to the Higher Administrative Court; the appeal was then denied in a decision of 18 July 2006. According to the grounds of its decision, the Higher Administrative Court found it credible, despite indications to the contrary, that the Interested Party did temporarily reside in Turkey after the end of the first asylum proceedings. The court left open whether his claims of political activity in Turkey conformed to the facts, and whether he was threatened with political persecution because of publications under his own name in Özgür Politika concerning Kurdish singers. The court held that the crucial point to be taken into account was that the Interested Party had continued and intensified

his journalistic work for that newspaper while in Germany. Here, the court said, he regularly publishes articles that appear under his own name, in which he writes critically of conditions in Turkey, and whose content from the viewpoint of the Turkish state is suitable to contribute toward the spread of separatist thinking. Because of this exposed pro-Kurdish commitment, the court found a substantial probability that he was threatened with political persecution if he returned to Turkey, despite the reform process there. The court held that the reason for a normal exclusion under Section 28 (2) of the Asylum Procedure Act, which took effect on 1 January 2005, did not oppose taking account of the subjective post-flight reasons adduced in the follow-up proceeding. In conjunction with the terms of Paragraph 1 of the provision, concerning the basic right of asylum, the court found that an exception to the norm, leading to recognition of refugee status, exists where post-flight activities represent the expression and continuation of a conviction that has already existed and clearly been acted upon during a person’s residence in his country of origin. This case, the court ruled, was an exceptional case of that nature. Although the Administrative Court in the initial proceedings denied the appeal in its decision of 9 December 1999, it was evident from the grounds of the decision that despite certain reservations, the court had accepted as true the information provided by the Interested Party about his pre-flight experiences. Consequently the political activities now claimed were founded on an orientation already expressed earlier, and did present the requisite continuity of content.

6 In the grounds for his appeal to the Federal Administrative Court, which this Court has consented to hear, the Federal Officer argued that in light of the legislative goal of reducing follow-up applications, post-flight activities that represent the expression of a conviction that has already existed and clearly been acted upon during a person’s residence in his country of origin are not sufficient to establish an exception from the reason for normal exclusion under Section 28 (2) of the Asylum Procedure Act. Furthermore, he argued, the amendment to the provision of the Directive Implementation Act of 19 August 2007 has uncoupled the reason for exclusion from the terms of Paragraph 1. In any case, he claimed, the appealed decision lacked adequately supportive findings.

7 The Respondent and the Interested Party defend the appealed decision.

II

8 The appeal to this Court by the Federal Officer for Asylum Matters is upheld, because the appealed decision is founded on a contravention of federal law (Section 137 (1) No. 1 Code of Administrative Court Procedure). To be sure, for purposes of the present appeal, it is not objectionable that in regard to the Interested Party's follow-up application, the court below assumed that if he returned to Turkey he would be exposed to the threats addressed in Section 60 (1) of the Residence Act as a consequence of subjective post-flight circumstances that he had himself created (1.). But the court below's reasons for assuming that by exception, the conditions for a normal exclusion under Section 28 (2) of the Asylum Procedure Act do not apply, do not withstand the present Court's review (2.). The findings of fact in the appealed decision do not suffice for this Court to arrive at a decision in this matter either for or against the Complainant (3.), so that the appealed decision must be set aside and the matter must be remanded to the court below for further hearing and a decision (Section 144 (3) Sentence 1 No. 2 of the Code of Administrative Court Procedure).

9 The legal assessment of the recognition of refugee status sought by the Interested Party is controlled by the Asylum Procedure Act in the version promulgated on 2 September 2008 (Federal Law Gazette I p. 1798). If the court below were to decide now, it would have to base its reasoning on the status of law that applies at present, in accordance with Section 77 (1) of the Asylum Procedure Act. Consequently the provision of Section 28 of the Asylum Procedure Act as amended by the Act Implementing European Union Directives on Residence and Asylum Law of 19 August 2007 (Federal Law Gazette I p. 1970) should also be the basis for the decision of the present Court (decision of 1 November 2005 - BVerwG 1 C 21.04 - Buchholz 402.25 Section 73 Asylum Procedure Act No. 15; settled case law).

10 1. The conditions for conducting a further asylum proceeding as provided in Section 71 (1) Sentence 1 of the Asylum Procedure Act in conjunction with Sec-

tion 51 (1) through (3) of the Administrative Procedure Act are present in this case. At any event, the Interested Party's September 2003 publication under his own name in a periodical affiliated with the PKK establishes a subsequent change in the basic material situation within the meaning of Section 51 (1) No. 1 of the Administrative Procedure Act, which may argue in his favour in regard to refugee status and which – as is required for multiple grounds submitted for reconsideration of the case after a certain time (see decision of 13 May 1993 - BVerwG 9 C 49.92 - Buchholz 402.25 Section 1 Asylum Procedure Act No. 161) – has been adduced in the follow-up application within the three-month deadline under Section 51 (3) of the Administrative Procedure Act. In the present case, the court below assumed there is a substantial probability that the Interested Party would be threatened with political persecution upon his return to Turkey, because of his exposed pro-Kurdish involvement that developed during the asylum proceedings. This Court has no objection to that assumption; the court below's prognosis of persecution, measured by the standard of review under Section 60 (1) Sentence 1 of the Residence Act, is not objectionable in the present appeal proceedings.

11 2. The court below affirmed that the Interested Party was entitled to refugee status on grounds that are not compatible with Section 28 (2) of the Asylum Procedure Act. According to that provision, follow-up proceedings cannot as a rule confer refugee status if the foreigner reapplies for asylum after the withdrawal or incontestable rejection of an earlier application, and if the follow-up application is founded on circumstances that he himself has created after the withdrawal or incontestable rejection of his earlier application.

12 a) Contrary to the Interested Party's opinion, the provision that took effect on 1 January 2005 does extend to post-flight circumstances that came into being before that date. There is no explicit transitional provision, so that the provision of Section 77 (1) of the Asylum Procedure Act remains in force. The retroactive application of the new provision to the circumstances is further supported by the legislator's intent that the provision should eliminate the previous incentive to pursue a new asylum proceeding on the basis of new post-flight reasons after a person has emigrated without having been persecuted, and after the asylum

proceeding has ended; furthermore the number of follow-up proceedings was to be reduced in order to relieve the burden on the Federal Office (see Bundestag Publication 15/420 p. 110). These goals are achieved significantly more effectively by extending the new provision to subjective post-flight circumstances that had already come into being when the new provision took effect. The quasi-retroactivity of the provision offers no injury to the constitutional protection of a legitimate expectation, because only a legitimate expectation that has been acted upon can be worthy of protection – in other words, the 'investment of confidence' that led to the establishment of a legal status or other equivalent dispositions (Federal Constitutional Court, decision in camera of 12 September 2007 - 1 BvR 58/06 - juris Marginal No. 20 with citation of decision of 16 July 1985 - 1 BvL 5/80 et al. - BVerfGE 69, 272 <309>, Decision of 5 May 1987 - 1 BvR 724/81 et al. - BVerfGE 75, 246 <280>). Nothing has either been adduced or is evident in this regard; moreover, the individual concerned still has protection against deportation under Section 60 (2) through (5) and (7) of the Residence Act, so that it does not seem unreasonable to group post-flight circumstances that have already come into being among the conditions for normal exclusion (on the quasi-retroactivity of Section 28 (2) of the Asylum Procedure Act, see: Decision of 23 April 2008 - BVerwG 10 B 106.07 - juris Marginal No. 5; Münster Higher Administrative Court, decision of 12 July 2005 - 8 A 780/04.A - InfAuslR 2005, 489; Koblenz Higher Administrative Court, order of 5 January 2006 - 6 A 10761/05 - AuAS 2006, 102).

13 b) But since, in any case, the Interested Party's articles published under his own name after the follow-up application was filed do fall under the conditions of Section 28 (2) of the Asylum Procedure Act, they fall under the statutory consequence that refugee status cannot as a rule be granted in a follow-up proceeding. In assuming an exception from this rule, the court below – albeit under Section 28 (2) of the Asylum Procedure Act in the now outdated version of the provision under Art. 3 No. 18 of the Immigration Act of 30 July 2004 (Federal Law Gazette I p. 1950) – taking its orientation from Paragraph 1 of the provision, considered it sufficient that the post-flight activities represent an expression and continuation of a conviction held and clearly acted upon while in the individual's country of origin (concurring, Münster Higher Administrative Court, decision of

12 July 2005 - 8 A 780/04.A – InfAuslR 2005, 489 <490>). This Court cannot agree. For the version of the provision as amended by the Directive Implementation Act of 19 August 2007, in any case, although continuity of political convictions acted upon externally, in terms of both content and time, is an important indicator, nevertheless it is not sufficient in itself to refute the statutory presumption that the norm applies. Rather, the applicant for asylum must adduce good reasons why he became politically active in exile, or intensified his former activities, only after the asylum proceedings were unsuccessful. On this point, this Court has considered the following:

14 In Section 28 (2) of the Asylum Procedure Act, the legislature ordained as a matter of rule that a risk-free provocation of persecution through post-flight reasons that the individual himself created after the first asylum proceedings ended should fall under the suspicion of abuse. This is evident from the statement of reasons for the draft bill, which aim at removing the former incentive to pursue further asylum proceedings on the basis of newly arising post-flight reasons following an immigration without persecution and the end of the initial asylum proceedings (see Bundestag Publication 15/420 p. 110). By contrast, there is no filter for subjective post-flight circumstances that already came into being during the initial proceedings; for refugee status these – in contrast to a recognition of refugee status under Section 28 (1) of the Asylum Procedure Act – do not even need to be founded on a firm conviction that has already clearly been acted upon in the country of origin. The crucial caesura in time for an understanding of the provision lies in the (unsuccessful) termination of the initial proceedings; for post-flight reasons created by the individual himself after that date, as a rule an abuse of the claim of refugee protection is presumed. Thus there is no need for a positive demonstration of the ultimate connection between the post-flight circumstances created by the individual himself and the sought refugee status in the specific case. Section 28 (2) of the Asylum Procedure Act shifts the burden of substantiation and the objective burden of proof to the applicant for asylum, who must refute the statutory presumption of abuse in order to achieve refugee status.

15 A different abuse provision was included in Section 1a of the Asylum Procedure Act of 1982 (Act of 6 January 1987, Federal Law Gazette I p. 89, amended by the Act of 9 July 1990, Federal Law Gazette I p. 1354). There, circumstances adduced by a foreigner as reasons for his fear of political persecution were to be left out of consideration in a decision as to asylum status, if certain facts showed that the foreigner brought those circumstances about within the scope of that Act for the purpose of creating the conditions for obtaining asylum status. A comparable approach in a specific case of abuse requiring proof for all subjective post-flight reasons – whether brought into being before or after the conclusion of the initial proceedings – was provided by the European Commission in Art. 8 (2) of its proposal for a Directive on Minimum Standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection (Official Journal C 51 E/325 of 26 February 2002). But this was not model that was adopted in the voting on the Directive; instead it is included in diluted form in the review requirement under Art. 4 (d), and moreover in the possibility for Member States to restrict the rights proceeding from international protection, under Art. 20 (6) of Council Directive 2004/83/EC of 29 April 2004 (Official Journal L 304 of 30 September 2004 p. 12; corr. Official Journal L 204 of 5 August 2005 p. 24). On this point, in the hearing before this Court, the representative of the Federal Ministry of the Interior explained that the guiding factor in the change from the Commission draft to a regulatory presumption linked to external events was the problem of proving the motives behind subjective post-flight circumstances. The German legislature exercised the regulatory option for Member States under Art. 5 (3) of Directive 2004/83/EC, when it enacted Section 28 (2) of the Asylum Procedure Act in the version of the Directive Implementation Act of 19 August 2007, and adapted the provision that had been in effect since 1 January 2005 to the wording of the Directive (see Bundestag Publication 16/5065 p. 216 et seq.).

16 The standard for distinguishing a normal exclusion from an exceptional case in which post-flight reasons created after the end of the first proceedings do result in asylum status must be derived from the regulatory model chosen by the legislators, and from the purpose of the provision. The statutory presumption of abuse is refuted if the applicant for asylum can clear away the suspicion that

after the rejection of the first application he developed or intensified post-flight activities solely or primarily with an eye to obtaining refugee status. From the prescriptions in Art. 5 (2) and (3) of Directive 2004/83/EC, it can be deduced that the criterion of continuity of convictions acted upon outwardly is also legitimate under European law, and has an indicative effect, but is not sufficient to refute the presumption. If the individual's profile of activity remains unchanged after the first proceedings end, the presumption of an abusive link between post-flight activities and the sought status is rather remote. But if the applicant for asylum becomes politically active in exile, or intensifies his former activities, only after an unsuccessful asylum proceeding, he must give good reasons for such a change if he is to clear away the suspicion that the activities were pursued primarily to create the conditions for asylum status (finding of Magdeburg Higher Administrative Court, decision of 20 June 2007 - 3 L 309/05 - juris p. 17 et seq. of the copy of the decision, even under the former legislation). Here the judge assessing the facts must conduct an overall assessment of the personality of the applicant for asylum and his motives for first taking up or intensifying his activities, against the background of his previous assertions and his pre-flight experiences.

17 c) The normal exclusion of refugee status for post-flight reasons created by the individual himself after the end of the first proceedings is compatible with the provisions of the Geneva Convention – 'GC' – and therefore also does not raise doubts under European law in regard to Art. 5 (3) of Directive 2004/83/EC ('Without prejudice to the Geneva Convention …').

18 First of all, it already appears doubtful whether fear of persecution within the meaning of Art. 1A of the GC can exist at all in cases of risk-free provocation of persecution in a host country. To be sure, the definition of refugee under Art. 1A (2) of the GC also includes refugees 'sur place' – i.e., persons who become refugees only after immigrating. Nevertheless, it does not appear that one must necessarily conclude as a consequence that, without legal limitation, post-flight reasons created by the individual himself can also provide grounds for refugee status – albeit subject to the proviso of a careful examination of the circumstances (UNHCR, Handbook on Procedures and Criteria for Determining Refu-

gee Status, Geneva 1979, Nr. 96; Marx, *Handbuch der Flüchtlingsanerkennung* [Handbook of Refugee Status Recognition], Section 30 Marginal No. 10). Against this position, it is argued that the ‘events’ within the meaning of Art. 1A (2) of the GC always pertain to events within the home country, not actions by the concerned individual in the host country (Frowein/Zimmermann, *Der völkerrechtliche Rahmen für die Reform des Asylrechts* [The International Law Context for the Reform of Asylum Law] – Opinion for the German Federal Ministry of Justice, 1993, p. 15; Richter, ZaöRV 1991, 1 <19 et seq.>; Maassen, *Die Rechtsstellung des Asylbewerbers im Völkerrecht* [The Legal Status of the Asylum-Seeker in International Law], 1997, p. 281). Moreover, at the time when the Convention was signed, the treaty states did not wish to forgo the ability to regulate the political activities of foreigners, and to expel foreigners if such activity nevertheless took place; yet Art. 33 of the GC would have deprived them of this option if even post-flight reasons created by the individual himself could provide grounds for refugee status. Nor does the practice of nations provide any indication to the contrary (according to the analysis by Richter, op. cit.). There is even less of an argument that post-flight reasons created by the individual himself should be incorporated within the scope of protection of Art. 1A GC if the circumstances represent an abusive claim on the protection provided under the Convention.

19 But this question may be set aside, because through its prohibition on expulsion or return (‘refoulement’) anchored in Art 33 (1), the Geneva Refugee Convention does not confer any particular status on a foreigner threatened with political persecution elsewhere, but merely guarantees protection against deportment for the duration of the threat (see Bundestag Publication 15/420, p. 109 et seq.; in the same sense, Koblenz Higher Administrative Court, order of 5 January 2006 - 6 A 10761/05 - AuAS 2006, 102; Bremen Higher Administrative Court, order of 20 July 2006 - 2 A 215/05.A - juris Marginal No. 16; Magdeburg Higher Administrative Court, decision of 19 December 2006 - 1 L 319/04 - juris Marginal No. 31; Funke-Kaiser, in: GK-AsylVfG, II-Section 28 Marginal No. 57). In this sense, the prohibitions on deportation under Section 60 (2), (3), (5) and (7) of the Residence Act regularly afford adequate protection.

20 3. Since the court below did not base its decision on the above standard for distinguishing normal cases from exceptional cases, the appealed decision is contrary to federal law. The findings of fact by the court below do not suffice for this Court to reach a decision of its own.

21 Because of the lack of sufficient findings of fact in the appealed decision, this Court cannot examine whether the appealed decision confirming the Respondent's obligation to confer refugee status is correct for other reasons (Section 144 Abs. 4 Code of Administrative Court Procedure). It is not entirely clear from the grounds of the decision (p. 10 et seq. of the copy of the decision), whether the court below positively found that the Interested Party had spent the entire time between June 2000 and September 2003 in Turkey, as he claimed, and had not merely stayed there 'temporarily' (p. 11, bottom, of the copy of the decision). The court below expressly left unanswered the question whether his statements about his further political activities in Turkey conform to the facts, and whether he was threatened with political persecution because of the publications in April and September 2003 (p. 12 of the copy of the decision). Thus the necessary findings are absent for basing a grant of asylum status on other circumstances that do not fall under the rule of Section 28 (2) of the Asylum Procedure Act. This Court also cannot arrive at any final decision in the Complainant's favour, because the findings in the appealed decision likewise do not suffice for a review of the decided case on the basis of Section 28 (2) of the Asylum Procedure Act with an eye to the standard developed for distinguishing a normal case from an exceptional case. Therefore the appealed decision must be set aside, and the matter must be remanded to the court below for further hearings and a decision (Section 144 (3) Sentence 1 No. 2 Code of Administrative Court Procedure).

22 4. In the examination under Section 28 (2) of the Asylum Procedure Act, the court below will again have to investigate the question of whether and how long the Interested Party stayed in Turkey between the conclusion of the initial proceedings and his submission of the follow-up application, and whether he became politically active there, as he claims. A return to his country of origin in and of itself is immaterial, because in so returning the Interested Party only

complies with his obligation to emigrate following the negative outcome of asylum proceedings. But if he indeed did publish from Turkey the articles that appeared under his own name in April und September 2003 and thus – a further matter that requires clarification – exposed himself to the risk of political persecution because of their content critical of the regime, in any case his post-flight activities conducted in Germany after he filed the follow-up application did not appear to have intensified. If the publications of April and September 2003 from Turkey actually resulted in a substantial probability of political persecution, a new pre-flight reason would exist, and a review under Section 28 (2) of the Asylum Procedure Act would be obsolete.

23 However, if it is not possible to verify the interim period spent in Turkey and a publication activity by the Interested Party from there that offers grounds for a risk of political persecution, the court below would have to reexamine whether the political activities, as he now claims, derived from an orientation already clearly expressed before, and whether they present the necessary continuity. Its assessment in this regard (p. 27 of the copy of the decision) gives rise to reservations, because the court below has not convinced itself with the requisite certainty (Section 108 (1) Sentence 1 Code of Administrative Court Procedure) of the Interested Party’s claims regarding his pre-flight experiences before the first application for asylum was filed. To be sure, a separate clarification of this point is not compulsory in a follow-up proceeding. But such findings are necessary in the present case, since to that extent the court below based its reasoning on an assumption of truth from the decision of the Oldenburg Administrative Court of 9 December 1999, which in its turn had in fact actually denied continuity for lack of credibly demonstrated political activity. If the court below were then able to convince itself of the continuity, in terms of content and time, of the Interested Party’s political activity, it would furthermore have to examine why he published for the first time under his own name only after the first proceedings were over. Only if the Interested Party can furnish good reasons for so doing will he have refuted the statutory presumption that he did so with an eye to the refugee status he sought.

24 5. The disposition as to costs is reserved for the final judgment. The value at issue proceeds from Section 30 (1) of the Attorney Compensation Act.

Dr. Mallmann Prof. Dr. Dörig Richter

Prof. Dr. Kraft Fricke

Field: BVerwGE: Yes

Asylum law Professional press: Yes

Sources in Law:

Asylum Procedure Act	Section 28
Residence Act	Section 60 (1) Sentence 1
Geneva Convention	Art. 1A (2), Art. 33 (1)
Directive 2004/83/EC	Art. 5

Headwords:

Exception; exceptional case; refugee status; follow-up application; follow-up proceedings; post-flight reason; post-flight circumstances; regular case; reason for normal exclusion; post-flight circumstance created by party himself; subjective post-flight reason; recognition of refugee status.

Headnote:

According to Section 28 (2) of the Asylum Procedure Act, post-flight circumstances created by the individual himself after the conclusion of asylum proceedings do not as a rule result in recognition of refugee status. To establish an exception to this rule, in cases of political activity in exile the continuity in content and time of the convictions outwardly acted upon is indeed an important indicator, but is not sufficient in itself to refute the presumption under the statutory norm. Rather, the applicant for asylum must furnish good reasons why he first became politically active in exile, or intensified his former activities, only after an unsuccessful asylum proceeding.

Decision of the 10th Division of 18 December 2008 – BVerwG 10 C 27.07

I. Stade Administrative Court, 13.06.2005 – Case No.: VG 4 A 483/04 -
II. Lüneburg Higher Administrative Court, 18.07.2006 – Case No.: OVG 11 LB 75/06 -