FEDERAL ADMINISTRATIVE COURT

IN THE NAME OF THE PEOPLE

DECISION

BVerwG 10 C 52.07
VGH 11 B 02.31724

Released
on 19 January 2009
by Ms. Förster
Senior Court Official
as Clerk of the Court

in the administrative case

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

the Tenth Division of the Federal Administrative Court
upon the hearing of 19 January 2009
Federal Administrative Court Justice Dr. Mallmann sitting as Presiding Justice,
with Federal Administrative Court Justices Richter, Beck, Prof. Dr. Kraft and Fricke

decides:

To the extent that the Parties have declared the dispute settled by joint agreement (with regard to the threat of deportation of Complainant 2 to the Russian Federation in Item 4 of the decision of the Federal Office for Migration and Refugees, dated 19 October 2001), the proceedings are terminated.

To that extent, the decisions of the Bavarian Higher Administrative Court of 31 August 2007 and of the Würzburg Administrative Court of 2 September 2002 are without effect.

For the rest, in response to the appeal of the Federal Officer for Asylum Matters, the decision of the Bavarian Higher Administrative Court of 31 August 2007 is set aside insofar as concerns recognition of the refugee status of Complainant 2.

To that extent, the matter is remanded to the Higher Administrative Court for a new hearing and decision.

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

R e a s o n s :

I

1 Complainant 2 (hereinafter the Complainant), of Chechnyan origin, seeks recognition as a refugee.

2 The Complainant, born in 1954, grew up in Chechnya and – like her husband, a music teacher and concert pianist, and their daughter (formerly Complainants 1 and 3) – is a national of the Russian Federation and an ethnic Chechen. In September 1999 the family relocated from Grozny, initially to Moscow. At the beginning of January 2000 they travelled from there to the Federal Republic of Germany, and applied for asylum. The stated grounds were in essence that in July 1999 the husband had been abducted by religious fanatics in Chechnya and had been imprisoned for a considerable time. For that reason, and because of the turmoil of war, the family stated that it could no longer remain in Chechnya; they stated that as Chechens they were also unable to live in peace in Moscow.

3 The Federal Office for the Recognition of Foreign Refugees (now the Federal Office for Migration and Refugees) – the ‘Federal Office’ – denied them recognition as persons entitled to asylum, and found that the requirements under Section 51 (1) of the Aliens Act and the impediments to deportation under Section 53 Aliens Act were not present; it threatened the family with deportation to the Russian Federation.

4 In response to the action that was then lodged, the Würzburg Administrative Court ordered the Federal Office in a decision of 2 September 2002 to grant the family protection from deportation, under the laws on refugees. Although the Complainants were not entitled to asylum status, said the court, the family could claim protection from deportation as refugees, because as ethnic Chechens they could not reasonably be expected to return to Chechnya. A partisan war was being waged with great ferocity there, in the course of which massive violations of human rights were being committed, including by the Russian armed

forces. The court found that there was no internal flight alternative in other territories of the Russian Federation.

5 The Federal Officer for Asylum Matters – the ‘Federal Officer’ – appealed this decision. In the appeal proceedings, the Complainant asserted that she had fallen ill with a post-traumatic stress disorder (PTSD) that required treatment. The Bavarian Higher Administrative Court gathered evidence in this regard by obtaining two expert opinions from medical specialists. Particularly after the opinion by public health officer and psychiatrist B. of 8 August 2005 stated the conclusion that the Complainant was suffering from a severe and now-chronic PTSD, for the treatment of which long-term psychotherapy and a continuation of antidepressant medication were absolutely necessary, in August 2005 the Federal Office granted the Complainant protection from deportation under the laws on aliens pursuant to Section 60 (7) of the Residence Act, with regard to the Russian Federation. With regard to refugee status, the Federal Office held firm to its rejection.

6 In a decision of 31 August 2007, the Higher Administrative Court upheld the Federal Office’s rejection decision as legally valid in respect of the Complainant’s husband and daughter. To that extent the decision became final and absolute. Concerning the Complainant, however, the court affirmed an entitlement to refugee status with regard to her PTSD requiring treatment. As reasons, the court stated in substance: The Administrative Court rightly granted the Complainant protection from deportation under the laws on refugees. However, such an entitlement did not exist independently of the illness with which she had been diagnosed, so that the action by the husband and daughter failed. The family had not emigrated after previously being persecuted. Here the court found it could set aside the question of whether prior to their departure for Germany, they would have been faced concretely and immediately with measures of Russian state power that would be material in asylum law, and whether Chechens coming from Chechnya who had until recently lived elsewhere in Russia had been exposed to group persecution at the turn of the year from 1999 to 2000. This was because in any case, the court said, the Complainants had had an internal flight alternative in Ingushetia at the time. At the time of their departure

they would have been assured a life of human dignity there, free from persecution – including within the meaning of Article 8 of Directive 2004/83/EC of the Council of 29 April 2004 (known as the ‘Qualification Directive’). Therefore, for this family that had not emigrated after previously being persecuted, the standard of reasonable probability applied in making the current prognosis regarding persecution. Under that standard, the Complainant’s husband and daughter did not have to fear suffering persecution within the meaning of Section 60 (1) of the Residence Act upon returning to the Russian Federation. They were not threatened with persecution either in Chechnya or in the Russian Federation, for individual reasons or because of their nationality or origin in the Northern Caucasus. Abuses relevant to asylum were no longer occurring in Chechnya with the frequency necessary in order to assume the existence of group persecution. Nor, said the court, were they currently being persecuted as a group in other parts of the Russian Federation; this was because, in particular, the widespread illegal practice of denying registration to Chechens was not material to asylum in normal instances. In this regard, the court found, it should also be taken into account now that the obligation to register did not take effect until a person had been residing in a place for 90 days, and that Chechens had very good prospects for success in defending themselves against an illegal denial of registration.

7 By contrast, the court found a reasonable probability that the present Complainant was threatened with persecution within the meaning of Section 60 (1) of the Residence Act if she returned to parts of the Russian Federation other than Chechnya. On the basis of the expert opinion from the medical specialists, the court was satisfied that she was suffering from severe, now-chronic PTSD, the treatment of which necessarily called for long-term psychotherapy with a continuation of antidepressant medication. If she were to take up residence in the Russian Federation outside Chechnya, there was a reasonable probability that these treatments, which were absolutely necessary for her, would be withheld from her for reasons relevant to asylum law, as a consequence of delayed registration – specifically, because of her ethnicity or her origin in the Northern Caucasus. The consequence would be that she would come into a concretely

life-threatening situation, and at the least would suffer severe damage to her health.

8 The widespread practice of denying registration to Chechnyans intending to in-migrate, said the court, represents a state measure that is connected with criteria relevant to asylum – i.e., either the ethnicity or the regional origin of the individual concerned. The court found that the statement in the Foreign Office's Situation Report of 17 March 2007, to the effect that these restrictions on in-migration would apply irrespective of ethnicity, was largely accurate, but not without exception. In particular, the manner in which the rules were applied had to be considered in deciding this question. However, the court said, in this regard the Foreign Office too conceded that the local regulations in question seriously affected repatriated Chechnyans' ability to settle legally in places where such regulations or administrative practices existed. It was also evident from the matter itself, said the court, that the restrictions served to seriously impede the legal in-migration 'of persons from the southern republics of the Russian Federation'. A preponderance of factors argued that the Complainant would initially be denied registration in the Russian Federation outside Chechnya. The court found that she would have to rely on settling in a rather large city because psychiatric and psychotherapeutic care would be possible for her only there. But restrictions on incoming migration were especially common in larger cities. Insofar as there was a good prospect of success in combating a denial of registration, the court said, it must in any case be expected that several months would pass before the Complainant would receive a non-time-limited registration, which was necessary for access to state healthcare. Therefore even a temporary denial of registration would have the consequence of causing serious detriment to the Complainant's legally protected rights of 'life' and 'freedom from bodily harm' that are protected under Section 60 (1) of the Residence Act and Article 2 (1) of the European Convention on Human Rights. Without access to the state healthcare system, she would not be able to pay the cost of the necessary therapy sessions and medications. The danger to life and limb thus to be expected were the direct consequence of state conduct which in turn was connected to factors material to asylum. This danger would, so to speak, arise 'automatically' without any further cause instigated by the individual concerned

or by third parties. Nothing in this picture was changed by the fact that a desk officer at the registration authority who refused to register the Complainant would not be causing her the resulting damage to her life and health in such a ‘targeted’ way that he would be purposely refusing to perform the requested official act in order to harm the Complainant in the indicated manner.

9 The present Complainant, said the court, also could not be directed to take up residence in Chechnya. Even though registration would not be denied her there, so that she would be sufficiently safe from such persecution, nevertheless given the general circumstances in Chechnya and her personal condition, today she could not reasonably be expected to reside in that part of the country. The absolutely necessary medical treatment would not be available to her there for reasons that were not to do with persecution, because medical care in Chechnya was deficient in general.

10 It is this decision against which the Federal Officer directed the present appeal, by authorisation of the Higher Administrative Court. It is his opinion that the decision of the court below is founded on too broad an interpretation of the concept of a targeted violation of rights. Even if denial of registration constituted an abuse relevant to asylum, he argued that the decision of the Higher Administrative Courts was defective. The assumed danger of persecution, he said, was limited to a geographically clearly defined zone, and therefore was equivalent to a ‘locally restricted’ group persecution. However, according to the case law of the Federal Administrative Court, such a persecution would not pertain to a person who lacked a local relationship to the territory where the danger existed. In that case the question of an internal flight alternative would be of no further concern. Irrespective of that fact, he argued, the reasons for the finding of a connection of a denial of registration that was relevant for asylum were self-contradictory and insufficiently sound. To that extent, the decision suffered from an improper formation of the court’s opinion and from procedural defects.

11 In the present proceedings, at this Court’s suggestion the Respondent lifted the threat of deporting the Complainant to the Russian Federation under Item 4 of

the decision of 19 October 2001. To that extent the parties have jointly declared their dispute settled.

12 The Federal Officer asks this Court

> to set aside the decisions of the Bavarian Higher Administrative Court of 31 August 2007 and of the Würzburg Administrative Court of 2 September 2002, insofar as they concern the refugee status of Complainant 2, and to that extent also to find against her in her suit.

13 The Complainant asks this Court

> to deny the appeal.

14 The Complainant defends the appealed decision, and in respect of the prohibition on deportation that she was granted under 60 (7) of the Residence Act and the suspension of the threat of deportation, she abandons her auxiliary prayer seeking subsidiary protection against deportation.

15 The Respondent, in agreement with the Federal Officer, considers that the grant of refugee status to the Complainant was not justified.

II

16 Now that the Respondent has lifted the threat of deportation to the Russian Federation under Item 4 of the decision of 19 October 2001 insofar as concerns the Complainant, and the parties have declared the matter settled in that regard, by due application of Section 141 Sentence 1 and Section 125 (1) Sentence 1 in conjunction with Section 92 (3) of the Code of Administrative Procedure, the proceedings in that regard are to be terminated. At the same time, under Section 173 of the Code of Administrative Procedure in conjunction with Section 269 (3) of the Code of Civil Procedure it must be found that the decisions of the courts below in that regard are without effect.

17 With regard to the Complainant's sole remaining petition, seeking refugee status, the appeal of the Federal Officer for Asylum Matters – the Federal Officer – has merit. The court below affirmed that the Complainant was entitled to refugee status on grounds that are incompatible with federal law (Section 137 (1) No. 1 Code of Administrative Procedure). Since this Court is not itself able to decide, on the basis of the findings of the court below, whether the Complainant should be granted refugee status for other reasons, 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 Code of Administrative Procedure).

18 The controlling provisions in the legal assessment of the Complainant's petition for refugee status are Section 3 (1) and (4) of the Asylum Procedure Act as amended in the notification of 2 September 2008 (BGBl I p. 1798) and Section 60 (1) of the Residence Act as amended in the notification of 25 February 2008 (BGBl I p. 162). The changes in the law recognised in these notifications under the Act for the Transposition of European Union Directives on Residence and Asylum Law of 19 August 2007 (BGBl I p. 1970) – the Directive Transposition Act – which took effect on 28 August 2007, were correctly applied as a basis by the Higher Administrative Court in its appellate decision of 31 August 2007, in accordance with Section 77 (1) Sentence 1 Clause 2 of the Asylum Procedure Act.

19 1. The court below awarded refugee status to the Complainant because she would at least temporarily be denied registration in the Russian Federation (outside Chechnya) on the basis of her ethnicity or her origin in the Northern Caucasus, and thus would also be barred from access to state healthcare, so that therefore she would be denied the medical treatment she urgently needs, with the consequence that she would fall into a situation concretely jeopardising her life, or at least would suffer severe damage to her health, without having an internal alternative for protection in Chechnya (copy of the decision Marginal No. 84 et seq.). These grounds do not withstand review by this Court.

20 Under Section 3 (1) of the Asylum Procedure Act, a foreigner is a refugee within the meaning of the Convention Relating to the Status of Refugees of 28 July 1951 (the Geneva Refugee Convention – GRC) if in the country of his citizenship or in which he habitually resided as a stateless person he faces the threats listed in Section 60 (1) of the Residence Act. Under Section 60 (1) Sentence 1 of the Residence Act, in application of the Geneva Refugee Convention, a foreigner may not be deported to a state in which his or her life or liberty is under threat on account of his or her race, religion, nationality, membership of a certain social group or political convictions. In finding whether persecution under Sentence 1 exists, Article 4 (4) and Articles 7 through 10 of Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ L 304 p. 12) – the 'Qualification Directive' – must additionally be applied (Section 60 (1) Sentence 5 Residence Act). Under Article 9 (1) of the Directive, persecution in this sense comprises acts which must

> a) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or
>
> b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a).

21 Article 9 (3) of the Directive ordains that there must be a connection between the reasons for persecution mentioned in Article 10 and the acts of persecution as qualified in paragraph 1.

22 a) The court below incorrectly proceeded on the assumption that the temporary denial of registration – which in that court's own opinion would not otherwise be relevant for purposes of asylum – constituted an act of persecution within the meaning of Article 9 of the Directive because of the special circumstances in the Complainant's case. The definition of an act of persecution not only presupposes that a certain conduct by the potential actor of persecution must consti-

tute a severe violation of basic human rights or a comparably severe violation of rights by an accumulation of various measures (Article 9 (1) a and b of the Directive), but also requires that the conduct must aim to violate such a protected legal right. This interpretation is consistent with supreme court case law on persecution relevant for asylum, which establishes the requirement of an intentional violation of rights, or in other words, a targeted violation of a legal right that is protected under asylum law (see the Federal Constitutional Court's fundamental judgment of 10 July 1989 - 2 BvR 502/86 etc. - BVerfGE 80, 315 <334 et seq.>). Targeting refers not only – as the court below appears to believe – to the characteristics relevant for asylum, or in the present case to the reasons for persecution within the meaning of Article 10 of the Directive, with which the action must be connected (see Article 9 (3) of the Directive), but also to the violation of rights itself that the act brings about. Further support for such an interpretation of the concept of an act of persecution within the meaning of Article 9 of the Directive can be found in the reasons given by the Commission of the European Communities in its proposal for a Council Directive of 12 September 2001, which states – in that case, regarding Article 11 (1) of the proposal – that in order to constitute persecution, 'acts must be intentional, sustained or systematic and must be sufficiently serious to make return to the country of origin untenable' (COM (2001) 510 final p. 22).

23 On this basis, the local authorities' temporary denial of registration to the Complainant in the Russian Federation, under the circumstances found by the court below, cannot be considered an act of persecution directed against the Complainant's life and freedom from bodily harm. Insofar as concerns denials of registration on the part of local authorities outside 'large' or 'rather large' cities, there is already an absence of a causal connection between the denial of registration and the danger to life, limb and freedom from bodily harm caused by insufficient access to state healthcare. According to the lower court's own findings, the medical treatment (long-term psychotherapy and medications) needed by the Complainant is available only in the 'large' or 'rather large' cities of the Russian Federation (copy of the decision p. 56 et seq. Marginal No. 93). Thus, if only for that reason, the presumption of persecution for the case of denials of registration in other territories is excluded.

24 But even in those places where the necessary medical treatment is possible according to the findings of the court below, the temporary denial of registration to the Complainant does not constitute an act of persecution within the meaning of Article 9 (1) of the Directive, because by its nature this denial does not aim at violating the fundamental human right to life and freedom from bodily harm, which is the right at issue here. The requisite final connection described above between the conduct of the potential actor of persecution and the violation of human rights can regularly be affirmed without difficulties in the case of an active violation. However, on careful assessment, the denial of registration at issue here is a form of omission, namely the non-granting of a permit to migrate into a given city or municipality, which according to the findings of the court below – unless a remedy is already found outside the courts – can as a general rule be remedied through the courts (copy of the decision p. 37 Marginal No. 51). To be sure, even an omission may constitute persecution, but in such cases a separate examination is required as to whether the consequences that possibly might result only indirectly therefrom can still be attributed to that conduct as targeted violations of rights. A temporary denial of registration may in a targeted way violate a possible existing right to in-migration, and thus the right to freedom of movement within the state's territory. But this right is not among the fundamental human rights that must be violated in order for an act of persecution to be assumed under Article 9 (1) of the Directive (see also the Directive's referral there to Article 15 (2) of the European Convention on Human Rights). However, a further targeting of a violation of the right to life and freedom from bodily harm is not connected with the local authorities' denial of registration under the circumstances found by the court below. To be sure, this conclusion does not derive merely from the fact that according to the court below, the local authorities will as a rule be unaware of the medical problems present in the person of the Complainant (copy of the decision p. 59 Marginal No. 99). To that extent, the important point is not the future subjective notions of a given desk officer, which are in any case highly unlikely to be determinable in advance; rather, the point on which one must focus – in regard to an objective targeting – is the direction of targeting inherent in the measure under the given circumstances, by virtue of its nature. But by virtue of the nature of the meas-

ure, the denial of registration at issue here is intended not to bring about a violation of the life or health of a person desiring to in-migrate, but only to make the person take up residence in other parts of the country. Something else may apply, however, if such denials are based on a systematic state programme of persecution that aims at, or at least condones, a withholding of generally available medical care from a certain group of the population, and thus the associated endangerment of the life and health of that group. But no such circumstances have been found here.

25 b) Irrespective of the above, the appealed decision also could not stand because the findings of the court below do not support the court's conclusion that the temporary denial of registration with which the Complainant was threatened in the entire Russian Federation outside Chechnya, or at least in large cities where the requisite medical treatment for her condition is possible, would also be connected with her Chechnyan ethnicity or her origin in the Northern Caucasus (see Article 9 (3) in conjunction with Article 10 of the Directive). In this regard the formation of opinion by the court below does not rest on an adequately sound foundation of fact (Section 108 (1) Code of Administrative Procedure). To be sure, the Federal Officer's procedural objection on this point does not stand, for lack of adequate arguments establishing a violation of the right to be heard or of the court's duty to seek clarification. But in this matter he correctly complains of a breach of substantive law. First, the court below provides no specific, regionally related findings, even though it itself proceeds on the assumption of regional differences in registration practices, so that its conclusion that there is a nationwide connection between denials of registration and Chechnyan ethnicity or origin in the Caucasus is not understandably reasoned. Moreover, the court does not, as it must, address the contrary findings of fact and assessments of evidence by other Higher Administrative Courts, some of which arrived at the conclusion, on the basis of the knowledge available to them, that specifically in certain large cities of the Russian Federation, but in some cases elsewhere as well, the local authorities' denial of registration was not connected with Chechnyan ethnicity or origin in the Northern Caucasus, but rather regarded all persons equally who were attempting to migrate into the area (see for example Lüneburg Higher Administrative Court, decisions of 16 January 2007 - 13 LA

67/06 - juris and 24 January 2006 - 13 LA 398/05 - juris ; Bremen Higher Administrative Court, decision of 31 May 2006 - 2 A 112/06.A - juris).

26 c) Since the assumption of persecution adopted by the court below already collapses for want of a targeted act of persecution (point a above), there is no need for a final clarification of whether a recognition of refugee status owing to a denial of registration would also be out of the question because an assumed future persecution for this reason would not be threatened nationwide, but would be limited to the Russian Federation outside Chechnya. To that extent, it appears questionable whether the Complainant, who comes from Chechnya, could claim at all for herself, as a refugee ‘sur place’, the possibility of (group) persecution in other parts of the Russian Federation outside her region of origin, even though she has had no relationship of any kind so far with those parts of the territory. This would also be associated with the question of whether, now that the Qualification Directive applies, one can adhere to the principles that have been developed in case law on what is known as locally limited group persecution, and whether the governing principles for a regional group persecution by the state should be applied without restriction, or what criteria should otherwise be applied in the case of a persecution event that occurs in a portion of the country of origin after the person has emigrated.

27 2. Even though according to the above discussion, the Complainant cannot be recognised as a refugee for the reasons stated by the court below (temporary denial of registration in parts of the Russian Federation as a ground for the status of refugee ‘sur place’), this Court cannot decide the matter finally against the Complainant and reject her suit for refugee status. The court below has stated that the Complainant cannot be recognised as a refugee for other reasons, but those remarks do not withstand review by this Court. To a significant degree, the court below denied the existence of previous persecution of the Complainant in part because it deemed that at the time of her emigration she had an internal flight alternative in Ingushetia; at the time of its decision, the court assessed the existence of any persecution of the Complainant upon her return according to the prognostic standard of reasonable probability, and did not take account of the facilitated standard of proof for previously persecuted

persons under Article 4 (4) of the Directive. This is incompatible with Section 60 (1) Sentence 4 and 5 of the Residence Act in conjunction with Article 4 (4) of the Directive. The findings of the court below do not suffice for a final assessment of the Complainant's previous persecution and her persecution upon her return, and therefore the matter must be remanded to the court below for further clarification (Section 144 (3) Sentence 1 No. 2 Code of Administrative Procedure).

28 To some extent the Higher Administrative Court did examine, and rejected, the existence of previous persecution in this matter – for example on account of the threat from 'Wahabis' in 1996 and 1997, the 'detention' of the Complainant's husband by radical Islamist forces in summer 1999, individual abuses by the Russian authorities at the beginning of the second Chechnyan war, and during the Complainant's residence in Moscow from the end of September 1999 to the beginning of January 2000 (copy of the decision p. 11 et seq., Marginal No. 5 et seq.). However, beyond that it explicitly left open the question of a direct danger of persecution because of a group persecution of the Complainant at the time of her emigration, because it found that any previous persecution on that basis was excluded because of the existence of an internal flight alternative in Ingushetia (copy of the decision p. 16 Marginal No. 13). Therefore it assessed the possibility of a group-related or individual persecution in the Russian Federation at the date of its decision only according to the standard of reasonable probability (see explicitly, for example, copy of the decision p. 41 Marginal No. 61) and, aside from persecution because of the reason for the status of refugee 'sur place' as discussed above, it denied such a possibility. Although this was in keeping with supreme court case law at the time (see, for example, decision of 8 December 1998 – Federal Administrative Court 9 C 17.98 - BVerwGE 108, 84 <85, 87> and decision of 30 November 2004 – Federal Administrative Court 1 B 49.04 - Buchholz 402.25 Section 1 Asylum Procedure Act No. 295; fundamentally on asylum law, Federal Constitutional Court, decision of 10 July 1989, op. cit., p. 344), it is no longer compatible with German federal refugee law now that Directive 2004/83/EC is in force.

29 Contrary to the view of the Higher Administrative Court, previous persecution in the context of recognition of refugee status under the Qualification Directive can no longer be denied because a flight alternative existed in another part of the country of origin at the time of emigration (so too, among others, the findings by the Kassel Higher Administrative Court, decision of 21 February 2008 - 3 UE 191/07.A - NVwZ-RR 2008, 828; Hailbronner, *Ausländerrecht* [Law on Foreigners], Section 60 Marginal No. 97; Marx, *Handbuch der Flüchtlingsanerkennung* [Manual of Recognition of Refugee Status], Section 14 Marginal No. 62). However, this does not automatically proceed from the provision – to be applied under Section 60 (1) Sentence 5 of the Residence Act – pursuant to Article 8 (2) of the Directive, that in examining whether a part of the country of origin meets the requirements for internal protection in accordance with paragraph 1, Member States shall ‘at the time of taking the decision on the application’ have regard to the general circumstances prevailing in that part of the country and to the personal circumstances of the applicant. First of all, this provision implies only that recognition of refugee status – if the threat of persecution of the applicant in one part of the country of origin has been established – cannot be refused because of an internal alternative for protection that existed formerly, but only because of an internal alternative for protection that exists at the time of the decision, as is also consistent with German case law to date. The provision, by contrast, does not address the question that we must deal with here, and that systematically comes first in order, of whether the application of the facilitated standard of proof for those who have previously been persecuted is opposed by the existence of an internal alternative for flight or protection at the time of their emigration. This question must be addressed on the basis of Article 4 (4) of the Directive. According to that provision – so far as recognition of refugee status is concerned – the fact that an applicant has already been subject to persecution or to direct threats of such persecution is a serious indication of the applicant’s well-founded fear of persecution, unless there are good reasons to consider that such persecution will not be repeated. The very wording of the provision indicates that an applicant who has suffered persecution in his country of origin, or was directly threatened with persecution there, is entitled to the facilitated standard of proof under Article 4 (4) of the Directive, irrespectively of whether he might also have found refuge in another part of his homeland at the time of

emigration. In other words, the facilitated standard of proof in the form of a refutable presumption is connected solely with the circumstance of suffered or directly threatened persecution, not with other prerequisites, such as options for protection in other parts of the country. In terms of the rules of evidence, the provision is obviously intended to privilege those who have in fact already experienced persecution personally in their homeland, because they either have suffered persecution themselves or were directly threatened with it. The principle of subsidiarity of refugee protection, by contrast, is acknowledged with a referral to an internal alternative for protection at the time of taking the decision about granting refugee status (see Art 8 (2) of the Directive). This does not mean that someone who seeks refuge outside the country despite the existence of an alternative for refuge within his own country at the time of emigration should be favoured unjustifiably. Such an internal flight alternative at the time of emigration, if it remains in existence unchanged at the time of taking the decision about granting refugee status, leads to a refusal of recognition even now that the Directive applies. This is because in such a case the presumption under Article 4 (4) of the Directive that the applicant's fear of future protection is well-founded does not come into play, because of the existence of internal protection within the meaning of Article 8 of the Directive. Consequently any favourable treatment in comparison to the previous situation under German law can at most arise if an internal alternative for protection ceases to exist after the person has emigrated. For that reason, in refugee law – though not for asylum law under Article 16a of the Basic Law – this Court no longer adheres to its former case law, according to which persons who were persecuted or threatened with persecution in one part of their homeland, and who could have found the requisite protection in other parts of the country at the time of their emigration, cannot be deemed previously persecuted. To that extent, the concept of previous persecution must be understood differently within the meaning of the Directive than in the context of asylum law under Article 16a of the Basic Law, according to which an inescapable nationwide situation of the asylum applicant at the time of emigration is required.

30 For that reason, it was impermissible for the Higher Administrative Court to leave open whether the Complainant was threatened directly with group perse-

cution before her emigration, and to view her as not previously persecuted solely because at that time there was still a flight alternative in Ingushetia. In the remanded proceedings, the Higher Administrative Court will have to re-examine the matter of previous persecution of the Complainant within the meaning of Article 4 (4) of the Directive. If such a previous persecution is affirmed, in deciding whether the Complainant would be exposed once again to such persecution, the court below would have to apply the facilitated standard of proof under Article 4 (4) of the Directive. It is likely that this can ultimately regularly be done if the reduced standard of probability is applied and if sufficient safety from such persecution is established (see this Court's referrals to the ECJ for a preliminary ruling of 7 February 2008 – Federal Administrative Court 10 C 33.07 - ZAR 2008, 192 and of 14 October 2008 – Federal Administrative Court 10 C 48.07 - juris Marginal No. 14, to be published in BVerwGE).

31 The disposition as to costs is reserved for the final decision. This Court assumes that the portion of the dispute (regarding the threat of deportation to the Russian Federation) that the parties have already jointly declared settled is so minor as to be of no consequence for purposes of the rules on costs (see Section 155 (1) Sentence 3 Code of Administrative Procedure).

Dr. Mallmann Justice Richter Beck
is unable to sign
because he is on leave.
Dr. Mallmann

Prof. Dr. Kraft Fricke

Field: BVerwGE: Yes

Asylum law Professional press: Yes

Sources in law:

Asylum Procedure Act	Section 3 (1), Section 77
Residence Act	Section 60 (1)
Basic Law	Article 16a
Directive 2004/83/EC	Article 4 (4), Article 8, Article 9, Article 10

Headwords:

Recognition of refugee status; act of persecution; targeted act; necessary medical treatment; post-traumatic stress disorder; denial of registration; violation of human rights; previous persecution; internal flight alternative; internal protection; time of emigration; facilitated standard of proof; standard of proof.

Headnote:

1. The concept of an act of persecution within the meaning of Directive 2004/83/EC presupposes a targeted violation of a legal right protected under Article 9 (1) of the Directive.

2. Under the new status of the law, with regard to Section 60 (1) Sentence 5 of the Residence Act in conjunction with Article 4 (4) of Directive 2004/83/EC, previous persecution under the terms of refugee law can no longer be denied solely because a flight alternative existed in another part of the country of origin at the time of emigration.

Decision of the Tenth Division of 19 January 2009 – Federal Administrative Court 10 C 52.07

I. Würzburg Administrative Court, 02.09.2002 – Case No.: VG W 8 K 01.31018 -
II. Munich Higher Administrative Court, 31.08.2007 – Case No.: VGH 11 B 02.31724 -