Field:

BVerwGE: no
Professional press: yes

Immigration law

Sources in law:

TFEU	Articles 20, 45, 78, 267
Residence Act	Section 5 (1) No. 1 and (3), Section 12 (2), Section 25 (2) and (3), Section 51 (6), Section 60 (2)
Geneva Convention	Articles 23, 26
Charter of Fundamental Rights	Article 18
ICCPR	Article 12
Protocol No. 4 to ECHR	Article 2
Directive 2011/95/EU	Article 2 (d) and (g), Article 18, 20 (1) and (2), Articles 29, 33

Title line:

Reference to ECJ

Headwords:

Residence; equal treatment of foreigners; freedom of movement; fiscal interest; refugee; action for a finding on continuation; equal treatment of residents; migration policy interest; person with subsidiary protected status; social assistance; beneficiary of subsidiary protection; preliminary ruling; residency requirement.

Headnotes:

Requests to the Court of Justice of the European Union for a preliminary ruling on whether residency requirements for beneficiaries of subsidiary protection are compatible with Article 33 and/or Article 29 of Directive 2011/95/EU.

Decision of the First Division of 19 August 2014 – BVerwG 1 C 1.14

I. Münster Administrative Court of 18 April 2013
Case No.: VG 8 K 295/13

II. Münster Higher Administrative Court of 21 November 2013
Case No.: OVG 18 A 1291/13

FEDERAL ADMINISTRATIVE COURT

DECISION

BVerwG 1 C 1.14
OVG 18 A 1291/13

Released
on 19 August 2014
Ms Wahl
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.

When citing this decision, it is recommended to indicate the court, the date of the decision, the case number and the paragraph: BVerwG, Decision of 19 August 2014 – BVerwG 1 C 1.14 – para. …

the First Division of the Federal Administrative Court
upon the hearing of 19 August 2014
by Presiding Federal Administrative Court Justice Prof. Dr Berlit and Federal Administrative Court Justices Prof. Dr Dörig, Prof. Dr Kraft, Dr Fleuss and Dr Rudolph

decides:

The proceedings are stayed.

A preliminary ruling from the Court of Justice of the European Union is to be obtained pursuant to Article 267 of the TFEU on the following questions:

1) Does the requirement to establish residence within a geographically limited area (municipality, administrative district, region) of the Member State constitute a restriction of freedom of movement within the meaning of Article 33 of Directive 2011/95/EU, if the foreigner can otherwise move about and stay freely within the territory of the Member State?

2) Is a residency requirement for persons with subsidiary protected status compatible with Article 33 and/or Article 29 of Directive 2011/95/EU, if it is founded on achieving a fair and reasonable distribution of the burdens of public social assistance among the responsible agencies within the national territory?

3) Is a residency requirement for persons with subsidiary protected status compatible with Article 33 and/or Article 29 of Directive 2011/95/EU, if it is based on grounds of policies on migration or integration, for example to avert social conflagration points as a result of the concentrated settlement of foreigners in certain municipalities or districts? To that extent, do grounds of migration or integration policy suffice in the abstract, or must such grounds be established in detail?

Reasons:

I

1 The Complainant seeks a finding that the residency requirement attached to his residence permit dating from 2012 is unlawful.

2 The Complainant, a Syrian national born in 1968, entered Germany with his wife and their three children in August 1998 and applied for asylum here under an alias. The Federal Office for the Recognition of Foreign Refugees (now the Federal Office for Migration and Refugees) – the 'Federal Office' – denied that application and the denial became final and absolute on completion of court proceedings in August 2003. The Complainant's residence was tolerated following the asylum proceedings. From the beginning of the asylum proceedings to this date, the Complainant, who is unemployed, and his family (his wife and, now, five children) have drawn social security benefits, and have been issued a requirement to establish their residence in the city of A., which is in the Respondent's administrative district.

3 In February 2012, under the name I. A., the Complainant lodged a follow-up application for asylum with the Federal Office, with a limitation to recognition of refugee status, and presenting the Respondent with a Syrian family register together with a translation. By a final decision dated 5 June 2012, amending its decision of August 1998, the Federal Office found that there was a prohibition of deportation in regard to Syria under Section 60 (2) of the Residence Act. The Respondent then granted the Complainant a residence permit under Section 25 (3) of the Residence Act, dated 12 October 2012 and with an expiry date of 7 June 2013. This permit was accompanied by a requirement under which the Complainant was 'obliged to take up residence in the city of A'. The Respondent's decision was guided by Items 12.2.5.2.1 and 12.2.5.2.2 of the General Administrative Regulation for the Residence Act. At present the Complainant holds a residence permit under Section 25 (2) of the Residence Act that is valid from 5 February 2014 to 7 June 2015, and it too is accompanied by a corresponding residency requirement.

4 The Complainant lodged an action in February 2013 challenging the residency requirement. While the Administrative Court found against him, the Higher Administrative Court of the State of North Rhine-Westphalia lifted the residency requirement in a judgment of 21 November 2013. It founded its judgment in essence on the finding that the decision within the discretionary powers of the Respondent violated Article 28 (1) in conjunction with Article 32 of Directive 2004/83/EC (now Article 29 (1) and Article 33 of Directive 2011/95/EU). It found that according to the Geneva Convention on Refugees, residency requirements cannot be imposed on recognised refugees for the purpose of a fair and reasonable distribution of public social assistance burdens. The equivalent, it held, must apply for persons with subsidiary protected status such as the Complainant, because Article 28 (1) in conjunction with Article 32 of Directive 2004/83/EC does not distinguish between refugees and persons entitled to subsidiary protection.

5 In its appeal to this Court, the Respondent argues that its discretionary decision to impose a residency requirement does not violate Union law. This is because Article 32 of Directive 2004/83/EC and Article 33 of Directive 2011/95/EU cover only freedom of movement, not freedom to choose a residence, as is evident not least of all from a comparison of the English, French and German versions. Other relevant provisions of Union law as well (e.g., Article 45 of the Charter of Fundamental Rights, Article 21 of the TFEU and Article 7 of Directive 2003/9/EC) mention choice of residence or abode in addition to freedom of movement if they intend to protect that choice. A prohibition on imposing residency requirements on refugees so as to fairly distribute the burden of public social assistance can be derived from the Geneva Convention, but the issuers of the Directive did not incorporate such a prohibition into the Directive, and in any case they did not extend it to persons with subsidiary protected status.

6 The Complainant defends the challenged judgment and now, in view of the renewed requirement of February 2014 restricting his residence, seeks only a finding that the residency requirement imposed in 2012 was unlawful. He de-

rives his interest in such a finding from the danger of recurrence, which he says has already been realised in 2014 in the form of the renewed requirement.

7 The Representative of the Federal Interests before the Federal Administrative Court has joined in the proceedings and in substance shares the legal opinion of the respondent administrative district.

II

8 The case must be stayed. A preliminary ruling must be obtained from the Court of Justice of the European Union (hereinafter: the Court of Justice) on the questions stated in the operative part of this decision (Article 267 of the TFEU). The questions concern the interpretation of Articles 33 and 29 of Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (OJ L 337 of 20 December 2011 p. 9 – CELEX: 32011L0095). As this is a matter of interpretation of Union law, the Court of Justice has jurisdiction. We may point out that the questions have been the subject matter of two other requests for preliminary rulings with the same wording (see decisions of 19 August 2014 – BVerwG 1 C 3.14 and BVerwG 1 C 7.14).

9 1. Normally, the legal assessment of the request for a finding of unlawfulness of the residency requirement issued in 2012, as an administrative act with lasting effect, must be founded on the date of the last oral hearing or decision before the court finding on the facts (judgment of 15 January 2013 – BVerwG 1 C 7.12 – BVerwGE 145, 305 = Buchholz 402.242 Section 23 Residence Act No. 5, each at para. 9). Changes in the law during the supreme court appeal proceedings must, however, be taken into account if the court below would have to give them consideration if it were deciding instead of the Federal Administrative Court. The present case must be governed by the status of the law at the date of the expiry of the requirement in February 2014. This is because under national residence law (Section 51 (6) Residence Act), the requirement remained

in effect until the new requirement, with the same wording, was issued in February 2014. At that date, Articles 29 and 33 of Directive 2011/95/EU, which are relevant here, had taken effect under Article 41 of the Directive, and the deadline for their transposition into national law under Article 39 (1) of Directive 2011/95/EU had expired. The Directive was transposed into national law by the Act of 28 August 2013 (BGBl I S. 3474). Accordingly, the following national provisions, which – insofar as they are relevant here – still remain in force at present, establish the legal framework for this dispute:

10 Section 5 (1) Nos. 1 and (3), Section 12 (1) and (2) and Section 25 (2) sentence 1 of the Residence Act of 30 July 2004 (BGBl I p. 1950), in the version promulgated on 25 February 2008 (BGBl I p. 162) and as last amended by the Act of 28 August 2013 (BGBl I p. 3474), read as follows:

Section 5
General preconditions for the granting of a residence title

(1) The granting of a residence title shall generally presuppose
1. that the foreigner's livelihood is secure.

(3) Application of sub-sections 1 and 2 shall be waived in the cases of issuance of a residence title pursuant to Section […] 25 (1) to (3) […].

Section 12
Area of application; subsidiary provisions

(1) The residence title is issued for the Federal territory. Its validity in accordance with the provisions of the Convention Implementing the Schengen Agreement for residence in the territories of the parties signatory shall remain unaffected.

(2) The visa and the residence permit may be issued and extended subject to conditions. Conditions, in particular geographic restrictions, may also be imposed subsequently on visa and residence permits.

Section 25
Residence on humanitarian grounds

> (2) A foreigner shall be granted a residence permit where the Federal Office for Migration and Refugees has […] granted refugee status […] or subsidiary protection […].

11 On the basis of the Residence Act, the Federal Minister of the Interior, with the consent of the Bundesrat, issued an administrative regulation with which the foreigners' authorities must comply in applying the law (General Administrative Regulation for the Residence Act of 26 October 2009 – GMBl 2009, 878). According to that regulation, a residence permit granted on grounds of international law or on humanitarian or political grounds under Chapter 2 Section 5 of the Residence Act must be associated with a requirement restricting residence in cases where the beneficiary draws social security benefits. The relevant numbers of the Administrative Regulation read as follows:

> 12.2.5.2.1 The requirement restricting residence is a suitable means in particular to prevent a disproportionate fiscal burden on individual Federal states and communities by foreign recipients of social benefits, by setting a regional restriction. Such requirements may also help prevent a concentration of foreigners dependent on social assistance in certain territories, with the associated development of social combustion points and their adverse effects on the integration of foreigners. Such measures are also justified in order to establish ties for foreigners with a special need for integration to a certain place of residence so that they can make use of the integration facilities there.
>
> 12.2.5.2.2 Given this background, requirements restricting residence are to be issued and maintained for holders of residence permits under Chapter 2 Section 5 of the Residence Act or settlement permits under Section 23 subsection 2, if and so long as they draw benefits under Book II or XII of the Social Code or under the Asylum Applicants' Benefits Act. This also includes resident permits under Sections 104a and 104b.

12 2. The referred questions are material to a decision and are in need of clarification by the Court of Justice.

13 a) The Complainant holds subsidiary protected status within the meaning of Article 2 (g) and Article 18 of Directive 2011/95/EU on the basis of the recognition decision of the Federal Office for Migration and Refugees (the Federal Office) of 5 June 2012. However, for its entire duration – since 1998 – his residence has been subject to the requirement that he must take up residence in the city of A., which is located in the Respondent's administrative district. Such a requirement was attached to this residence permit of 12 October 2012, which he seeks to have declared unlawful in the instant complaint. His current residence permit of 5 February 2014 is also associated with a requirement in the same terms. Therefore the Complainant has a justified interest in a finding from the courts as to whether the residence restriction imposed on him is lawful.

14 b) Under Section 12 (2) sentence 2 of the Residence Act, a residence title, which is generally issued for the entire Federal territory (Section 12 (1) Residence Act), may be subject to conditions, in particular geographic restrictions. It is generally permissible to issue a residence restriction, because this constitutes a lesser interference than the geographic restriction of the residence permit expressly mentioned in Section 12 (2) sentence 2 of the Residence Act (see judgment of 15 January 2008 – BVerwG 1 C 17.07 – BVerwGE 130, 148 = Buchholz 402.22 Article 26 Geneva Convention No. 3, each at para. 13). While it establishes an obligation to take up and use a residence in that locality, it does not restrict the possibility of otherwise moving about and staying freely within the Federal territory. The decision whether a residence permit is to be accompanied by a requirement is within the discretionary power of the responsible authority. Its decision is therefore subject to review only as to whether the agency exceeded the statutory limits of its discretionary power or exercised that power in a manner inconsistent with the purpose of its authorisation. As the Higher Administrative Court found (Copy of the Decision, p. 6 et seq.), in the Federal Office's exercise of its discretionary power it was guided by Items 12.2.5.2.1 and 12.2.5.2.2 of the General Administrative Regulation of the Federal Ministry of the Interior for the Residence Act of 26 October 2009 (GMBl 2009, 878 <960>), according to which holders of residence titles on grounds of international law or on humanitarian or political grounds (see Chapter 2 Section 5 of the Residence Act) may be subject to requirements restricting residence if

and so long as those persons draw social security benefits, so as to achieve a fair and reasonable distribution of the burdens of public social security benefits. Under national law, it is permissible to limit the discretionary decision of the individual foreigners offices by uniform administrative regulations.

15 It is also lawful under national law – except where special provisions such as Articles 26 and 23 of the Geneva Convention on Refugees (the ‘Geneva Convention’) apply – to link foreigners’ residence permit with residency requirements for the purpose of fairly distributing social assistance benefits. This was decided by the Federal Administrative Court for the acceptance of rather large groups of foreigners – e.g., refugees from civil wars, or Jewish immigrants from the former Soviet Union. It serves an important public interest, within the federally structured Federal Republic of Germany, to keep individual Federal states and communities from being overburdened with social security benefit payments, by way of a distribution procedure with corresponding residence restrictions (judgments of 15 January 2013 – BVerwG 1 C 7.12 – BVerwGE 145, 305 = Buchholz 402.242 Section 23 Residence Act No. 5, each at para. 16, and of 19 March 1996 – BVerwG 1 C 34.93 – BVerwGE 100, 335 <342> = Buchholz 402.240 Section 12 Aliens Act 1990 No. 9 p. 40). According to this Court’s case law, different conditions apply for refugees recognised under the Geneva Convention, because with respect to public relief and assistance, Article 23 of that Convention provides for ‘the same treatment’ of refugees as is accorded to the country’s own nationals, for whom no such residency requirements for fiscal reasons are provided. For that reason – in contrast to stateless persons, contingent refugees and other holders of residence permits on grounds of international law or on humanitarian or political grounds – recognised refugees’ choice of residence cannot be limited for the purpose of a fair and reasonable distribution of social assistance burdens (see judgment of 15 January 2008, loc. cit., each at para. 18 et seqq.). It is therefore material to this decision whether residence restrictions may be imposed on beneficiaries of subsidiary protection, for the purpose of a fair and reasonable distribution of social assistance burdens.

16 c) The residence restriction ordered for the Complainant does not violate the terms of international law under Article 2 of Protocol No. 4 to the European

Convention on Human Rights (ECHR) of 16 September 1963 (BGBl 1968 II p. 423, 1109) and under Article 12 of the International Covenant on Civil and Political Rights (ICCPR) of 19 December 1966 (BGBl 1973 II p. 1533, 1976 II p. 1068).

17 Under Article 2 (1) of Protocol No. 4 to the ECHR only those ‘lawfully within the territory of a State’ have the right to liberty of movement and the freedom to choose their residence. The limitations governed by Section 3, concerning restrictions of the freedom guaranteed under Section 1 of the Article, apply only if residence is lawful. If – as in the instant case – residence was granted from the outset only subject to the ordered residence restriction, it is also lawful only within those limits; the suspensive effect of the appeal lodged against the residency requirement merely forestalls its fulfilment, but does not affect the validity of the residency requirement. Lawfulness of residence may be contingent on a geographical restriction, in accordance with the case law of the European Court of Human Rights (see decision of 20 November 2007 – No. 44294/04 – Omwenyeke v. Germany – with further references – issued on a geographical restriction on an asylum seeker to the territory of the city of Wolfsburg), the case law of the present Court (see judgment of 19 March 1996, loc. cit. <346> or p. 44), and the commentary literature (see Grabenwarter, European Convention on Human Rights – Commentary – 2014, p. 412 at para. 3). A restriction on residence in such a case is not to be measured by the standard of a restriction under Section 3 of Article 2 of Protocol No. 4, because it is already integral to what constitutes lawful residence within the meaning of Section 1. The same applies for the interpretation of Article 12 of the ICCPR, because residence became lawful within the meaning of Article 12 (1) of the ICCPR only subject to the inclusion of the residency requirement. Therefore the requirement is not to be measured by the standard of Article 12 (3) ICCPR. By contrast, the commentary on Article 12 of the ICCPR (UN Human Rights Committee (HRC), CCPR General Comment No. 27: Article 12 (Freedom of Movement), 2 November 1999, CCPR/C/21/Rev.1/Add.9 – marginal 12), cited by the Complainant, refers to Article 12 (3) ICCPR and not to Article 12 (1) of the ICCPR, which obtains here.

18 If the challenged residency requirement is lawful under national law and the standards of international law, it is material to a decision whether it is contrary to Article 33 and/or Article 29 of Directive 2011/95/EU. Specifically, the following referred questions 1 through 3 arise in this connection. They are in need of clarification by the Court of Justice of the European Union because it is that court's mission to decide on matters in need of clarification under Directive 2011/95/EU, which governs here.

19 First referred question:

If the present case concerns the question of whether a residency requirement imposed on a person who has subsidiary protected status is compatible with Article 33 of Directive 2011/95/EU, it must first be clarified whether such a residency requirement constitutes any restriction at all on freedom of movement within the meaning of Article 33 of Directive 2011/95/EU, if the foreigner concerned enjoys freedom of movement otherwise within the Member State. In the referring Court's decision on residency requirements for refugees (Article 2 (d) Directive 2011/95/EU), this question did not arise because Article 26 of the Geneva Convention expressly ensures a free choice of place of residence.

20 a) The wording of Article 33 of Directive 2011/95/EU, which diverges from the Geneva Convention article, does not preclude an interpretation under which the concept of freedom of movement also includes freedom to choose a place of residence. To that extent, however, the heading 'Free movement within a Member State' ('Freizügigkeit innerhalb eines Mitgliedstaats') chosen for the German version offers little decisive enlightenment, as it argues for a broad interpretation of freedom of movement, while other language versions mention only 'Freedom of Movement' or 'Liberté de circulation'.

21 It may argue against the reading that freedom of movement includes freedom to choose a place of residence that in other provisions of Union law and international law, free choice of place of residence and the right of residence are guaranteed separately, in addition to freedom of movement. For example, not only Article 26 of the Geneva Convention, but Article 2 of Protocol No. 4 to the

ECHR and Article 12 of the ICCPR make separate mention of freedom to choose a residence, in addition to freedom of movement. Other provisions as well mention freedom of movement and the right of residence separately beside each other, and the right of residence includes freedom to choose a residence (Articles 20 and 45 TFEU). Yet from an overall assessment of the provisions, it is an open question in the mind of this Court whether choosing a residence is necessarily a separate matter or additional feature alongside freedom of movement.

22 b) In its case law on Article 2 of Protocol No. 4 to the ECHR, the European Court of Human Rights (ECtHR) viewed restrictions on choice of residence as a restriction of freedom of movement. That court categorises residency requirements and other restrictions on freedom of movement uniformly under the concept of freedom of movement (‘restrictions à la liberté de circuler’) within the meaning of Article 2 of the Protocol, even though that provision protects the right to ‘liberty of movement’ and ‘to choose his residence’ (Judgment of 20 April 2010 – No. 19675/06 – Villa v. Italy – para. 41 through 43; that judgment also concerns a residency requirement). Indeed, the ECtHR sees no difference in substance between deprivation of liberty within the meaning of Article 5 of the ECHR and its restriction within the meaning of Article 2 of the Protocol, but only a difference in degree (différence de degré ou d'intensité – para. 41). Likewise in its judgment of 22 February 2007 (No. 1509/02 – Tatishvili v. Russia – para. 46) on Russia’s refusal of a residence registration to an ethnic Georgian (‘Propiska’), the ECtHR attributes the restrictions synonymously to ‘liberty of movement’ and ‘choice of residence’.

23 c) The intent and purpose of Article 33 of Directive 2011/95/EU are of material importance to the interpretation of that provision. The article does not provide for any difference in treatment between recognised refugees and beneficiaries of subsidiary protection. But if Article 33 of the Directive governs freedom of movement for refugees in the same way as for beneficiaries of subsidiary protection, and if refugees are guaranteed freedom of movement and freedom to choose a residence under Article 26 of the Geneva Convention, this could ar-

gue that the scope of protection of freedom of movement under Article 33 of the Directive is no more limited than under Article 26 of the Geneva Convention.

24 The objective of Directive 2011/95/EU is a common European asylum system whose standards of protection are consistent with the terms of the Geneva Convention on Refugees. That proceeds from the basis of authorisation for issuing the Directive, its recitals, and possibly also from its Article 20 (1). That article is founded on Article 78 (1) and (2) (a) and (b) of the TFEU, which reads as follows (emphasis added):

> Article 78
>
> (1) The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.
>
> (2) For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures for a common European asylum system comprising:
>
> a) a uniform status of asylum for nationals of third countries, valid throughout the Union;
>
> b) a uniform status of subsidiary protection for nationals of third countries who, without obtaining European asylum, are in need of international protection.

25 It proceeds from the above that the Directive is intended to create a ‘status of asylum’ for third-country nationals (and not just requirements for recognition) that is ‘in accordance’ with the Geneva Convention. The goal of full compliance with the Geneva Convention also finds expression in recital 16 of the Directive. This supplements recital 10 of the prior Directive 2004/83/EC by adding the goal of ‘promot[ing] the application of Articles 1, ... 18, ... of [the] Charter’. Under Article 18 of the Charter of Fundamental Rights, however, the right to asylum is to be guaranteed ‘with due respect to the Geneva Convention of 28 July 1951 …’.

26 The Commission's reasons for today's Directive 2011/95/EU of 21 October 2009 (COM(2009)551 final, p. 6 et seq. in the German version) read (emphasis added):

> The main objective of this proposal is to ensure
>
> - higher protection standards regarding both the grounds and the content of the protection in line with international standards, and in particular in order to ensure the full and inclusive application of the Geneva Convention relating to the Status of Refugees of 28 July 1951, as supplemented by the New York Protocol of 31 January 1967 ('Geneva Convention') and full respect for ECHR and the EU Charter of Fundamental Rights ('EU Charter').

27 This may argue that the content of the protection to be conferred by the Directive (Articles 20 through 35) is also intended to ensure the 'full and inclusive' application of the Geneva Convention. At no time during the deliberations on the Directive was any doubt raised on that point.

28 On this interpretation, which is oriented to the guarantees of the Geneva Convention, the protection of freedom of movement within the meaning of Article 33 of Directive 2011/95/EU also includes freedom to choose a residence, and to that extent also does not confer any lesser degree of protection than Article 26 of the Geneva Convention. The guarantee of freedom of movement under Article 33 of the Directive would then, according to Article 20 (2) of the Directive, also apply in the same way for recognised refugees and persons with subsidiary protected status.

29 d) However, we must not lose sight of the fact that the 'content of international protection' governed by Chapter VII of Directive 2011/95/EU (Articles 20 through 35) does not thematically cover the full range of the guarantees under Articles 12 through 34 of the Geneva Convention. Moreover, it is conspicuous that not only are the rights worded differently under Article 33 of Directive 2011/95/EU (freedom of movement) and Article 26 of the Geneva Convention ('to choose their place of residence and to move freely'), but so are their restrictions: while Article 33 of the Directive refers, quite in general, to other third-country nationals legally resident in the Member States' territories as the group

for comparison, Article 26 of the Geneva Convention refers to the terms that apply to aliens generally in the same circumstances (see Article 6 Geneva Convention). These findings argue against the possibility that Directive 2011/95/EU also intends to govern the rights of refugees independently and conclusively, with no need for recourse to the Geneva Convention. If and insofar as the Directive were to be secondary to the Geneva Convention, recognised refugees would continue to enjoy their rights transformed into national law, for under Article 20 (1) of Directive 2011/95/EU the terms of this Chapter are to be without prejudice to the rights laid down in the Geneva Convention.

30 Second referred question:

If Question 1 is to be answered in the affirmative, the question arises as to whether residency requirements under Article 33 of Directive 2011/95/EU may be imposed on persons with subsidiary protected status, subject to the same conditions and restrictions as those provided in general for third-country nationals legally resident in the host state's territory, or whether the same exceptions for geographical restrictions apply to persons with subsidiary protected status as the Federal Administrative Court has derived from Article 26 of the Geneva Convention for recognised refugees.

31 a) Under Article 33 of the Directive, the Member States are to allow freedom of movement 'under the same conditions and restrictions' as those provided for other third-country nationals legally resident in their territories. Therefore the standard for the lawfulness of residence restrictions is whether they can also be ordered for other third-country nationals legally resident in the Federal territory.

32 Under German residence law, residency requirements may be imposed on third-country nationals in general, with no limitation to certain groups (Section 12 (2) Residence Act). Under the General Administrative Regulation of the Federal Ministry of the Interior for the Residence Act, of 26 October 2009, residency requirements are normally imposed on holders of a residence title that is granted on grounds of international law or on humanitarian or political grounds, if the beneficiary receives social security benefits. Such a limitation to third-country

nationals whose residence is permitted on grounds of international law or on humanitarian or political grounds is founded on the principle of separation under German residence law, which says that the lawfulness of residence and of restrictions on residence is to be determined on the basis of the purpose of the residence, for which the legislature establishes different provisions in different ways in the various sections of the Residence Act. Thus residence for the purpose of gainful activity or training is subject to different requirements and restrictions than residence on grounds of international law or on humanitarian or political grounds. Foreigners from the latter group are privileged under the Residence Act particularly with respect to the requirement that the grant of a residence title will normally presuppose a secure livelihood, i.e., one that can be gained without drawing on public funds (Section 5 (1) No. 1 in conjunction with Section 2 (3) sentences 1 and 2 of the Residence Act). For example, under Section 5 (3) sentence 1 of the Residence Act, the requirement of a secure livelihood may be waived for recognised refugees and beneficiaries of subsidiary protection, among others. This makes it clear, in the present Court's opinion, why the General Administrative Regulation does not contravene the law in imposing residency requirements because of drawing social security benefits, if it focuses on third-country nationals who hold a residence title on grounds of international law or on humanitarian or political grounds, and not on all third-country nationals irrespective of the purpose of their stay. This is because for the other third-country nationals, the legislature assumes in principle that they can earn their own livelihood, so that there was no need for a corresponding provision in the General Administrative Regulation.

33 b) It may, however, be incompatible with Article 33 of Directive 2011/95/EU to treat persons with subsidiary protected status like other third-country nationals with respect to imposing residency requirements even if, and because, recognised refugees enjoy greater protection in this regard under the Geneva Convention. This is because according to the case law of the Federal Administrative Court, recognised refugees cannot be subjected to residency requirements solely for the purpose of a fair and reasonable distribution of public social assistance burdens (judgment of 15 January 2008 – BVerwG 1 C 17.07 – BVerwGE 130, 148 = Buchholz 402.22 Article 26 Geneva Convention No. 3, each at para.

18 et seqq.). This proceeds from Article 23 of the Geneva Convention, according to which refugees must receive ‘the same treatment’ with respect to public relief and assistance as is accorded to the nationals of the host state. According to the case law of the Federal Administrative Court, the ‘same treatment’ within the meaning of Article 23 of the Geneva Convention is a broadly drafted expression that does not merely include the same benefits in terms of kind and amount, but also presupposes that refugees cannot be treated differently to the country’s own nationals in comparable situations.

34 However, there is no equivalent provision in Directive 2011/95/EU. Article 29 of the Directive requires Member States to ensure that beneficiaries of international protection receive the ‘necessary social assistance’ as provided to the Member State’s own nationals, but does not require them to be treated the same with respect to the methods of payment, as is provided in Article 23 of the Geneva Convention. To that extent, this Court believes there is a difference between the provision of Article 29 of Directive 2011/95/EU, which applies to beneficiaries of international protection in general, and the provision of Article 23 of the Geneva Convention, which is limited to recognised refugees. However, it does not necessarily follow that it is justifiable under Article 33 of Directive 2011/95/EU to treat recognised refugees differently from persons having subsidiary protected status in respect of imposing residency requirements, if those persons receive public social benefits. Rather, the matter is in need of clarification by the Court of Justice.

35 Third referred question:

There is furthermore a need for clarification whether a residency requirement for persons having subsidiary protected status is compatible with Directive 2011/95/EU if it is founded on grounds of policies on migration or integration.

36 a) The General Administrative Regulation of the Federal Ministry of the Interior for the Residence Act, of 26 October 2009, provides that foreigners who are granted residence on grounds of international law or on humanitarian or political grounds, if they draw social benefits, may also be placed under a residency re-

quirement if this seems imperative on grounds of migration or integration policy. It is necessary that such requirements must help avert a concentration of foreigners dependent on social assistance in certain regions, with the associated development of social combustion points and their adverse effects on the integration of foreigners. But such measures are also justified in order to establish ties between foreigners who have a particular need for integration and a specific place of residence so that they can make use of the integration facilities available there. The Respondent also cited this purpose when it imposed the residency requirement that is at issue in the instant proceedings on the Complainant.

37 This Court believes that in principle, residency requirements on the grounds of migration and integration policy cited in the General Administrative Regulation are justified with respect to recognised refugees and persons with subsidiary protected status as well. One argument in favour of the lawfulness of such residence restrictions for refugees is that even the authors of the Geneva Convention believed there was a need, on grounds of migration policy, for temporal and geographical restrictions on the residence of refugees. During the deliberations on what later became Article 26 of the Geneva Convention (Article 21 of the draft) in the *ad hoc* Committee on 27 January 1950, delegates from several countries pointed out the necessity of preventing a concentration of refugees in regions near the borders to their country of origin (Takkenberg/Tahbaz, Travaux Préparatoires, Vol. I, p. 251 et seqq., at para. 74, 76 and 86 et seq.). This was justified on the grounds, among others, that the number of minorities already present in border regions should not be permitted to increase further, and that there was a need to counteract the danger that refugees might participate in activities against the unity of the countries (para. 87). The Committee finally agreed on the provision incorporated into Article 26 of the Convention, under which refugees legally within the country should be subject only to those temporal and geographical restrictions governing aliens generally (para. 93 and 119).

38 b) According to the case law of this Court on the lawfulness of residency requirements under the Geneva Convention, however, a mere abstract possibility of migration or integration policy reasons is not sufficient. What is required in-

stead is that the responsible authorities must describe the migration or integration policy grounds – for example, naming potential social combustion points and explaining, at least in outline, the suitability of residence restrictions for helping to resolve problems, without however allowing this obligation of explanation to prejudice the administration's general prerogative of assessment, which must be acknowledged (see judgment of 15 January 2008, loc. cit., para. 23). A decision from the Court of Justice is needed as to whether these principles also apply under Article 33 of Directive 2011/95/EU, particularly for persons with subsidiary protected status.

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

Dr Fleuss

Justice Dr Rudolph
is unable to sign
because she is on leave.
Prof. Dr Berlit