

Field: BVerwGE: No
Asylum law Professional press: Yes

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Residence Act Section 60 (1) sentence 1
Asylum Procedure Act Section 3 (1), (2) sentence 1 no. 3, sentence 2
Directive 2004/83/EC Article 12 (2) (c) (3)

Headwords:

Reason for exclusion; participation otherwise; refugee status; ideological support; musician; PKK; propaganda; terrorism; act in violation; purposes and principles of the United Nations.

Headnotes:

1. Even under the lowered standard of proof under Section 3 (2) sentence 1 of the Asylum Procedure Act, an exclusion from refugee status under Section 3 (2) of the Asylum Procedure Act because of a foreigner's participation in certain crimes or acts can be assumed only if a linkage to individual events can be established for the necessary principal act.

2. Important ideological and propagandistic activities in favour of a terrorist organisation can still come under consideration as participation in acts in violation of the aims and principles of the United Nations under Section 3 (2) sentence 1 no. 3 in conjunction with (2) of the Asylum Procedure Act even if the applicant for asylum had neither an actual possibility of influencing the committing of terrorist acts, nor publicly approved of or incited such acts.

Judgment of the 10th Division of 19 November 2013 – BVerwG 10 C 26.12

- I. Schwerin Administrative Court of 5 September 2008 – Case: VG 5 A 2154/05 As –
- II. Greifswald Higher Administrative Court of 21 August 2012 – Case: OVG 3 L 218/08 –



FEDERAL ADMINISTRATIVE COURT

IN THE NAME OF THE PEOPLE

JUDGMENT

BVerwG 10 C 26.12
OVG 3 L 218/08

Released
on 19 November 2013
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, Judgment of 19 November 2013 – BVerwG 10 C 26.12 – para. ...

the Tenth Division of the Federal Administrative Court
upon the hearing of 19 November 2013
by Presiding Federal Administrative Court Justice Prof. Dr Berlitz and Federal
Administrative Court Justices Prof. Dr Dörig, Prof. Dr Kraft, Fricke and Dr
Maidowski

decides:

On appeal by the Complainant, the judgment of the Mecklenburg-Western Pomerania Higher Regional Court of 21 August 2012 is set aside insofar as it denies refugee status to the Complainant. To that extent the matter is remitted to the Higher Regional Court for further hearing and a decision.

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

Reasons:

I

- 1 The Complainant, a Turkish national of Kurdish ethnicity, seeks refugee status.
- 2 The Complainant, born in 1979, entered the Federal territory in June 2005 and filed an application for asylum. As grounds, he stated that in June 1999 he had joined the militant arm of the PKK. In the region of the Iranian-Iraqi border he had headed an art and culture school of the PKK and had appeared as an artist. The concerts had been broadcast by a Kurdish television station. From the end of 2003 he continued his artistic work in the M. camp as a cadre of the PKK and was in charge of culture (music lessons, group leadership). Because he did not comply with an order from the PKK in April 2005 to move to the mountains so as to resume armed conflict, he had fled to Germany.

- 3 The Federal Office for Migrations and Refugees – the ‘Federal Office’ – denied the Complainant’s application for asylum in a decision of 16 September 2005 and found that the requirements of Section 60 (1) of the Residence Act had not been met and there were no prohibitions of deportation under Section 60 (2) through (7) of the Residence Act. It warned the Complainant of deportation to Turkey. The Administrative Court ordered the Respondent to grant the Complainant refugee status, but otherwise denied the complaint.

- 4 On appeal by the Respondent, the Higher Administrative Court modified the decision of the Administrative Court and ordered the Respondent to find that there was a prohibition of deportation in the Complainant’s favour under Section 60 (2) of the Residence Act; otherwise, it denied the complaint. As grounds, it stated that the Complainant was excluded from refugee status under Section 3 (2) sentence 1 no. 3 and sentence 2 of the Asylum Procedure Act, because in any case between 1999 and 2005, as a member of the PKK and of the ‘people’s liberation forces’, he had ‘otherwise’ participated in acts by the PKK that were in violation of the aims and principles of the United Nations. It held that an involvement was also possible through an active, significant ideological or propagandistic support for a terrorist organisation, because terrorist groups like the PKK base their cohesion and efficacy on an ideological foundation and a goal disseminated through propaganda. As the leader of cultural activities at a ‘culture and art school’ of the PKK and at the M. camp controlled by the PKK, the Complainant had been active in the organisation and had been responsible in a position of prominence for propaganda and ideological training. Even as a subordinate cadre, he had led a rather large number of persons on his own responsibility within the bounds of the instructions given him, and had appeared for the PKK in public in the international media. For example, he had appeared on Kurdish television in two propaganda broadcasts for the PKK and its fighters, in which, with his cooperation, such topics as armed conflict, life in the mountains, and the Kurdish resistance had been celebrated and acclaimed. However, in view of the persecution for suspicion of membership of the PKK with which he was threatened in the event of his return to Turkey, the court held that he was

entitled to a finding of a prohibition of deportation under Section 60 (2) of the Residence Act.

- 5 In his appeal to this Court by leave of the court below, the Complainant complains of inadequate findings of fact by the Higher Administrative Court on specific actions by the PKK in violation of the aims and principles of the United Nations, in which he had allegedly participated. If the exclusion from refugee status was to be founded solely on ideological support for the PKK's armed conflict, he argued, the content of this support must be directed to the use of violent means, and must be situated in both temporal and spatial-organisational proximity to armed conflict. However, the Complainant avers, he has never incited criminal acts of terrorism.
- 6 In the opinion of the Respondent and the Representative of the Federal Interests, propaganda support for violent actions by terrorist organisations can also lead to exclusion from refugee status. However, the court below should have clarified which specific actions the PKK undertook in the time during which the Complainant belonged to its militant arm and conducted propaganda for it in a leadership position.

II

- 7 The Complainant's appeal meets with success, because the judgment of the court below is founded on a contravention of Federal law (Section 137 (1) no. 1 Code of Administrative Court Procedure). Once it had held that the Complainant's fear of persecution within the meaning of Section 60 (1) of the Residence Act was well founded (1.), the court below could not deny the complaint directed to obtaining refugee status on the grounds that the Complainant had participated in acts within the meaning of Section 3 (2) sentence 1 no. 3 of the Asylum Procedure Act without making a finding as to the terrorist acts specifically committed by the PKK while the Complainant was a member of the organisation (2.). However, there is no reason for this Court to object to the finding by the court below that assuming that there had been such actions by the PKK during the period of his membership between June 1999 and May 2005, the Com-

plainant did participate otherwise in these acts through his significant propaganda activities for this organisation (3.). Therefore this Court cannot itself reach a final decision in this matter, so that for lack of adequate findings of fact the matter must be remitted to the court below for further clarification as required by Section 144 (3) sentence 1 no. 2 of the Code of Administrative Court Procedure (4.).

8 According to Section 77 (1) of the Asylum Procedure Act, the legal assessment of the Complainant's petition, which is now directed only to obtaining refugee status, is governed by the Asylum Procedure Act in the version promulgated on 2 September 2008 (Federal Law Gazette I p. 1798), as last amended by Article 1 nos. 27 and 45 in conjunction with Article 7 sentence 2 of the Act for the Transposition of Directive 2011/95/EC of 28 August 2013 (Federal Law Gazette I p. 3474). However, this version has not changed the provisions that are material to a decision here.

9 1. The Higher Administrative Court affirmed the existence of the requirements for refugee status under Section 3 (1) of the Asylum Procedure Act in conjunction with Section 60 (1) of the Residence Act in a manner that is unobjectionable in the eyes of this Court. In particular, it founded its prognosis of persecution on the basis of current sources, and provided detailed reasons (Section 108 (1) Code of Administrative Court Procedure). In so doing, it also addressed, in a manner that is (still) comprehensible, the statement by the Foreign Office (February 2011 Situation Report) that in recent years no cases had become known in which returning applicants for asylum – even exposed members and leading personalities of terrorist organisations – had been tortured or abused because of previous activities.

10 2. Nevertheless, in the opinion of the court below, the Complainant is excluded from refugee status under Section 3 (2) sentence 1 no. 3 in conjunction with sentence 2 second half-sentence of the Asylum Procedure Act. However, the considerations adduced in support of this finding do not withstand review by this Court. The Higher Regional Court proceeded on the assumption that the Complainant was an active member of the PKK in any case between 1999 and

2005, but it made no findings of fact about terrorist activities by the PKK in which the Complainant might have been able to otherwise participate during this period.

- 11 According to Section 3 (2) of the Asylum Procedure Act, a foreigner does not qualify as a refugee where there are serious reasons for considering that he has committed a crime against peace, a war crime or a crime against humanity as defined in the international instruments drawn up to make provision for such crimes (Section 3 (2) sentence 1 no. 1 Asylum Procedure Act); if he has committed a serious non-political crime outside the Federal territory before being admitted as a refugee, in particular a cruel act, even if it was intended with an allegedly political aim (Section 3 (2) sentence 1 no. 2 Asylum Procedure Act); or if he has acted in violation of the aims and principles of the United Nations (Section 3 (2) sentence 1 no. 3 of the Asylum Procedure Act). This is also to apply to foreigners who instigated others or otherwise participated in the commission of the crimes or acts mentioned (Section 3 (2) sentence 2 Asylum Procedure Act).

- 12 An exclusion from refugee status for participation in acts in violation of the aims and principles of the United Nations (Section 3 (2) sentence 1 no. 3 in conjunction with sentence 2 Asylum Procedure Act) first of all presupposes that such acts in violation exist. The relevant aims and principles for this purpose are set forth in the Preamble and Articles 1 and 2 of the Charter of the United Nations, and are anchored in the resolutions of the UN Security Council on antiterrorism measures, among other sources. It follows from these that 'acts, methods and practices of terrorism are contrary to the purposes and principles of the United Nations' and that 'knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations' (see Recital 22 of Directive 2004/83/EC). As is evident from UN Resolutions 1373 (2001) and 1377 (2001), the Security Council of the United Nations takes as its starting point the principle that international terrorist acts are, generally speaking and irrespective of any State participation, contrary to the purposes and principles of the United Nations. From this, the Court of Justice of the European Union concludes that this reason for exclusion can also be applied to persons who, in the course of their membership of an organisation which is on the list forming the

Annex to Common Position 2001/931, have been involved in terrorist acts with an international dimension (ECJ, judgment of 9 November 2010 – Cases C-57/09 and C-101/09 – Col. 2010, I-10979 at para. 82 et seqq. = NVwZ 2011, 285). Accordingly, violations within the meaning of Section 3 (2) sentence 1 no. 3 of the Asylum Procedure Act, at any event in the case of activities of international terrorism, may also be committed by persons who have no position of power in a Member State of the United Nations or at least in a state-like organisation (judgment of 7 July 2011 – BVerwG 10 C 26.10 – BVerwGE 140, 114 = Buchholz 402.25 Section 73 Asylum Procedure Act no. 40, each at 28).

- 13 The appeal to this Court rightfully complains that the court below made no findings of fact as to terrorist acts by the PKK during the period of the Complainant's membership of that organisation between June 1999 and May 2005. On the basis of the lowered standard of proof in Section 3 (2) sentence 1 of the Asylum Procedure Act, a participation in the criminal acts or other acts named in the law can be assumed only if a link can be established to individual events for the necessary principal act (order of 10 October 2013 – BVerwG 10 B 19.13 – juris at para. 5). Even if the Complainant's participation in acts that violate the aims and principles of the United Nations need not meet the same standard as for a participation in the sense under criminal law, it is nevertheless necessary that specific acts of this nature must have occurred during his activity for the PKK. Otherwise there would be no nexus for a responsibility of the Complainant to serve as basis for his exclusion from refugee status. The judge of fact must therefore concretely find whether there is serious reason to believe that a supportive activity within the meaning of Section 3 (2) sentence 2 of the Asylum Procedure Act was reflected in acts within the meaning of Section 3 (2) sentence 1 no. 3 of the Asylum Procedure Act during the period when such supportive activity was provided. However, the court below made no such findings, so that the challenged decision is in contravention of Federal law.
- 14 3. The decision also does not prove to be either correct or incorrect on other grounds. In particular, this Court cannot itself finally decide the matter in the Complainant's favour. This is because the assessment by the court below that – assuming acts by the PKK as provided in Section 3 (2) sentence 1 no. 3 of the

Asylum Procedure Act did occur during the period of his membership – the Complainant participated otherwise in them through his important ideological and propagandistic activities for this organisation is unobjectionable in the eyes of this Court on the grounds of the facts found by the lower court.

- 15 The court below correctly proceeded on the assumption that mere membership of an organisation included in the so-called EU Terror List, like the PKK, and active support for its armed conflict, does not automatically justify the assumption of participation in acts within the meaning of Section 3 (2) sentence 1 no. 3 of the Asylum Procedure Act. Rather, there must be an assessment on a case-by-case basis of the specific facts as to whether individual responsibility for carrying out those acts can be attributed to an applicant for asylum, regard being had to the standard of proof required by the provision (see ECJ, judgment of 9 November 2010, *loc. cit.*, at 99). Unlike participation in a serious non-political crime under Section 3 (2) sentence 1 no. 2 in conjunction with sentence 2 of the Asylum Procedure Act, which requires an attribution under the criteria of criminal law (instigation or abetment) (judgment of 4 September 2012 – BVerwG 10 C 13.11 – BVerwGE 144, 127 = Buchholz 402.25 Section 39 Asylum Procedure Act no. 1, each at para. 24), acts of support for a terrorist organisation need not specifically refer to individual terrorist actions in order to be included under Section 3 (2) sentence 1 no. 3 in conjunction with sentence 2 of the Asylum Procedure Act. This reason for exclusion does not require attribution under the criteria of criminal law, because it does not presuppose a criminal act within the meaning of a participation in specific crimes. Accordingly even purely logistical acts of support in advance, if they are of sufficient importance, may fulfil the characterising circumstances of Section 3 (2) sentence 1 no. 3 in conjunction with sentence 2 of the Asylum Procedure Act (judgments of 7 July 2011, *loc. cit.*, each at 39, and of 4 September 2012, *loc. cit.*, each at 26). The same applies to serious ideological and propagandistic activities in favour of a terrorist organisation (see also Münster Higher Administrative Court, judgment of 9 March 2011 – 11 A 1439/07.A – OVGE MüLü 54, 95 <juris at 61 et seq.>; Schleswig Higher Administrative Court, judgment of 1 September 2011 – 4 LB 11/10, AuAS 2011, 262 <juris at 52>). By contrast, for example, merely spouting slogans of the organisation or distributing flyers does not suffice. The importance of the contribu-

tion to an act by an accomplice as one who 'otherwise participates' must be equivalent to that of participation in a serious non-political crime within the meaning of Section 3 (2) sentence 1 no. 2 of the Asylum Procedure Act (judgment of 7 July 2011, loc. cit., each at para. 39).

- 16 Contrary to the opinion advocated in the appeal to this Court, however, attribution of participation in acts in violation of the aims and principles of the United Nations is not limited to cases in which the applicant for asylum objectively had the possibility of actually influencing the committing of terrorist acts, or publicly approved of or incited such acts. Because there is no need for a specific connection between the act of support and an individual act of terror, for participation otherwise within the meaning of Section 3 (2) sentence 1 no. 3 in conjunction with sentence 2 of the Asylum Procedure Act there is no requirement for either spatial-organisational proximity within the organisation to commit terrorist acts, nor for their justification in public. Otherwise, those who are purely desk perpetrators and propagandists would enjoy protection as refugees even though under the required evaluatory approach, with a view to the purpose of Section 3 (2) of the Asylum Procedure Act, which is to keep persons unworthy of asylum from enjoying the status of a 'bona fide refugee' (see judgment of 24 November 2009 – BVerwG 10 C 24.08 – BVerwGE 135, 252 = Buchholz 402.25 Section 3 Asylum Procedure Act no. 8, each at para. 25 et seqq.), their ideological or propagandistic contribution to terrorist acts appears by no means less important than that of those who participated in the act directly.
- 17 By the application of this standard, the court below rightly held that the Complainant – assuming terrorist acts by the PKK in the time of his membership between June 1999 and May 2005 – is excluded from refugee status under Section 3 (2) sentence 1 no. 3 in conjunction with sentence 2 of the Asylum Procedure Act. The lower court found that in any case the Complainant was a member of the PKK and a member of the 'people's liberation forces' between June 1999 and May 2005. According to the findings of the finder of fact, he was the head of cultural activities at a 'culture and art school' of the PKK and later held a position of prominence, responsible for propaganda and the ideological training of the PKK, at the M. camp controlled by the PKK. He furthermore appeared on

Kurdish television as a musician in propaganda broadcasts for the PKK and celebrated and acclaimed their armed conflict. The court below held that these activities for the PKK were sufficiently important for exclusion from refugee status. In view of the great importance of music, dance and custom as an expression of cultural identity among persons of Kurdish ethnicity, and the intentional use of these means to promote the PKK and encourage its internal cohesion, this finding arouses no reservations here.

- 18 4. As this Court cannot itself make the missing findings of fact, the matter must be remitted to the court below for further clarification, in accordance with Section 144 (3) sentence 1 no. 2 of the Code of Administrative Court Procedure. In the new appeal proceeding, the Higher Administrative Court, allowing for the lowered standard of proof under Section 3 (2) sentence 1 of the Asylum Procedure Act, will have to make findings about terrorist activities by the PKK in the period between June 1999 and May 2005 that is in any case relevant here, as a basis for participation by the Complainant. For this purpose it can make use of generally accessible sources (e.g., the Global Terrorism Database of the University of Maryland: <http://www.start.umd.edu/gtd>), or it may be necessary to obtain the opinion of an expert (see the approach by the North Rhine-Westphalia Higher Administrative Court in proceeding 8 A 5118/05.A, judgment of 2 July 2013 <juris>).
- 19 5. The disposition as to costs is reserved for the final decision. No court costs will be assessed in accordance with Section 83b of the Asylum Procedure Act. The value at issue proceeds from Section 30 of the Act on Attorney Compensation.

Prof. Dr Berlit

Prof. Dr Dörig

Prof. Dr Kraft

Fricke

Dr Maidowski