FEDERAL ADMINISTRATIVE COURT

IN THE NAME OF THE PEOPLE

DECISION

BVerwG 10 C 24.08
VGH 3 UE 411/06.A

Released
on 24 November 2009
Ms. von 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 24 November 2009
Federal Administrative Court Justice Dr. Mallmann sitting as Presiding Justice,
the Federal Administrative Court Justices Prof. Dr. Dörig, Richter, Prof. Dr. Kraft and Fricke

decides:

On appeal by the Respondent, the decision of the Hessian Higher Administrative Court of 24 April 2008 is set aside.

The matter is remanded to the Higher Administrative Court for further hearing and a decision.

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

R e a s o n s :

I

1 The Complainant, a Russian citizen from Chechnya, seeks refugee status.

2 The Complainant, born in 1965, entered Germany by land in June 2001, together with his wife and two sons, and applied for asylum. As reasons, he indicated that he had worked in the security department of the police from 1994 to 1995, and thereafter had taken part in the First Chechen War. From 1996 to

1999 he had worked in the Chechen security service, at the State Security department of the ‘Ministry of Sharia’. He explained that ministry’s activity to the effect that persons who had not followed Sharia law were reported to the Sharia service; they were then handed over to a Sharia court. From 1999 to his emigration, he fought in the same group as his nephew, the Complainant in the proceedings under Case No. BVerwG 10 C 23.08. They hid during the day and at night attacked Russian troops with mortars and machine guns. Russian security forces, he said, had searched for him and completely destroyed his house by bombardment; as a consequence, his mother had suffered a heart attack and died. He claimed to be weary of war, and that his brother had advised him to emigrate after their mother’s death.

3 By a decision of 12 July 2001, the Federal Office for the Recognition of Foreign Refugees (now the Federal Office for Migration and Refugees) rejected his application for asylum, finding that the requirements of Section 51 (1) of the Aliens Act had not been met and that there were no impediments to deportation under Section 53 of the Aliens Act, and threatened the Complainant with deportation to the Russian Federation.

4 In the parallel proceedings involving his nephew, the Foreign Office informed the Administrative Court upon inquiry by that court that Commander B., to whom according to the nephew the combat group had been subordinate, was one of the leaders of the Chechen terrorists who took more than 700 theatregoers hostage in a Moscow musical theatre in October 2002. Like all the other hostage takers, he had been killed by Russian security forces in the course of freeing the hostages.

5 The Administrative Court severed the application for asylum, and to that extent rejected the action by a decision of 11 February 2002 as without merit on its face. By a decision of 21 October 2004, it found against the Complainant as to the remainder of the action, because it found his arguments implausible.

6 On appeal by the Complainant, in a decision of 24 April 2008 the Higher Administrative Court set aside the lower court’s judgment and ordered the

Respondent to find that the requirements of Section 60 (1) of the Residence Act had been met. The court based its decision on the finding that the Complainant had left Chechnya after being previously persecuted. His life and freedom had been directly threatened solely because of his Chechen ethnicity. In addition, said the court, the Complainant had also been previously persecuted for individual reasons. According to his credible testimony, he had been directly threatened with arrest accompanied by abuses by Russian security forces that were relevant in refugee law, and that were not justified by the legitimate combating of terrorism. Under Article 4 (4) of Directive 2004/83/EC, there is no further call for an additional assessment of whether there was a possibility of internal protection at the date of exit. The Complainant, the court said, could not return to either Chechnya or other territories of the Russian Federation because there was no good reason to believe that he would not again be threatened with such persecution. It had to be assumed, the court found, that the Russian security forces would be aware of both his activity under the Maskhadov government and his activity as a Chechen fighter, and that he was consequently being sought as a terrorist. Upon return to his homeland, he would be threatened with abuse that was relevant under asylum law. The court found that refugee status was not excluded under Section 3 (2) of the Asylum Procedure Act in the Complainant's case. Although by his own admission he had participated in killing Russian soldiers, nevertheless his combat missions had not been measures against the civilian population, but a part of a belligerent conflict, and did not satisfy the requirements of Section 3 (2) Sentence 1 No. 1 of the Asylum Procedure Act. Nor was No. 2 of that provision satisfied. Although the attacks on Russian security forces as described by the Complainant could quite well be categorised as criminal acts, their political background could not be denied, nor were they directed against the civilian population. Rebels defending Chechen autonomy, said the court, had believed themselves in a situation of self-defence against the Russian occupiers. Section 3 (2) Sentence 1 No. 3 of the Asylum Procedure Act did not apply, the court found, because the Complainant's activities lacked the requisite international dimension.

7 In its appeal to this Court by leave of the Higher Administrative Court, the Respondent complains that the reasons for exclusion were improperly dealt

with. It avers that the court below incorrectly construed Section 3 (2) Sentence 1 No. 1 of the Asylum Procedure Act, because actions against combatants can also be war crimes. The court below's assessment, based solely on the Complainant's statements, did not suffice for its assumption that the reasons for exclusion were not satisfied; the same held true for its assessment of Section 3 (2) Sentence 1 No. 2 of the Asylum Procedure Act. Finally, in regard of the Complainant's cooperation in the application of Sharia law, the court below had neglected the grounds for exclusion of a crime against humanity.

8 The Complainant defends the appealed decision. He alleges that no facts had been found that could justify the application of the grounds for exclusion. The background in international criminal law for Section 3 (2) Sentence 1 No. 1 of the Asylum Procedure Act forbids distancing the principles of evidence too far from the standards of criminal procedure. Because of the exceptional character of the grounds for exclusion, he says, the individual circumstances and facts must be investigated and determined especially carefully and exhaustively. Item No. 1 of the aforementioned provision cannot apply, because the actions of the Complainant's combat group had been directed solely against the military adversary. By the date of Commander B.'s participation in the terrorist attack on the musical theatre in Moscow in October 2002, the Complainant was already within the territory of the Federal Republic. Nor does No. 2 of the provision apply, because there is no evidence whatsoever that the Complainant, defending Chechen autonomy, had participated in combat missions against combatants that were incompatible with international humanitarian law, or that he had participated in abuses of the civilian population. Moreover, the Complainant was not being persecuted because of his former professional activity as a policeman, so that there is no correlation between the reason for persecution and the reason for exclusion.

9 The representative of the federal interests has intervened in the proceedings. It is his opinion that the court below improperly applied Section 3 (2) of the Asylum Procedure Act. On the basis of his own findings, he says, there is sufficient reason for a more thorough examination of whether the Complainant's refugee status is excluded because of his association with the Chechen rebels

and their warfare. Additionally, in respect of the Complainant's collaboration in the application of Sharia law, a crime against humanity comes under consideration as a reason for exclusion.

II

10 The Respondent's appeal is upheld. The court below affirmed the Complainant's entitlement to refugee status in contravention of appealable law (Section 137 (1) No. 1 Code of Administrative Court Procedure). To be sure, at this level of the proceedings there can be no objection to the court below's finding that in the case of the Complainant, who is to be deemed as having suffered previous persecution for individual reasons, there is no good reason to believe that he would not be threatened again with such persecution upon his return to Chechnya, and there is also no possibility of internal protection in other regions of the Russian Federation (1.). However, the court below based its finding that there were no reasons for exclusion under Section 3 (2) Sentence 1 No. 1 and 2 of the Asylum Procedure Act on grounds that do not withstand review by this Court (2.). Since this Court cannot itself arrive at a final decision as to the recognition of refugee status, for lack of sufficient findings of fact on the part of the court below, the matter must be remanded to the court below for further hearing and a decision, in accordance with Section 144 (3) Sentence 1 No. 2 of the Code of Administrative Court Procedure (3.).

11 The key provisions for the legal assessment of this application for refugee status are Section 3 (1) and (4) of the Asylum Procedure Act in the version of the Announcement of 2 September 2008 (BGBl I p. 1798), and Section 60 (1) of the Residence Act in the version of the Announcement of 25 February 2008 (BGBl I p. 162). The changes in the law acknowledged in these announcements as a result of the Act for the Transposition of Directives of the European Union 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 rightly adopted as a basis by the Higher Administrative Court in its appealed decision

of 24 April 2008, in accordance with Section 77 (1) Sentence 1 of the Asylum Procedure Act.

12 1. Among other reasons, the court below awarded the Complainant refugee status because he was directly threatened with individual political persecution in Chechnya. The court found that he would have to expect immediate arrest and associated abuses by the Russian security forces that were relevant in refugee law. As a person who had suffered previous persecution, it could not be assured with the necessary certainty that he would not be sought as a terrorist upon his return because of his activity in the security service under Maskhadov and his participation in armed conflict, or that in the event of his arrest, there would be no abuses by the security forces. Moreover, at the date of the appealed decision, the court found that no possibility of internal protection was open to him in other regions of the Russian Federation. This reasoning, which the appealed decision presents independently from the discussion of group persecution, withstands review by this Court.

13 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 Convention on Refugees (GCR) – 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 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 determining whether persecution within the meaning of Sentence 1 exists, supplementary application must be made of 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), known as the ‘Qualification Directive’ (Section 60 (1) Sentence 5 Residence Act).

14 a) According to the findings of fact by the court below, against which the Respondent has raised no procedural complaints, and which are binding on this Court (Section 137 (2) Code of Administrative Court Procedure), at the time of his exit the Complainant – as evidenced by multiple searches of his home – was immediately threatened with arrest. Immediately pending persecution – i.e., pending with substantial probability – that is to be deemed equivalent to persecution already suffered presupposes a danger that has already become so highly concentrated that the individual at risk must at present readily expect persecution against his person to commence at any time (see decisions of 9 April 1991 – BVerwG 9 C 91.90 et al. – Buchholz 402.25 Section 1 Asylum Procedure Act No. 143 p. 289 <291 et seq.> and of 14 December 1993 – BVerwG 9 C 45.92 – Buchholz 402.25 Section 1 Asylum Procedure Act No. 166 p. 403 <404 ff.>). The court below found that this condition was met. It proceeded from the assumption that arrest by the Russian security forces, together with treatment in severe violation of human rights, would have occurred because in cases of doubt rebels and members of the Maskhadov government were subjected to ‘kangaroo courts’. The application of physical violence of the kind ascertained in the appealed decision represents a serious violation of fundamental human rights – here, the prohibition on inhuman or degrading treatment within the meaning of Article 3 of the ECHR – and thus meets the definition of an act of persecution (Article 9 (1) (a) in conjunction with (2) (a) of Directive 2004/83/EC). Here the threat of persecution derived from Russian security forces, and thus directly from the state (Section 60 (1) Sentence 4 (a) of the Residence Act in conjunction with Article 6 (a) of the Directive). Because of the large number of unsanctioned abuses, the court below rightly excluded the existence of acts of excess that are not of consequence in refugee law.

15 b) Section 60 (1) Sentence 1 of the Residence Act furthermore requires that the protected rights must be threatened because of the foreigner’s race, religion, nationality, membership of a certain social group or political convictions. Under European law as well, an act of persecution is relevant to refugee status only if it is connected with one of the reasons for persecution indicated in Article 10 of Directive 2004/83/EC (Article 9 (3) of Directive). In assessing reasons for

persecution, it is sufficient if these characteristics are merely attributed to the applicant by the actor of persecution (Article 10 (2) of the Directive).

16 According to the findings of the court below, the individual persecution with which the Complainant was threatened is connected with his Chechen ethnicity, his activity for the Maskhadov government, and the suspicion that he belonged to the rebels. This represents a combination of race and political convictions as the reasons for persecution. According to the findings of the court below, the measures to be feared from the security forces far exceeded the legitimate combating of terrorism and separatism; they cannot be justified by the pursuit of the state's appropriate interest in security and the protection of rights. For that reason, a presumption argues that the measures of persecution will affect the individual, at least in part, because of characteristics that are relevant for asylum, and that they therefore constitute political persecution (see decision of 25 July 2000 – BVerwG 9 C 28.99 – BVerwGE 111, 334 <340 et seq.>).

17 c) The prognosis of persecution at which the court below arrives for the Complainant is not subject to objection by this Court, being primarily an assessment by the trier of fact.

18 Because the Complainant was individually persecuted and shortly thereafter left his homeland, he benefits from the facilitated standard of proof under Article 4 (4) of Directive 2004/83/EC, irrespective of the comments by the court below regarding the group persecution of persons of Chechen ethnicity. According to this provision, the fact that an applicant has already been persecuted, or was directly threatened with 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. Previous persecution can no longer be denied because there may have been a flight alternative to another part of the country of origin at the date of exit (decision of 19 January 2009 – BVerwG 10 C 52.07 – BVerwGE 133, 55 Marginal No. 29). In other words, in the recognition of refugee status, the facilitated standard of proof applies even if there was not a nationwide situation that offered no alternatives at the date of exit.

19 The court below was satisfied that there is no good reason to believe that if the Complainant returns to Chechnya or other regions of the Russian Federation, he will not again be threatened with state persecution by the Russian security forces. This prognosis is based on the Higher Administrative Court's assumption that the Complainant is known to the Russian security forces as an employee of the security service under Maskhadov, and as a Chechen fighter, and that he is therefore being sought as a terrorist. The prognosis of the court below is founded on a finding of fact that meets the requirements of Section 108 (1) Sentence 1 of the Code of Administrative Court Procedure. The resulting finding of fact that there is no assurance that the Complainant will not be arrested by Russian security forces upon his return, and will then be mistreated, appears not speculative but logically explicable. The Higher Administrative Court founded its assessment on multiple sources and furnished sufficient reasons; there is no objection to be raised against it in this review on points of law.

20 Since according to the findings of the court below the Complainant was directly threatened with persecution by Russian security forces, and he must again fear that persecution in the event of a return, there is no need to decide here whether the wording 'such persecution' in Article 4 (4) of Directive 2004/83/EC presumes an inner connection between an established previous persecution and threatened persecution (on this point see this Court's referral seeking the ECJ's opinion, of 7 February 2008 – BVerwG 10 C 33.07 – Buchholz 451.902 *Europ. Ausl.- u. Asylrecht* [European Law on Foreigners and Asylum] No. 19 Marginal No. 41).

21 d) The court below furthermore assumed that no possibility for internal protection was available to the Complainant in other regions of the Russian Federation. We may set aside the question of whether internal protection needs to be examined at all in the present case, where the court below assumes that the Complainant is threatened with persecution by the state nationwide. The court below has already found that the first requirement of Article 8 (1) of the Directive is not met, according to which there must be a part of the country of

origin where there is no well-founded fear of being persecuted. In so doing, it allowed the Complainant to benefit from the facilitated standard of proof under Article 4 (4) of Directive 2004/83/EC. This Court finds no reservations in this regard (decision of 5 May 2009 – BVerwG 10 C 21.08 – juris Marginal No. 22 ff.).

22 2. In the opinion of the court below, Section 3 (2) of the Asylum Procedure Act does not oppose the Complainant's refugee status. To be sure, by his own admission the Complainant, together with other rebels in a combat group, carried out attacks on Russian units during the Second Chechen War, and killed Russian soldiers. However, the court found that his participation in armed conflicts in which the civilian population was not affected does not meet the requirements for reasons for exclusion. This assumption does not fully examine the concept of a war crime under Section 3 (2) Sentence 1 No. 1 of the Asylum Procedure Act. It furthermore contravenes Section 3 (2) Sentence 1 No. 1 and 2 of the Asylum Procedure Act, because it is based solely on the Complainant's statements, and thus on too narrow a foundation of fact.

23 a) According to Section 3 (2) of the Asylum Procedure Act, a foreigner is not a refugee if there is good reason to believe that he has committed a crime against peace, a war crime or a crime against humanity within the meaning of the international instruments drawn up for the purpose of establishing provisions regarding such crimes (Section 3 (2) Sentence 1 No. 1 Asylum Procedure Act), if he committed a serious non-political crime outside the Federal territory before being admitted as a refugee, in particular a brutal act, even if it was supposedly intended to pursue political aims, (Section 3 (2) Sentence 1 No. 2 Asylum Procedure Act), or if he acted in violation of the aims and principles of the United Nations (Section 3 (2) Sentence 1 No. 3 Asylum Procedure Act). This also applies to foreigners who have incited others to commit such crimes, or who have otherwise been involved in such crimes (Section 3 (2) Sentence 2 Asylum Procedure Act). German lawmakers have now transposed Article 12 (2) and (3) of Directive 2004/83/EC into national law, with the reasons for exclusion for refugee status that are now governed by the Asylum Procedure Act since the implementation of the Directive Transposition Act. This provision under

European law in turn derives from the reasons for exclusion already stated in Article 1 F of the Convention of 28 July 1951 Relating to the Status of Refugees (BGBl 1953 II, 559) – the Geneva Convention on Refugees (GCR).

24 b) The concept of a limitation on asylum can already be found in Hugo Grotius (De iure belli ac pacis, 1625, L. II, Cap. XXI, § 5). According to this concept, asylum can be enjoyed only by one who suffers from ‘unmerited persecution’; on the other hand, protection is withheld from those who have committed wrongdoings against others, or against human society. This concept is reflected in the exclusion provisions of Article 1 F of the GCR, Article 12 (2) of Directive 2004/83/EC, and Section 3 (2) Asylum Procedure Act, which do not differ substantively from one another.

25 aa) The reasons for exclusion already incorporated into the Geneva Convention on Refugees can be traced back to two provisions. The deliberations on the Convention drew upon the Constitution of the International Refugee Organisation (IRO) of 15 December 1946, which limited the concept of refugees to ‘bona fide refugees’, and excluded, for example, ‘war criminals’. A second model was Article 14 (2) of the Universal Declaration of Human Rights of 10 December 1948, under which the right of asylum cannot be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

26 In the drafting of Article 1 F (a) of the GCR, all representatives of the participating states were unanimous that war criminals should be excluded from protection under the Convention. They also affirmed that a provision was still necessary after the condemnation of the war criminals from the Second World War (E/AC.32/SR.5 p. 5, 11 and 16, in: Takkenberg/Tahbaz, The collected Travaux Préparatoires of the 1951 Geneva Convention relating to the Status of Refugees, Vol. I Early History and the Ad Hoc Committee on Statelessness and Related Problems, 16 January – 16 February 1950 Lake Success, New York, published by the Dutch Refugee Council under the auspices of the European Legal Network on Asylum, Amsterdam 1989, p. 175, 178 and 180). At first an explicit reference was planned to Article VI of the Charter of the International

Military Tribunal of 8 August 1945 (hereinafter: the London Charter), in which crimes against peace, war crimes, and crimes against humanity had been defined (Article 1 B of the proposal of the working group of 23 January 1950 – E/AC.32/L.6, in: Takkenberg/Tahbaz, op. cit. Vol. I, p. 361). At Germany's instigation, the reference to the London Charter was replaced during the deliberations of the Conference of the Plenipotentiaries, in Article 1 F (a) of the GCR, by a general reference to international instruments regarding crimes under international criminal law (A/CONF.2/SR.29 p. 9 ff., in: Takkenberg/Tahbaz, Vol. III The Conference of the Plenipotentiaries on the Status of Refugees and Stateless Persons 2 – 25 July 1951 Geneva Switzerland, p. 490 et seq.).

27 By contrast, initially there was debate about the exclusion of 'common criminals' under Article 1 F (b) of the GCR. Some states considered this a matter of course (E/AC.32/SR.2 p. 9 and E/AC.32/SR.5 p. 5, in: Takkenberg/Tahbaz, op. cit. Vol. I, p. 160 and p. 175), but it encountered resistance from the United Kingdom (A/CONF.2/SR.24 p. 4 ff., in: Takkenberg/Tahbaz, op. cit. Vol. III, p. 429 ff.). However, France, in particular, argued for the exclusion of common criminals, and emphasised the need to protect refugee status from discredit in this way (A/CONF.2/SR.24 p. 5 ff. and A/CONF.2/SR.29 p. 19, in: Takkenberg/Tahbaz, op. cit. Vol. III, p. 430 and p. 495). This position met with consent after the wording of the text of the Convention was made more specific than Article 14 (2) of the Universal Declaration of Human Rights, with regard to the place (outside the host country) and time (before entry as a refugee) of the offence, so as to distinguish this reason for exclusion against the exception from the non-refoulement prohibition under Article 33 (2) of the GCR. However, the need was pointed out at the same time for a proper balance between the contrary aims of effective refugee protection, on one side, and avoiding discrediting refugee status, on the other side. For that reason, there was consensus that this reason for exclusion could apply only after the commitment of serious crimes (A/CONF.2/SR.24 p. 13 and A/CONF.2/SR.29 p. 18 ff., in: Takkenberg/Tahbaz, op. cit. Vol. III, p. 434 and p. 494 ff.)

28 The examination and determination of whether the person concerned has committed an act covered by the reasons for exclusion should be reserved for the relevant host country, as a sovereign decision (see E/AC.32/SR.18 p. 3: '… they consider a war criminal' and U.N. Doc. E/1618: '… who in its opinion has committed a crime …', in: Takkenberg/Tahbaz, op. cit. Vol. I, p. 274 and 405 <409>). In this connection, the requirements for the standard of proof for establishing incriminating acts were eased in the final version of the introductory clause, '… shall not apply to any person with respect to whom there are serious reasons for considering that: …'.

29 bb) The reasons for exclusion listed in Article 12 (2) and (3) of Directive 2004/83/EC are based on Article 1 F of the GCR. This is clearly evident in the wording and structure of the provision, as well as in the statement of reasons in the Proposal for a Council Directive of the European Communities (Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection, of 12 September 2001, COM(2001) 510 final, p. 28 et seq.). The text of letter (a) was left unchanged in the legislative process; letter (b) was made more specific as to the date of commitment of the serious non-political crime (see Council Document 14083/02 p. 18) and supplemented by adding the variant regarding brutal acts (see Council Documents 9038/02 p. 20 footnote 2 and 12199/02 p. 17).

30 cc) The German legislators first incorporated the reasons for exclusion from refugee status, taking account of the concept of law contained in Article 1 F of the GCR, into Section 51 (3) Sentence 2 Aliens Act by way of the Act to Combat International Terrorism of 9 January 2002 (BGBl I p. 361), in order to implement Resolutions 1269 (1999) and 1373 (2001) of the Security Council of the United Nations. Here the statement of reasons for the bill explicitly referred to the lowered standard of proof that presupposes no final and absolute conviction by a court (BTDrucks 14/7386 p. 57). The Immigration Act incorporated the unaltered content of this provision as of 1 January 2005 into Section 60 Abs. 8 Sentence 2 of the Residence Act (old version) (see BTDrucks 15/420 p. 91 et seq.). The Directive Transposition Act implemented Article 12 (2) of Directive

2004/83/EC; for systematic reasons the legislators now covered the reasons for exclusion, termed cases of ‘ineligibility for asylum’, in Section 3 (2) of the Asylum Procedure Act (BTDrucks 16/5065 p. 187 and 213 et seq.).

31 c) For the definition of crimes against peace, war crimes and crimes against humanity as characterising elements, Section 3 (2) Sentence 1 No. 1 of the Asylum Procedure Act refers to ‘international instruments drawn up for the purpose of establishing provisions regarding such crimes’. The wording and genesis of the provision reveal a dynamic approach (Zimmermann, DVBl 2006, 1478 <1481 ff.>), in which the lawmakers assume that evolving international criminal law provides a sanction for violations of international humanitarian law. Therefore in the present instance, the determination of whether war crimes or crimes against humanity within the meaning of Section 3 (2) Sentence 1 No. 1 of the Asylum Procedure Act have been committed must primarily be made in accordance with the defining elements of these offences formulated in the Rome Statute of the International Criminal Court of 17 July 1998 (BGBl 2000 II p. 1394, hereinafter: the Rome Statute), which articulates the current status of developments in international criminal law for cases of violations of international humanitarian law.

32 aa) Article 8 (2) of the Rome Statute defines war crimes with a differentiation between international armed conflicts (letters (a) and (b)) and internal armed conflicts (letters (c) through (f)). For international armed conflicts, letter (a) is concerned with grave breaches of the four Geneva Conventions for the protection of victims of armed conflicts of 12 August 1949, for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (the First Convention – BGBl 1954 II p. 783), for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (the Second Convention – BGBl 1954 II p. 813), relative to the Treatment of Prisoners of War (Third Convention – BGBl 1954 II p. 838), and relative to the Protection of Civilian Persons in Time of War (Fourth Convention – BGBl 1954 II p. 917, corr. 1956 II p. 1586), and enumerates acts against protected persons and property. Letter (b) names other serious violations of the laws and customs applicable in international armed conflict, within the established framework of

international law. By contrast, for armed conflicts that are not of an international character, letter (c) refers to serious violations of Article 3 common to the four Geneva Conventions of 12 August 1949. Among these it sanctions violence to life and limb against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause. Letter (e) covers other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law.

33 Article 8 (2) (d) and (f) of the Rome Statute distinguish armed conflicts that are not of an international character from situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. Letter (f) furthermore presupposes a protracted armed conflict between governmental authorities and organised armed groups or between such groups. These provisions, adopted on the model of the decision of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia of 2 October 1995 (ICTY-Appeals Chamber Prosecutor v. Tadic, www.unhcr.org/refworld/pdfid/47fdfb520.pdf, Marginal No. 70, status of November 2009), establish the lowest threshold of relevance under international law for an internal armed conflict. A certain degree of intensity and permanence of the conflict is required in order to justify an intervention in the sovereignty of the relevant state (Werle, *Völkerstrafrecht* [International Criminal Law], 2nd ed., 2007, Marginal No. 938 ff. and 952 ff.; see also decision of 24 June 2008 – BVerwG 10 C 43.07 – BVerwGE 131, 198 <208 et seq.> on Section 60 (7) Sentence 2 Residence Act in conjunction with Article 15 (c) Directive 2004/83/EC). The Higher Administrative Court did not explicitly find that the Second Chechen War satisfied the characteristics of an internal armed conflict. But this assumption is rather obvious, at least for the period in question here, and was shared by the parties at the hearing before this Court.

34 Taking a correct approach, the court below proceeded on the assumption that the Complainant’s mere active participation in the Second Chechen War did not meet the definition of a war crime or crime against peace. The international

criminal law adopted in Section 3 (2) No. 1 of the Asylum Procedure Act – like the international humanitarian law that it sanctions – contains only procedural rules for a conflict with regard to an internal armed conflict (*ius in bello*), but does not penalise the application of violence against combatant adversaries *per se* (*ius ad bellum*; see also Marx, Asylum Procedure Act, 7th ed. 2008, Section 3 Marginal No. 22). In examining the Complainant's participation in war crimes, however – assuming the existence of an internal armed conflict – the court below focused, with regard to potential victims, only on the civilian population (Copy of the Decision p. 41). This falls short, because Article 8 (2) (c) of the Rome Statute includes, among other points, the killing and abuse of members of the armed forces who have laid down their arms or are otherwise placed *hors de combat*. Article 8 (2) (e) No. ix – xi of the Rome Statute also extends protection to combatant adversaries in the case of killing or wounding treacherously a combatant adversary, declaring that no quarter will be given, or the physical mistreatment of persons who are in the power of another party to the conflict. The court below did not examine whether there are indications of fact for the satisfaction of these defining elements of offences.

35 Furthermore, insofar as it finds that the Complainant did not participate in war crimes (Section 3 (2) Sentence 1 No. 1 and Sentence 2 Asylum Procedure Act), the appealed decision rests on too narrow a foundation of fact. The court below based its assumption that this reason for exclusion did not oppose the Complainant's refugee status solely on the Complainant's own testimony and that of his family members. Because of the findings in the appealed decision regarding the course of the Second Chechen War, this is insufficient; the Higher Administrative Court itself refers to terrorist attacks by the rebels (Copy of the Decision p. 19 et seq. and p. 41 et seq.), to massive violations of rights, including by the Chechen partisans (Copy of the Decision p. 20 et seq.), and to attacks and assaults on Chechens cooperating with the Russian side (Copy of the Decision p. 25). These references call for at least an attempt at clarifying, on the basis of other sources of information, whether the group to which the Complainant belonged is suspected of having participated in abuses that imply war crimes. Section 3 (2) of the Asylum Procedure Act takes hold even where there is only good reason to believe that the requirements of fact have been met

for the elements of crimes establishing reasons for exclusion; the lowered standard of proof accordingly does not require proof beyond a reasonable doubt (decision of 25 November 2008 – BVerwG 10 C 25.07 – Buchholz 402.25 Section 71 Asylum Procedure Act No. 15 Marginal No. 20 ff.).

36 A further factor in the present case is that the nephew – the Complainant in case BVerwG 10 C 23.08, who belonged to the same combat group as the present Complainant – stated that the rebel group was under the command of Commander B. In this regard, the Foreign Office informed the Administrative Court in the parallel proceedings for the nephew, in a memorandum of 15 June 2004, that, among other points, B. was one of the leaders of the Chechen terrorists who took more than 700 theatregoers hostage in the Moscow musical theatre in October 2002. Like all the other hostage takers, the Foreign Office reported, he was killed by Russian security forces in the course of freeing the hostages. The Complainant's involvement in this command structure, which the court below did not examine in its decision, arouses doubts as to his testimony, and suggests it should be checked on a basis of objective fact. Even if the Complainant was already in Germany in October 2002 and states in the present proceedings that the commander did not take part in terrorist actions until later, there is still occasion to clarify these circumstances. This is because, as the Complainant accurately notes, in examining the reasons for exclusion under Section 3 (2) of the Asylum Procedure Act, all facts and circumstances material to the characterising elements of crimes should be investigated and determined carefully and exhaustively by the trier of fact.

37 bb) However, contrary to the arguments advanced in the present appeal, the findings of the court below in regard to the Complainant's professional activity in a security department of the Chechen Ministry of the Interior called a 'Sharia authority' do not reveal any indications of participation in a crime against humanity; to that extent, the decision rests on an adequate foundation of fact.

38 To be sure, this reason for exclusion – contrary to the Complainant's interpretation of the law – is not out of the question merely because he need fear no persecution because of his previous professional activity. For historical

and teleological reasons, nothing argues that the applicability of Section 3 (2) of the Asylum Procedure Act should be narrowed by a requirement for a specific connection between a reason for persecution and a reason for exclusion. Rather, the genesis of Article 1 F of the GCR clearly shows that all states were unanimous that war crimes in the broad sense were to be excluded in any case from the protection offered by the Convention. The opposing interpretation that demands a specific connection cannot effectively achieve the aspiration to protect refugee status from discredit. Furthermore, the historical record supports the opinion argued here, in that the separation of refugee status from the question of extradition is emphasised (one need see only A/CONF.2/SR.29 p. 17, in: Takkenberg/Tahbaz, op. cit. Vol. III, p. 494). From the fact that a connection between the reason for persecution and the reason for exclusion may exist in an individual case, one cannot conclude that such a connection is required by Article 1 F of the GCR, Article 12 (2) of Directive 2004/83/EC or Section 3 (2) of the Asylum Procedure Act. In examining the reasons for exclusion, therefore, the entire conduct of the applicant for protection prior to entry into the host country must be examined, and not only the conduct connected with the feared persecution.

39 Article 7 (1) of the Rome Statute defines crimes against humanity as single acts, such as murder, enslavement or torture, that are committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack. According to Paragraph 2 (a) of this provision, ‘attack directed against any civilian population’ means a course of conduct involving the multiple commission of acts referred to in Paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack. Accordingly, the individual acts must fit into a functional overall context in order for the act as a whole to exist; here the final ‘policy’ element has a linking effect (Werle, op. cit. Marginal No. 753 ff. and Marginal No. 770 ff.). The findings of the court below (Copy of the Decision p. 41) as to the Complainant’s professional activity do not suggest his participation in single acts covered by Article 7 (1) (a) – (k) of the Rome Statute. Still less – even if one does assume such individual acts – is there any recognisable objective or

subjective indication of a linking general context of a widespread or systematic attack directed against any civilian population.

40 d) The appealed decision is also contrary to Section 3 (2) Sentence 1 No. 2 of the Asylum Procedure Act. While the court below's interpretation of the norm is unobjectionable, the appealed decision is to that extent also based on a foundation of fact that does not meet the requirements of the provision.

41 Article 1 F (b) of the GCR, on which this reason for exclusion is based, serves – as already explained – to exclude 'common criminals'. The drafters wished to exclude these from protection under the Convention so as not to discredit the status of a 'bona fide refugee' for reasons of acceptance. For that reason, not every criminal act by an applicant for protection before his entry into the host country entails an exclusion from refugee status. The crime must first of all have a certain gravity under international rather than local standards (see UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status, 1979, No. 155). It must therefore be a capital crime or some other crime that is categorised as especially serious and prosecuted accordingly under criminal law in most legal systems (decision of 14 October 2008 – BVerwG 10 C 48.07 – BVerwGE 132, 79 Marginal No. 19).

42 At the same time, the act must be non-political. In this determination, regard is to be given to the nature of the offence, as well as to the motives behind the act and the purpose it pursues. An offence is non-political if it has been committed primarily for other reasons – for example, for personal reasons or gain (UNHCR, op. cit., No. 152). If there is no clear connection between the crime and its alleged political goal, or if the act committed is out of proportion to its alleged political objective, then non-political motives predominate and characterise the offence as a whole as non-political (House of Lords, judgment of 22 May 1996 – [1996] 2 All ER 865 – T v. Secretary of State for the Home Department, www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b70f4, status November 2009). In implementation of Article 12 (2) (b) last clause of Directive 2004/83/EC, the lawmakers categorised especially brutal acts, for example, as serious non-political crimes even if they were committed in pursuit

of primarily political goals. This will regularly be the case for acts of violence that are commonly considered to be of a “terrorist” nature (see paragraph 15 of the UNCHR Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, of 4 September 2003 – HCR/GIP/03/05 –).

43 The reasons for exclusion in Section 3 (2) Sentence 1 No. 1 and 2 of the Asylum Procedure Act are applicable in parallel with one another in an internal armed conflict. The genesis of Article 1 F (a) and (b) of the GCR shows that the exclusion because of ineligibility for asylum for war criminals in the broad sense, on the one side, and for ‘common criminals’, on the other, is founded on different sources and is specific to different scenarios (crimes in war and criminal offences in peace). But this historical source does not support the conclusion that Section 3 (2) Sentence 1 No. 1 of the Asylum Procedure Act is exclusive or specific relative to No. 2, because even in an armed conflict, combatants may commit serious non-political offences. However, the aforementioned reasons for exclusion in such a conflict situation do not stand in isolation beside one another; rather, the existence of an internal armed conflict, with the pertinent rules of international humanitarian law and their sanctioning under international criminal law, also influences the standards under which the proportionality of means in particular should be assessed under No. 2. To be sure, combatants of rebel groups in non-international armed conflicts – unlike combatants in an international armed conflict – do not benefit from the immunity of combatants; in other words, under international law they have no right to perpetrate armed harmful acts (Ambos, in: Munich Commentary on the Code of Criminal Procedure, Vol. 6/2, 2009, before Sections 8 ff. Code of Criminal Procedure, Marginal No. 38 with further authorities). But international (criminal) law also does not sanction their participation in combat operations as such, but rather refrains from setting any rule in this regard. This finding affects the assessment of an act within the meaning of Section 3 (2) No. 2 of the Asylum Procedure Act. If, for example, killing combatant adversaries in combat operations does not constitute an element of a war crime and is not to be sanctioned under international criminal law, then this act cannot so to speak automatically result in the exclusion of an applicant from eligibility for refugee

status under No. 2, without a contradiction of the assessment. If combat operations by combatants in an internal armed conflict are not covered by Section 3 (2) Sentence 1 No. 1 of the Asylum Procedure Act, as a rule they will also not constitute a reason for exclusion as a serious non-political crime.

44 For that reason there is no objection to the approach taken by the court below in finding that the Complainant's politically motivated participation in killing Russian soldiers in the course of combat operations by Chechen combatants as such does not meet the definition of a severe non-political crime because of disproportionality. But to that extent as well – as already explained – the appealed decision rests on a foundation of fact that does not satisfy the requirements of Section 3 (2) Sentence 1 No. 2 of the Asylum Procedure Act.

45 3. For lack of sufficient findings of fact by the court below regarding the reasons for exclusion under Section 3 (2) No. 1 and 2 of the Asylum Procedure Act, this Court cannot itself reach a final decision as to whether the Complainant is entitled to refugee status. For that reason, under Section 144 (3) Sentence 1 No. 2 of the Code of Administrative Court Procedure, the matter must be remanded to the court below for further hearing and decision.

46 The court below will have to clarify, taking account of findings about the activities of the Chechen rebels, whether on the basis of fact, there is good cause to believe in the Complainant's regard that before entering the Federal Republic he participated in the commission of war crimes or serious non-political crimes. In this regard, the court will also have to pursue the question of whether the inclusion of his combat group in the command structure under Commander B. at the time before his exit reveals any points of connection for his involvement, for example, in terrorist activities. Here the provisions on responsibility under Article 25 (2) and (3) of the Rome Statute must be taken into account, which among other points cover abetment and other assistance or contributions. Article 27 of the Rome Statute indicates that any applicable official capacity of the person concerned is irrelevant, and Article 28 of the Rome Statute governs the responsibility of military commanders and other superiors. Even if the Complainant did not personally bring about the elements

of a serious non-political crime, under Section 3 (2) Sentence 2 of the Asylum Procedure Act it must be examined whether he instigated the crime or was involved in it in any other way.

47 The disposition as to costs is reserved for the final decision. Court costs are not levied, in accordance with Section 83b of the Asylum Procedure Act. The value at issue proceeds from Section 30 of the Act on Attorney Compensation.

Dr. Mallmann Prof. Dr. Dörig Richter

Prof. Dr. Kraft Fricke

Field: BVerwGE: Yes

Asylum Law Professional press: Yes

Sources in Law:

Asylum Procedure Act	Section 3 (1), (2) Sentence 1 No. 1 and 2, (2) Sentence 2
Aliens Act 1990	Section 51 (3) Sentence 2
Residence Act	Section 60 (8) Sentence 2 (old version)
Residence Act	Section 60 (1) Sentence 1
Charter of the International Military Tribunal of 8 August 1945	Article VI
GCR	Article 1 F, Article 33 (2)
Rome Statute	Article 7, Article 8, Article 25, Article 27, Article 28
Code of Administrative Court Procedure	Section 108 (1), Section 137 (2), Section 144 (3) Sentence 1 No. 2
Directive 2004/83/EC	Article 4 (4), Article 8 (1), Article 12 (2)
Universal Declaration of Human Rights	Article 14 (2)

Headwords:

Reason for exclusion; standard of proof; refugee status; international humanitarian law; internal armed conflict; combatant; war crime; non-political crime; separatism; terrorism; crime against humanity; insufficient findings of fact; international criminal law.

Headnotes:

1. At the present time, whether war crimes or crimes against humanity within the meaning of Section 3 (2) Sentence 1 No. 1 of the Asylum Procedure Act exist must be determined primarily according to the elements of these crimes formulated in the Rome Statute of the International Criminal Court of 17 July 1998.

2. In an internal armed conflict, war crimes may be committed not only against the civilian population, but also against combatant adversaries.

3. If combat operations by combatants in an internal armed conflict are not covered by Section 3 (2) Sentence 1 No. 1 of the Asylum Procedure Act, as a rule they will also not constitute a serious non-political crime as a reason for exclusion (No. 2).

Decision of the 10th Division of 24 November 2009 – Federal Administrative Court 10 C 24.08

I. Wiesbaden Administrative Court, 21.10.2004 – Case No.: VG 5 E 1545/01.A(2) -
II. Kassel Higher Administrative Court, 24.04.2008 – Case No.: VGH 3 UE 411/06.A -