Field:

BVerwGE: no
Professional press: yes

Asylum law

Sources in law:

Asylum Procedure Act, sec. 3(1), sec. 3a(1)(1)
Basic Law, art. 4, 140
Code of Administrative Court Procedure, sec. 86(1), sec 108(1) sentence 1, sec. 132(2)(1) and (3)
Weimar Constitution, art. 136(1), art. 137(3)

Title line:

Religious persecution subsequent to conversion – courts are not bound to baptising pastor's assessment of sincerity of change of faith

Headwords:

Objection of need for investigation; standard of proof; freedom of faith; refugee status; right of religious self-determination; conversion; practice of faith; membership; religion; religious identity; religious persecution; state laws on the church; baptism; neutrality as to belief systems.

Headnote:

If an asylum applicant claims to be threatened with religious persecution because of a conversion to Christianity, when deciding whether pursuing a religious practice entailing danger is especially important to that person in order to maintain his religious identity, the administrative courts are not bound by the assessment of the officiant of a Christian church that the baptism of the person concerned is founded on a sincere and lasting religious decision.

Decision of the First Division of 25 August 2015 - BVerwG 1 B 40.15

I. Stuttgart Administrative Court, 20 September 2013
Case: VG A 11 K 5/13

II. Mannheim Higher Administrative Court, 15 April 2015
Case: VGH A 3 S 1923/14

FEDERAL ADMINISTRATIVE COURT

DECISION

BVerwG 1 B 40.15
VGH A 3 S 1923/14

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 25 August 2015 – 1 B 40.15 – para. …

of Mr K.N.

Plaintiff, respondent in the appeal,
and complainant

- Attorney of record:
X, Attorney at law -

v.

the Federal Republic of Germany,
represented by the Federal Ministry of the Interior,
represented in turn by the President of the
Federal Office for Migration and Refugees,
90343 Nuremberg,

Respondent, appellant and respondent
in the complaint

The First Division of the Federal Administrative Court
on 25 August 2015
by Presiding Federal Administrative Court Justice Prof. Dr Berlit
and Federal Administrative Court Justices Prof. Dr Kraft and Fricke

has decided:

The plaintiff's complaint against the denial of leave to appeal on points of law in the judgment of the Baden-Württemberg Higher Administrative Court of 15 April 2015 is denied.

Costs of the complaint proceedings are imposed on the plaintiff.

Reasons:

I

1 The plaintiff, an Iranian national, filed an application for asylum in March 2011 because of a refusal to serve in the military. The Federal Office for Migration and Refugees (the “Federal Office”) denied the application in a decision of 19 December 2012 for lack of credibility of the information about his experiences prior to fleeing his country. While his action was pending, the plaintiff converted to Christianity, and was baptised in May 2013.

2 The Administrative Court found in his favour in his action for recognition of refugee status. From the grounds of the decision, one finds that although the court was unable to satisfy itself as to the sincerity of his conversion, it held that the plaintiff should nevertheless be granted refugee status because baptism, as an act of acceptance into a faith community, is part of the core of spiritual care in such a community. For that reason, under art. 140 of the Basic Law in conjunction with art. 137(3) of the Weimar Constitution, the court held that it was bound by the opinion of the pastor who performed the baptism that the plaintiff sincerely desired his conversion.

3 On appeal by the respondent, the Higher Administrative Court amended the Administrative Court’s judgment and found against the plaintiff. In its grounds, it stated that a sufficiently severe interference, relevant in refugee law, with the religious freedom of the plaintiff, who left Iran without being persecuted, would presuppose – among other factors – that in order to maintain his religious identity, the individual concerned would consider it especially important to pursue publicly certain religious practices that would entail danger. But even in view of the plaintiff’s having been baptised, the court was unable to satisfy itself to the necessary degree that his averred turn to the Christian religion was founded on a firm conviction and a sincerely intended change of religious perspective. According to the court, the Christian faith does not shape the plaintiff’s religious identity in such a way that he finds Christian practices obligatory for himself in order to maintain his identity. Given this assessment, the court found, that the

fact that the individual concerned was baptised by the officiant of a Christian church, is not a binding aspect for entities of the state. Rather, it is the fundamental task of administrative courts of the state to arrive at their own assessment concerning the sincerity of a conversion. Nothing else proceeds from art. 140 of the Basic Law in conjunction with art. 137(1) and (3) of the Weimar Constitution. The church congregation is still entirely free to regard the plaintiff as a member. But it is for the courts of the state alone to answer the separate question of whether membership of a Christian church entails religious persecution, and therefore provides a basis for granting refugee status.

4 The plaintiff's complaint seeking leave for an appeal on points of law is directed against that decision.

II

5 The complaint, founded on the grounds for leave of the fundamental importance of the matter (sec. 132(2)(1) Code of Administrative Court Procedure) and a procedural deficiency in the judgment of the court below (sec. 132(2)(3) Code of Administrative Court Procedure) does not meet with success.

6 1. A matter has fundamental importance within the meaning of sec. 132 (2)(1) of the Code of Administrative Court Procedure if it raises an abstract question of law that is both subject to supreme court review and material to the case to be decided, and that has a general significance that goes beyond the individual case and must be clarified in an appeal proceeding on points of law in the interest of consistency of the administration of justice, or in the interest of the continuing evolution of the law. These requirements are not met if the raised question would not arise in a proceeding on a point of law only, or if it has already been resolved, or if, on the basis of the wording of statute, it can be answered by applying the usual rules of appropriate interpretation on the basis of the relevant case law without a supreme court appeal, or if it is not susceptible of an abstract clarification (Federal Administrative Court, decision of 1 April 2014 – 1 B 1.14 – AuAS 2014, 110).

7 The complaint argues that there is a fundamental need for clarification

> "whether a court of the state has unrestricted authority, in the course of an asylum proceeding, to hold, contrary to a baptism in the Christian faith and contrary to an official certification from the pastor of the applicant's church congregation, that an applicant for asylum does not have a religious identity in the sense that he cannot reasonably be expected to forgo the publicly perceptible practice of his Christian faith."

8 In this regard, the complaint essentially argues that determining the sincerity of a conversion to Christianity, as well as the religious identity of an asylum-seeker, is an internal church matter that is removed from review by the state under art. 140 of the Basic Law in conjunction with art. 137(3) of the Weimar Constitution. Baptism, it argues, is part of the core sphere of ecclesiastical activity that the state is not permitted to question. Moreover, the plaintiff's constitutionally protected freedom of faith would be violated if the state were to assume the power to decide whether he is a "true" Christian or not. In this and its other arguments, the complaint does not raise any questions of law subject to supreme court review that are in need of clarification and would justify leave to appeal on points of law under sec. 132(2)(1) or 132(3) of the Code of Administrative Court Procedure.

9 There is no need for a supreme court proceeding to clarify that in examining the requirements for awarding refugee status under sec. 3(1) and (4) of the Asylum Procedure Act, authorities of the state and administrative courts are not bound by the assessment of a competent officiant of a Christian church that the baptism of the asylum-seeker in question is founded on a sincere and lasting religious decision. This follows in particular from the case law of the Federal Administrative Court on which the Higher Administrative Court founded its judgment on appeal (Federal Administrative Court, judgment of 20 February 2013 – 10 C 23.12 – BVerwGE 146, 67 in concordance with ECJ, judgment of 5 September 2012 – C-71/11 und C-99/11 [ECLI:EU:C:2012:518] – NVwZ 2012, 1612). The arguments in the complaint do not reveal any new or additional need for clarification.

10 Article 4(1) and (2) of the Basic Law, as uniform fundamental statutory law, and art. 140 of the Basic Law in conjunction with 137(3) first sentence of the Weimar Constitution, guarantee religious societies the freedom to regulate and administer their affairs independently within the limits of the law that applies to all (on the relationship among these provisions in the sense of a specialism of limits: Federal Constitutional Court, decision of 22 October 2014 – 2 BvR 661/12 – EuGRZ 2014, 698 para. 82 et seq.). The right of religious self-determination includes all measures that serve to safeguard the religious dimension of actions within the meaning of churches' understanding of themselves, and to preserve the direct relationship of their activity with their fundamental ecclesiastical mission (Federal Constitutional Court, decision of 22 October 2014 – 2 BvR 661/12 – EuGRZ 2014, 698 para. 95 with further references). "Their affairs" in this sense particularly includes the rights and obligations of the members of a given faith community, particularly provisions that govern the enrolment and departure of members of the faith, their status as members, and their exclusion (Federal Constitutional Court, decision of 17 December 2014 – 2 BvR 278/11 – EuGRZ 2015, 250 para. 37 with further references). Membership of a faith community, with effect for the secular sphere (e.g., as a prerequisite for the obligation to pay church tax), is normally to be assessed according to the rules of the faith community itself (Federal Constitutional Court, decision of 31 March 1971 – 1 BvR 744/67 – BVerfGE 30, 415 <422> – including on the limits of the law that applies to all). Accordingly, it is for the competent officiants within the church itself to interpret and assess the canon-law requirements for a baptism and its efficacy, with the consequence that the person concerned is a member of the congregation of a faith community such as the Evangelical-Lutheran Church (cf. Federal Administrative Court, judgment of 27 November 2013 – 6 C 21.12 – BVerwGE 148, 271 para. 46 et seq. – including on the distinction against points that remain open to review by courts of the state).

11 It is self-evident that – apart from cases of abuse – when examining whether an asylum-seeker is threatened with a serious violation of freedom of religion in that person's homeland, as a persecution relevant in asylum law, the administrative courts cannot question a membership per se that has been confirmed by a faith community. However, membership of a Christian faith community, brought about through baptism, is by itself material to a decision only if persecution in a country is linked exclusively with membership of a church. But if this is not the case – as indeed the appellate court found in its assessment of the facts of the situation of persecution in Iran – then when assessing the severity of an impending violation of a concerned individual's religious freedom, the Federal Office or the administrative courts, as the case may be, building on the legal fact of membership of a church, must examine whether pursuing a certain endangering religious practice is especially important to that individual in order to preserve his or her religious identity. Since refraining from practising one's religion under duress from the threat of persecution can already qualify as persecution within the meaning of sec. 3a(1)(1) of the Asylum Procedure Act, in the instant case, for a recognition of refugee status on the grounds of threatened religious persecution, it is relevant how the individual lives in exercising his faith, and whether practising his faith in a way that would lead to persecution is a central element of his religious identity for him personally, as he understands his faith, and in that sense is indispensable to him (Federal Administrative Court, judgment of 20 February 2013 – 10 C 23.12 – BVerwGE 146, 67 para. 28 et seq. in concordance with ECJ, judgment of 5 September 2012 – C-71/11 and C-99/11 – NVwZ 2012, 1612). The fact that this question may concurrently be of significance in some regards as a requirement under canon law for baptism, and has been affirmed by the competent officiant within the church, does not make it – as the court below correctly found – an "own affair" of the faith community within the meaning of art. 137(3) first sentence of the Weimar Constitution in conjunction with art. 140 of the Basic Law, with respect to the recognition of refugee status that is to be examined here and that is the responsibility of agencies of the state. These principles apply irrespective of whether the particular faith community is or is not constituted as a corporation under public law.

12

There is also no need to clarify in a proceeding on points of law that when agencies of the state independently assess, under sec. 3(1) of the Asylum Procedure Act, whether an applicant feels that a certain religious practice is a central element of his religious identity according to his understanding of his faith, and in that sense is indispensable to him, those agencies do not violate the state's obligation to maintain neutrality as to philosophical creeds as provided under art. 3(3) first sentence and art. 4(1) and (2) of the Basic Law, together with art. 140 in conjunction with art. 136(1) and (4) and art. 137(1) of the Weimar Constitution. After all, this does not involve an unconstitutional assessment of a church's beliefs or teachings. In examining a grant of refugee status on the grounds of claimed religious persecution, agencies of the state neither address the content of belief systems, nor assess those beliefs, still less do they formulate their own viewpoints in matters of belief (on the scope of the neutrality principle: Federal Constitutional Court, decision of 22 October 2014 – 2 BvR 661/12 – EuGRZ 2014, 698 para. 88 et seq. with further references; cf. also European Court of Human Rights, judgment of 15 January 2013 – No. 48420/10 et al. – NJW 2014, 1935 para. 81 and judgment of 8 April 2014 – No. 70945/11 et al. – NVwZ 2015, 499 para. 76). They also do not decide on the legitimacy of religious convictions, but merely explore an individual applicant's stance towards his or her belief, namely how intensely religious principles, as the person experiences them, are binding for his or her identity. This does not involve any violation of the state's obligation to maintain neutrality as to philosophical creeds.

13 The case law of the Federal Administrative Court has also clarified that in examining the internal fact of whether the plaintiff feels that the suppressed religious practice of his faith is mandatory for him in order to maintain his religious identity, the administrative courts cannot limit themselves to reviewing the plausibility of an adequately substantiated argument, but rather, in this regard, must apply the regular standard of proof, namely demonstration to the full satisfaction of the court (sec. 108(1) sentence 1 Code of Administrative Court Procedure) (Federal Administrative Court, judgment of 20 February 2013 – 10 C 23.12 – BVerwGE 146, 67 para. 30). A need for a new or further clarification does not proceed from the contention, according to the argument in the complaint, that the application of the regular standard of proof violates the freedom of faith of the indi-

vidual concerned, and at the same time violates the right to religious self-determination. According to the case law of the Federal Constitutional Court, an abrogation of the standard of proof applied by the judge of fact, and of the intensity of court review, is indicated only when determining the scope of protection under art. 4 of the Basic Law. In assessing what should be considered, in an individual case, as a collective or individual exercise of religion and philosophical creed within the meaning of art. 4(1) and (2) of the Basic Law, the central significance of the term “exercise of religion” must be taken into account with a broad interpretation; to that extent, the self-conception of the faith communities concerned, and of the individual holder of a fundamental right, cannot be ignored. The definition of churches’ self-conception and of their mission – as a particular ecclesiastical attribute – is the responsibility of the churches alone and enjoys constitutional protection under art. 4(1) and (2) of the Basic Law as a fundamental component of corporate freedom of religion (Federal Constitutional Court, decision of 22 October 2014 – 2 BvR 661/12 – EuGRZ 2014, 698 para. 101, 114). On the individual level as well, organs of the state may examine only whether there has been an adequately substantiated demonstration that a behaviour which the individual concerned claims is required by religion can in fact, according to its spiritual content and external appearance, be plausibly placed under the scope of protection of art. 4 of the Basic Law, and therefore does in fact have a motivation that is to be considered religious (Federal Constitutional Court, decision of 27 January 2015 – 1 BvR 471/10 et al. – EuGRZ 2015, 181 para. 86 with further references). However, in determining how far the protection of art. 4(1) and (2) of the Basic Law extends in a specific case, the required allowance for the ecclesiastical and individual self-perception of the holder of a fundamental right is not transferable to the assessment by the judge of fact – prior to determining the scope of protection – whether and to what extent a person feels a certain religious practice of his or her faith is obligatory in order for him or her to preserve his or her religious identity.

14 This Court has also made it clear that religious identity, as an internal fact, can be determined only from the arguments adduced by the asylum applicant and by way of a deduction of the inner attitude of the person concerned on the basis of external evidence (Federal Administrative Court, judgment of 20 February

2013 – 10 C 23.12 – BVerwGE 146, 67 para. 31). Contrary to the interpretation argued in the complaint, it does not violate the freedom of faith of an asylum-seeker who invokes the threat of being persecuted for his religion, if as part of the obligations to cooperate under asylum law (sec. 15 (2)(1) Asylum Procedure Act) and the principle of examination under procedural law (sec. 86(1) Code of Administrative Court Procedure), he is required to inform agencies of the state about his religious self-perception. The manner in which the judge of fact attempts to obtain the requisite degree of satisfaction as to the existence of the fact of preserving the asylum applicant's religious identity, which is material to a decision, is covered by the free assessment of evidence under sec. 108(1) first sentence of the Code of Administrative Court Procedure, and to that extent is not open to any further clarification of principle. In particular, there is no further need for clarification in this context that – as was held by the court below (original copy of the decision, p. 16) – it does not violate freedom of faith, and does not overstretch the requirements of evidence, if an adult is expected in a normal case to be able to provide plausible and understandable information about the inner motives for a conversion, and to show that he is familiar, within the bounds of his personality and intellectual disposition, with the basic principles of his new religion.

15 2. The complaint furthermore objects that the court below did not have the requisite expert knowledge to assess the plaintiff's religious identity. The Higher Administrative Court, it claims, should have seen an obvious need for an expert psychological and religious evaluation of the plaintiff (sec. 132(2)(3) in conjunction with sec. 86(1) Code of Administrative Court Procedure). The objection of the need for clarification, with the associated denial of a fair hearing, does not help the complaint succeed.

16 First of all, on the basis of the record of the appellate hearing, the plaintiff did not file any such application for evidence. In general, a court does not violate its obligation to conduct an exhaustive investigation of the facts under sec. 86(1) of the Code of Administrative Court Procedure if it elects not to gather evidence that does not seem obviously needed, and if there has been no express application by a party represented by counsel (Federal Administrative Court, deci-

sion of 2 November 1978 – 3 B 6.78 – Buchholz 310 sec. 86(1) Code of Administrative Court Procedure No. 116). The complaint does not show on what grounds the Higher Administrative Court should have seen an obvious need for further clarification ex officio. Second, any examination of whether the court in the appeal has made a procedural error must be based on that court's interpretation of substantive law, even if that interpretation is in error – of which there is no indication here (Federal Administrative Court, judgment of 9 December 2010 – 10 C 13.09 – BVerwGE 138, 289 para. 17 with further references; established case law). It has not been shown in the complaint, nor is it otherwise evident, on what grounds the court below – inasmuch as there was no need, for example, to investigate the tenets of an unfamiliar religion – would not have adequate knowledge to assess the plaintiff's religious convictions and identity. As a general rule, determining and assessing the presence (or absence) of this internal fact does not necessitate knowledge that is reserved for experts alone. Ultimately, the complaint involving an objection concerning investigation and a fair hearing is directed against the assessment of the evidence by the court below; but in that, it cannot prevail.

17 3. This Court declines to provide any further grounds (sec. 133(5) sentence 2 second half-sentence, Code of Administrative Court Procedure).

18 4. The disposition as to costs is founded on sec. 154(2) of the Code of Administrative Court Procedure; court costs will not be levied, pursuant to sec. 83b of the Asylum Procedure Act. The value at issue proceeds from sec. 30 of the Act on Attorney Compensation; there are no grounds for a derogation under sec. 30(2) of that Act.

Prof. Dr Berlit Prof. Dr Kraft Fricke