FEDERAL ADMINISTRATIVE COURT

IN THE NAME OF THE PEOPLE

JUDGMENT

BVerwG 10 C 4.09
VGH 8 A 611/08.A

Released
on 27 April 2010
by 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.

the Tenth Division of the Federal Administrative Court
upon the hearing of 27 April 2010
Federal Administrative Court Justice Dr. Mallmann sitting as Presiding Justice,
and Federal Administrative Court Justices Prof. Dr. Dörig,
Beck, Prof. Dr. Kraft and Fricke

decides:

Upon appeal by the Respondent, the judgment of the Hessian Higher Administrative Court of 11 December 2008 is set aside insofar as the Respondent was required to find that a prohibition on deportation exists under section 60 (7) sentence 2 Residence Act.

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

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

R e a s o n s :

I

1 In the present proceedings, the parties are in dispute only as to the finding of a prohibition on deportation with regard to Afghanistan under section 60 (7) sentence 2 of the Residence Act in conjunction with article 15 (c) of Directive 2004/83/EC (known as the ‘Qualification Directive’).

2 The Complainant, born in 1972, is an Afghan national of Pashtun ethnicity. He is from the province of Paktia, southeast of Kabul. in February 2001 he entered

Germany and applied for asylum. As grounds, he argued in substance that he had left Afghanistan to escape forced recruitment by the Taliban.

3 In July 2001 the Federal Office for the Recognition of Foreign Refugees (now the Federal Office for Migration and Refugees) – the 'Federal Office' – rejected the application for asylum and refugee status, and denied the existence of impediments to deportation under sections 53 (1) through (4) of the Aliens Act, but did find that there was an impediment to deportation in the Complainant's favour under section 53 (6) sentence 1 of the Aliens Act, with respect to Afghanistan. As grounds, it stated that the recruitment by the Taliban as described by the Complainant could not result in asylum or refugee status because it is not linked with factors relevant to asylum. However, that recruitment did establish grounds for an impediment to deportation under section 53 (6) sentence 1 of the Aliens Act. Forced recruitment of young men by the Taliban or the Northern Alliance, the Federal Office found, is common practice throughout the country and also threatened the Complainant in the event of his return. If the Complainant were forced into the army and sent practically without preparation into this violent combat, there would be acute danger to life and limb.

4 In February 2006 the Federal Office initiated revocation proceedings with regard to the impediment to deportation that had been allowed, because it held that the fall of the Taliban had eliminated the danger of forced recruitment of the Complainant. At the hearing, the Complainant claimed that he still had individual reasons to be granted protection against deportation. His home village in Paktia province, he said, is near the border with Pakistan. At present this is still one of the Taliban's principal territories of operation. The danger of punishment by the Taliban still exists for him, he said, because he evaded forced recruitment in the past. The danger of forced recruitment also continues to be present. He no longer knows of any relatives living in Afghanistan who could furnish protection or help to him. His home village has been bombed, and his family's house has been destroyed. His relatives living there are said to have died in that destruction. His wife had fled with their children to Pakistan, and lived in a village there that was destroyed by an earthquake in October 2005. Since then he has had no sign of life from them. Moreover, since his childhood, he says, he has suf-

fered epileptic seizures three to four times a month that require both medical treatment and expensive medications. He furthermore suffers from post-traumatic stress disorder.

5 By a decision dated 29 May 2006, under section 73 (3) of the Asylum Procedure Act, the Federal Office revoked the protection that had been granted against deportation, and found that there were also no other prohibitions on deportation under section 60 (2) through (6) of the Residence Act. At least in the Kabul area, the Federal Office held, the safety and supply situation was not so bad that in the event of a return there the Complainant would be 'delivered up to certain death or very severe injury, so to speak with his eyes wide open'. With regard to the Complainant's personal living situation as an unmarried male adult, it must be assumed that he would find a comparatively stable basis for making a living in the Kabul area. The Federal Office found that he is not among those persons who are in particular need of protection because of their individual situation. Also his epileptic seizures could be treated in Kabul, as could his post-traumatic stress disorder.

6 In September 2007 the Administrative Court denied the action brought against that decision. The court found that the rejection had been proper because at the date of the hearing, there was no prohibition on deportation under section 60 (7) sentence 1 of the Residence Act, the presently applicable successor provision to the former section 53 (6) of the Aliens Act. Moreover, the court found, the new prohibition on deportation under section 60 (7) sentence 2 of the Residence Act, now introduced in the process of transposing article 15 (c) of the Qualification Directive, was not applicable in the Complainant's case. Nor were there any other prohibitions on deportation under section 60 (2), (3) and (5) of the Residence Act. Following the downfall of the Taliban regime, the Complainant no longer need fear forced recruitment by the Taliban. The court found that it is irrelevant that the Taliban has regained strength and are active in Paktia province, because the Complainant can settle in the Kabul area. He can also be treated there for his illnesses. An international or internal armed conflict that poses a substantial individual danger to the Complainant's life or limb as a re-

sult of indiscriminate violence, pursuant to section 60 (7) sentence 2 of the Residence Act, cannot be assumed for the greater Kabul area.

7 The Complainant's appeal against this decision met with success. In a judgment dated 11 December 2008, the Hessian Higher Administrative Court modified the lower court's judgment, set aside the Respondent's decision of 29 May 2006 insofar as concerned revoking the finding of an impediment to deportation under section 53 (6) sentence 1 of the Aliens Act, and ordered the Federal Office to find that the requirements for a prohibition on deportation under section 60 (7) sentence 2 of the Residence Act exist with regard to Afghanistan. The Higher Administrative Court found that the prerequisites for a prohibition on deportation under section 60 (7) of the Residence Act did exist in the Complainant's case with regard to Afghanistan. At the same time, since the change in the law through the entry into force of the Directive Transposition Act on 28 August 2007, priority should be given, for reasons of effective legal protection, to the newly introduced prohibition on deportation under section 60 (7) sentence 2 of the Residence Act. The prerequisites for such a prohibition on deportation existed, the court held. In the Complainant's home region, Paktia province, an internal armed conflict currently prevails, in the form of civil-war conflicts and guerrilla war between the Afghan government army, Isaf, and Nato, on the one side, and the Taliban and other opposition forces, on the other. An internal armed conflict, the court found, does not presuppose a nationwide situation of conflict, but exists even if its required characteristics are satisfied in only one part of the country's territory. Paktia province is located in southeast Afghanistan, in what is known as the Pashtun Belt, and is now described by aid organisations and members of foreign military forces as one of the most dangerous regions in the world. The court found that the Taliban were regaining strength throughout southeast Afghanistan, and consider Paktia an area for retreat and transit. The governor of the province, the court noted, had been murdered on 10 September 2006 by the Taliban, which perpetrated yet another suicide attack during the funeral. The guerrillas' infiltration across the nearby Pakistan border had rapidly increased. In this predominantly Pashtun region, ambushes and suicide attacks by 'neo-Taliban fundamentalists' had increased. In this finding, the Higher Administrative Court drew upon an expert opinion from Dr. D. of De-

cember 2006, a report from Amnesty International of January 2007, and the situation report of the German Federal Foreign Office dated March 2008 on the increase in violent incursions by regrouped Taliban and other forces hostile to the government, in south and southeast Afghanistan.

8 For a large number of civilians, this internal armed conflict gives rise to dangers that the court found would be so concentrated in the person the Complainant, if he returned, that they would constitute a substantial individual danger to life or limb for him, as a member of the civilian population, in accordance with section 60 (7) sentence 2 of the Residence Act, in the form of punishment and/or forced recruitment by the Taliban, especially because the mitigated standard of prognosis under article 4 (4) of the Directive applies in his favour, in the sense of a reversal of the burden of proof. Specifically, the court found that in February 2001, the Complainant had fled from his home village because he was threatened with forced recruitment and/or punishment by the Taliban. The Complainant's description, the court found, was consistent with the description of the forced recruitment practices of the Taliban in the evidence from the Federal Office. Consequently his information could be deemed credible in the court's opinion as well. There was no good reason to believe that if he returned he would not be threatened, because of his previous history, with punishment or forced recruitment by the Taliban, which operates with great support from the population there. Because the danger with which the Complainant is threatened by reason of the armed conflict is therefore not based on new circumstances of a different type that would establish persecution, but rather on an internal nexus with the reasons that played the determinative role in his emigration, the court decided that the application of the facilitated standard of proof under article 4 (4) of the Directive was justified.

9 Finally, the court found, the Complainant could not be referred to internal protection in a different part of Afghanistan. In other parts of the country, especially in the area of the capital of Kabul, which presumably is the only one that can be considered for this purpose, the untrained, ill Complainant, who comes from a rural province and has lived in Germany for nearly eight years, could not be assured of a minimum subsistence, because of the tense labour market situation

and the poor security and supply situation. He has no family or social network of any kind in Kabul, and no knowledge of the place. In addition to the general difficult living conditions, the court found, there was the fact that because of his proven condition of epilepsy, he also is subjected to a health risk, and therefore can be viewed as capable of employment only to a very limited degree. In this case, therefore, even according to the strict standards applied by this Division of the Court to date, there was also reason to find that the requirements were even present for a prohibition on deportation under German law, under a constitutional application of section 60 (7) sentence 1 of the Residence Act. For that reason as well, the appealed revocation decision was to be set aside.

10 In its appeal to this Court by leave of the Higher Administrative Court, the Respondent does not appeal the reversal of the revocation of the prohibition on deportation under German law pursuant to section 60 (7) sentence 1 of the Residence Act, but only the order to additionally find a prohibition on deportation under European law, pursuant to section 60 (7) sentence 2 of the Residence Act. It argues that it is already questionable whether the Higher Administrative Court properly found, consistently with the case law of the Federal Constitutional Court, that an internal armed conflict exists. In any case, the Respondent argues, the Higher Administrative Court did not make adequately reasoned findings why this conflict should pose a danger to life and limb for the Complainant in particular. The court had neither found nor made evident that the Complainant, for example, belongs to a group of persons who, because of their position and function, might be exposed to particular risks of persecution from fanatical Islamists. He also did not belong to any religious or ethnic minority. Rather, he was a simple farmer who had left Afghanistan more than eight years ago now, because he feared at the time that he would be forcibly recruited. It was not understandable why precisely this danger would still exist today, since although the Complainant, at age 36, is still of an age fit for military service, he is according to all the findings a sick man. Therefore it is an error of law to apply article 4 (4) of the Directive, because the former danger, and any future danger, are not of the same kind. Based on the description by the Higher Administrative Court, one cannot say that the danger is so great that, in Paktia province in any case, practically anyone is exposed to danger to life and limb everywhere and

at all times. Moreover, at the appeal hearing before this Court, the Respondent additionally argued that the Higher Administrative Court had breached the right to a hearing. That court had decided on the petition for a finding that the new prohibition on deportation under Community law pursuant to section 60 (7) sentence 2 of the Residence Act existed – a petition that had not been upgraded from an alternative prayer to a principal prayer until the appeal hearing before that court – without giving the Respondent, which was not present at the appeal hearing, an opportunity to submit its own position on the pertinent facts and law.

11 The Complainant defends the appealed decision.

12 The representative of the Federal interests has intervened in the proceedings, and argues that although the Higher Administrative Court correctly assumed the existence of an internal armed conflict in south and east Afghanistan, it did not derive adequate findings as to whether the Complainant was threatened with a significant individual danger by reason of indiscriminate violence. To that extent, the court improperly applied article 4 (4) of the Directive. In particular, the court did not examine whether there was good cause to believe that the Complainant would not any longer have to fear forced recruitment by the Taliban today. Yet there would in fact be reason to believe this, for example because of the Complainant's age and health status, as well as the change in the political conditions in Afghanistan. The representative argued that the court below also made no adequate findings of fact as to the general dangers of conflict, such as the impact of acts of war, mines, or bombardment on the civilian population in the Complainant's region of origin.

II

13 The appeal by the Respondent, who does not appeal the reversal by the lower court of the revocation decision, but only the additional obligation to find the existence of a prohibition on deportation under section 60 (7) sentence 2 of the Residence Act, has merit. Although the procedural complaint lodged by the Respondent is inadmissible (1.), the complaint of a violation of Federal law (sec-

tion 137 (1) no. 1 Code of Administrative Court Procedure) succeeds (2.). The court below affirmed that the Complainant is entitled to a finding of a prohibition on deportation under section 60 (7) sentence 2 of the Residence Act on grounds that are not entirely compatible with Federal law. Since this Court cannot make a final decision in the matter for lack of adequate findings in the appealed decision, the proceedings are to be remanded to the Higher Administrative Court (section 144 (3) sentence 1 no. 2 Code of Administrative Court Procedure).

14 1. The procedural complaint lodged by the Respondent is inadmissible, if only because it was not asserted within the time period for submitting reasons for such appeals as required under section 139 (3) of the Code of Administrative Court Procedure. Contrary to the Respondent's opinion, compliance with this deadline could not be waived even by exception. Moreover, this complaint lacks a cogent presentation of the alleged violation of the right to a hearing. The Respondent does not show what arguments of relevance to a decision it was prevented from submitting by the upgrade of the Complainant's former alternative prayer under section 60 (7) sentence 2 of the Residence Act to an (additional) principal prayer at the appeal hearing. The Respondent could have, and should have, already presented its objections to the petition for the finding of a prohibition on deportation under section 60 (7) sentence 2 of the Residence Act in light of the auxiliary prayer in this regard.

15 2. Nevertheless, the appeal rightly complains that the appealed decision is incompatible with Federal Law insofar as it refers to the petition for an order to find the existence of a prohibition on deportation under 60 (7) sentence 2 of the Residence Act.

16 a) However, the Higher Administrative Court correctly proceeded on the assumption that the (additional) principal prayer for an order that the Respondent should find the existence of a prohibition on deportation under section 60 (7) sentence 2 of the Residence Act is admissible. To be sure, in the appealed revocation decision of 29 May 2006 the Respondent denied only the existence of the prohibitions on deportation under the applicable provisions of immigration

law at the time, under section 60 (3) to (6) of the Residence Act in its old version. But this is no obstacle to including in the present proceedings the new prohibitions on deportation under EU law, which were incorporated into the Residence Act as from 28 August 2007 under section 60 (2), (3) and (7) sentence 2 of that Act, which the Complainant has also cited from the outset. These prohibitions on deportation are founded on article 15 of Council 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 – and were incorporated into the Residence Act by the Act for the Transposition of Directives of the European Union on Residence and Asylum Law of 19 August 2007 – the Directive Transposition Act – (BGBl I p. 1970). According to the case law of this Court, this constitutes an independent issue that is to be examined with priority over the remaining national prohibitions on deportation under sections 60 (5) and (7) sentence 1 of the Residence Act (see judgments of 14 July 2009 – BVerwG 10 C 9.08 – BVerwGE 134, 188 marginal no. 9, and of 24 June 2008 – BVerwG 10 C 43.07 – BVerwGE 131, 198 marginal no. 11 et seq.). We may leave in abeyance the question of whether and under what circumstances this new issue – just as in application proceedings under asylum law – also comes into play by operation of law in court proceedings in revocation cases with regard to subsidiary protection under section 73 (3) of the Asylum Procedure Act since the Directive Transposition Act took effect on 28 August 2007. This is because at any event, if the Federal Office – as here – has made findings of fact as to all prohibitions on deportation under immigration law with reference to the destination country, the Complainant may invoke the new subsidiary prohibitions on deportation, founded on the Directive, in the pending court proceedings. To that extent, there is no need for a new application to the Federal Office and for a prior administrative proceeding. Thus due account is also taken of the maxim of expeditiousness and concentration that also obtains in the asylum process, under which at the end of a court proceeding, it should be fundamentally clarified whether and which protection from deportation (with reference to the country of destination) the Complainant enjoys at the time the decision is taken (see section 77 (1) Asylum Procedure Act).

17 Contrary to the Respondent's opinion, the admissibility of the petition for an order to find that there is a prohibition on deportation under EU law is also not opposed by the fact that the court below affirmed the Complainant's first principal prayer (for reversal of the revocation of the finding of a national prohibition on deportation), and thus that there is a further prohibition on deportation under national law (now under section 60 (7) sentence 1 of the Residence Act) in the Complainant's favour. For just as a foreigner may demand in an application proceeding that priority is to be given to deciding on the existence of a prohibition on deportation under EU law under section 60 (2), (3) and (7) sentence 2 of the Residence Act, and the finding of a subordinate prohibition on deportation under national law is not opposed to such a decision, in a revocation proceeding the foreigner may also demand a clarification of his higher-priority claims with reference to the prohibitions on deportation under European law. He need not content himself with the fact that he is already eligible for a subordinate prohibition on deportation under national law. Therefore it was permissible for the Complainant to upgrade his petition for a finding of a prohibition on deportation under EU law to a (further) primary petition, along with his petition for reversal of the revocation decision.

18 Accordingly, the Complainant's petition for an order to find a prohibition on deportation under section 60 (2), (3) or (7) sentence 2 of the Residence Act, which itself is thus permissible, does not become impermissible because the Complainant's legal interest in such a finding might be thought to have lapsed in the course of the present appellate proceedings. To be sure – as is not in dispute between the parties – now that the reversal of the revocation of prohibition on deportation section 53 (6) Aliens Act 1990/section 60 (7) sentence 1 of the Residence Act as a result of the appealed decision has become final, the Complainant has been granted a residence permit by the foreigners' authority under section 25 (3) of the Residence Act. But this does not eliminate his legal interest in the recognition of a subsidiary prohibition on deportation under EU law. This is because the rights associated with subsidiary protected status under the Directive are not exhausted in the granting of a (time-limited) residence permit, but may also ramify otherwise in diverse ways in the Complainant's favour (see

article 20 et seq. of the Directive). Moreover, it would contravene the meaning and effect of the Directive, which assumes that Member States have an obligation to accord subsidiary protected status (article 18 of the Directive), if the Complainant were denied a decision on the existence of a prohibition on deportation under EU law on account of a time-limited residence title granted under national law.

19 b) However, the Higher Administrative Court's opinion that in the Complainant's case, the requirements for a prohibition on deportation under section 60 (7) sentence 2 of the Residence Act exist with reference to Afghanistan does not withstand review by this Court.

20 Under section 60 (7) sentence 2 of the Residence Act, a foreigner shall not be deported to another state in which he or she will be exposed, as a member of the civilian population, to a substantial individual danger to life or limb as a result of an international or internal armed conflict. According to the case law of this Court, this provision, despite sometimes minor differences in wording, conforms to the requirements of article 15 (c) of the Directive (judgments of 24 June 2008 – BVerwG 10 C 43.07 – BVerwGE 131, 198 marginal no. 17, 36 and of 14 July 2009 – BVerwG 10 C 9.08 – BVerwGE 134, 188 marginal no. 11) and must be construed in that sense.

21 To be sure, the court below was correct in affirming the existence of an internal armed conflict in the Complainant's territory of origin (aa). But its opinion that the Complainant would be exposed to a substantial individual danger to life or limb as a result of indiscriminate violence by reason of this conflict is not entirely compatible with the legal requirements of section 60 (7) sentence 2 of the Residence Act. In particular, the findings of the Higher Administrative Court provide an insufficient basis for the assumption that the Complainant should benefit from the facilitated standard of proof under article 4 (4) of the Directive (bb), on account of serious harm that had been suffered or directly threatened before his emigration. Furthermore, there are insufficient findings as to whether the situation in the Complainant's region of origin is characterised by such a high level of indiscriminate violence that practically any civilian would be exposed to a seri-

ous individual threat solely because of his or her presence there, or at least that the Complainant, as a civilian, would be individually threatened in this way because of personal circumstances which increase that danger (cc).

22 aa) In examining whether an internal armed conflict within the meaning of section 60 (7) sentence 2 of the Residence Act exists, the Higher Administrative Court proceeded from the principles developed in this Court's judgment of 24 June 2008 (loc. cit., marginal no. 19 et seq.), and interpreted the concept of internal armed conflict taking account of the significance of this concept in international humanitarian law, and particularly in the four Geneva Conventions of 12 August 1949, including Additional Protocols I and II of 8 June 1977 – pertinent here: article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (BGBl 1990 II p. 1550 <1637>). This approach meets with no objection under review from this Court. This Court adheres to this approach even in light of the judgment issued in the meantime by the European Court of Justice (ECJ) of 17 February 2009 – Case C-465/07 – (Elgafaji, OJ 2009, no. C 90, 4), which did not deal in any further detail with these circumstances of fact. Also, to the extent that the courts of the United Kingdom, in their more recent case law, have advocated an independent interpretation of the requirements under article 15 (c) of the Directive solely according to its meaning and effect (judgment of the Court of Appeal of 24 June 2009, QD and AH v. Secretary of State for the Home Department <2009> EWCA Civ. 620), this Court nevertheless sees no reason therein to diverge from its previous approach to interpreting the concept of an internal armed conflict.

23 As is evident in detail from the discussion in the judgment of 24 June 2008 (loc. cit., marginal no. 19 et seq.), this Court's approach by no means presupposes an unconditional adoption of the requirements of article 1 of Protocol II, but rather aims for an orientation to those criteria, while the interpretation of this concept in international criminal law may also be taken into account alongside them or as a supplement to them (judgment of 24 June 2008, loc. cit., marginal no. 23). Accordingly, the orientation to international humanitarian law means that on the one hand – at the lower end of the scale – cases of internal distur-

bances and tensions such as riots, isolated and sporadic acts of violence, and other acts of a similar nature cannot be considered internal armed conflict (article 1 (2) of Protocol II), and on the other hand – at the upper end of the scale – such a conflict will in any case exist if the criteria of article 1 (1) of Protocol II are satisfied – i.e., if armed conflicts occur within the territory of a state between its armed forces and dissident armed forces or other organised armed groups which, under responsible command, exercise such control over a part of the territory of the state as to enable them to carry out sustained and concerted military operations, and to implement this Protocol (Protocol II). The assumption of an armed conflict within the meaning of article 15 (c) of the Directive is not automatically excluded for conflicts falling between these two forms of manifestation. Typical examples are civil-war disputes and guerrilla warfare. However, the conflict must in any case demonstrate a certain degree of intensity and constancy. As this Court has expressly emphasised, in any event the orientation to the criteria of international humanitarian law runs up against its limits where it is opposed by the purpose of granting protection to civilians who are threatened with indiscriminate violence in armed conflicts within their country of origin. With an eye to this purpose, in this Court's opinion the existence of an armed conflict within the meaning of article 15 (c) of the Directive does not necessarily presuppose that the parties to the conflict must have achieved such a high level of organisation as is necessary to satisfy the requirements under the Geneva Conventions of 1949 and for the intervention of the International Red Cross (see article 1 (1) Protocol II; still left open in the judgment of 24 June 2008, loc. cit., marginal no. 22). Rather, following a general assessment of the circumstances, it may also suffice if the parties to the conflict are able to carry out sustained and concerted acts of combat of such intensity and constancy that the civilian population is thereby typically also caused to suffer significantly. Equivalent considerations may well also apply to the requirement that the party to the conflict opposing the state's armed forces must exercise effective control over a portion of the state's territory. However, this does not mean that in an overall assessment, the existence of one of these characteristics cannot be of significance as an indicator of the intensity and constancy of the conflict.

24 In sum, this approach takes sufficient account of the concern, emphasised in the more recent British case law, with making sufficient allowance for the different objectives of international humanitarian law on the one hand, and international protection under the Qualification Directive, on the other hand, without interpreting the characteristic of an armed conflict entirely in isolation from the previous understanding of this concept in international humanitarian law, and thus depriving it of any contour and – contrary to the letter of the provision – making it virtually superfluous.

25 Measured by these criteria, the findings of the Higher Administrative Court suffice for the assumption of an internal armed conflict in the Complainant's territory of origin, Paktia province. According to the findings in the appealed decision, armed disputes similar to civil war are taking place in east and south Afghanistan between the troops of the Isaf/Nato and the Afghan army, on the one side, and the Taliban and other opposition forces on the other side. This, the court below found, also pertains to Paktia province, which is located in southeast Afghanistan, in what is known as the 'Pashtun Belt'. This region too is in the grip of the increasing struggle against the Taliban, whose attacks are assuming dimensions similar to war. As the court below finds, this is also consistent with the report of the Federal Foreign Office of 7 March 2008, according to which an increase in violent incursions by regrouped Taliban and other forces hostile to the government have been recorded since the spring of 2007, especially in the southern and eastern part of the country (copy of the decision p. 19 et seq.). These findings, in any case with reference to the report of the Federal Foreign Office, are still sufficiently current to justify the conclusion that there was an internal armed conflict in the Complainant's territory of origin at the date of the appealed proceedings. According to the above standards of interpretation, there is no adverse effect from the fact that the Higher Administrative Court made no explicit findings as to the degree of organisation of the Taliban, because given the established military strength and 'successes' of the Taliban in parts of Afghanistan, there is no doubt of the existence of a sufficiently intense and sustained armed conflict. Moreover, the Federal Prosecutor General before the Federal Court of Justice also assumes the existence of a non-international armed conflict within the meaning of international criminal law, for the conflicts

between the rebel Taliban and the Afghan government and the Isaf in Afghanistan (press release of 19 April 2010 no. 8/2010; see also Ambos, NJW 2010, 1725).

26 bb) However, the assumption by the court below that upon his return, the Complainant as a member of the civilian population would consequently be exposed to a substantial individual danger to life and limb (including to bodily integrity) by reason of indiscriminate violence does not withstand review by this Court. The court below affirmed this finding by application of the facilitated standard of proof under section 60 (11) of the Residence Act in conjunction with article 4 (4) of the Directive. It assumed that the Complainant fled from his home village in Paktia province in 2001 because he was threatened with forced recruitment and/or punishment by the Taliban, and that there is no good reason to believe that upon his return there he would not be threatened with punishment because of his previous history, or in any case with forced recruitment by the Taliban because he belongs to the group of Pashtun men of an age fit for military service. Since the danger to life and limb threatening the Complainant on account of the armed conflict is consequently not founded on new circumstances of a different kind, establishing persecution, but rather on an internal nexus with the reasons that led to his emigration, the court found that the facilitated standard of proof under article 4 (4) of the Directive was justified (copy of the decision p. 23 et seq.). The application of the facilitated standard of proof, as thus reasoned, in the context of subsidiary protection is incompatible with Federal law.

27 (1) According to article 4 (4) of the Directive, the fact that an applicant has already been subject to persecution or serious harm or to direct threats of such persecution or serious harm is a serious indication of the applicant’s well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated. This facilitated standard of proof, in the form of a refutable statutory presumption, applies both for the protection of refugees and for subsidiary protection under the Directive (see also section 60 (11) Residence Act). It presupposes for subsidiary protection that the applicant has already suffered or been directly threatened with serious harm in his or her country of origin (prior harm).

Article 15 (a) through (c) of the Directive define what is to be understood as serious harm within the meaning of the Directive.

28 The findings of the Higher Administrative Court do not even justify the conclusion that the Complainant was directly threatened with serious harm in this sense before his emigration, and thus that the requirements for applying the facilitated standard of proof under article 4 (4) of the Directive exist at all. The Higher Administrative Court did not find that the Complainant, as a civilian, was subject to a serious and individual threat to his life or person by reason of indiscriminate violence in a situation of international or internal armed conflict (article 15 (c) of the Directive). To that extent, for the period before the Complainant's emigration, there are no findings as to the existence of an armed conflict in the Complainant's home province, and also no findings of any kind as to the level of indiscriminate violence and its effects on the civilian population. Furthermore there are no findings as to the existence of a risk to the Complainant's life or person as a civilian.

29 Even if one were to assume in the Complainant's favour that the harm or direct threats of harm to which he was subjected before emigrating must not necessarily be of the kind as defined in article 15 (c) of the Directive, but may also be harm under the other alternatives of this provision – in any case insofar as there is an internal nexus with the harm with which he is threatened at present – the findings of the Higher Administrative Court do not suffice for the assumption of serious harm directly threatening the Complainant before his emigration, under the other alternatives offered by article 15 of the Directive. In substance, only harm within the meaning of article 15 (b) of the Directive would come under consideration – i.e., inhuman or degrading treatment or punishment – by reason of the forced recruitment of the Complainant by the Taliban that was assumed by the Higher Administrative Court and threatened in 2001, or a punishment associated therewith. However, the findings in the appealed decision as to the circumstances of forced recruitment do not suffice for the assumption of inhuman or degrading treatment or punishment within the meaning of article 3 ECHR. To be sure, the Higher Administrative Court satisfied itself that the Complainant was threatened at the time with forced recruitment by the Taliban,

and also found as to the more detailed circumstances of such recruitment (indiscriminate, arbitrary, with no basis in law, immediate and unceremonious removal in military vehicles) (copy of the decision p. 23); but it made no comment as to whether and to what extent this, or a possible punishment in the event of a refusal, should be considered inhuman or degrading treatment within the meaning of article 3 ECHR. Forced recruitment for service in war per se, like killing or injury in war, is not implicitly inhuman or degrading treatment in this sense. The judgment likewise contains no findings of any kind as to the nature and manner of a punishment. The Higher Administrative Court's reference to the grant of protection from deportation under section 53 (6) Aliens Act 1990 by virtue of the Federal Office's now-final decision of 18 July 2001 also does not suffice for this purpose. That decision did not pertain to granting protection from deportation because of a breach of article 3 ECHR (at that time, under section 53 (4) Aliens Act 1990), but rather to granting national, subsidiary protection from deportation because of other dangers. The focus there was on the acute danger to life and limb as a consequence of unprepared deployment in the army in intense combat, and thus on a danger that per se does not constitute inhuman or degrading treatment within the meaning of article 3 ECHR.

30 As there are no sufficient findings on the matter of whether the Complainant was directly threatened with serious harm within the meaning of article 15 of the Directive before he emigrated, there is no adequate basis in fact for applying the facilitated standard of proof under article 4 (4) of the Directive. Therefore the matter cannot hinge on the question of the nexus between the harm suffered or directly threatened before emigration and the harm threatened at present, nor on the question of whether there is good reason to believe that the Complainant will not be threatened again with such harm.

31 However, this Court notes that in order for the facilitated standard of proof under article 4 (4) of the Directive to take effect not just in the context of protection of refugees, but also in the context of subsidiary protection, it is necessary that an internal nexus must exist between the harm previously suffered or directly threatened, and the feared future harm. The presumption of being threatened again with such persecution or harm, which underlies this provision, is substan-

tially also founded on the presumption that a repeat of persecution or harm – with the initial situation remaining the same – is strongly implied for reasons of fact (see also judgment of 27 April 2010 – BVerwG 10 C 5.09 – marginal no. 21 to be published in the BVerwGE collection). Therefore one must review and establish in each individual case the particular factual circumstances of harm to which the presumptive effect of article 4 (4) of the Directive extends. And in such a case it does not seem impossible that, for example, a suffered encroachment on an individual's physical person under article 15 (b) of the Directive by one of the parties to an armed conflict that arose later – assuming that a grant of protection was not required anyway under this alternative offered in article 15 of the Directive – could also be viewed as a serious indication of a personal circumstance increasing danger within the meaning of article 15 (c) of the Directive, of such a nature that even when there is not an extremely high level of indiscriminate violence in a situation of armed conflict, there could be reason to assume a significant individual threat to life or limb for the civilian concerned. Contrarily, by the same token, such a presumptive effect might well not extend, for example, to the existence of an armed conflict or to a high level of indiscriminate violence against the civilian population (see below under (2)).

32 (2) With regard to granting a prohibition on deportation under section 60 (7) sentence 2 of the Residence Act, there is also a lack of sufficient findings that upon his return to Afghanistan the Complainant would be subject as a civilian to a serious individual threat to his life or person by reason of indiscriminate violence. The characteristic of a threat 'by reason of indiscriminate violence' mentioned in article 15 (c) of the Directive is also incorporated accordingly into the national transposition provision under section 60 (7) sentence 2 of the Residence Act (judgment of 24 June 2008 – BVerwG 10 C 43.07 – loc. cit., marginal no. 36). The European Court of Justice, in its judgment of 17 February 2009 – Case C-465/07 – (Elgafaji loc. cit.) construed the requirement of a serious and individual threat by reason of indiscriminate violence under article 15 (c) of the Directive as referring to harm directed against civilians irrespective of their identity, where the degree of indiscriminate violence characterising the armed conflict taking place reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may

be, to the relevant region, would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to the serious threat referred to in the Directive (marginal no. 35). With regard to recital 26 and the conditions set out in article 15 of the Directive, however, the ECJ found that this should be reserved for an extraordinary situation which would be characterised by such a high degree of risk that substantial grounds would be shown for believing that that person would be subject individually to the risk in question (marginal no. 36, 37). This was to be clarified further in that the more the applicant is able to show that he is specifically affected by reason of factors particular to personal circumstances, the lower the level of indiscriminate violence required for him to be eligible for subsidiary protection (marginal no. 39).

33 From this reading of the provision, which in this Court's opinion is consistent in substance with the comments in its own judgment of 24 June 2008 (cf. judgment of 14 July 2009 – BVerwG 10 C 9.08 – BVerwGE 134, 188 marginal no. 15), it follows that in any case, findings must be made as to the level of indiscriminate violence in the territory in question. If there are no personal circumstances increasing risk, an especially high level of indiscriminate violence is necessary; if personal circumstances increasing risk are present, a lower level of indiscriminate violence will suffice. These factors that increase risk primarily include those personal circumstances that make the applicant appear more severely affected by general, non-selective violence, for example because he is forced by reason of his profession – e.g., as a physician or journalist – to spend time near the source of danger. But in this Court's opinion, it may also include personal circumstances by reason of which the applicant, as a civilian, is additionally subject to the danger of selective acts of violence – for example, because of his religious or ethnic affiliation – to the extent that a recognition of refugee status does not come under consideration on that basis anyway. But even in the case of personal circumstances that increase danger, a high level of indiscriminate violence or a high density of danger to the civilian population must be found in the region in question. The mere presence of an armed conflict and the finding of a factor increasing risk in the person of the applicant is not sufficient for this purpose. What is necessary, rather, is at least an approximate quantitative determination of the total number of civilians living in the area

concerned, on the one hand, and on the other hand, the number of acts of indiscriminate violence committed by the parties to the conflict against the life or person of civilians in this region, as well as a general assessment of the number of victims and the severity of the casualties (deaths and injuries) among the civilian population. To that extent, the criteria for a finding of a group persecution that have been developed under refugee law may also be applied accordingly (see decision of 7 August 2008 – BVerwG 10 B 39.08 – juris marginal no. 4 with reference to the judgment of 24 June 2008, loc. cit., marginal no. 35; likewise the UK Asylum and Immigration Tribunal, judgment on the basis of the hearing of 22 and 23 July 2009, Afghanistan CG <2009> UKAIT 00044, marginal no. 124 et seq.).

34 In this process, according to the European Court of Justice in its judgment of 17 February 2009 (Elgafaji), one must assume that account should be taken not only of those acts of violence which violate the rules of international humanitarian law (for this interpretation, see also the judgment of this Court of 24 June 2008, loc. cit., marginal no. 37), but also of other acts of violence that are not directed against specific persons or groups of persons, but are perpetrated non-selectively, and extend to civilians irrespective of their personal circumstances (see ECJ, loc. cit., marginal no. 34). In view of the ECJ's interpretation of the concept of indiscriminate violence but also in view of the meaning and effect of the grant of protection under article 15 (c) of the Directive, a limitation to the acts of violence that violate international humanitarian law, meaning for example that unforeseeable collateral damage would not count among such acts, cannot be deduced from this provision (this too is the position of recent UK case law, judgment of the Court of Appeal of 24 June 2009, QD and AH v. Secretary of State for the Home Department <2009> EWCA Civ. 620).

35 The appealed decision does not meet the above requirements for a finding of a level of indiscriminate violence or a density of danger. It does not even have an at least approximate total number of civilians living in the region concerned at the pertinent date. The findings as to the order of magnitude of civilian victims are also only cursory, and refer to a date farther in the past (copy of the deci-

sion p. 20). For that reason as well, the appealed decision cannot stand in this regard.

36 3. This Court cannot reach a final decision either for or against the Complainant on the basis of the court below's findings to date. In particular, as is evident from the above discussion, the court below's findings as to the level of indiscriminate violence in the Complainant's region of origin by no means suffice for an affirmation, irrespective of a possible additional threat by reason of personal circumstances increasing risk, that the Complainant is individually affected within the meaning of article 15 (c) of the Directive solely because of his presence in that region.

37 For that reason, the case must be remanded to the court below. In its re-examination, it may also have the opportunity to review the question emphasised in the present appeal and by the representative of the Federal interests, as to whether the Complainant's illness with epilepsy, which has now become known, and his current health status would counter the danger of forced recruitment.

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

Dr. Mallmann Prof. Dr. Dörig Beck

is unable to sign
because of illness.
Dr. Mallmann

Prof. Dr. Kraft Fricke

Field: BVerwGE: Yes

Asylum Law Trade press: Yes

Sources in Law:

Asylum Procedure Act	Section 73 (3), section 77
Residence Act	Section 25 (3), section 60 (2), (7) sentence 2 and (11)
Aliens Act 1990	Section 53 (6)
Directive 2004/83/EC	Article 4 (4), article 15 (b) and (c)

Headwords:

Protection from deportation; prohibition on deportation; revocation proceeding; subsidiary protection; subsidiary protected status; legal interest in protection; internal armed conflict; international humanitarian law; Afghanistan; parties to conflict; serious harm; indiscriminate violence; non-selective violence; high level of indiscriminate violence; density of danger; civilian population; general danger; individual threat; personal circumstances increasing risk; facilitated standard of proof; forced recruitment.

Headnotes:

1. Neither the grant of a prohibition on deportation under national law (here: section 60 (7) sentence 1 of the Residence Act) nor the grant of a residence permit under section 25 (3) of the Residence Act causes a legal interest in the grant of a subsidiary prohibition on deportation under EU law to lapse.

2. An internal armed conflict within the meaning of section 60 (7) sentence 2 of the Residence Act or article 15 (c) of Directive 2004/83/EC does not necessarily presuppose such a high level of organisation and such control by the parties to the conflict over a portion of the territory of a state as is required in order to fulfil the requirements under the Geneva Conventions of 1949 (further evolution of case law in: BVerwG, judgment of 24 June 2008 – BVerwG 10 C 43.07 – BVerwGE 131, 198).

3. In order for the facilitated standard of proof under article 4 (4) of Directive 2004/83/EC to apply in a situation involving subsidiary protection, an internal nexus must exist between the serious harm suffered or directly threatened prior to emigration, and the feared future harm.

4. In determining the necessary level of indiscriminate violence within the meaning of article 15 (c) of Directive 2004/83/EC in a particular region, account must be taken not just of the acts of violence by the parties to the conflict that violate the rules of international humanitarian law, but also other acts of violence by those parties that do harm to the life or person of civilians non-selectively and irrespective of their personal situation.

Judgment of the Tenth Division of 27 April 2010 – BVerwG 10 C 4.09

I. Frankfurt Administrative Court, 20.09.2007 – Case no.: VG 5 E 2199/06.A -
II. Kassel Higher Administrative Court, 11.12.2008 – Case no.: VGH 8 A 611/08.A -