Field:	BVerwGE: Yes
Asylum law	Professional press: Yes

Sources in law:

Basic Law	Articles 1 (1), 2 (2) sentence 1, 101 (1) sentence 2
Residence Act	Section 60
Aliens Act 1990	Section 53
European Convention on Human Rights	Article 3
Charter of Fundamental Rights	Articles 19 (2), 51 (1), 52 (7)
Treaty on the Functioning of the European Union	Articles 267, 288
Directive 2004/83/EC	Articles 6, 8, 15
Directive 2011/95/EU	Articles 6, 8, 15, 39, 40 (1), 41 (2)

Headwords:

Afghanistan; Helmand Province; Kabul; deportation; prohibition of deportation; protection from deportation; subsidiary protection; protection from deportation under Union law; armed conflict; regional armed conflict; actual destination of return; region of origin; internal protection; reasonable expectation; basis for subsistence; inhuman or degrading treatment; humanitarian conditions; living conditions; compelling humanitarian reasons; human dignity; worthiness of protection; place of deportation; referral; obligation to refer; national protection from deportation; subsidiarity; restrictive effect; interpretation in conformity with the constitution; extreme situation of danger; minimum subsistence level.

Headnotes:

1. Where there is an armed conflict that is not nationwide, the prognosis of danger required under Section 60 (7) sentence 2 of the Residence Act must be based on the foreigner’s actual destination in the event of a return. This will regularly be the foreigner’s region of origin. If the region of origin is out of the question as a destination because of the danger threatening the Complainant there, he can be expelled to another region of the country only under the conditions established in Article 8 of Directive 2004/83/EC (confirmation of the judgment of 14 July 2009 – BVerwG 10 C 9.08 – BVerwGE 134, 188 – para. 17, and the decision of 14 November 2012 – BVerwG 10 B 22.12 –).

2. In assessing whether extraordinary circumstances exist that are not the direct responsibility of the destination state of expulsion, and that prohibit the expelling state from deporting the foreigner under Article 3 of the European Convention on Human Rights, normally the examination should be based on the entire destination state of expulsion, and should first examine whether such conditions exist at the place where the deportation ends.

3. Poor humanitarian conditions in the destination state of expulsion may provide grounds for a prohibition of deportation only in exceptional cases having regard to Article 3 of the European Convention on Human Rights (here: denied for Afghanistan, following European Court of Human Rights, judgments of 21 January 2011 – no. 30696/09, M.S.S. – NVwZ 2011, 413; of 28 June 2011 – no. 831/07, Sufi and Elmi – NVwZ 2012, 681; and of 13 October 2011 – no. 10611/09, Husseini – NJOZ 2012, 952).

4. The national prohibition of deportation under Section 60 (5) of the Residence Act, with reference to Article 3 of the European Convention on Human Rights, is not superseded by the prohibition of deportation under Union law pursuant to Section 60 (2) of the Residence Act.

Judgment of the 10th Division of 31 January 2013 – BVerwG 10 C 15.12

I. Karlsruhe Administrative Court of 16 September 2011 – Case: VG A 8 K 744/10 -
II. Mannheim Higher Administrative Court of 27 April 2012 – Case: VGH A 11 S 3079/11 -

FEDERAL ADMINISTRATIVE COURT

IN THE NAME OF THE PEOPLE

JUDGMENT

BVerwG 10 C 15.12
VGH A 11 S 3079/11

Released
on 31 January 2013
Ms Wahl
as Clerk of the Court

In the administrative case

Translator's Note: The Federal Administrative Court, or *Bundesverwaltungsgericht*, is the Federal Republic of Germany's supreme administrative court. This unofficial translation is provided for the reader's convenience and has not been officially authorised by the *Bundesverwaltungsgericht*. Page numbers in citations of international texts have been retained from the original and may not match the pagination in the parallel English versions.

When citing this decision, it is recommended to indicate the court, the date of the decision, the case number and the paragraph: BVerwG, Judgment of 31 January 2013 – BVerwG 10C 15.12 – para …

The Tenth Division of the Federal Administrative Court
upon the hearing of 31 January 2013
by Presiding Federal Administrative Court Justice Prof. Dr Berlit and
Federal Administrative Court Justices Prof. Dr Dörig, Prof. Dr Kraft,
Fricke and Dr Maidowski

decides:

The judgment by the Baden-Württemberg Higher Administrative Court of 27 April 2012 is set aside.

The matter is remitted 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 seeks protection from deportation because of the threat of danger he faces in Afghanistan.

2 The Complainant, born in 1986, is an Afghan national. He comes from Helmand Province (Afghanistan), is of the Shiite faith, and is a member of the Hazara ethnic group. He entered Germany in February 2009. The Federal Office for Migration and Refugees – the ‘Federal Office’ – declined his application for

asylum in in a decision dated 17 March 2010. At the same time, the Federal Office held that the requirements for refugee status were not met and that there were no prohibitions on deportation under Section 60 (2) through (7) of the Residence Act, and served the Complainant with a warning of deportation to Afghanistan.

3 After the withdrawal of the action seeking asylum, the Administrative Court ordered the Respondent to find that there was a prohibition of deportation under Section 60 (7) sentence 2 of the Residence Act in respect of Afghanistan, and found against the Complainant as to the rest. In response to the Respondent's appeal, the Higher Administrative Court found against the Complainant in full, in a judgment dated 27 April 2012. As grounds, it stated that the Complainant was not entitled to protection from deportation under either European Union or German law. With regard to any prohibition of deportation under Section 60 (2) of the Residence Act, the court found, there was no sufficient indication that the Complainant faced a considerable probability of concrete danger of being subjected to torture or inhumane or degrading treatment or punishment upon returning to Afghanistan. Nor, it found, was there any evident prohibition of deportation under Section 60 (3) of the Residence Act. Requirements for a prohibition of deportation under Section 60 (7) sentence 2 of the Residence Act were likewise absent. As a nationwide armed conflict did not prevail in Afghanistan, an individual threat would come under consideration only if the conflict extended to the actual destination in the event of a return to the country of origin. This, the court held, was the foreigner's region of origin in which he had most recently lived, or to which he typically could, and prospectively would, return. The Complainant had submitted adequate prima facie arguments that in his home region of Helmand, he no longer had acquaintances or relatives willing to take him in, and no basis for earning a living. Moreover, he was afraid of a private person living there; he furthermore feared discrimination, to which his ethnic group was particularly exposed in Helmand. If the Complainant did not wish to return to Helmand, or would not do so under any circumstances, the court held, the decision should take as its basis Kabul, the only possible destination for deportation at present. There, the court held, no internal armed conflict prevailed any longer. Apart from a few spectacular attacks, the security situation in Kabul had

been assessed relatively uniformly as stable, and furthermore as significantly more peaceful than approximately two years before.

4 Nor, the court reasoned, was the Complainant entitled to the national protection from deportation that he sought in the alternative. The court held that it was not evident what human right under the ECHR might provide a basis for a prohibition of deportation under Section 60 (5) of the Residence Act. A prohibition of deportation under Section 60 (7) sentence 1 of the Residence Act because of the generally poor living conditions in Afghanistan was opposed by Section 60 (7) sentence 3 of the Residence Act. An extreme situation of danger in which, by exception, the restrictive effect of Section 60 (7) sentence 3 of the Residence Act would not apply, owing to the protective effect of the fundamental rights under Article 1 (1) and Article 2 (2) sentence 1 of the Basic Law, was not present (or was no longer present) for Kabul. Indeed, a certain improvement of the basic supply situation was evident in Kabul, and according to the strict standards of the Federal Administrative Court, in the context of an overall assessment, this improvement argued against the presumption of an extreme danger to healthy, unmarried Afghan men shortly after deportation, even if they had no assets or connections to local family or tribal structures. The court no longer saw any adequate indication that death or severe health impairments might be expected within a short time for this group of persons in the event of deportation. Rather, it should be expected that those returning to Kabul could earn a meagre income from occasional work, and thus could finance a life at the margins of the minimum subsistence level. Whilst it was true that from the humanitarian viewpoint, even healthy, unmarried men could indeed hardly be reasonably expected to return to Kabul without protective family or tribal structures, owing to the poor overall situation, nevertheless, according to the case law of the Federal Administrative Court, this reasonable expectation was not a central standard for determining an extreme situation of danger within the meaning of Section 60 (7) sentence 1 of the Residence Act. In the Complainant’s case, moreover, no adequate individual factors had been shown that might by exception establish an extreme situation of danger as an exception.

5 In his appeal to this Court by leave of the court below, the Complainant complains of noncompliance with Section 60 (2), (5) and (7) sentences 1 and 2 of the Residence Act. He furthermore complains of procedural errors, and asks for a referral to the European Court of Justice for further clarification of the sub-

stance of the prohibitions of deportation under Section 60 (2) and (7) sentence 2 of the Residence Act.

6 The Respondent defends the challenged decision.

7 The representative of the Federal interests took part in the proceedings.

II

8 The Complainant's appeal is allowable and has merit. The judgment of the court below is inconsistent with Federal law in respect of the application for protection from deportation under Union law as sought by the Complainant in his principal request for relief. In the review required for the prohibition of deportation under Section 60 (7) sentence 2 of the Residence Act as to whether an armed conflict prevails at the Complainant's actual destination in the event of a return to Afghanistan, the court below did not base its reasoning on the Complainant's region of origin, but on conditions in Kabul, as the only possible deportation destination at present. As this Court, for lack of sufficient findings in the judgment of the court below, cannot itself reach a final decision on the accordance of protection from deportation under Union law, the matter must be remitted to the Higher Administrative Court (Section 144 (3) sentence 1 (2) of the Code of Administrative Court Procedure).

9 1. Furthermore, in addition to protection from deportation under Union law, these proceedings also concern protection from deportation under German law, sought by the Complainant as an alternative. This aim is not opposed by the fact that the court below gave leave for the present appeal solely on the grounds of the fundamental significance of a question that was tailored to protection from deportation under Union law. The judgment does not contain wording that limits the leave to a protection from deportation under Union law. The scope of the leave must therefore be determined by interpretation, taking the fundamental principle of the clarity of means of recourse into account. Accordingly, here an unrestricted leave is to be assumed. The (principal and alternative) requests for relief made by the Complainant in the appeal proceedings

below do, to be sure, concern different matters at issue. But these matters are closely interrelated; in particular, the question raised by the court below as to the relevant location to be considered arises in respect of protection from deportation not only under Union law, but under national law as well. Furthermore, an unlimited leave to appeal is also argued for by the instructions regarding recourse attached to the judgment, which refer only to the present form of appeal on points of law alone.

10 2. As a general principle, the relevant date for the legal assessment of the Complainant's application for protection from deportation is the date of the last oral hearing or decision of the trier of fact (judgment of 24 June 2008 – BVerwG 10 C 43.07 – BVerwGE 131, 198 – para. 10). Changes in the law during the present appeal proceedings must, however, be taken into account if the court below would have to take them into account if it were deciding in place of the Federal Administrative Court. Therefore, the relevant version of the law for the present appeal proceedings is the Residence Act in the version promulgated on 25 February 2008 (Federal Law Gazette I p. 162), as last amended by the Act Amending the Freedom of Movement Act/EU and Further Provisions on the Residence of Foreigners, of 21 January 2013 (Federal Law Gazette I p. 86). Under Union law, Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees as refugees or as persons who otherwise need international protection and the content of the protection granted – the Qualification Directive – of 29 April 2004 (OJ L 304 of 30 September 2004 p. 12; corrected OJ L 204 of 5 August 2005 p. 24) applies, as does the recasting – which took effect during the appeal proceedings below – enacted by Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (OJ L 337 of 20 December 2011 p. 9). The Member States were given until 21 December 2013 to transpose the provisions whose content was recast in the new version (Article 39 (1) of Directive 2011/95/EU), and until that time the provisions of Directive 2004/83/EC remain in force (see Article 41 (2) in conjunction with

Article 40 (1) of Directive 2011/95/EU). With regard to the provisions taken over unchanged, however, the new version applies already (see Article 41 (1) of Directive 2011/95/EU).

11 3. The judgment of the court below is inconsistent with Federal law in respect of the protection from deportation under Union law as sought primarily by the Complainant. In a supererogatory transposition, the provisions of Article 15 of Directive 2011/95/EU (formerly: Article 15 of Directive 2004/83/EC) in this regard are configured in Section 60 (2), (3) and (7) sentence 2 of the Residence Act as absolute prohibitions on deportation, and constitute a self-contained matter at issue that cannot be further subdivided (judgments of 24 June 2008, op. cit., para. 11 and of 27 April 2010 – BVerwG 10 C 5.09 – BVerwGE 136, 377 – paras. 13 and 16).

12 3.1 The court below denied the Complainant's entitlement to a finding of a prohibition of deportation under Section 60 (7) sentence 2 of the Residence Act on grounds that do not stand up to review by this Court. Under that provision, a foreigner shall not be deported to another state in which he 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.

13 The findings of fact required for this prohibition of deportation – which transposes the requirements under Article 15 (c) of Directive 2004/83/EC (now: Article 15 (c) of Directive 2011/95/EU) – may also be met if the armed conflict does not extend to the entire territory of the state concerned (judgment of 24 June 2008, op. cit. – para. 25). In this case, the point of reference for the prognosis of danger is the foreigner's actual destination in the event of a return. This, as a rule, is the foreigner's region of origin, to which he will typically return (judgment of 14 July 2009 – BVerwG 10 C 9.08 – BVerwGE 134, 188 – para. 17 with reference to ECJ, judgment of 17 February 2009 – Case C-465/07, Elgafaji – NVwZ 2009, 705, para. 40).

14 The court below correctly took this factor into consideration. It did not, however, examine whether an armed conflict prevails in the Complainant's region of ori-

gin, but instead based its decision on conditions in Kabul as the only possible deportation destination at present, because the Complainant did not wish to, and would not, return to Helmand under any circumstances. As this Court has already viewed as settled, in its decision of 14 November 2012 (BVerwG 10 B 22.12 – juris at 7), the question of which region should be considered the destination for a foreigner's return depends neither on which region an unbiased observer would reasonably decide for, nor which region the foreigner concerned desires from his subjective viewpoint. In particular, a deviation from the rule cannot be justified on the grounds that the foreigner is threatened in his region of origin with the dangers from which Section 60 (7) sentence 2 of the Residence Act is supposed to protect him. This is evident, if only from the systematic connection of the prohibitions on deportation under Union law with the provisions on internal protection (Article 8 of Directive 2004/83/EC; in future: Article 8 of Directive 2011/95/EU). If the region of origin is out of the question as a destination because of the danger threatening the foreigner there, he may be expelled to another region of the country only subject to the restrictive requirements of Article 8 of Directive 2004/83/EC. The concept of the 'actual destination of return' is therefore not a merely empirical concept that is to be based on what is actually the most probable or subjectively desired region of return. As Section 60 (7) sentence 2 of the Residence Act concerns protection from dangers from an armed conflict – which need not necessarily be nationwide – in the country of origin, 'origin' takes on particular significance as an identifying characteristic and feature of reasonable expectation in deciding the location of the (presumed) actual return. Therefore a divergence from the region of origin also cannot be justified on the grounds that owing to an armed conflict, the foreigner has lost his personal connection with his region of origin, for example because family members have been killed, or because they as well have left these territories. Likewise, to the extent that the waning subjective tie to the region of origin is justified by circumstances that are the indirect consequences of an armed conflict (e.g., impairment of the social and economic infrastructure, lasting deterioration of the supply situation), and that it is a reasonable attitude not to desire to return to the region of origin for lack of a basis for earning a living and future prospects, this region still fundamentally retains its relevance for a consideration regarding rights of protection. However, one can in any case not

(or no longer) based one's considerations on the region of origin if the foreigner has broken off his connections with that region even before leaving the country, irrespectively of the circumstances that triggered flight, and settled in another region of the country with the aim of living there for the foreseeable future. By such a voluntary breaking of ties, the region of origin loses its significance as an identifying characteristic and feature of reasonable expectation, and therefore is no longer to be considered as a basis for the prognosis of danger under Section 60 (7) sentence 2 of the Residence Act.

15 The term 'the actual destination of the applicant' used by the European Court of Justice – ECJ – (judgment of 17 February 2009, op. cit., para. 40) may be interpreted in this manner without submitting the matter to the ECJ for a preliminary decision. Although it is true that the ECJ did not provide a conclusive definition of the term in its judgment of 17 February 2009, the interpretation developed here takes account of the purpose of the provisions for internal protection, and consequently complies with the ECJ's requirement that national law should be interpreted, as far as possible, in the light of the wording and the purpose of the Directive in order to achieve the result pursued by the latter and thereby comply with Article 249 (3) of the EC Treaty (now: Article 288 Treaty on the Functioning of the European Union) (ECJ, judgment of 17 February 2009, op. cit., para. 42).

16 According to the above principles, the judgment by the court below does not conform to Federal law because in determining the existence of an internal armed conflict, the court did not examine conditions in the Complainant's region of origin, but rather based its opinion on the situation in Kabul as the likely destination of a deportation. But it is not evident from the findings of the court below that before leaving Afghanistan, the Complainant had settled permanently in a region other than Helmand. To be sure, he and his life-companion initially went to Kabul (and later to his sister in Iran). But by his account, this was done solely for fear of his companion's father; the judgment of the court below contains no findings as to the duration and the further circumstances of their residence in Kabul. The considerations by the court below concerning why the Complainant did not wish to return, and would not return, to Helmand, do not dispense with

the relevance of the home region in the prognosis of danger where there is an armed conflict.

17 3.2 The judgment of the court below is founded on this error. As was logical from its legal position, the court below did not arrive at any findings of fact regarding the situation in Helmand Province. Therefore this Court can neither affirm nor deny whether an internal armed conflict prevails in that region, and whether the Complainant is threatened there with the danger defined in Section 60 (7) sentence 2 of the Residence Act.

18 3.3 With regard to the protection from deportation under Union law, the decision also does not prove to be correct or incorrect for other reasons (Section 144 (4) of the Code of Administrative Court Procedure), so that this Court cannot reach a final decision in the matter.

19 a) A prohibition of deportation under Section 60 (7) sentence 2 of the Residence Act is not automatically out of the question because the Complainant – assuming an internal armed conflict in his region of origin – might find internal protection in Kabul. According to Section 60 (11) of the Residence Act in conjunction with Article 8 of Directive 2004/83/EC, this would presuppose that not only was there no danger that the Complainant might suffer serious harm in Kabul, but also that he could reasonably be expected to reside there.

20 On this point as well, the trier of fact has provided insufficient findings. Whilst it is true that the court below found, in respect of Kabul, that the prerequisites of fact for a grant of national protection from deportation under Section 60 (7) sentence 1 and 3 of the Residence Act are not present, because no extreme situation of danger prevails there, and it can be expected that returnees can earn a meagre income from occasional work, and could therefore finance a life at the margins of the minimum subsistence level, nevertheless, under Article 8 of Directive 2004/83/EC, in assessing internal protection, a basis for subsistence must be sufficiently assured that the foreigner can reasonably be expected to stay in that part of the country. This standard of reasonable expectation, however, goes beyond the absence of a substantial danger to life or limb

under Section 60 (7) sentences 1 and 3 of the Residence Act; it may remain open what additional economic and social standards must be met (see judgment of 29 May 2008 – BVerwG 10 C 11.07 – BVerwGE 131, 186 – para. 35).

21 b) Nonetheless, on the basis of the findings of fact, it cannot be held that the challenged judgment is incorrect for other reasons with regard to the protection from deportation under Union law. Particularly in its results, the court below rightly denied the existence of the prerequisites for a prohibition of deportation under Section 60 (2) of the Residence Act. Contrary to the interpretation advanced in the present appeal, such a prohibition of deportation does not proceed, in particular, from the general humanitarian conditions in Afghanistan.

22 According to Section 60 (2) of the Residence Act, a foreigner may not be deported to a state in which a concrete danger exists of the said foreigner being subjected to torture or inhumane or degrading treatment or punishment. This prohibition of deportation transposes Article 15 (b) of Directive 2004/83/EC (now: Article 15 (b) of Directive 2011/95/EU). In the wording of the provisions of that Directive, the European Commission was guided by Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (Federal Law Gazette 1952 II p. 685) – the European Convention on Human Rights (ECHR) – and in that connection, expressly referred to the case law of the European Court of Human Rights (ECtHR) (Commission 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. 6, 30). The case law of the European Court of Human Rights on Article 3 of the European Convention on Human Rights must also be taken into account in interpreting Section 60 (2) of the Residence Act, by way of Article 19 (2) of the EU Charter of Fundamental Rights (the ‘Charter’) (OJ 2010 C 83, 389). According to that Article, no one may be deported to a state where there is a serious risk that he or she would be subjected to torture or other inhuman or degrading treatment or punishment. Under Article 51 (1) of the Charter this also applies to the Member States in applying Union law. According to the explanations to be given due regard in accordance with Article 52 (7) of the

Charter in the interpretation of the Charter (OJ 2007 C 303 p. 17 = EuGRZ 2008, 92), the provision of Article 19 (2) of the Charter incorporates the case law of the European Court of Human Rights regarding Article 3 of the European Convention on Human Rights in matters of removal, expulsion, or extradition (judgment of 27 April 2010, op. cit. – paras. 15 and 17).

23 Contrary to the interpretation advanced in the appeal to this Court, it cannot be seen from the more recent case law of the European Court of Human Rights that the standard for inhuman or degrading treatment within the meaning of Article 3 of the European Convention on Human Rights, in the case of deportations to states with difficult living conditions, is to be determined according to the 'minimum standards of treatment that apply to all persons equally'. Nor do equivalent considerations proceed in particular from the decision of the European Court of Human Rights in the matter of M.S.S. v. Belgium and Greece (judgment of 21 January 2011 – no. 30696/06 – NVwZ 2011, 413). In its decision of 25 October 2012 (BVerwG 10 B 16.12 – juris – para. 8 et seq.), this Court has already explained that the European Court of Human Rights holds that States – irrespective of their treaty obligations, including those under the Convention itself – have the right to control the immigration of foreign nationals into their territory (ECtHR, judgments of 28 May 1985 – no. 15/1983/71/107-109, Abdulaziz et al. v. The United Kingdom – NJW 1986, 3007, para. 67; of 18 October 2006 – no. 46410/99, Üner v. The Netherlands – NVwZ 2007, 1279, para. 54, and of 28 June 2012 – no. 14499/09, A.A. et al., para. 71). However, deportation by a Contracting State may establish its responsibility under the Convention if there are serious and substantial grounds to believe that the person concerned will in fact be in danger, if he is deported, of treatment in contravention of Article 3 of the European Convention on Human Rights in the destination country. In such a case, Article 3 of the European Convention on Human Rights gives rise to the obligation not to deport the person to that country (settled case law, European Court of Human Rights, judgments of 7 July 1989 – no. 1/1989/161/217, Soering v. The United Kingdom – NJW 1990, 2183, para. 90 et seq. and of 28 February 2008 – no. 37201/06, Saadi v. Italy – NVwZ 2008, 1330, para. 125). However, foreigners cannot claim any entitlement under the Convention to remain in a Contracting State in order to continue to benefit

from medical, social, or other forms of assistance and services there. According to this case law, the fact that the applicant's circumstances, including his life expectancy, would be significantly reduced if he were to be removed is not sufficient in itself to give rise to a breach of Article 3 of the European Convention on Human Rights. Anything to the contrary may apply only in very exceptional cases, where the humanitarian grounds against the removal are compelling (European Court of Human Rights, judgment of 27 May 2008 – no. 26565/05, N. v. The United Kingdom – NVwZ 2008, 1334, para. 42). Thus the European Court of Human Rights affirmed a prohibition of deportation under Article 3 of the European Convention on Human Rights in favour of a patient in an advanced, fatal and uncurable stage of Aids, because removal would hasten his death, he could not receive appropriate treatment, and there was no evidence of any form of moral or social support in the destination state (ECtHR, judgment of 2 May 1997 – no. 146/1996/767/964, D. v. The United Kingdom – NVwZ 1998, 161, para. 52 et seq.). In summary, regarding the derivation of a prohibition of deportation from Article 3 of the European Convention on Human Rights on the basis of illnesses, the court explains that given the fundamental importance of Article 3 of the European Convention on Human Rights in the Convention system, a degree of flexibility may be necessary to prevent expulsion in very exceptional cases. But Article 3 of the European Convention on Human Rights, it says, does not place an obligation on the States to compensate for advances in medicine or differences in social and economic standards through the provision of free and unlimited care to aliens without a right to stay within the States' jurisdiction (European Court of Human Rights, judgment of 27 May 2008 op. cit., para. 44).

24 As this Court stated in its decision of 25 October 2012 (op. cit., para. 9) this settled case law was not fundamentally revised by the judgment of the Grand Chamber of 21 January 2011 (op. cit.) in the matter of M.S.S. v. Belgium and Greece. Contrary to the interpretation advanced in the appeal to this Court, that judgment does not recognizably relate to the 'minimum standards of treatment applicable to all persons equally'. It is true that the European Court of Human Rights found that there had been a violation of Article 3 of the European Convention on Human Rights by the Kingdom of Belgium as the expelling state,

because the applicant for asylum was exposed to a situation of extreme material poverty by his expulsion to Greece, as a Contracting State of the of the European Convention on Human Rights, as was known to the Belgian authorities (paras. 263 et seq., 366 et seq.). However, this decision expressly does not extend the scope of protection of Article 3 of the European Convention on Human Rights to the rights to social benefits in general; rather, the European Court of Human Rights emphasises that its very circumspect case law in this regard continues to apply (para. 249 with further authorities), and bases its decision on the grounds of protecting the human dignity of persons who – in an environment entirely foreign to them – are wholly dependent on State support and are faced with official indifference in a situation of serious deprivation and want (para. 253). As a group to be given consideration in this respect, the court cites the group of asylum seekers, which it considers particularly vulnerable and in need of special protection (paras. 251, 259).

25 Subsequent judgments of the European Court of Human Rights also indicate that this principle does not go hand in hand with a general extension of protection under Article 3 of the European Convention on Human Rights to the standards to be guaranteed in the home State of the individual concerned (see decision of 25 October 2012, op. cit., para. 9 with further authorities). In its judgment of 28 June 2011 in the case of Sufi und Elmi v. The United Kingdom (no. 8319/07 – NVwZ 2012, 681) the European Court of Human Rights again makes it clear that the sole question to be considered in an expulsion case is whether, in all the circumstances of the case, substantial grounds have been shown for believing that the person concerned, if returned, would face a real risk of being subjected to treatment contrary to Article 3 of the European Convention on Human Rights. If the existence of such a risk is established, the foreigner's removal would necessarily breach Article 3 of the Convention, regardless of whether the risk emanates from a general situation of violence, a personal characteristic of the foreigner, or a combination of the two (para. 218). At the same time, the European Court of Human Rights points out that the socio-economic and humanitarian conditions in a country of return do not necessary have a bearing, and certainly not a decisive bearing, on the question whether the person concerned would face a real risk of ill-treatment within the

meaning of Article 3 of the Convention. After all, the Convention is essentially directed at the protection of civil and political rights. The fundamental importance of Article 3 of the Convention, in the opinion of the European Court of Human Rights, does, however, mean that it is necessary to retain a degree of flexibility to prevent expulsion in very exceptional cases. Therefore (poor) humanitarian conditions would give rise to a breach of Article 3 of the Convention in very exceptional cases where humanitarian grounds against removal are 'compelling' (para. 278). Only where dire humanitarian conditions – as in Somalia – are not solely or predominantly attributable to poverty or to the State's lack of resources to deal with a naturally occurring phenomenon, but are primarily due to the direct and indirect actions of the parties to the conflict, does the European Court of Human Rights hold that the criterion developed in the case of M.S.S. v. Belgium and Greece (op. cit.,) is better suited, under which regard must be given to the applicant's ability to cater for his most basic needs, such as food, hygiene and shelter, his vulnerability to ill-treatment and the prospect of his situation improving within a reasonable time-frame (paras. 282 et seq.).

26 In the present instance there is no need for a final decision as to specifically what requirements proceed from this case law of the European Court of Human Rights for removals to a country of origin where there are poor humanitarian conditions. The European Court of Human Rights itself holds, with reference to Afghanistan, that the general situation there is not so serious that a removal would in itself constitute a violation of Article 3 of the European Convention on Human Rights (ECtHR, judgment of 13 October 2011 – no. 10611/09, Husseini v. Sweden – NJOZ 2012, 952, para. 84). On the basis of the findings of fact by the court below as well, the prerequisites for a violation of Article 3 of the Convention founded solely on the general living conditions in the country of origin are evidently not met. Here the controlling perspective is that of the expelling state, from whose viewpoint it must be examined whether the person concerned is at real risk, through the expulsion, of being exposed to treatment in contravention of Article 3 of the Convention. The European Court of Human Rights fundamentally bases this examination on the entire recipient country, and first of all examines whether such conditions exist at the place where the expulsion ends (ECtHR, judgment of 28 June 2011 op. cit., paras. 265, 301, 309). This

also applies in assessing conditions that are not within the immediate responsibility of the country of return, but that nevertheless forbid the expelling country from expelling the foreigner under Article 3 of the Convention.

27 The court below held that at present, only deportation to Kabul is possible (Copy of the Decision, p. 14). At the same time, with respect to the general living conditions in Kabul – as part of its comments on Section 60 (7) sentences 1 and 3 of the Residence Act – it concurred, with respect to the facts, in the finding by the Bavarian Higher Administrative Court that returnees can be expected to earn a meagre income there, through occasional work, and therefore could finance a life at the margins of the minimum subsistence level (Copy of the Decision, p. 23). The subsequent remark by the court below that because of the poor overall situation, a return to Kabul without protective family and tribal structures could ‘hardly be reasonably expected’ from the humanitarian viewpoint even for healthy, unmarried men, does not lead to any other assessment. It does not incorporate the finding of fact that the socio-economic and humanitarian conditions in the destination state are so poor that a deportation must mandatorily be forgone under Article 3 of the European Convention on Human Rights. In this wording, the court below merely expresses its position that in its opinion, the legal ‘hurdles’ of the Federal Administrative Court for the presumption of a prohibition of deportation, in an interpretation of Section 60 (7) sentences 1 and 3 of the Residence Act conforming with the constitution, are set too high, and gives voice in this matter to its regret that the highest national authority has not ordered a general halt to deportations for Afghanistan on humanitarian grounds under Section 60a (1) sentence 1 of the Residence Act, and that – short of the limit of constitutionally required protection from deportation, which is not achieved here – the court is unable to furnish a substitute for this political decision (decision of 25 October 2012, op. cit., para. 5).

28 Therefore the prerequisites of fact for a prohibition of deportation under Section 60 (2) of the Residence Act – irrespective of the fact that different legal standards apply to Section 60 (2) of the Residence Act and Section 60 (7) sentence 1 and 3 of the Residence – evidently are not present. Even if one were to adopt the lowered standards – developed by the European Court of Human Rights in

the case of M.S.S. v. Belgium and Greece for an entirely different application, and transferred to a likewise different initial situation in the country of origin in the case of Sufi and Elmi v. The United Kingdom – which focus on the situation of particular vulnerability and the need for special protection, according to the findings of the court below concerning conditions in Kabul, no prohibition of deportation proceeds for the Complainant from Section 60 (2) of the Residence Act in conjunction with Article 3 of the European Convention on Human Rights (decision of 25 October 2012, op. cit., para. 10).

29 To that extent as well there is no need for a referral to the ECJ. The conditions under which an expelling State is liable, by exception, for conditions not attributable to that State or to other actors proceed from the case law of the European Court of Human Rights, and do not arouse any matters of doubt under Union law that would be material to a decision in the present case. The case law of the European Court of Human Rights on Article 3 of the European Convention on Human Rights must be taken into account in interpreting Article 15 (b) of Directive 2011/95/EU. It is already evident from Article 6 of Directive 2011/95/EU (formerly: Article 6 of Directive 2004/83/EC) that the Directive affords no protection above and beyond that conferred under the case law of the European Court of Human Rights in respect of Article 3 of the European Convention on Human Rights, in conditions that are not within the sphere of responsibility of either the expelling state or any other actor. From that provision it can be seen that according to the ideas of the authors of the Directive, even in cases of subsidiary protection, there is a fundamental requirement for an actor from whom serious harm could emanate.

30 4. If this Court, for lack of findings of fact, cannot arrive at a final decision, whether positive or negative, as to the existence of the conditions for conferring protection from deportation under Union law, the decision of the court below must be vacated if only for that reason, and the matter must be remitted to the court below irrespectively of the procedural objections that were raised, in timely fashion, in the appeal to this Court. However, for clarification, this Court points out that the purported procedural errors are not present. To that extent, we refer to the comments in this Court’s decisions of 25 October 2012 – BVerwG 10 B

16.12 und 10 B 20.12 – on procedural complaints comparable to those lodged by counsel for the Complainant. The court below also did not contravene Article 101 (1) sentence 2 of the Basic Law in that it did not submit the matter to the ECJ. Such a contravention is out of the question if for no other reason that whilst Article 267 (2) of the Treaty on the Functioning of the European Union establishes an authorisation to refer a question, it imposes no obligation to do so. However, irrespectively of that consideration, the requirements for a referral to the ECJ have also not been met. The matters of Union law that are material to a decision have been clarified in the case law of the ECJ, or else raise no doubts that would justify, still less require, a referral. To that extent, we refer to the comments above.

31 5. For the further course of this matter, this Court points out the following:

32 5.1 In respect of the application for protection against deportation under Union law, especially having regard to Section 60 (7) sentence 2 of the Residence Act, the court below will have to clarify, on the basis of the current state of the facts, whether an armed conflict prevails in the Complainant's region of origin, and whether he is at risk there of the dangers against which Section 60 (7) sentence 2 of the Residence Act provides protection. If this is the case, the court must further examine whether the Complainant can be expected under Section 60 (11) of the Residence Act in conjunction with Article 8 of Directive 2004/83/EC to make use of the possibility of internal protection in another part of the country, particularly Kabul.

33 5.2 If the court below arrives at the conclusion that the Complainant is not entitled to protection from deportation under Union law, it must also decide again, on the basis of the current state of facts, regarding the Complainant's alternative application for national protection from deportation under Section 60 (5) and (7) sentences 1 and 3 of the Residence Act.

34 a) Here we may leave aside the question of how to understand the court below's statement, concerning Section 60 (5) of the Residence Act, that with reference to Article 3 of the European Convention on Human Rights, the broader

standard of protection required under Union law pursuant to Section 60 (2) of the Residence Act is ‘not to be examined as a priority, i.e., in the present case’. If, however, the court below intended by this to express that having regard to Article 3 of the European Convention on Human Rights, a prohibition of deportation under Section 60 (5) of the Residence Act is superseded by Section 60 (2) of the Residence Act, this would not be compatible with Federal law.

35 Under Section 60 (5) of the Residence Act, a foreigner may not be deported if deportation is impermissible under the terms of the European Convention on Human Rights. According to the case law of the Federal Administrative Court concerning the predecessor of this provision in Section 53 (4) of the Aliens Act (judgment of 11 November 1997 – BVerwG 9 C 13.96 – BVerwGE 105, 322), a referral to the European Convention on Human Rights concerns only impediments to deportation founded on risks threatening the foreigner in the destination state of the deportation (impediments to deportation ‘connected with the destination state’).

36 The reference to prohibitions of deportation that proceed from the application of the European Convention on Human Rights also includes the prohibition of deportation to a destination state in which the foreigner is threatened with inhuman or degrading treatment or punishment within the meaning of Article 3 of the European Convention on Human Rights. Under Section 60 (5) of the Residence Act, all guarantees provided by the European Convention on Human Rights that may result in a prohibition of deportation must be given consideration. Insofar as Section 60 (5) of the Residence Act repeats the obligation of the Federal Republic of Germany, under international law, to take into account the threat of inhuman or degrading treatment or punishment in measures terminating residence (Article 3 of the European Convention on Human Rights), the objective scope of the provision is, to be sure, largely identical with the prohibition of deportation pursuant to Union law under Section 60 (2) of the Residence Act, but it does not in any event exceed the scope of that prohibition, to the extent that Article 3 of the European Convention on Human Rights is concerned. This is because – as has already been explained – Section 60 (2) of the Residence Act is built on Article 15 (b) of Directive 2011/95/EC, which in its turn takes on

the responsibility of the expelling state under Article 3 of the European Convention on Human Rights. Even if, in cases concerning applications for international protection, the protection from deportation under Union law – and therefore also the existence of a prohibition of deportation under Section 60 (2) of the Residence Act – must be examined prior to the national protection from deportation, this does not give rise, in respect of a breach of Article 3 of the European Convention on Human Rights, to any (superseding) special character of the prohibition of deportation under Section 60 (2) of the Residence Act that would exclude on principle any review of Section 60 (5) of the Residence Act. Rather, the guarantee under national law stands independently beside the guarantee under Union law. A special character of Section 60 (2) of the Residence Act that would exclude a certain set of defining elements would be incompatible with the high priority of the legal interests protected by Article 3 of the European Convention on Human Rights. Therefore, in respect of the existence of a prohibition of deportation under Section 60 (5) of the Residence Act, it must be substantively examined in each case whether the requirements of Article 3 of the European Convention on Human Rights are met. However, in cases – like this one – in which a decision must be reached simultaneously on granting protection from deportation under both Union and national law, if the requirements of Section 60 (2) of the Residence Act are found to be absent, then a prohibition of deportation under Section 60 (5) of the Residence Act in respect of Article 3 of the European Convention on Human Rights will regularly also be excluded on the basis of the same considerations of fact and law, so that in point of fact divergent assessments are hardly conceivable.

37 b) Finally, under Section 60 (7) sentence 1 of the Residence Act, a foreigner should not be deported to another state in which a substantial danger to his life and limb or liberty applies. However, dangers to which the population at large, or the population group to which the foreigner belongs, are exposed in general can normally be taken into account only under Section 60 (7) sentence 3 of the Residence Act, where orders under Section 60a (1) sentence 1 of the Residence Act have been issued (restrictive effect).

38 The court below correctly held that a foreigner may only by exception claim protection from deportation under a constitutional application of Section 60 (7) sentence 1 of the Residence Act, with reference to the living conditions that await him in the destination state, and particularly the economic living conditions that prevail there and the associated supply situation, when there is a high probability that he would be exposed to an extreme situation of danger because of these conditions in the event of a return. Only in such a case do the fundamental rights under Article 1 (1) and Article 2 (2) sentence 1 of the Basic Law require that he be granted protection from deportation under Section 60 (7) sentence 1 of the Residence Act in spite of the absence of a guiding policy decision under Section 60a (1) sentence 1 in conjunction with Section 60 (7) sentence 3 of the Residence Act. Accordingly, whether and when general dangers result in a constitutional prohibition of deportation therefore depends materially on the circumstances of the individual case, and is not available to a purely quantitative or statistical consideration. However, the impending dangers must be of such seriousness, in terms of their nature, extent and intensity, that upon objective consideration they give rise to a well-founded fear that the foreigner might personally become a victim, in a material manner, of the extreme general situation of danger. With reference to the probability of occurrence of the impending dangers, a heightened standard compared to the prognostic standard of a ‘considerable’ probability must be applied. There must therefore be a high probability that the foreigner will be threatened with these dangers. This level of probability marks the limit beyond which deporting the person to his country of origin appears constitutionally unreasonable. Finally, these dangers must be realised shortly after the return (settled case law, see judgment of 8 September 2012 – BVerwG 10 C 14.10 – BVerwGE 140, 319 – para. 22 et seq. with further authorities). In this regard as well, conditions throughout the country must be taken into consideration and – as in the case of Section 60 (2) and (5) of the Residence Act in respect of Article 3 of the European Convention on Human Rights – the conditions at the destination of deportation must be examined first.

39 Applying these standards, the court below found that there was no prohibition of deportation, because it could in fact be expected that returnees could earn a

meagre living in Kabul through occasional work, and could therefore finance a life at the margins of the minimum subsistence level. In so doing, it neither overstretched the requirements for the probability that the problematic supply situation, which in addition to a supply of food also includes medical care and the provision of living space, might impair fundamental protected legal interests, nor did it arrive at its satisfaction as to the facts on the basis of too narrow a basis of fact. Insofar as the appeal to this Court claims that the court below did not take adequate account of the medical care situation in assessing an extreme situation of danger, the appeal fails to recognise that such a situation is of significance only in preexisting illnesses acutely in need of treatment, or in cases in which, because of the general living conditions, there is an appropriately high probability of a life-threatening illness for which there is, in fact, no access to (basic) medical care (see, inter alia, decision of 25 October 2012 – BVerwG 10 B 20.12 – para. 14).

40 Moreover, insofar as the court below is of the opinion that under an application in accordance with the constitution, the Federal Administrative Court sets overly stringent legal requirements for the existence of a prohibition of deportation under Section 60 (7) sentence 1 and 3 of the Residence Act, this Court sees no cause in these comments to alter its case law. The court below founds its criticism on the fact that according to the case law, the reasonable expectation of a return – which, because of the poor general situation, it holds ‘hardly’ exists from a humanitarian point of view even for healthy, unmarried men, in the absence of protective family or tribal structures – is ‘not a central standard for determining an extreme situation of danger within the meaning of Section 60 (7) sentence 1 of the Residence Act’. With these considerations, it sets up against the legal concept of reasonable expectation derived from constitutional law a separate reasonable expectation – more narrowly construed and founded on extra-legal considerations – and thereby blurs the boundary between a return that can legally (still) be reasonably expected of the individual concerned, and one that can (no longer) be reasonably expected. In so doing, furthermore, it overlooks that an interpretation in conformity with the constitution is not concerned with defining a regime of protection from deportation that is, from the viewpoint of a given court, ‘reasonable’ and/or ‘favourable to human rights’, but

rather with specifying the conditions under which, under the rule of law with separation of powers, case law is authorised by exception, by way of an interpretation in conformity with the constitution, to disregard a democratically legitimated legislature's decision to take general dangers into account only within the bounds of an order under Section 60a (1) sentence 1 of the Residence Act. Here, in the matter at hand, it makes a material difference whether a person is placed in a situation, without any option of escape, in which he has as good as no possibility of survival, or whether, despite all difficulties – even difficulties that may threaten survival – he is not without prospects of a chance, but has the possibility of influencing his own fate.

41 The further doubts of the court below as to whether a high-level court of appeal may be obligated by supreme court review to address the deviating assessment of other high-level courts of appeal do not affect the standard in substantive law for assessing an extreme situation of danger itself. The criticism thus expressed against the Federal Administrative Court's case law concerning the requirements for the formation of opinion by the trier of fact under Section 108 (1) sentence 1 of the Code of Administrative Court Procedure (see judgment of 29 June 2010 – BVerwG 10 C 10.09 – BVerwGE 137, 226 – para. 22) overlooks that this examination is not required as an end in itself. It is intended to improve the quality of a decision by broadening the basis of fact and argument recognizably included in the assessment by the trier of fact. This applies, in particular, in cases where – as here – an interpretation of Section 60 (7) sentences 1 und 3 of the Residence Act in accordance with the constitution entails a 'correction' of the democratically legitimated legislature, for which a comprehensive overall assessment of the prospective living conditions in the destination state, and the associated dangers, is necessary in the assessment of the facts and the situation.

42 The disposition as to costs is reserved for the final decision. The amount at issue proceeds from Section 30 of the Act on Attorney Compensation.

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

Fricke Dr Maidowski