FEDERAL ADMINISTRATIVE COURT

DECISION

BVerwG 10 C 48.07
OVG 8 A 2632/06.A

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 14 October 2008
Federal Administrative Court Justice Dr. Mallmann sitting as Presiding Justice
and Federal Administrative Court Justices Prof. Dr. Dörig, Richter,
Beck and Fricke

decides and orders as follows:

The proceedings are stayed.

Pursuant to Article 234 (1) and (3) and Article 68 (1) of the EC Treaty, a preliminary ruling is sought from the European Court of Justice on the following questions:

1. Does a serious non-political crime or an act contrary to the purposes and principles of the United Nations within the meaning of Article 12 (2) b and c of Council Directive 2004/83/EC of 29 April 2004 exist if the applicant has belonged to an organisation that appears on the list of persons, groups and entities annexed to the Council Common Position on the Application of Specific Measures to Combat Terrorism, and that applies terrorist methods, and the applicant actively supported the armed struggle of that organisation?

2. In the event that Question 1 is to be answered in the affirmative: Does the exclusion from refugee status under Article 12 (2) b and c of Directive 2004/83/EC presuppose that the applicant still represents a danger?

3. In the event that Question 2 is to be answered in the negative: Does the exclusion from refugee status under Article 12 (2) b and c of Directive 2004/83/EC presuppose a proportionality test referred to the individual case?

4. In the event that Question 3 is to be answered in the affirmative:

a) Should the proportionality test take into account that the applicant benefits from protection against deportation under Article 3 of the European Convention on the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, or under national law?

b) Is exclusion disproportionate only in special cases?

5. Under the terms of Article 3 of Directive 2004/83/EC, is it compatible with the Directive for an applicant to be entitled to asylum under national constitutional law, in spite of the existence of a reason for exclusion under Article 12 (2) of the Directive?

Reasons:

I

1 The Complainant seeks asylum and refugee status, as well as, alternatively, a finding that a prohibition against deportation exists in regard to Turkey.

2 The Complainant, born in 1975 in Hozat, is a Turkish national of Kurdish ethnicity. At the end of 2002 he entered Germany by air and sought asylum. As reasons, he stated that even as a schoolboy he had sympathised with Dev Sol (now DHKP/C) in Turkey, and from the end of 1993 to the beginning of 1995 he had supported armed guerrilla combat in the mountains. After being arrested in February 1995, he said, he had been physically badly abused, and had been forced to give evidence under torture. In December 1995 he was sentenced to life imprisonment. After he accepted the blame for killing a fellow prisoner suspected of being an informant, he said, he had been sentenced once again to life imprisonment in 2001. In the autumn of 2000 he took part in a hunger strike. Because of the damage his health suffered in that action, he was conditionally released from custody for six months in December 2002. Out of fear of being re-imprisoned, he left the country. The DHKP/C, he says, now views him as a traitor. As a result of his experiences in his homeland, he says he now suffers from

severe post-traumatic stress syndrome, and also, as a consequence of the hunger strike, from cerebral damage (organic brain disorder) and associated blackouts (Korsakoff's syndrome).

3 In a decision of 14 September 2004, the Federal Office for the Recognition of Foreign Refugees (now the Federal Office for Migration and Refugees) – the 'Federal Office' – rejected his application for asylum as being manifestly unfounded (Item 1), and found that the conditions under Section 51 (1) of the Aliens Act were plainly not present (Item 2). As grounds, the Federal Office pointed out that the Complainant satisfied the reason for exclusion under Section 51 (3) sentence 2 Alternative 2 of the Aliens Act (serious non-political crime). At the same time, the Federal Office found that there were no impediments to deportation under Section 53 of the Aliens Act (Item 3), and threatened the Complainant with deportation to Turkey (Item 4).

4 In an order of 13 October 2004, the Administrative Court imposed the suspensive effect of a court action; by a judgment of 13 June 2006 it ordered the Respondent, rescinding Items 1, 2 and 4 of the Federal Office decision, to recognise the Complainant as entitled to asylum, and to find that the requirements under Section 60 (1) of the Residence Act were met.

5 In a judgment of 27 March 2007, the Higher Administrative Court rejected the Respondent's appeal. As grounds, it found in substance that the Complainant should be recognised as entitled to asylum under Article 16a of Germany's constitution, the Basic Law, and should be granted refugee status. Before emigrating from Turkey, the court said, he had suffered political persecution. The violations of his rights intentionally inflicted upon him while in custody were linked to his political convictions and activities, and went beyond criminal-law penalties that would be immaterial under asylum law. The Complainant would not be sufficiently safe from renewed persecution in the event of a return. It must be assumed, the court said, that the Turkish security forces had taken an interest in him, and that abuses relevant for asylum purposes would occur during questioning. The 'terrorism reservation' developed by the Federal Constitutional Court was not an impediment to granting asylum, the court found, because

there was no evidence that the Complainant would continue from Germany to support a violent extremist organisation in his homeland. Nor did the reasons for exclusion formerly governed by Section 51 (3) sentence 2 of the Aliens Act, and now by Section 60 (8) sentence 2 of the Residence Act, stand in the way of granting asylum and refugee status. The Second Alternative in Section 51 (3) of the Aliens Act, said the court, was the only one to come under consideration, and should be understood, in an interpretation under European and German constitutional law in conformity with the Geneva Refugee Convention, as indicating that the reason for exclusion served not merely to sanction a serious non-political crime committed in the past, but also to avert danger, and required a full assessment of the individual case in the light of the intent and purpose of the provision and the principle of proportionality. Hence the reason for exclusion may be inapplicable if the foreigner poses no further danger, for example because it is clear that he has renounced all former terrorist activities, or because he is no longer capable of political activity for health reasons. The court found that it could set aside the question whether the Complainant had committed a serious non-political crime, since in any event the assessment of his individual case would turn out in his favour. He spent nearly eight years in custody in Turkey. Given the conditions of imprisonment at the time, the punitive purpose had largely been achieved, insofar as concerns the punishment of criminal wrongdoing. As a young adult he was presumably especially sensitive to imprisonment. The health consequences of imprisonment must also be taken into account, said the court. His experiences during imprisonment, which cause him to still need psychotherapeutic treatment today, represent a caesura that makes a reorientation appear plausible. A criminal character no longer predominates, the court found, and the Complainant no longer poses a danger to the collective benefits protected by Section 60 (8) of the Residence Act.

6 In the appeal to this Court, which this Court has consented to hear, the Respondent primarily alleges a contravention of Section 60 (8) sentence 2 Alternatives 2 and 3 of the Residence Act (now: Section 3 (2) sentence 1 No. 2 and 3 of the Asylum Procedure Act). Contrary to the opinion of the court below, it says, a threat to the safety of the Federal Republic of Germany and/or the communities of states organised in the UN and EU is not necessary for either of

the two reasons for exclusion, and no proportionality test of the individual case is needed. If there is a danger of continuing or repeated terrorist activities, Section 60 (8) sentence 1 Alternative 1 of the Residence Act already represents an obstacle to recognition. Both the wording and the developmental history of the exclusion clauses make obvious the interpretation that because of the 'unworthiness for protection' of certain crimes, their mere commission is the only concern. The requirements of constituent fact mean that those clauses already include an abstract proportionality test. Any further limitation of the reasons for exclusion on the grounds of proportionality would also be unnecessary, it argued, because the protection against deportation under the Aliens Act assures that the individual concerned will not be deported to a state where he is threatened with treatment in violation of human rights.

7 It also is not constitutionally necessary, the Respondent argues, to expect the foreigner to pose an ongoing danger in order for the reasons for exclusion to apply. In light of the changed international security situation since 11 September 2001 and the pertinent UN Resolutions, there is some justification for including the foreigner's ineligibility for protection under the inherent constitutional limitations on the fundamental right of asylum under the expanded conception of security. Apart from that consideration, the reasons for exclusion in Article 12 (2) of Directive 2004/83/EC are also among the fundamental principles from which no deviations are permitted, under Article 3 of the Directive. Because European law takes priority, it is therefore not permissible to grant a right of asylum that is essentially equivalent to refugee status, under national constitutional law, when there are reasons for exclusion under Article 12 (2) of the Directive. In the Complainant's case, the Respondent says, there is serious reason to assume that his conduct falls under the Second or Third Alternative in Section 60 (8) sentence 2 of the Residence Act. Contrary to the UNHCR's interpretation, the Third Alternative does not extend solely to so-called 'state terrorism'. UN Resolution 1373 (2001) assumes that actions, methods and practices of terrorism are contrary in general to the purposes and principles of the UN Charter. An equivalent position is evident from Recital 22 of Directive 2004/83/EC.

8 The Respondent asks this Court,

to set aside the decisions of the Higher Administrative Court for the State of North Rhine Westphalia of 27 March 2007, and of the Gelsenkirchen Administrative Court of 13 June 2006, and to deny the appeal.

9 The Complainant has opposed the present appeal.

10 The Representative of Federal Interests before the Federal Administrative Court has entered into the proceedings, and likewise opposes the court below's interpretation of the exclusion clauses.

II

11 The proceedings must be stayed, and a preliminary ruling must be sought from the European Court of Justice on the interpretation of Council Directive 2004/83/EC of 29 April 2004 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 and the Content of the Protection Granted (Official Journal L 304 of 30 September 2004 p. 12; corr. Official Journal L 204 of 5 August 2005 p. 24) (Article 234 (1) and (3), Article 68 (1) EC Treaty). Since an interpretation of European law is concerned, that court has jurisdiction. The referred questions on the interpretation of the Directive are material to this decision and require clarification by the ECJ.

12 To the extent that the Complainant seeks protection as a refugee, it is doubtful whether recognition of refugee status is opposed by the reasons for exclusion under Article 12 (2) b and c of Directive 2004/83/EC; to that extent, the decision depends on the answers to the referred questions 1 through 4 (1.). If a reason for exclusion exists, a grant of asylum under German constitutional law (Article 16a Basic Law) depends on the answer to referred question 5 (2.).

13 1. The Complainant meets the positive requirements for asylum status. Since 28 August 2007, the effective date of the Act Implementing European Union Directives on Residence and Asylum Law of 19 August 2007 (Federal Law Gazette I p. 1970) – hereinafter the ‘Directive Implementation Act’ – these proceed from Section 3 (1) of the Asylum Procedure Act in conjunction with Section 60 (1) of the Residence Act.

14 On the basis of the findings of fact of the court below, which are binding upon this Court (Section 137 (2) Code of Administrative Court Procedure), the Complainant left his homeland after being persecuted there for his political convictions. The actions taken against him while in custody were not limited to the criminal-law penalties against criminal wrongdoing committed by violent means in the pursuit of political goals, but exceed them, in association with political convictions and activities, in the sense of a political persecution or ‘Politmalus’ (p. 19 of the copy of the original decision). Thus under Section 60 (1) sentence 5 of the Residence Act, the Complainant supplementarily falls under the facilitated standard of proof of Article 4 (4) of Directive 2004/83/EC. From the further findings of the court below – not procedurally subject to objection by this Court – it cannot be determined whether cogent reasons argue that there will be no resumption of persecution. Following the standards of probability developed by this Court for granting asylum under Article 16a of the Basic Law, and later transferred to recognition of refugee status under the Geneva Refugee Convention (see this Court’s referral for a preliminary ruling of 7 February 2008 - BVerwG 10 C 33.07 - ZAR 2008, 192) the court below assumed that in the event of a return the Complainant would not be sufficiently safe from renewed persecution. In practice, this approach leads regularly – as it does here – to the same result as the facilitated standard of proof under Article 4 (4) of Directive 2004/83/EC (see this Court’s referral for a preliminary ruling of 7 February 2008, loc. cit., for the case of a revocation).

15 In this connection, the court below assumed that in the event of a return, the Turkish security forces would take an interest in the Complainant because even though his release from custody was only for a limited time, he left the country, and on the basis of the two criminal sentences, is deemed as belonging to a

left-wing extremist terrorist organisation. In this connection the court saw a danger that he would be questioned so as to obtain knowledge about his activities while in Germany, as well as about any contacts with organisation members both here and in other countries, and that the questioning would be accompanied with abuses that are of material importance for asylum (p. 26 of the copy of the decision). Contrary to the Respondent's interpretation, this reasoning is founded on a sufficiently broad basis of fact, and does not contradict the concurrent finding that the danger of becoming the victim of mistreatment by security forces in the execution of justice is now viewed as improbable (p. 23 of the copy of the decision). Given the specific circumstances of the case, it must be assumed that the security forces will take an interest in the Complainant not merely after he is returned to custody, but at the very moment of admission to the country. In the light of Article 9 of Directive 2004/83/EC, whose Paragraphs 1 and 2 define in detail which acts are or may be deemed persecution, and which according to Section 60 (1) sentence 5 of the Residence Act must likewise be applied supplementarily in determining whether persecution within the meaning of Section 60 (1) sentence 1 of the Residence Act exists, the court below did not set too low a threshold of materiality for the abuses that may be feared. Any abuses by the security forces would also be attributable to the Turkish state, since a state must be imputed with the acts of its servants unless those acts are isolated excesses on the part of its officers; given the findings of fact by the court below, there is no evidence of such isolation here (see Federal Constitutional Court, decisions of 10 July 1989 - 2 BvR 502/86 et al. - BVerfGE 80, 315 <352>, and of 14 May 2003 - 2 BvR 134/01 - DVBl 2003, 1260 on the distinction between state persecution that is 'material to asylum' and non-state persecution that is 'not material to asylum').

16 If the positive requirements for refugee status exist for the above reasons, the Complainant is nevertheless not a refugee if one of the reasons for exclusion under Section 3 (2) sentence 1 of the Asylum Procedure Act exists (formerly Section 60 (8) sentence 2 of the Residence Act/Section 51 (3) sentence 2 of the Aliens Act). In these reasons for exclusion, now governed by the Asylum Procedure Act since the Directive Implementation Act took effect, the German legislature implemented Article 12 (2) and (3) of Directive 2004/83/EC, which in its

turn goes back to the reasons for exclusion already listed in Article 1 Part F of the Geneva Refugee Convention (GRC). Accordingly, a foreigner is not a refugee if there are serious reasons for considering that he committed a serious non-political crime outside the Federal Republic prior to his admission as a refugee, and in particular a brutal act, even if it was supposedly intended to pursue political aims (Section 3 (2) sentence 1 No. 2 Asylum Procedure Act), or that he acted in violation of the aims and principles of the United Nations (Section 3 (2) sentence 1 No. 3 Asylum Procedure Act); this also applies to foreigners who have incited others to commit such crimes or otherwise been involved in such crimes (Section 3 (2) sentence 2 Asylum Procedure Act). It is in this connection that the referred questions 1 through 4 arise.

Referred Question 1:

17 a) According to the binding findings of fact by the court below, in his youth the Complainant was already brought by his brother into the ambience of the prohibited left-wing extremist organisation Dev Sol. At the age of 18 he joined the guerrilla force of its successor organisation, the DHKP/C (p. 18 of the copy of the decision). This organisation has been included on the European list of terrorist organisations since 2002 (see Item 2.27 of the Annex Council Common Position of 17 June 2002 updating the Council Common Position 2001/931/GASP on the Application of Specific Measures to Combat Terrorism and revoking Common Position 2002/340/GASP - 2002/462/GSAP - Official Journal L 160 of 18 June 2006, p. 32), and according to the findings of the court below, also applies terrorist methods. It pursues the goal of breaking up the existing system of the Turkish state through armed civil war, so as to establish a socialist system (p. 20 of the copy of the decision). Even though the Complainant says he himself did not take part in armed conflicts, he supported the fighting troops in various ways: he scouted routes and arranged for supplies. In those activities, he was armed, which in any case permits the conclusion that he was also willing to use his weapons if necessary (p. 18 of the copy of the decision). Thus the Complainant actively supported the armed struggle of an organisation that appears on the list of persons, groups and entities annexed to

the Council Common Position on the Application of Specific Measures to Combat Terrorism, and that applies terrorist methods.

18 b) In this Court's opinion, such conduct meets the criteria of constituent fact for a serious non-political crime within the meaning of Article 12 (2) b of Directive 2004/83/EC. Therefore, no importance attaches to the questions left open by the court below (p. 18 et seq. of the copy of the decision) as to whether he participated in combat missions in which several soldiers were killed, or whether he killed a fellow prisoner while in custody in Turkey, which he admitted without being forced to do so by the officials in the Turkish hearing, but which he has denied in the administrative court proceedings in Germany.

19 As in Article 1 F (b) of the GRC, not every criminal act by a person seeking asylum prior to admission to the country justifies exclusion from refugee status. First of all, the crime must have a certain weight. Here international rather than local standards are relevant (see Paragraph 14 of the UNHCR Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees, of 4 September 2003 - HCR/PIP/03/05 - hereinafter: the 'UNHCR Guidelines'). The crime must be a capital crime or some other crime that would be considered especially serious in most jurisdictions and is prosecuted accordingly under criminal law.

20 At the same time, the act must be non-political. Under Paragraph 15 of the UNHCR Guidelines, a serious crime should be considered non-political when it is committed predominantly for other motives (such as personal reasons or gain). Where no clear link exists between the crime and its alleged political objective or when the act in question is disproportionate to the alleged political objective, non-political motives are predominant. Under Article 12 (2) b last half-sentence of Directive 2004/83/EC, particularly cruel actions may be classified as serious non-political crimes, even if committed with an allegedly political objective. This is regularly the case with acts of violence commonly considered to be of a 'terrorist' nature (see Paragraph 15 of the UNHCR Guidelines). In the absence of a definition of terrorism recognised under international law, this term admittedly lacks a certain focus. Nevertheless the case law of the Federal Ad-

ministrative Court has clarified, consistently with the Federal Constitutional Court, that the use of weapons dangerous to public safety and attacks on the lives of non-participants in order to achieve political goals must be considered ‘terrorist’ (see decision of 30 March 1999 - BVerwG 9 C 23.98 - BVerwGE 109, 12 <20> with reference to Federal Constitutional Court, decision of 10 July 1989 - 2 BvR 502/86 et al. - BVerfGE 80, 315 <339>; furthermore see Federal Administrative Court, decision of 15 March 2005 - BVerwG 1 C 26.03 - BVerwGE 123, 114 <129 et seq.>). At the Community level, moreover, in distinguishing a terrorist act from a political criminal act, one can furthermore draw on the definition agreed by the Member States in the Council Common Position of 27 December 2001 on the Application of Specific Measures to Combat Terrorism. There certain intentional acts (such as attacks on a person’s life or physical integrity) become ‘terrorist acts’ if – first – given their nature or context, they may seriously damage a country or an international organisation, and are defined as an offence under national law, and if – second – they are committed with the aim of seriously intimidating a population, or unduly compelling a government or an international organisation to perform or abstain from performing any act, or of seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or international organisation (see Article 1 (3) of the Common Position of 27 December 2001 on the Application of Specific Measures to Combat Terrorism - 2001/931/GASP - Official Journal L 344 of 28 December 2001 p. 93).

21 In the case of the activities of terrorist organisations in particular, the question additionally arises as to attribution. Under Article 12 (3) of Directive 2004/83/EC, the reasons for exclusion also apply to persons who instigate or otherwise participate in the mentioned crimes or acts. Thus the person seeking protection need not have committed the serious non-political crime himself, but he must be personally responsible for it. This must in general be assumed if a person has committed the crime personally, or made a substantial contribution to its commission, in the knowledge that his or her act or omission would facilitate the criminal conduct (see Paragraph 18 of the UNHCR Guidelines). Thus this principle covers not only active terrorists and participants in the criminal sense, but also persons who perform advance acts in support of terrorist activities (see

Federal Constitutional Court, decision of 10 July 1989, loc. cit., on the limits of the fundamental right of asylum).

22 In this Court's opinion, all three prerequisites of fact are met in the case of a person who actively supported the armed struggle of a terrorist organisation, so that the answer to Question 1 is presumably affirmative.

23 c) At the same time, it must be taken into account that the displayed conduct also falls under the reason for exclusion under Article 12 (2) c of Directive 2004/83/EC, because it is contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations.

24 This reason for exclusion likewise already appears in the Geneva Refugee Convention. From the *Travaux Préparatoires* one finds that during the deliberations it was unclear which acts are included under the reason for exclusion incorporated into Article 1 F (c) of the GRC on the basis of Article 14 (2) of the United Nations Universal Declaration of Human Rights of 10 December 1948 (see Takkenberg/Tabhaz, The Collected *Travaux Préparatoires* of the 1951 Geneva Convention relating to the Status of Refugees, Vol. III, The Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 2 – 25 July 1951, Geneva, Switzerland, published by the Dutch Refugee Council under the auspices of the European Legal Network on Asylum, Amsterdam 1990, SR 29, pp. 12). In the practice of nations as well, it is still unclear what group of persons the clause can apply to, and particularly whether an act can be contrary to the purposes and principles of the United Nations only if it is performed in the exercise of governmental or quasi-governmental power (see Federal Constitutional Court, decision of 12 March 2008 - 2 BvR 378/05 - InfAuslR 2008, 263 with further authorities). In the opinion of the UNHCR, the exclusion clause has an international dimension and fundamentally covers only persons who held a position of power in a State or State-like entity (see Paragraphs 17 and 26 of the UNHCR Guidelines). The Federal Administrative Court, in a previous decision, also assumed that the exclusionary provision of Article 1 F (c) of the GRC covers only actions contrary to international peace and international under-

standing among peoples (see decision of 1 July 1975 - BVerwG 1 C 44.68 - Buchholz 402.24 Section 28 Aliens Act No. 9). Other states, however, also apply the exclusion clause of Article 1 F (c) of the GRC to persons who exercised no governmental power (see, for example, the judgment of the British Immigration Appeal Tribunal of 7 May 2004, KK <Article 1 F (c)> Turkey [2004] UKIAT 00101 Marginal No. 20; Supreme Court of Canada in Pushpanathan v. Canada [1999] INLR 36). There is some question whether this broad interpretation should be affirmed, not least of all on the basis of the United Nations Security Council's Anti-Terror Resolutions that have been adopted in the meantime. If the acts contrary to the purposes and principles of the United Nations must have an international dimension, it would be necessary to clarify when this condition exists with reference to an individual person (for example, when involved in international terrorism).

25 Under Article 24 of the Charter of the United Nations, the Security Council has the primary responsibility for the maintenance of international peace and security, and in carrying out its duties under this responsibility it acts on behalf of the members and in accordance with the purposes and principles of the United Nations. From the viewpoint of international law, the duties of the UN Member States under the Charter of the United Nations take priority over all other duties of national law or treaty. According to the case law of the European Court of Justice, particular significance must be assigned to the fact that under Article 24 of the UN Charter, the Security Council exercises the responsibility to maintain international peace and security conferred upon it by adopting resolutions under Chapter VII of the Charter. This includes the Security Council's authority to decide what constitutes a threat to international peace and security (ECJ, Judgment of the Grand Chamber of 3 September 2008 – Joined Cases C-402/05 P and C-415/05 P – Kadi and Al Barakaat – Collection 2008 Marginal No. 294).

26 With reference to terrorist activities, the Security Council of the United Nations, in the introductory recitals to Resolution 1269 of 19 October 1999, pointed out that the suppression of acts of international terrorism, including those in which States are involved, is an essential contribution to the maintenance of international peace and security. In the introductory recitals to Resolution 1373 of

28 September 2001 it reaffirmed that any act of international terrorism constitutes a threat to international peace and security, and then ‘acting under Chapter VII’, declared that acts, methods and practices of terrorism are contrary to the purposes and principles of the United Nations, as are knowingly financing, planning and inciting terrorist acts (see Item 5 of Resolution 1373). From this it can be gathered that the Security Council evidently assumes that acts of international terrorism, whether or not a state is involved, are in general contrary to the purposes and principles of the United Nation. The 22nd recital of Directive 2004/83/EC also makes reference to this aspect.

Referred Question 2:

27 a) If Question 1 is to be answered in the affirmative, it raises the question, material to deciding the present case, whether the applicable reason for exclusion additionally presupposes that the foreigner continues to pose a danger (Question 2). According to the binding findings of the court below, the Complainant has credibly asserted that – based on the conviction that the path taken by the DHKP/C is wrong – he has broken off every contact with the organisation and has distanced himself from its goals. In any case, in emigrating to Germany he has broken with the past and begun a new chapter of his life, in which extremist activities and violence are no longer to have a place (p. 21 of the copy of the decision). Therefore he no longer poses a danger (p. 53 of the copy of the decision).

28 b) In this Court’s opinion, Question 2 is to be answered in the negative. Mere ‘unworthiness for protection’ on the basis of prior acts suffices for the application of the exclusion clauses; it is not necessary that the foreigner should still pose such dangers as he manifested in his previous conduct.

29 The very wording of the exclusion clauses argues that there is no requirement for a danger of reoffence. The reasons for exclusion listed in Article 12 (2) of Directive 2004/83/EC, with the wording ‘has committed’ or ‘has been guilty of’ tie solely into conduct that lies in the past, as does Article 1 F of the GRC. Not just the wording, but the intent and purpose of the exclusion clauses differ from

the exceptions from the prohibition against *refoulement* under asylum law as set forth in Article 33 (2) of the GRC. Those exceptions expressly require a (current) danger to the security or community of the host country. They are intended to protect the host country, and therefore require that the person concerned must pose a present or future danger. They thus take into account the recognised principle of customary international law that every state may give protection of its own security priority over obligations under laws pertaining to foreigners. By contrast, the exclusion clauses are linked to an act lying in the past. They are founded on the consideration that certain persons are not 'deserving' of international refugee protection (see Paragraph 2 of the UNHCR Guidelines and Paragraph 140 of the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status of September 1979, new edition, UNHCR Austria, December 2003 - hereinafter: the 'UNHCR Handbook'; likewise the recommendation of the Council of Ministers of 23 March 2005 - Rec <2005>6 -), and they pursue two purposes: They are intended to protect refugee status from abuse, by keeping it from being granted to undeserving applicants. And they are intended to ensure that these persons cannot escape criminal prosecution (see Gilbert, Current Issues in the Application of the Exclusion Clauses, 2001, p. 2; see also Paragraph 2 of the UNHCR Guidelines). From these differences in the focus of protection, it proceeds that in contrast to the exceptions to the prohibition on *refoulement,* the protection of the host state is only a secondary consequence in the case of the reasons for exclusion.

30 This is confirmed by the history of the evolution of the Geneva Refugee Convention. According to the *Travaux Préparatoires*, the fundamental difference between reasons for exclusion – tied to previous personal misconduct – and the exceptions from the non-*refoulement* imperative – intended to protect the host state – was evident in the deliberations. In the case of the exclusion clauses, the deciding factor for the representatives of the states was not whether the refugee currently posed a danger, but the distinction between 'bona fide' and 'criminal' refugees ('ordinary common law criminals' - see Takkenberg/Tabhaz, op. cit., SR 24 p. 5). The group of persons covered by the exclusion clauses, because of their misconduct, was not to be set on a par with 'bona fide refugees' (see Takkenberg/Tabhaz, op. cit., SR 24 p. 6). The intent was to prevent

refugee status from being discredited by including criminals in the group of recognised refugees (‘refugees whose actions might bring discredit on that status’ - see Takkenberg/Tabhaz, op. cit., SR 29 p. 19). There is no support in either the background materials to the Geneva Refugee Convention or the international practice of nations for the UNHCR’s opinion that the aim and purpose of considering a serious non-political crime as a reason for exclusion is to protect the community of a receiving country from the danger of admitting a refugee who has committed a serious common crime (see Paragraph 151 of the UNHCR Handbook). The proposed Directive of the EC Commission also takes up the notion of abuse only to point out that the Member States are obligated not to grant refugee status to applicants to whom Article 1 F of the GRC applies, in order to preserve the integrity and credibility of the Geneva Refugee Convention (see proposal by the Commission for a 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, KOM(2001) 510 final, p. 29 - hereinbelow: the ‘Commission’s Directive Proposal’). Accordingly, both in the recognition of refugee status and in the recognition of subsidiary protection, Directive 2004/83/EC makes a clear distinction between exclusion because of previous acts (for refugee status see Article 12 (2) of the Directive; for subsidiary protection see Article 17 (1) a through c of the Directive) and subsequent revocation of, ending of or refusal to renew refugee status (see Article 14 (4) of the Directive), or the exclusion from subsidiary protection (see Article 17 (1) d and Article 19 (3) a of the Directive) in the case of persons who represent a danger to the security or community of the admitting state.

Referred Questions 3 and 4:

31 a) If Question 2 is to be answered in the negative, it becomes material to the decision whether exclusion from refugee status under Article 12 (2) b and c of Directive 2004/83/EC requires a proportionality test at least in regard to the specific case; also what criteria must be taken into consideration in such a test, and what standard should be applied. If no proportionality test regarding the individual case is required, and if Question 3 is therefore to be answered in the

negative (and if Question 1 is answered in the affirmative and Question 2 in the negative), the Complainant is mandatorily excluded from refugee status. If a proportionality test regarding the individual case is required, however, recognition of refugee status depends on the answer to Question 4 regarding the criteria and standards for such a test.

32 b) In this Court's opinion, the exclusion clauses are fundamentally mandatory, and leave the authorities in charge no room for discretion. The requirements of constituent fact are founded on an abstract proportionality test. If the requirements of constituent fact are met, it must be assumed that the individual is not deserving of refugee status. Nevertheless, the application of the exclusion clauses in a given case cannot contravene the principle of proportionality recognised in international and European law. This principle requires that every measure must be suitable and necessary, and in reasonable proportion to the intended purpose. Therefore, this Court believes Question 3 must in principle be answered in the affirmative (the UNHCR too requires a proportionality test 'regularly' [see Paragraph 24 of the UNHCR Guidelines]; some other states generally reject a proportionality test – see for example the British Immigration Appeal Tribunal, decisions of 7 May 2004, KK <Article 1 F (c)> Turkey [2004] UKIAT 00101 Marginal No. 90 et seq. and 18 May 2005, AA <Exclusion clause> Palestine [2005] UKIAT 00104 Marginal No. 59 et seq.).

33 c) In examining whether exclusion from refugee status does not apply because of disproportionality in a specific case even though requirements of constituent fact are met, this Court believes that primary consideration must be given to the purpose sought by the exclusion clauses. If the exclusion clauses – as described above – are not intended to protect the admitting country, and instead are based on the concept of unworthiness for asylum, and if the aim is to avoid abusive claims of refugee status and ensure that no one escapes his or her penal responsibility, then primarily the misconduct charged against the individual must be weighed against the consequences of exclusion. The Commission also leans in this direction in its Directive Proposal, in which under the exclusion clause concerning serious non-political crime, the severity of the expected persecution must be weighed against the nature of the crime of which the individual

is suspected (see the Commission's Directive Proposal, p. 29). In this consideration, this Court believes it must be taken into account that at the effective date of the Geneva Refugee Convention, there was no possibility of subsidiary protection, with the consequence that if a reason for exclusion existed, the individuals concerned were regularly deported to the persecuting state. By contrast, in all states that have ratified the European Convention on Human Rights, persons excluded from refugee status are covered by the – absolute – prohibition on *refoulement* under Article 3 of the ECHR. This ensures that they will not be deported to a state where they would be subjected to torture or to inhuman or degrading treatment or punishment. Moreover, in some cases there are national prohibitions on deportation that go farther (in Germany, for example, under Section 60 (2) through (7) of the Residence Act). Thus, today, exclusion from refugee status no longer necessarily results in deportation to the persecuting state, but in most cases has the consequence that although the individual is barred from refugee status, he will benefit from subsidiary protection from deportation (not to be confused with subsidiary protection under Directive 2004/83/EC). This Court believes that this circumstance must also be taken into account in the proportionality test, so that Question 4 a should be answered in the affirmative.

34 d) Based on the abstract proportionality test already inherent in the requirements of constituent fact, on the intended purpose of the exclusion clauses, and on the possibility of obtaining subsidiary protection from deportation, the application of the exclusion clauses is presumably ultimately disproportionate only in special exceptional cases, so that this Court believes that Question 4 b should also be answered in the affirmative. A prerequisite for assuming such an exceptional case is that in spite of his previous misconduct, the individual must deserve to be placed (back) on a par with a 'bona fide refugee.' This is the case when an overall assessment of his personality and his conduct in the meantime shows that in spite of his past, he is (i.e., has again become) deserving of protection. For this purpose, this Court believes, it is not sufficient that, as in the present case, the individual no longer poses a danger, has distanced himself from his previous acts, and has at least partially paid the penalty, suffering injury to his health in the process. However, in the case of previous support for terrorist activities, an exceptional case might come into consideration, for ex-

ample, if the individual not only distances himself from his acts, but now actively works to prevent further acts of terrorism, or if the act is a ‘sin of youth’ lying decades in the past.

35 2. In addition to recognition of refugee status in implementation of Directive 2004/83/EC, the present proceedings are also concerned with whether the Complainant is entitled to asylum under German constitutional law. It is in this connection that Referred Question 5 arises, in regard to whether granting asylum is compatible with Directive 2004/83/EC, within the meaning of the Directive’s Article 3, for those cases where a grant of refugee status under Article 12 (2) and (3) of the Directive is excluded.

36 a) On the basis of the existing case law of the Federal Constitutional Court and the Federal Administrative Court on the interpretation of Article 16a of the Basic Law, the Complainant would be entitled to asylum status. As has been set forth above, according to the findings of fact of the court below, which are not subject to objection by this Court, he was politically persecuted in his homeland and would not be sufficiently safe from renewed political persecution in the event of his return.

37 According to the case law of the Federal Constitutional Court and the Federal Administrative Court, recognition of an entitlement to asylum would not be opposed by the fact that the Complainant actively supported a terrorist organisation in his country of origin. The exclusion clauses of the Geneva Refugee Convention are founded on the concept of unworthiness for asylum. But they do not forbid states from nevertheless granting protection to persons excluded under the Convention (see Davy, *Terrorismusbekämpfung und staatliche Schutzgewährung* [Combating Terrorism and Granting State Protection], ZAR 2003, 43 with further authorities on the background history). Although the authors of the Basic Law were quite familiar with the problem of applications for asylum by perpetrators of violent acts, they chose not to explicitly limit this fundamental right to protecting only those persons who were not guilty of serious non-political crimes or acts of terrorism. The fundamental right of asylum, including in the current version of Article 16a of the Basic Law, includes no re-

strictions or reservations that would authorise the ordinary legislator to generally exclude certain groups of persons from protection – for example, in implementation of the exclusion clauses under Article 1 F of the GRC. A legislator is authorised only to follow the outlines of the fundamental right of asylum inherent in the constitution.

38 From these facts, the Federal Administrative Court has concluded in its case law to date that the fundamental right of asylum is not limited to persons who have proved to be either deserving or undeserving of asylum. It has based this finding on the fact that in contrast to the Geneva Refugee Convention, the right of asylum entails no exclusion of those considered ‘undeserving’ of asylum. This Court held that Article 1 F of the GRC, which excludes perpetrators of the serious crimes listed there from the application of refugee status, was not the expression of a fundamental principle of law with constitutional rank, and therefore, as a lower-ranking law, could not limit the scope of application of a fundamental right that is guaranteed without restriction (see decisions of 17 May 1983 - BVerwG 9 C 36.83 - BVerwGE 67, 184 <192> and 8 November 1983 - BVerwG 9 C 93.83 - BVerwGE 68, 171 <173>).

39 To date, the Federal Constitutional Court as well has not applied the exclusion clauses under Article 1 F of the GRC to the fundamental right of asylum. It does assume in principle that with the fundamental right of asylum, the authors of the Basic Law intended to elevate to the status of a legal entitlement what was understood by asylum or a grant of asylum under international law at the time when the Basic Law was drafted, and therefore unless there is some special reason to do otherwise, presumably the fundamental right should in any case not be interpreted more broadly than international law on refugees under the Geneva Refugee Convention (see Federal Constitutional Court, decision of 10 July 1989 - 2 BvR 502/86 et al. - BVerfGE 80, 315 <343>). But in regard to the group of persons covered by the right of asylum, the Federal Constitutional Court has always worked with a broad interpretation of the concept of a person subjected to political persecution. This was done on the grounds that in the deliberations of the Parliamentary Council, there was unanimity that there is no imperative to interpret the right of asylum narrowly, or to limit it to a certain

group of persons. Consequently, for example, the right of asylum also extends to persons who have committed a serious non-political crime, if in the event of their return they would be exposed to danger to life or limb, or to restrictions on their personal freedom, due to politically motivated persecution, and such a right may exist even in the absence of the characteristic as a ‘political refugee’ under the Geneva Refugee Convention (see Federal Constitutional Court, decisions of 4 February 1959 - 1 BvR 193/57 - BVerfGE 9, 174 <180 et seq.> and 2 July 1980 - 1 BvR 147/80 et al. - BVerfGE 54, 341 <357>). The case law of the Federal Administrative Court and the Federal Constitutional Court to date has assumed an exclusion from the right of asylum for only two groups of cases. First, the right of asylum does not cover situations in which a new arena is merely being sought to continue or support terrorist activities. Accordingly, anyone intending to use the Federal Republic of Germany as a platform to continue terrorist activities undertaken in the country of origin, or to support such activities, via the forms possible here, cannot claim asylum; he is not seeking the protection and peace that the right of asylum is intended to guarantee (see Federal Constitutional Court, decision of 20 December 1989 - 2 BvR 958/86 - BVerfGE 81, 142 <152>). The same applies for someone who, from Germany, first takes up a political struggle through terrorist means as a part of political activities from exile (decision of 30 March 1999 - BVerwG 9 C 23.98 - BVerwGE 109, 12 <16 et seq.>) – the so-called ‘terrorism reservation’. Second, it is recognised that the entitlement to asylum is excluded in the presence of the conditions under Section 60 (8) sentence 1 of the Residence Act, which in turn is equivalent to Article 14 (4) a and b of Directive 2004/83/EC and Article 33 (2) of the GRC – in other words, when, for serious reasons, the foreigner is to be regarded as a risk to the security of the Federal Republic of Germany, or constitutes a risk to the general public, because he or she has been unappealably sentenced to a prison term of at least three years for a crime or a particularly serious offence. But an additional requirement here in any case is a high future probability that the foreigner will continue the activity endangering the security of the state or its community (see decisions of 30 March 1999 - BVerwG 9 C 31.98 - BVerwGE 109, 1 <3 et seq., 8> and 1 November 2005 - BVerwG 1 C 21.04 - BVerwGE 124, 276 <278, 289>). This restriction on the otherwise unreserved fundamental right of asylum is constitutional because it is made imperative by the equally

ranked constitutional value of the security of the state as the constitutional guarantor of law and order, and the security of its population that the state is supposed to guarantee, and thus this security is inherent in the constitution as a limitation on the right of asylum, and the legislature has permissibly concretised that limitation in Section 60 (8) sentence 1 of the Residence Act in the narrow interpretation set forth above (see decision of 30 March 1999 - BVerwG 9 C 31.98 - op. cit. p. 3 et seq. with further authorities).

40 These constitutionally justified reasons for exclusion are not present in the Complainant's case. According to the findings of the court below, no later than the time when he left his homeland, the Complainant broke with the past and began a new chapter in his life; he fled to Germany solely to find the protection and peace here that the right of asylum confers. There are no indications that he is continuing from Germany the support he had provided in his homeland for a violent extremist organisation. Rather, he has credibly asserted that on the basis of the conviction that the DHKP-C has taken the wrong path, he has now broken off all contact with the organisation and has distanced himself from its goals (p. 20 et seq. of the copy of the decision). On the basis of these findings, which are binding upon this Court, one cannot assume that the Complainant intends to continue or support terrorist activities from Germany. As the danger of reoffence is also absent, the Complainant is also not excluded from a grant of asylum status under Section 60 (8) sentence 1 of the Residence Act.

41 b) If refugee status cannot be granted hear because of a reason for exclusion under Article 12 (2) and (3) of Directive 2004/83/EC, the material question for this decision then arises as to whether this exclusion affects the entitlement to asylum under Article 16a of the Basic Law, through the priority of application of European law. This depends on whether Directive 2004/83/EC allows a national protected status comparable to refugee status to be granted despite the existence of a reason for exclusion. This is guided by Article 3 of Directive 2004/83/EC, which indicates that Member States may introduce or retain more favourable standards for determining who qualifies as a refugee or as a person eligible for subsidiary protection, and for determining the content of international protection, in so far as those standards are compatible with the Directive.

42 This Court believes that the compatibility of a grant of asylum with Directive 2004/83/EC, and thus an affirmative answer to Question 5, are advocated by the fact that the Directive concentrates on establishing minimum standards. Thus it fundamentally does not prevent Member States from granting applicants more favourable conditions than are offered by the established minimum standards (this is also true of the Commission's Directive Proposal, p. 13). According to Article 3 of Directive 2004/83/EC, this is explicitly also the case in regard to the question of who is to be considered a refugee. But the introduction or retention of more favourable standards is subject to the express proviso that they must be compatible with the Directive. It is doubtful that granting a constitutionally anchored legal status as an individual entitled to asylum, despite the existence of a reason for exclusion, would overreach this limit. Although a grant of asylum under Article 16a of the Basic Law is not identical with recognition of refugee status under the Geneva Refugee Convention and Directive 2004/83/EC, nevertheless it has essentially the same function and the same legal consequences. According to Section 2 (1) of the Asylum Procedure Act, persons entitled to asylum enjoy, at least in German territory, the legal status pursuant to the Convention Relating to the Status of Refugees of 28 July 1951, or in other words, the Geneva Refugee Convention. The underlying goal of Directive 2004/83/EC of making asylum policy uniform and achieving a common European asylum system (see Recital 1) might possibly be evaded if under national asylum regulations, the Member States grant another protected status essentially having the same function, in addition to the forms of protection established in the Directive, and the other protected status is granted in deviation from the mandatory reasons for exclusion under Article 12 (2) and (3) of the Directive. Here it must be borne in mind that Directive 2004/83/EC recognises a system of various reasons for exclusion, expiration, and other forms of revocation, termination or refusal to renew. Most of these reasons, including the reasons for exclusion under Article 12 (2) and (3) of Directive 2004/83/EC, are in mandatory form, and thus do not permit Member States to make exceptions or discretionary applications. On the other hand, the Directive also recognises reasons which the Member States may apply at their discretion in granting refugee status (see, for example, Article 14 (4) of Directive 2004/83/EC). The (optional)

reasons listed there are characterised by the fact that they pertain to the security interests of the Member State concerned, and thus primarily national interests. By argumentum e contrario, this might mean that the mandatory reasons for exclusion under Article 12 (2) and (3) of Directive 2004/83/EC cannot be evaded by way of Article 3 of Directive 2004/83/EC. One might well conclude that the drafters of the Directive attached particular weight to the reasons for exclusion listed in Article 12 (2) of Directive 2004/83/EC, from the fact that those reasons reappear almost word for word in the case of subsidiary protection in Article 17 (1) a through c of Directive 2004/83/EC, and therefore according to the intent of the drafters of the Directive, if those reasons are present the individual concerned is supposed to be entirely excluded from international protection under the Directive.

Dr. Mallmann Prof. Dr. Dörig Richter

Beck Fricke

Field: BVerwGE: Yes

Asylum law Professional press: Yes

Sources in Law:

Asylum Procedure Act	Section 3 (1), (2)
Residence Act	Section 60 (1) through (8)
Aliens Act	Section 51 (1) and (3)
ECHR	Article 3
Basic Law	Article 16a
GRC	Article 1 F (b) and (c), Article 33 (2)
EC Treaty	Article 68 (1), Article 234 (1) and (3)
Directive 2004/83/EC	Articles 3, 4 (4), Articles 9, 12 (2) and (3)
UN Charter	Articles 24, 25

Headwords:

Asylum; recognition of refugee status; prohibition on refoulement; exclusion; terrorism; support; DHKP/C; serious non-political crime; purposes and principles of the United Nations; preliminary ruling; ineligibility for asylum; danger of reoffence; proportionality; protection from deportation; priority of application.

Headnote:

Requests for preliminary rulings from the European Court of Justice to clarify the prerequisites for and effects of an exclusion under Article 12 (2) b and c of Directive 2004/83/EC.

Decision of the 10th Division of 14 October 2008 - BVerwG 10 C 48.07

I. Gelsenkirchen Administrative Court, 13.06.2006 – Case No.: VG 14a K 5395/04.A -
II. Münster Higher Administrative Court, 27.03.2007 – Case No.: OVG 8 A 2632/06.A -