FEDERAL ADMINISTRATIVE COURT

IN THE NAME OF THE PEOPLE

JUDGMENT

BVerwG 10 C 13.10
VGH 13a B 08.30285

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
on 17 November 2011
By Presiding Federal Administrative Court Justice Prof. Dr Berlit and Federal Administrative Court Justices Prof. Dr Dörig, Richter, Prof. Dr Kraft and Fricke

has decided, an oral hearing having been waived:

> The Complainant's appeal against the Bavarian Higher Administrative Court judgment of 21 January 2010 is denied.
>
> The Complainant is to bear the costs of this appeal.

R e a s o n s :

I

1 The Complainant, an Iraqi national, seeks protection from deportation because of danger threatening him in Iraq.

2 The Complainant, born in Mosul in 1976, is of Kurdish ethnicity and of the Sunni faith. As grounds for his application for asylum made in July 2001 to the Federal Office for the Recognition of Foreign Refugees (now the Federal Office for Migration and Refugees – the 'Federal Office' –), he stated that he had operated a grocery business in Mosul. A bag containing Shiite leaflets, left by a customer in his shop, had been inspected by a person unknown. His father had then advised him to flee, and had later been arrested because of him. He feared he would be killed or imprisoned for life because of the incident. By a decision of 14 September 2001, the Federal Office rejected the Complainant's application for asylum, but found that the requirements for recognition of refugee status under Section 51 (1) of the Aliens Act 1990 (now Section 60 (1) of the Residence Act) had been met with regard to Iraq. It must be presumed, the Federal

Office found, that the Complainant would be persecuted because of his illegal emigration and his application for asylum.

3 Because of the change in political conditions in Iraq, on 16 March 2006 the Federal Office revoked the recognition of refugee status, finding at the same time that there were no prohibitions on deportation under Section 60 (2) through (7) of the Residence Act.

4 The complaint brought against this decision met with no success in the courts below. In a judgment of 1 February 2007, the Higher Administrative Court stated, in substance, that the revocation had been lawful because the Complainant no longer needed to fear persecution in Iraq following the fall of the Saddam Hussein regime. He also could not claim a finding of prohibitions on deportation under Section 60 (2) through (7) of the Residence Act, or subsidiary protection under Article 15 (c) of Directive 2004/83/EC. No nationwide internal armed conflict was present in Iraq, the court found. Moreover, the Complainant had options for finding internal protection in parts of Iraq. Furthermore, the body of administrative law from the Bavarian State Ministry of the Interior, which offers comparable protection from deportation in cases of general danger, stands in opposition to the granting of subsidiary protection under the Directive.

5 During the appeal proceedings before this Court, the Complainant withdrew his appeal against the revocation of refugee status. In a judgment of 24 June 2008 – BVerwG 10 C 44.07 – this Court suspended the appeal proceedings in that regard. For the rest, insofar as the Complainant sought the establishment of an obligation to find protection from deportation under Union law pursuant to Section 60 (2), (3) and (7) Sentence 2 of the Residence Act, and alternatively, national protection from deportation under Section 60 (5) and (7) Sentence 1 of the Residence Act, this Court set aside the appealed decision and remanded the matter to the court below. In its grounds, it ruled that Section 60 (7) Sentence 2 of the Residence Act does not presuppose a nationwide armed conflict. The additional presumption by the court below that the Plaintiff could find internal protection within Iraq was founded on too narrow a basis of fact. Finally, the referral to the suspension of deportation by way of ministerial orders did not

withstand review by this Court, in that the court below held that Section 60 (7) Sentence 3 of the Residence Act was to be construed, in compliance with the Directive, as meaning that the blocking effect does not apply if the requirements under Article 15 (c) of Directive 2004/83/EC are met.

6 During the appeal proceedings on remand, the Respondent pointed out that the Complainant holds a settlement permit. Therefore his residence was secure and there was no longer a need for subsidiary protection.

7 In a judgment of 21 January 2010, the Higher Administrative Court denied the Complainant's appeal insofar as concerns the still-pending application for a finding of prohibitions on deportation under Section 60 (2) through (7) of the Residence Act. The court held that the appeal was procedurally allowed, because there was a justified interest in obtaining a finding of a prohibition on deportation under 60 (2) through (7) of the Residence Act even though the Complainant now held a settlement permit under Section 26 (4) of the Residence Act. Recognition of subsidiary protected status under Article 18 of Directive 2004/83/EC might, it held, provide the Complainant with an additional legal position. However, the appeal was without merit. In view of Section 60 (7) Sentence 2 of the Residence Act, the appellate court held that it might leave aside the question of whether the terrorist acts that had persisted in Iraq since 2003 and been combated by state security forces could qualify, in their intensity and magnitude, as an internal armed conflict. The Complainant was at any event not exposed to a substantial individual danger to life or limb. In his place of origin, Mosul, the density of danger was not so great that practically any civilian was exposed to a serious individual danger merely because of his or her presence in the region concerned. This, the court found, was evident from the number of attacks and the number of victims in proportion to the population. The probability of being injured or killed by a terrorist attack in Nineveh Province was approximately 0.12% in 2009, or approximately 1 in 800 per year, the court found. There was no reason to believe that the security situation had become more acute. There were no evident individual circumstances that would intensify danger in the Complainant's case. Nor were the requirements met for national protection

against deportation (Section 60 (7) Sentence 1 and Section 60 (5) of the Residence Act), which was sought as an alternative.

8 In his appeal to this Court by leave of the Higher Administrative Court, the Complainant objects only to the refusal to find a prohibition on deportation under Section 60 (7) Sentence 2 of the Residence Act. He complains that in determining the density of danger, the Higher Administrative Court focused on the criteria for density of persecution that have been developed in the context of group persecution, without differentiating between protective systems or taking account of the special characteristics of subsidiary protection. Furthermore, he argues, the sources adduced in the proceedings with regard to the frequency of attacks in Iraq and the number of persons dead and injured had not been interpreted and assessed.

9 The Respondent defends the appealed decision.

II

10 The Complainant's appeal, which, by consent of the parties, has been decided by this Court without an oral hearing (Section 101 (2) in conjunction with Section 141 Sentence 1 and Section 125 (1) Sentence 1 Code of Administrative Court Procedure), is without merit. In denying the requested finding of an obligation to grant subsidiary protection from deportation under Union law, the court below did not contravene federal law subject to review by this Court (Section 137 (1) (1) Code of Administrative Court Procedure).

11 The only remaining subject matter of the appeal before this Court is the application for the finding of an obligation to grant subsidiary protection against deportation under Union law. The further limitation of the appeal to the existence of a prohibition on deportation under Section 60 (7) Sentence 2 of the Residence Act proves to be without effect, because according to the pertinent substantive law, the asserted claim to a finding of an obligation to grant protection from deportation under Section 60 (2), (3) and (7) Sentence 2 of the Residence Act (in

accordance with the requirements for subsidiary protection in Article 15 of Council Directive 2004/83/EC 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ EU L 304 p. 12; corr. OJ EU of 5 August 2005, L 204 p. 24) constitutes a unitary matter of controversy that inherently cannot be subdivided further (judgments of 24 June 2008 – BVerwG 10 C 43.07 – BVerwGE 131, 198 at 11, and of 8 September 2011 – BVerwG 10 C 14.10 – to be published in the BVerwGE collection – at 16). Therefore an appeal to this Court cannot validly be limited to individual substantive bases for this unitary procedural claim (judgment of 27 April 2010 – BVerwG 10 C 5.09 – BVerwGE 136, 377 at 13).

12 Contrary to the Respondent's opinion, a justified interest in the proceedings for this request for the finding of an obligation has not lapsed, even though the Complainant now has a settlement permit under Section 26 (4) of the Residence Act. That interest would be absent only if the complaint could plainly not bring any legal or factual advantage for the Complainant (judgment of 29 April 2004 – BVerwG 3 C 25.03 – BVerwGE 121, 1 <3>). It must be conceded to the Respondent that under national residence law, the legal position of a foreigner in the situation of the Complainant, who holds a settlement permit under Section 26 (4) of the Residence Act, currently cannot be improved by recognising protection from deportation under Union law. However, that consideration in itself is insufficient. This is because the implementation deficit on the part of the German legislature – which, contrary to the requirements under Union law arising from Directive 2004/83/EC, in its fifth recital, in Article 2 (f) and in Article 18, has not explicitly configured the status in national law of a person entitled to subsidiary protection – cannot be allowed to inure to the Complainant's detriment (see also judgment of 24 June 2008 – BVerwG 10 C 43.07 – BVerwGE 131, 198, at 13). Therefore, having regard to this protected status and the associated benefits, and despite his secure position under residence law, he has a legitimate interest in a decision on the existence of a prohibition on deportation under Union law.

13 However, the complaint, although procedurally allowable, is without merit. On the basis of the findings of fact by the court below, which have not been attacked on procedural grounds and are therefore binding upon this Court (Section 137 (2) Code of Administrative Court Procedure), none of the prohibitions on deportation founded on Union law takes hold here (Section 60 (2), (3) and (7) Sentence 2 of the Residence Act).

14 1. Under Section 60 (7) Sentence 2 of the Residence Act, a foreigner is not to be deported to another state in which he or she will be exposed, as a member of the civilian population, to a substantial individual danger to life or limb as a result of an international or internal armed conflict. According to the case law of this Court, despite minor differences in wording, this provision is equivalent to the requirements of Article 15 (c) of Directive 2004/83/EC and is to be construed in that sense (judgment of 24 June 2008 – BVerwG 10 C 43.07 – BVerwGE 131, 198, at 17 and 36).

15 The court below chose not to answer the question of whether the terrorist acts that have persisted in Iraq since 2003 and that are being combated by state security forces are of such intensity and magnitude as to be considered an internal armed conflict, because even if such a conflict were presumed, the Complainant would not be exposed to a substantial individual danger to life or limb. This finding withstands review by this Court.

16 a) In deciding the likelihood of whether the Complainant would be exposed, upon his return to Iraq, to substantial individual danger to life or limb as a result of indiscriminate violence, the Higher Administrative Court correctly based its finding on the actual conditions in his region of origin, Mosul. That is where the Complainant last lived, so that it is justified to presume that he will return there (judgment of 14 July 2009 – BVerwG 10 C 9.08 – BVerwGE 134, 188, at 17).

17 b) Furthermore, the court below correctly examined whether the armed conflict – which is presumed to exist, to the Complainant’s advantage – in the region of Mosul results in a general danger to numerous civilians that is concentrated in the person of the Complainant in such a way as to represent a substantial indi-

vidual danger within the meaning of Section 60 (7) Sentence 2 of the Residence Act. This is so because even a general danger proceeding from an armed conflict may become concentrated in an individual, and thereby meet the requirements of Section 60 (7) Sentence 2 of the Residence Act and Article 15 (c) of Directive 2004/83/EC (judgment of 24 June 2008, op. cit., at 34).

18 Where there is a high level of indiscriminate violence against the civilian population, such an individualisation may arise from circumstances in the person of the individual concerned that intensify the danger. These first and foremost include personal circumstances that cause the applicant to appear more severely affected by general, indiscriminate violence, for example because he is compelled by his profession – e.g., as a physician or journalist – to spend time in the vicinity of the source of danger. But the possibility also exists of personal circumstances through which the applicant, as a civilian, is additionally exposed to the danger of targeted acts of violence – for example because of his religious or ethnic affiliation – in cases where a recognition of refugee status because of such a danger does not already come under consideration (judgment of 27 April 2010 – BVerwG 10 C 4.09 – BVerwGE 136, 360, at 33). The court below found no individual circumstances that intensify danger in the Complainant's case (copy of the decision, p. 12); nor has the Complainant argued against that finding in his appeal to this Court.

19 However, an individualisation of general danger may also arise by exception, in the absence of individual circumstances intensifying danger, where there is an unusual situation that is characterised by such a high level of danger that practically any civilian would be exposed to a substantial individual danger merely because of his or her presence in the area concerned (judgment of 14 July 2009, op. cit., at 15, with reference to ECJ, judgment of 17 February 2009 – C-465/07, Elgafaji – ECR 2009, I-921 = NVwZ 2009, 705). Where no personal circumstances intensifying danger are present, an especially high level of indiscriminate violence is necessary (judgment of 27 April 2010, op. cit., at 33).

20 At any event, for the presumption of a substantial individual danger, Section 60 (7) Sentence 2 of the Residence Act requires that there must be a considerable

probability that the person concerned will be threatened with harm to the legally protected interests of life or limb. This proceeds from the characterising element '... face a real risk ...' in Article 2 (e) of Directive 2004/83/EC. The standard of probability contained therein is oriented to the case law of the European Court of Human Rights. In reviewing Article 3 of the ECHR, that court focused on the real danger ('real risk'; see, for example, ECtHR (Grand Chamber), judgment of 28 February 2008 – No. 37201/06, Saadi/Italy – NVwZ 2008, 1330 <at 125 et seq.>); this is equivalent to the standard of considerable probability (judgment of 27 April 2010, op. cit., at 22 on Section 60 (2) of the Residence Act and Article 15 (b) of Directive 2004/83/EC).

21 According to Section 60 (11) of the Residence Act, a finding of a prohibition on deportation under Section 60 (7) Sentence 2 of the Residence Act is governed by the rule of evidence under Article 4 (4) of Directive 2004/83/EC, among other provisions. According to that rule, the fact that an applicant has already been subject to persecution or serious harm or to direct threats of such persecution or such harm, is a serious indication of the applicant's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated. This facilitated standard of proof in the form of a refutable presumption of fact presupposes, however, even in the context of subsidiary protection, that there must be an internal nexus between the harm suffered or directly threatened prior to emigration (prior harm) and the feared future harm. The presumption of repetition on which this provision is based is founded in substance on the idea that a repetition of persecution or harm – assuming that the initial situation remains the same – is evident from grounds of fact (judgment of 27 April 2010, op. cit., at 31).

22 The court below has found that the region of the city of Mosul does not have a density of danger sufficient for the presumption of a substantial individual danger. Following the model of the procedure for determining a group persecution under refugee law (see judgment of 18 July 2006 – BVerwG 1 C 15.05 – BVerwGE 126, 243, at 20 et seq.), on the basis of current sources it determined the approximate total number of civilians living in Nineveh Provence and its capital,

Mosul, and related that figure to the frequency of acts of indiscriminate violence and the number of those injured and killed in those acts. It found that the risk of being injured or killed in Nineveh Province was approximately 1 in 800 for all of 2009. It was unable to discern any trend toward a deterioration of the safety situation (copy of the decision, p. 12). Consequently, this Court finds nothing to object to in the appellate court's conclusion, on the basis of these findings, that the Complainant will not be exposed to a substantial individual danger to life or limb upon his return to his country of origin.

23 To be sure, as the appeal to this Court implicitly but correctly complains, in addition to this quantitative determination it is also necessary to make a general appraisal of the statistical material with an eye to the number of victims and the severity of the harm (fatalities and injuries) among the civilian population (judgment of 27 April 2010, op. cit., at 33). This appraisal would in any event also include an assessment of the status of medical care delivery in the territory concerned, on the quality and accessibility of which the severity of incurred bodily injuries may depend, with an eye to the permanent consequences that injuries may have for the victims. However, this shortcoming in the approach by the court below is without consequence for the case before us. This is because the level of risk of harm to the Complainant, as found by the court below, is so far distant from the threshold of a considerable probability that this shortcoming ultimately can have no effect.

24 Nor is there any comfort for the appeal to this Court in the fact that the Higher Administrative Court did not concern itself with the facilitated standard of proof under Article 4 (4) of Directive 2004/83/EC, because the Complainant's prior history of flight gave no cause for such an examination. That history reveals no adverse effects that might, even from the viewpoint of Article 15 (b) of Directive 2004/83/EC, attain the status of prior harm. Furthermore, there would be no objective connection with the threat of danger that now exists in Iraq.

25 2. The court below also examined the prohibitions on deportation under Section 60 (2) and (3) of the Residence Act, but did not find that they applied. This Court has no reservations against that finding.

26 3. The disposition as to costs is founded on Section 154 (2) of the Code of Administrative Court Procedure. In accordance with Section 83b of the Asylum Procedure Act, no court costs are imposed. The value at issue proceeds from Section 30 of the Act on Attorney Compensation.

Prof. Dr Berlit Prof. Dr Dörig Richter

Prof. Dr Kraft Fricke

Asylum law

Sources in law:

Residence Act	Section 60 (2), (3), (7) Sentence 2
Directive 2004/83/EC	Article 2 (e), Article 4 (4), Article 15 (c)

Headwords:

Prohibition on deportation; basis of claim; restriction of supreme court review; standard of proof; considerable probability; individual danger; justified interest in legal protection; legitimate interest in proceedings; matter in controversy; subsidiary protection; presumption; refutable presumption; standard of probability; presumption of repetition.

Headnotes:

1. In order for a substantial individual danger to be presumed, Section 60 (7) Sentence 2 of the Residence Act requires a considerable probability that the individual concerned will be threatened with harm to the legally protected interests of life or limb.

2. For a finding of the requisite density of danger, in addition to a quantitative determination of the risk of death or injury, a general appraisal is also required that also assesses the situation for the delivery of medical care.

Judgment of the Tenth Division of 17 November 2011 – BVerwG 10 C 13.10

I. Augsburg Administrative Court, 28.09.2006 – Case No.: VG Au 5 K 06.30181 -
II. Munich Higher Administrative Court, 21.01.2010 – Case No.: VGH 13a B 08.30285 -