



FEDERAL ADMINISTRATIVE COURT

IN THE NAME OF THE PEOPLE

DECISION

BVerwG 10 C 9.08
VGH A 2 S 863/06

Released
on 14 July 2009
Ms. von Förster
Senior Court Official
as Clerk of the Court

In the administrative case

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

the Tenth Division of the Federal Administrative Court
upon the hearing of 14 July 2009
Federal Administrative Court Justice Dr. Mallmann sitting as Presiding Justice
and Federal Administrative Court Justices Prof. Dr. Dörig, Richter, Beck and
Fricke

decides:

The decision of the Baden-Württemberg Higher Administrative Court of 25 June 2007 is set aside, insofar as concerns the finding of prohibitions on deportation under Section 60 (2) through (7) of the Residence Act.

The matter is remanded to the Higher Administrative Court for a new hearing and decision.

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

R e a s o n s :

I

- 1 The Complainant, born in Baghdad in 1983, seeks protection from deportation because of the general situation of danger in Iraq.
- 2 The Complainant is an Iraqi citizen of Arab ethnicity and of the Sunni Islamic faith. He entered Germany in October 2001. At his instance, the Federal Office for the Recognition of Foreign Refugees (now the Federal Office for Migration and Refugees) – the Federal Office – made a final and absolute finding in De-

cember 2001 that in light of the danger of persecution from the regime of Saddam Hussein, the requirements for refugee status under Section 51 (1) of the Aliens Act 1990 were met. Following the fall of that regime, the Federal Office revoked the Complainant's refugee status on account of the change in political circumstances in Iraq. At the same time, the Federal Office found that there were no prohibitions on deportation under Section 60 (2) through (7) of the Residence Act.

- 3 In the proceedings at first instance, the Administrative Court suspended the Federal Office's revocation. In a decision of 25 June 2007, the Higher Administrative Court modified the decision of the court below and found against the Complainant. As grounds, it argued in substance that the revocation was legally valid because the Complainant no longer had to fear political persecution in Iraq that would justify his refugee status. The court found that the Complainant also was not eligible for a finding of prohibitions on deportation under Section 60 (2) through (7) of the Residence Act. In particular, the court said, there was no eligibility for protection from deportation or subsidiary protection under Section 60 (7) of the Residence Act and Article 15 (c) of Directive 2004/83/EC of the Council of 29 April 2004 (known as the 'Qualification Directive'). The court ruled that there could be no question of finding a prohibition on deportation under Section 60 (7) Sentence 1 of the Residence Act, because the Complainant had cited only general dangers, **and to that extent was eligible under the current status of executive orders in Baden-Württemberg for an equivalent protection from deportation corresponding to a statutory suspension of deportation.** Upon returning to Iraq, the Complainant would also not be exposed to a serious and individual threat to his life or person by reason of a situation of internal armed conflict within the meaning of Article 15 (c) of the Directive. To be sure, said the court, the sporadic conflicts resembling a civil war – particularly between Sunnis and Shiites – in some areas of Central Iraq (especially in Baghdad and other cities of what is known as the 'Sunni Triangle') might well meet the criteria for an internal armed conflict. But the entire population of the 'combat zones' was exposed to the associated dangers. Such general dangers could not be considered sufficient to constitute an individual threat. An individual threat, the court said, furthermore presupposes – additionally – a particular, concrete situation of

danger particular to the individual concerned. This could be assumed, for example, for members of political parties, journalists or the Iraqi intellectual elite. The Complainant was not a member of one of those groups, the court found.

- 4 In his appeal to this Court, which was allowed only in regard to protection from deportation under Section 60 (2) through (7) of the Residence Act, the Complainant further pursues his petition for protection from deportation or for subsidiary protection.
- 5 The Federal Office opposes this appeal. The representative of the Federal interests argues that the court below applied Article 15 (c) of the Directive improperly.

II

- 6 Although the Complainant was absent from the hearing on this appeal, this Court was able to conduct the proceedings and arrive at a decision because the summons had pointed out this possibility (Section 102 (2) Code of Administrative Court Procedure).
- 7 The Complainant's appeal, which is directed only against the denial of protection from deportation under Section 60 (2) through (7) of the Residence Act, has merit. The court below denied the existence of a prohibition on deportation under the immigration laws, pursuant to Section 60 (7) Sentence 2 of the Residence Act, on grounds that are incompatible with Federal law (Section 137 (1) No. 1 Code of Administrative Court Procedure). Since this Court is unable itself to arrive at a final decision on the basis of the findings to date by the court below whether the Complainant is eligible for a finding of such a prohibition on deportation, the decision of the court below must be set aside in regard to protection from deportation under Section 60 (2) through (7) of the Residence Act, and the matter must be remanded to the court below to that extent, for further hearing and a decision (Section 144 (3) Sentence 1 No. 2 Code of Administrative Court Procedure).

- 8 The legal assessment of the Complainant's petition is governed by Section 60 (2) through (7) of the Residence Act in the new version that has applied since the Act for the Transposition of European Union Directives on Residence and Asylum Law of 19 August 2007 (BGBl I p. 1970) – hereinafter the Directive Transposition Act – took effect on 28 August 2007 (see the version of the Announcement of 25 February 2008 <BGBl I p. 162>). According to the settled case law of the Federal Administrative Court, the court of ultimate appeal must take account of changes in law that have gone into force since the decision of the court below if the court below would have to take those changes into account if it were deciding the case now. Since this case is a dispute in asylum procedure law, in which, under Section 77 (1) of the Asylum Procedure Act, the court below would regularly have to consult the status of fact and law at the date of its last hearing or decision, that court would have to base its decision on the new status of the law if it were to decide now (see decision of 24 June 2008 – Federal Administrative Court 10 C 43.07 – BVerwGE 131, 198 = Buchholz 451.902 *Europäisches Asyl- und Ausländerrecht* [European Asylum and Alien Law] No. 22 Marginal No. 10).
- 9 The consequence of the change in law enacted since the decision of the court below is that by law, in asylum proceedings the matter at issue in deciding on prohibitions of deportation under Section 60 (2) through (7) of the Residence Act has changed, and in the present case, in regard to the dangers that the Complainant claims would exist in the event of his return to Iraq, the prohibitions on deportation under Section 60 (2), (3) and (7) Sentence 2 of the Residence Act constitute an independent matter at issue, to be examined with priority over the other prohibitions of deportation relating to country of origin under the immigration laws, or also, as the case may be, they may represent a separable matter at issue. Accordingly, the Complainant pertinently primarily seeks an order to find a prohibition on deportation under Section 60 (2), (3) and (7) Sentence 2 of the Residence Act (in accordance with the requirements for subsidiary protection under Article 15 of Directive 2004/83/EC of the Council of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted – OJ L 304 p. 12; corr. OJ,

5 August 2005, L 204 p. 24 – known as the ‘Qualification Directive’). In the event that his complaint does not meet with success in that regard, as an alternative he seeks an order to find a prohibition on deportation under Section 60 (5) and (7) Sentence 1 of the Residence Act with regard to Iraq. This graduation takes account of the change in the matter at issue consequent upon the taking effect of the Directive Transposition Act, in determining prohibitions of deportation under Section 60 (2) through (7) of the Residence Act, and is now consistent with the typical nature of the interests involved for a complainant who – as in the present proceedings – seeks protection from deportation in regard to his country of origin under the immigration laws, subsequent to a final and absolute withdrawal of refugee status (see decision of 24 June 2008 – Federal Administrative Court 10 C 43.07 – op. cit., Marginal No. 11).

- 10 With regard to the prohibitions on deportation based on European law pursuant to Section 60 (2), (3) and (7) Sentence 2 of the Residence Act, which are the subject matter of the principal petition, by the Complainant’s own arguments the primary matter for consideration is the prohibition on deportation in the case of an internal or international armed conflict under Section 60 (7) Sentence 2 of the Residence Act (Article 15 (c) of the Directive) (on the prohibition on deportation under Section 60 (2) of the Residence Act – Article 15 (b) of the Directive – because of the conditions of danger in Iraq, see ECoHR, Decision of 20 January 2009 – Case No.: 32621/06 – Newsletter Menschenrechte 2009/1). To that extent, the court below arrived interpreted the legal requirements for granting this protection from deportation under European law incorrectly. Its decision is founded on this contravention of law.

- 11 The prohibition on deportation under Section 60 (7) Sentence 2 of the Residence Act, newly added to the Residence Act by the Directive Transposition Act, serves for the transposition of the provision on subsidiary protection under Article 15 (c) of the Directive (see the statement of reasons for the Federal government’s bill of 23 April 2007 on Section 60 Residence Act, BTDrucks 16/5065 p. 187 at letter d). 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 there, to a substantial individual danger

to life or limb as a result of an international or internal armed conflict. Despite some minor deviations in wording, this provision is equivalent to those of Article 15 (c) of the Directive (see again the decision of 24 June 2008 – Federal Administrative Court 10 C 43.07 – op. cit., Marginal No. 17).

- 12 The court below found that the requirements for the prohibition on deportation now governed by Section 60 (7) Sentence 2 of the Residence Act were not met, on the grounds that in the absence of individual circumstances that would increase risk, the general dangers in Iraq cited by the Complainant could not be an individual danger within the meaning of Section 60 (7) Sentence 2 of the Residence Act, or an individual threat within the meaning of Article 15 (c) of the Directive. Proceeding logically from that viewpoint, the court also made no findings as to the extent of the general dangers in the armed conflict that it assumed existed in parts of Iraq. This interpretation is incompatible with Federal law.
- 13 In its decision of 24 June 2008 – Federal Administrative Court 10 C 43.07 – (op. cit.) this Court has already explained that the general danger to which a large body of civilians are exposed on account of an armed conflict may become individually so concentrated as to represent a substantial individual danger within the meaning of Section 60 (7) Sentence 2 of the Residence Act, and thus may satisfy the requirements of this provision and of Article 15 (c) of the Directive (Marginal No. 34). At that time this Court also pointed out that the question of under what circumstances such a concentration can be assumed, together with the interpretation of the concept of indiscriminate violence, might be matters of doubt in European law, and it cited the question referred to the European Court of Justice (ECJ) by the Dutch Raad van State in the proceedings C-465/07 then pending (Marginal No. 34). The European Court of Justice has since then fundamentally clarified this question in its decision of 17 February 2009 – C-465/07 – (Elgafaji), arriving at substantially the same result as this Court in the aforementioned judgment of 24 June 2008.
- 14 In its decision of 17 February 2009, the European Court of Justice explained that the adjective ‘individual’ in Article 15 (c) of the Directive must be under-

stood as covering harm to civilians irrespective of their identity, where the degree of indiscriminate violence characterising the armed conflict taking place reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to the serious threat referred to in the Directive (Marginal No. 35). This interpretation, the court found, is not invalidated by the wording of recital 26 of the Directive. While that recital implies that the objective finding alone of a risk linked to the general situation in a country is not, as a rule, sufficient to establish that the conditions set out in Article 15 (c) of the Directive have been met in respect of a specific person, its wording nevertheless allows – by the use of the word ‘normally’ – for the possibility of an exceptional situation which would be characterised by such a high degree of risk that substantial grounds would be shown for believing that that person would be subject individually to the risk in question (Marginal No. 36 and 37). The exceptional nature of that situation is also confirmed, the court said, by the fact that the relevant protection is subsidiary, and by the broad logic of Article 15 of the Directive, as the harm defined in paragraphs (a) and (b) of that article requires a clear degree of individualisation. While it is admittedly true that collective factors play a significant role in the application of Article 15 (c) of the Directive, in that the person concerned belongs, like other people, to a circle of potential victims of indiscriminate violence in situations of international or internal armed conflict, it is nevertheless the case that that provision must be subject to a coherent interpretation in relation to the other two situations referred to in Article 15 of the Directive and must, therefore, be interpreted by close reference to that individualisation (Marginal No. 38). The court further clarified that the more the applicant is able to show that he is specifically affected by reason of factors particular to his personal circumstances, the lower the level of indiscriminate violence required for him to be eligible for subsidiary protection (Marginal No. 39).

- 15 These comments are largely consistent with what this Court set forth – using other terms – in the aforementioned judgment of 24 June 2008. When the European Court of Justice posits that the indiscriminate violence characterising

the armed conflict should reach such a level that there are substantial grounds for believing that that upon his return, a civilian would face a real risk of being subject to a serious threat under Article 15 (c) of the Directive solely on account of his presence in the territory in question, this is equivalent in substance to the individual concentration of general danger that this Court considered necessary. In the opinion of the European Court of Justice as well, such an individualisation of general danger can result from circumstances that increase risk and that are specific to the person of the foreigner. But irrespective of those circumstances, such an individualisation may also, by exception, arise in an extraordinary situation that is characterised by such a high degree of risk that practically any civilian would be exposed to a serious individual threat simply by being present in the relevant territory.

- 16 The decision of the court below is incompatible with this case law of the European Court of Justice and the Federal Administrative Court. For lack of sufficient findings of fact on the part of the court below, it is not possible to make a final assessment of whether that court's decision may prove to be correct for other reasons (Section 144 (4) Code of Administrative Court Procedure), or whether the Complainant may prevail as to the portion of the action that is still pending (Section 144 (3) No. 1 Code of Administrative Court Procedure). Therefore the matter must be remanded to the court below. In the new proceedings there, the court will have to supply the missing findings as to the existence of an internal armed conflict and the further requirements of Section 60 (7) Sentence 2 of the Residence Act, including the possibility of finding internal protection. The following aspects must be taken into consideration in this regard:

- 17 The court below will have to examine whether there is a substantial individual danger to life or limb for the Complainant, in Iraq or in parts of Iraq, as a consequence of indiscriminate violence within a situation of armed conflict. Since according to the findings of the court below to date, there are no individual circumstances that increase risk in the Complainant's case, a substantial individual danger in this sense can be assumed only if the general danger impending in Iraq is of such density or of such a high degree that practically any civilian is exposed to a serious individual threat solely on account of his or her presence

there. The internal armed conflict in this regard need not extend to the entire territory of the state (see decision of 24 June 2008 – Federal Administrative Court 10 C 43.07 – op. cit., Marginal No. 25), and indeed, little in the findings of the court below to date argues for such a situation. If an armed conflict with the described density of risk does not exist nationwide, however, as a rule an individual threat will come under consideration only if the conflict extends to the Complainant's region of origin, to which he will typically return. The European Court of Justice likewise speaks in its decision of 17 February 2009 about the foreigner's 'actual destination' in returning to the country of origin (op. cit., Marginal No. 40). An armed conflict outside the foreigner's region of origin can be taken into consideration only by exception. If there is a regionally limited conflict outside his region of origin, the foreigner must show substantial grounds for believing that a return to his region of origin is not possible for him, and only a return specifically to the danger zone would come under consideration (see Article 2 (e) of the Directive).

- 18 If it is found that in the region to be considered in his case, an individual threat to the Complainant is to be assumed because of an exceptionally high level of general danger within a situation of armed conflict, it must furthermore be examined whether the Complainant could find internal protection in accordance with Article 8 of the Directive in other parts of Iraq where such dangers do not exist (see this Division's decision of 29 May 2008 – Federal Administrative Court 10 C 11.07 – BVerwGE 131, 186 Marginal No. 30 et seq. and 35; see, moreover, ECJ, decision of 17 February 2009, op. cit., Marginal No. 40). The court below has hitherto omitted to carry out this examination. No findings of fact can be found in its decision that enable this Court to make its own assessment in this regard.
- 19 If applicable, the court below will also have to decide on the claim lodged by the Complainant as an alternative, regarding (national) protection from deportation under Section 60 (5) and (7) Sentence 1 of the Residence Act.

20 The disposition as to costs is reserved for the final judgment.

Dr. Mallmann

Prof. Dr. Dörig

Richter

Beck

Fricke

Field: BVerwGE: Yes

Asylum Law Professional press: Yes

Sources in Law:

Residence Act Section 60 (7) Sentence 2
Directive 2004/83/EC Article 2 (e), Article 8, Article 15 (c)

Headwords:

Protection from deportation because of internal armed conflict (Iraq); subsidiary protection; Qualification Directive; civilian population; general danger; extreme density of risk; substantial individual danger; individual threat; region of origin; actual destination upon return.

Headnotes:

1. A substantial individual danger to life or limb within the meaning of Section 60 (7) Sentence 2 of the Residence Act that also satisfies the equivalent requirements of Article 15 (c) of Directive 2004/83/EC (the 'Qualification Directive') may also arise from a general danger to a large body of civilians within a situation of armed conflict if the danger is concentrated in the person of the foreigner.

a) Such a concentration, or individualisation, may result from circumstances specific to the foreigner's person that increase risk.

b) By exception, it may also arise irrespectively of such an individualisation in an extraordinary situation that is characterised by such a high degree of risk that practically any civilian would be exposed to a serious individual threat solely on account of his presence on the relevant territory (concurring, ECJ, judgment of 17 February 2009 – C-465/07 – Elgafaji).

2. If an armed conflict with such a degree of risk does not exist nationwide, as a rule an individual threat will come under consideration only if the conflict extends to the foreigner's region of origin, to which he or she would typically return.

Decision of the Tenth Division of 14 July 2009 – Federal Administrative Court
10 C 9.08

I. Sigmaringen Administrative Court, 07.03.2006 – Case No.: VG A 3 K
10372/05 –

II. Mannheim Higher Administrative Court, 25.06.2007 – Case No.: VGH A 2 S
863/06 –