Case Summary

Country of Decision/Jurisdiction	**Germany**
Case Name/Title	
Court Name *(Both in English and in the original language)*	Federal Administrative Court (Bundesverwaltungsgericht)
Neutral Citation Number	10 C 52.07
Other Citation Number	
Date Decision Delivered	19/01/2009
Country of Applicant/Claimant	Russia
Keywords	Persecution; Internal Protection; Standard of proof
Head Note (Summary of Summary)	Case of a woman of Chechen origin suffering from post-traumatic stress disorder who faced denial of registration in other regions of Russia.
Case Summary (150-500)	The applicant, an ethnic Chechen who is a national of the Russian Federation, was born in 1954 and grew up in Chechnya. Like her husband and daughter she was a music teacher and concert pianist. In September 1999, the family relocated from Grozny to Moscow. At the beginning of January 2000 they travelled from there to Germany and applied for asylum. The stated grounds were, in essence, that in July 1999 the husband had been abducted by religious fanatics in Chechnya and had been imprisoned for a considerable time. For that reason, and because of the turmoil of war, the family stated that it could no longer remain in Chechnya; they stated that as Chechens they were also unable to live in peace in Moscow. In the appeal proceedings, the Complainant asserted that she had fallen ill with post-traumatic stress disorder (PTSD), which required treatment. Respective treatment would not be possible in Chechnya and were impeded in other regions of Russia because of a widespread practice of denial of registration of Chechens.
Facts	The Federal Office for the Recognition of Foreign Refugees (now the Federal Office for Migration and Refugees) denied their recognition as persons entitled to asylum, and found that the requirements under Section 51 (1) of the Aliens Act and the impediments to deportation under Section 53 Aliens Act were not present; it threatened the family with deportation to the Russian Federation. In response to the action that was then lodged, the Würzburg Administrative Court ordered the Federal Office, in the decision of 2 September 2002, to grant the family protection from deportation, under the laws on refugees. Although the court said that the Complainants were not entitled to asylum status, the family could claim protection from deportation as refugees, because as ethnic Chechens they could not reasonably be expected to return to Chechnya. A partisan war was being

	waged with great ferocity there, in the course of which massive violations of human rights were being committed, including by the Russian armed forces. The court found that there was no internal flight alternative in other territories of the Russian Federation. The Federal Officer for Asylum Matters appealed this decision. In August 2005, the Federal Office granted the applicant subsidiary protection from deportation under the laws on aliens pursuant to Section 60 (7) of the Residence Act, with regard to the Russian Federation. In August 2007, the Munich Higher Administrative Court affirmed an entitlement to refugee status with regard to her PTSD requiring treatment. Persecution would result from the widespread practice of denial of registration for Chechens in other parts of Russia, where the applicant would have had to move in order to receive treatment, leaving her without treatment for at least several months pending appeal concerning the denial of registration.
Decision & Reasoning	The Federal Administrative Court decided that the assumption of qualification for refugee status could not be upheld. It found that temporary denial of registration to the applicant, under the circumstances of the present case, could not be considered an act of persecution against the applicant's life and freedom from bodily harm. Concerning its understanding of an act of persecution, the court laid out the following: "The court below incorrectly proceeded on the assumption that the temporary denial of registration – which in that court's own opinion would not otherwise be relevant for purposes of asylum – constituted an act of persecution under Article 9 of the Qualification Directive because of the special circumstances in the Complainant's case. The definition of an act of persecution not only presupposes that a certain conduct by the potential actor of persecution must constitute a severe violation of basic human rights or a comparably severe violation of rights by an accumulation of various measures (Article 9 (1) a and b of the Qualification Directive), but also requires that the conduct must aim to violate such a protected legal right. This interpretation is consistent with supreme court case law on persecution relevant for asylum, which establishes the requirement of an intentional violation of rights, or in other words, a targeted violation of a legal right that is protected under asylum law (see the Federal Constitutional Court's fundamental judgment of 10 July 1989 - 2 BvR 502/86 etc. - BVerfGE 80, 315 <334 et seq.>). Targeting refers not only – as the court below appears to believe – to the characteristics relevant for asylum, or in the present case to the reasons for persecution within the meaning of Article 10 of the Qualification Directive, with which the action must be connected (see Article 9 (3) of the Qualification Directive), but also to the violation of rights itself that the act brings about. Further support for such an interpretation of the concept of an act of persecution within the meaning of Article 9 of the Qualification Directive can be found in the reasons given by the Commission of the European Communities in its proposal for a Council Directive of 12 September 2001, which states – in that case, regarding Article 11 (1) of the proposal – that in order to constitute persecution, 'acts must be intentional, sustained or systematic and must be sufficiently serious to make return to the country of origin untenable' (COM (2001) 510 final p. 22)." (unofficial translations of the court, para. 22)

"*Das Berufungsgericht ist zu Unrecht davon ausgegangen, dass in der - auch nach seiner Auffassung ansonsten nicht asylrelevanten - vorübergehenden Verweigerung der Registrierung wegen der besonderen Umstände im Fall der Klägerin eine Verfolgungshandlung im Sinne von Art. 9 der Richtlinie liegt. Der Begriff der Verfolgungshandlung setzt nicht nur voraus, dass ein bestimmtes Verhalten des potentiellen Verfolgers für die schwerwiegende Verletzung eines grundlegenden Menschenrechts oder eine vergleichbar schwere Rechtsverletzung durch Kumulierung unterschiedlicher Maßnahmen (Art. 9 Abs. 1 Buchst. a und b der Richtlinie) ursächlich ist, sondern erfordert auch ein auf die Verletzung eines derart geschützten Rechtsguts zielendes Verhalten. Dies entspricht der höchstrichterlichen Rechtsprechung zur asylerheblichen Verfolgung, wonach eine gezielte Rechtsverletzung, d.h. ein gezielter Eingriff in ein asylrechtlich geschütztes Rechtsgut erforderlich ist (vgl. die Grundsatzentscheidung BVerfG, Beschluss vom 10. Juli 1989 - 2 BvR 502/86 u.a. - BVerfGE 80, 315 <334 f.>). Die Zielgerichtetheit bezieht sich nicht nur - wie das Berufungsgericht offenbar meint - auf die asylerheblichen Merkmale bzw. jetzt auf die Verfolgungsgründe im Sinne von Art. 10 der Richtlinie, an die die Handlung anknüpfen muss (vgl. Art. 9 Abs. 3 der Richtlinie), sondern auch auf die durch die Handlung bewirkte Rechtsgutsverletzung selbst. Für ein solches Verständnis des Begriffs der Verfolgungshandlung im Sinne des Art. 9 der Richtlinie spricht auch die Begründung der Kommission der Europäischen Gemeinschaften zu ihrem Vorschlag für eine Richtlinie des Rates vom 12. September 2001, in der es - damals zu Art. 11 Abs. 1 des Vorschlags - heißt, dass als Verfolgung "ausschließlich Handlungen gelten, die absichtlich, fortdauernd oder systematisch ausgeführt werden und so gravierend sind, dass eine Rückkehr ins Herkunftsland ausgeschlossen ist" (KOM (2001) 510 endgültig S. 22).*"

The Court further argued that even in those places where the necessary medical treatment was possible according to the findings of the court below, the temporary denial of registration to the Complainant did not constitute an act of persecution within the meaning of Article 9 (1) of the Qualification Directive, because, by its nature, this denial does not aim at violating the fundamental human right to life and freedom from bodily harm, which is the right at issue here. While it made clear that even an omission may constitute persecution, it is held that, in such cases, a separate examination is required to determine whether the consequences that may indirectly result therefrom can still be attributed to that conduct as targeted violations of rights. This criterion was held to be not fulfilled concerning the denial of registration. While this may constitute a violation of the right to free movement, it is argued that this human right is not among the fundamental rights that must be violated in order for an act of persecution to be assumed under Article 9(1) Qualification Directive.

The Federal Administrative Court also argued that the court of appeals decision could not be upheld because the findings of the court below did not support the court's conclusion that the temporary denial of registration, with which the Complainant was threatened, in the entire Russian Federation

	outside Chechnya. Finally, the court held that it was impermissible for the Higher Administrative Court to disregard whether or not the complainant was threatened directly with group persecution before her emigration, and to view her as not previously persecuted solely because, at that time, there was still a flight alternative in Ingushetia. Reassessing its former jurisprudence in light of the Qualification Directive, it argued as follows: "Contrary to the view of the Higher Administrative Court, previous persecution in the context of recognition of refugee status under the Qualification Directive can no longer be denied because a flight alternative existed in another part of the country of origin at the time of emigration […]. However, this does not automatically proceed from the provision – to be applied under Section 60 (1) Sentence 5 of the Residence Act – pursuant to Article 8 (2) of the Qualification Directive, that in examining whether a part of the country of origin meets the requirements for internal protection in accordance with paragraph 1, Member States shall 'at the time of taking the decision on the application' have regard to the general circumstances prevailing in that part of the country and to the personal circumstances of the applicant. First of all, this provision implies only that recognition of refugee status – if the threat of persecution of the applicant in one part of the country of origin has been established – cannot be refused because of an internal alternative for protection that existed formerly, but only because of an internal alternative for protection that exists at the time of the decision, as is also consistent with German case law to date. The provision, by contrast, does not address the question that we must deal with here, and that systematically comes first in order, of whether the application of the facilitated standard of proof for those who have previously been persecuted is opposed by the existence of an internal alternative for flight or protection at the time of their emigration. This question must be addressed on the basis of Article 4 (4) of the Qualification Directive. According to that provision – so far as recognition of refugee status is concerned – the fact that an applicant has already been subject to persecution or to direct threats of such persecution is a serious indication of the applicant's well-founded fear of persecution, unless there are good reasons to consider that such persecution will not be repeated. The very wording of the provision indicates that an applicant who has suffered persecution in his country of origin, or was directly threatened with persecution there, is entitled to the facilitated standard of proof under Article 4 (4) of the Qualification Directive, irrespectively of whether he might also have found refuge in another part of his homeland at the time of emigration. In other words, the facilitated standard of proof in the form of a refutable presumption is connected solely with the circumstance of suffered or directly threatened persecution, not with other prerequisites, such as options for protection in other parts of the country. In terms of the rules of evidence, the provision is obviously intended to privilege those who have in fact already experienced persecution personally in their homeland, because they either have suffered persecution themselves or were directly threatened with it. The principle of subsidiarity

	of refugee protection, by contrast, is acknowledged with a referral to an internal alternative for protection at the time of making the decision about granting refugee status (see Art 8 (2) of the Qualification Directive). This does not mean that someone who seeks refuge outside the country, despite the existence of an alternative for refuge within his own country, at the time of emigration should be favoured unjustifiably. Such an internal flight alternative at the time of emigration, if it remains unchanged at the time of making the decision about granting refugee status, leads to a refusal of recognition even now that the Qualification Directive applies. This is because, in such a case the presumption, under Article 4 (4) of the Qualification Directive, that the applicant's fear of future protection is well-founded does not come into play, because of the existence of internal protection within the meaning of Article 8 of the Qualification Directive. Consequently, any favourable treatment in comparison to the previous situation under German law can at most arise if an internal alternative for protection ceases to exist after the person has emigrated. For that reason, in refugee law – though not for asylum law under Article 16a of the Basic Law – this Court no longer adheres to its former case law, according to which persons who were persecuted or threatened with persecution in one part of their homeland, and who could have found the requisite protection in other parts of the country at the time of their emigration, cannot be deemed previously persecuted. To that extent, the concept of previous persecution must be understood differently within the meaning of the Qualification Directive than in the context of asylum law under Article 16a of the Basic Law, according to which an inescapable nationwide situation of the asylum applicant at the time of emigration is required. (unofficial translations of the court, para. 29)" "*Im Rahmen der Flüchtlingsanerkennung nach der Qualifikationsrichtlinie kann entgegen der Ansicht des Verwaltungsgerichtshofs eine Vorverfolgung nicht mehr wegen einer zum Zeitpunkt der Ausreise bestehenden Fluchtalternative in einem anderen Teil des Herkunftsstaates verneint werden [...] Dies ergibt sich allerdings nicht schon ohne weiteres aus der gemäß § 60 Abs. 1 Satz 5 AufenthG anzuwendenden Bestimmung des Art. 8 Abs. 2 der Richtlinie, nach der die Mitgliedstaaten bei der Prüfung der Frage, ob ein Teil des Herkunftslandes die Voraussetzungen für einen internen Schutz nach Abs. 1 erfüllt, die dortigen Gegebenheiten und die persönlichen Umstände des Antragstellers "zum Zeitpunkt der Entscheidung über den Antrag" zu berücksichtigen haben. Denn diese Vorschrift besagt zunächst nur, dass eine Flüchtlingsanerkennung - bei festgestellter drohender Verfolgung des Antragstellers in einem Teil des Herkunftslandes - nicht wegen einer früher vorhandenen, sondern nur wegen einer im Zeitpunkt der Entscheidung bestehenden internen Schutzalternative versagt werden kann, wie dies auch der bisherigen deutschen Rechtsprechung entspricht. Die Vorschrift betrifft dagegen nicht die hier zu klärende - systematisch vorgelagerte - Frage, ob der Anwendung der Beweiserleichterung für Vorverfolgte eine zum Zeitpunkt der Ausreise bestehende interne Flucht- oder Schutzalternative entgegensteht. Diese Frage ist anhand von Art. 4 Abs. 4 der Richtlinie zu beurteilen. Nach dieser Bestimmung ist - soweit es um die Flüchtlingsanerkennung geht - die Tatsache, dass ein Antragsteller bereits verfolgt wurde bzw. von solcher Verfolgung unmittelbar bedroht war, ein*

	ernsthafter Hinweis darauf, dass seine Furcht vor Verfolgung begründet ist, es sei denn, stichhaltige Gründe sprechen dagegen, dass er erneut von solcher Verfolgung bedroht wird. Bereits aus dem Wortlaut der Vorschrift ergibt sich, dass einem Antragsteller, der im Herkunftsstaat Verfolgung erlitten hat oder dort unmittelbar von Verfolgung bedroht war, die Beweiserleichterung nach Maßgabe von Art. 4 Abs. 4 der Richtlinie unabhängig davon zugute kommen soll, ob er zum Zeitpunkt der Ausreise auch in einem anderen Teil seines Heimatlandes hätte Zuflucht finden können. Die Beweiserleichterung in Form einer widerlegbaren Vermutung knüpft nämlich nur an den Umstand einer erlittenen oder unmittelbar drohenden Verfolgung, nicht aber an weitere Voraussetzungen - wie etwa Schutzmöglichkeiten in anderen Landesteilen - an. Die Vorschrift soll erkennbar beweisrechtlich diejenigen privilegieren, die in ihrem Heimatland tatsächlich bereits persönlich Verfolgung erfahren haben, weil sie diese entweder selbst erlitten haben oder von ihr unmittelbar bedroht waren. Dem Grundsatz der Subsidiarität des Flüchtlingsschutzes soll dagegen durch eine Verweisung auf eine zum Zeitpunkt der Entscheidung über die Flüchtlingsanerkennung bestehende interne Schutzalternative Rechnung getragen werden (vgl. Art 8 Abs. 2 der Richtlinie). Dies bedeutet nicht, dass derjenige, der trotz innerstaatlicher Fluchtalternative im Zeitpunkt der Ausreise Schutz im Ausland sucht, ungerechtfertigt begünstigt wird. Denn eine solche innerstaatliche Fluchtalternative zum Zeitpunkt der Ausreise führt, sofern sie zum Zeitpunkt der Entscheidung über die Flüchtlingsanerkennung unverändert fortbesteht, auch unter Geltung der Richtlinie zur Versagung der Anerkennung. Die Vermutung des Art. 4 Abs. 4 der Richtlinie, dass die Furcht des Antragstellers vor künftiger Verfolgung begründet ist, kommt nämlich dann wegen des Vorliegens eines internen Schutzes im Sinne von Art. 8 der Richtlinie nicht zum Tragen. Eine Vergünstigung gegenüber der bisherigen deutschen Rechtslage kann sich für Vorverfolgte daher allenfalls bei einem Wegfall der internen Schutzalternative nach der Ausreise ergeben. Der Senat hält aus diesen Gründen für das Flüchtlingsrecht - anders als für das Asylrecht nach Art. 16a GG - nicht mehr an seiner bisherigen Rechtsprechung fest, wonach der in einem Teil des Heimatlandes Verfolgte oder von Verfolgung Bedrohte, der zum Zeitpunkt seiner Ausreise in anderen Landesteilen den erforderlichen Schutz hätte finden können, nicht als vorverfolgt angesehen werden kann. Insofern ist der Begriff der Vorverfolgung im Sinne der Richtlinie anders zu verstehen als im Rahmen des Asylrechts nach Art. 16a GG, wonach eine landesweit ausweglose Lage des Asylbewerbers im Zeitpunkt der Ausreise erforderlich ist."
Outcome	The decisions of the Higher Administrative Court and Administrative Court were set aside insofar as the recognition of refugee status of the applicant was concerned. The case was remanded to the Higher Administrative Court for a new consideration.