Field:	BVerwGE: Yes
Asylum law	Professional press: Yes

Sources in law:

Asylum Procedure Act	Section 3 (1) and (4), Section 71 (1)
Residence Act	Communityion 60 (1)
ECHR	Articles 3, 9, 15 (2)
Geneva Convention	Article 1 A
Charter of Fundamental Rights	Article 10 (1), Article 52 (1)
Directive 2004/83/EC	Article 2 (c), Articles 6, 9, 10, 38 (1)
Directive 2011/95/EU	Article 2 (d), Article 4 (4), Articles 6, 9 and 10
Administrative Procedure Act	Section 51 (1) through (3)

Headwords:

Ahmadiyya community; Ahmadis; refugee status; follow-up procedure; threat to life and physical freedom; practice of faith; forum internum; forum externum; religion; public practice of faith; religious freedom; religious identity; criminal prosecution; inhuman treatment; avoidance conduct; abstention; act of persecution; reason for persecution; prognosis for persecution; probability; resumption; voluntary conduct.

Headnotes:

1. If threats of danger to life, limb or liberty affect the freedom of decision of an asylum applicant to practise his religion in a particular manner, this must be examined as a possible interference with religious freedom.

2. Following the ECJ judgment of 5 September 2012 (Joined Cases C-71/11 und C-99/11), an act of persecution within the meaning of Article 9 (1) (a) of Directive 2011/95/EU may be constituted by a serious violation not only of the freedom to practise a religion in private (forum internum), but also of the freedom to practise a religion in public (forum externum).

3. The mere prohibition of practising a religion in certain forms may constitute a significant act of persecution within the meaning of Article 9 (1) of Directive 2011/95/EU, irrespectively of whether the member of the religion thus affected will in fact become religiously active or abstains from a practice because of fear of persecution.

4. Such a prohibition has the objective severity necessary for an act of persecution only if there is a considerable probability that the foreigner, upon practising his religion, will be threatened with being subjected to injury to life, limb or liberty, criminal prosecution, or inhuman or degrading treatment or punishment.

5. The prohibition has the additional necessary subjective severity only if following the forbidden religious practice is particularly important to the individual in order to preserve his religious identity, and in that sense is necessary to him.

6. An overall consideration of various measures takes on the nature of an act of violation within the meaning of Article 9 (1) (b) of Directive 2011/95/EU only if the foreigner is affected by them in a manner similar to the case of a severe violation of human rights under letter (a). For that purpose, a comparative examination is necessary having regard to the situation of the individual applicant.

Judgment of the 10th Division of 20 February 2013 – BVerwG 10 C 23.12

I. Stuttgart Administrative Court, 9 July 2010 – Case: VG A 4 K 1179/10 -
II. Mannheim Higher Administrative Court, 13 December 2011 – Case: VGH A 10 S 69/11 -

FEDERAL ADMINISTRATIVE COURT

IN THE NAME OF THE PEOPLE

JUDGMENT

BVerwG 10 C 23.12
VGH A 10 S 69/11

Released
on 20 February 2013
Ms Werner
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 *Bundesverwaltungs-gericht*. Page numbers in citations of international texts have been retained from the original and may not match the pagination in the parallel English versions.

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

The Tenth Division of the Federal Administrative Court
upon the hearing of 20 February 2013
by Presiding Federal Administrative Court Justice Prof. Dr Berlit and
Federal Administrative Court Justices Prof. Dr Dörig, Prof. Dr Kraft,
Fricke and Dr Maidowski

decides:

On appeal by the Respondent, the judgment of the Baden-Württemberg Higher Administrative Court of 13 December 2011 is set aside.

The matter is remitted to the Higher Administrative Court for further hearing and a decision.

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

Reasons:

I

1 The Complainant, a Pakistani national, seeks refugee status and, alternatively, a finding of protection from deportation in respect of Pakistan.

2 The Complainant, born in Pakistan in 1979, has been a member of the Ahmadiyya religious community since birth. He comes from a village in the Pakistani part of Punjab. By his own account, he entered Germany in July 2000 and applied for asylum here. He founded his application on having suffered measures of persecution in Pakistan because of his membership of his community. The Complainant has been married to a German woman since 2010 and has a German daughter, now two years old.

3 The Federal Office for the Recognition of Foreign Refugees (now the Federal Office for Migration and Refugees) – the 'Federal Office' – declined his application for asylum in a decision of 15 September 2000, and found that the requirements of Section 51 (1) of the Aliens Act had not been met and that there were no impediments to deportation under Section 53 of the Aliens Act. At the same time, the Federal Office served the Complainant with a warning of deportation to Pakistan. The complaint against this decision was denied by the Administrative Court, with final effect, in a judgment of 22 May 2001. In its reasoning, the Administrative Court remarked that the Complainant had not made an adequate prima facie case as to his persecution before he left Pakistan. Moreover, the court held, given the present status of information, a group persecution of members of the Ahmadiyya community (Ahmadis) in Pakistan could not be presumed.

4 In 2001 to 2005 the Complainant filed a total of five follow-up applications, each of which met with no success. In a brief dated 5 December 2008 he again applied for a resumption of his asylum proceeding, and as grounds, adduced that Directive 2004/83/EC had subsequently changed the situation of law to his advantage. He argued that Article 10 (1) (b) of Directive 2004/83/EC now defined religion, as a reason for persecution, in such a way as also to protect the practice of beliefs in

public. Consequently, active missionary work also fell within the scope of protection. The restrictions on public possibilities for exercising faith in Pakistan affected him personally, he said, because he viewed it as his religious duty to profess his faith and to proselytise actively for it among persons of other beliefs. The three-month period to file an application for asylum, he argued, had been complied with, because he first learned only at the beginning of November 2008, from two members of his community of faith, that they had been granted refugee status by the Administrative Court on grounds of European law. For that reason, he made contact with his present legal counsel on 1 December 2008.

5 In a decision dated 30 March 2010, the Federal Office declined the application for a further asylum proceeding (no. 1 below) and for an amendment of the decision of 15 September 2000 in respect of the finding of impediments to deportation under Section 53 of the Aliens Act (no. 2). The Administrative Court ordered the Respondent to grant the Complainant refugee status, and vacated items 1 and 2 of the Federal Office's decision of 30 March 2010, insofar as they were contrary to that status.

6 The Higher Administrative Court denied the Respondent's appeal in a judgment dated 13 December 2011. It based its decision substantially on the following grounds: The requirements for conducting a further asylum proceeding were met at the time of the follow-up application. A relevant change in the situation of law had taken place no later than the effective date of the Directive Transposition Act of 19 August 2007, the court held, because Directive 2004/83/EC altered the scope of protection for freedom of religion in refugee law in comparison to the provisions that applied formerly. On the basis of the Directive's standards, the Complainant was threatened with persecution in Pakistan. Members of the Ahmadiyya community, the court held, are subject to serious restrictions on their practice of religion, particularly by the criminal prohibitions under Sections 298 B, 298 C and 295 C Pakistan Penal Code against using religious terms and rituals of Islam in the practice of their faith, professing their faith in public, and proselytising for it. Furthermore, the court held, religious extremists commit acts of violence against Ahmadis to a conspicuous degree, without the police agencies providing effective protection against such abuses. The court noted that the Complainant could not

successfully rely on the aspect of a group persecution of members of the Ahmadiyya community, because the number of investigative proceedings initiated against Ahmadis, the resulting sentences, and the abuses of religious extremists did not attain the density of persecution necessary for that purpose. However, the court held, as the Complainant is an Ahmadi for whom, in Germany, it has become a deep need to practise his faith in public as well, particularly by engaging in missionary activity, he was individually affected by the restrictions on the public practice of religion in Pakistan. Therefore for him there was a considerable probability of the danger of religious persecution.

7 The Respondent challenges this judgment in its appeal to this Court by leave of the Higher Regional Court. In a decision of 15 May 2012, this Court stayed the proceedings until the European Court of Justice had decided on the requests for a preliminary ruling of 9 December 2010 – BVerwG 10 C 19.09 and BVerwG 10 C 21.09 – on diverse questions concerning the interpretation of Article 9 (1) (a) and concerning Article 2 (c) of Directive 2004/83/EC. The European Court of Justice answered the referred questions in a judgment of 5 September 2012 (Joined Cases C-71/11 and C-99/11 – NVwZ 2012, 1612).

8 The Respondent bases its appeal on the grounds that the Higher Administrative Court made no findings of fact as to how the Complainant would practise his faith after returning to Pakistan. It argues that it was not sufficient that the Complainant has the intent of practising his faith in public and engaging in missionary work. A well-founded fear of persecution, it argues, can be affirmed only if his faith is practised after his return in such a way as would expose the Complainant to the threat of persecution. Moreover, the Respondent argues, the Higher Administrative Court reached no adequate findings as to the considerable probability of the danger threatening the Complainant. Inasmuch as that court itself has held that there is a relatively low number of cases of persecution, it should have made a finding as to whether even a very small number of Ahmadis practise their faith in public in such a way that they are exposed to a threat of persecution.

9 The Complainant argues against the Appeal to this Court. In his opinion, it is sufficient for a grant of refugee status that under the pressure of the sanctions with which he is threatened, the Complainant might refrain from practising his religion in public, even though this is especially important to him, he said, according to his religious understanding of himself. The Higher Regional Court had found that these requirements were met for the person of the Complainant.

10 The representative of the Federal interests before the Federal Administrative Court has joined in the proceedings, and in essence concurs in the Respondent's argumentation.

II

11 The Respondent's appeal meets with success. The challenged judgment is based on an incompatibility with Federal law (Section 137 (1) no. 1 Code of Administrative Court Procedure). The court below denied the Respondent's appeal on grounds that are inconsistent with Federal law. Although it rightly affirmed that the requirements for conducting a further asylum proceeding were met under Section 71 (1) sentence 1 of the Asylum Procedure Act in conjunction with Section 51 (1) through (3) of the Administrative Procedure Act (1.), the considerations by which the court presumed that the Complainant was entitled to a finding of refugee status do not stand up to review by this Court (2.). For lack of adequate findings of fact by the court below, this Court cannot itself reach a final decision in this matter. The matter must therefore be remitted to the court below for further examination, in accordance with Section 144 (3) sentence 1 no. 2 of the Code of Administrative Court (3.).

12 The legal assessment of the Complainant's petition is governed by the Asylum Procedure Act in the version promulgated on 2 September 2008 (Federal Law Gazette I p. 1798), as last amended by the Act for the Transposition of Directives of the European Union on Residence Law and for the Revision of National Provisions of Law to Conform to the EU Visa Code, of 22 November 2011 (Federal Law Gazette I p. 2258) and the Residence Act in the version promulgated on 25 February

2008 (Federal Law Gazette I p. 162), as last amended by Article 2 of the Act Amending the Freedom of Movement Act/EU and Additional Provisions of Residence Law of 21 January 2013 (Federal Law Gazette I p. 86). According to the settled case law of the Federal Administrative Court, changes in law that come about after a challenged decision must be taken into account by the court hearing an appeal on points of law if a lower appellate court would have to take them into account if it were to decide now (see judgment of 11 September 2007 – BVerwG 10 C 8.07 – BVerwGE 129, 251 – para. 19). As the present matter is a dispute in asylum law in which, according to Section 77 (1) of the Asylum Procedure Act, the court below must regularly base its decision on the situation of fact and law at the date of its last oral hearing, that court would have to take the new legal situation as a basis if it were to decide now. The provisions that apply here have not changed, however, since the hearing before the court below.

13 Under Union law, both Council Directive 2004/83/EC of 29 April 2004 and the version as amended by Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 – which went into force in the course of the present proceedings – apply. The Member States were given until 21 December 2013 to transpose the provisions whose content was amended in the new version into national law (Article 39 (1) of Directive 2011/95/EU), and until that time period expires, Directive 2004/83/EC continues to apply (see Article 41 (2) in conjunction with Article 40 (1) of Directive 2011/95/EU). However, with regard to the provisions incorporated unchanged, the revised version already applies (see Article 41 (1) of Directive 2011/95/EU).

14 1. The requirements for conducting a further asylum proceeding under Section 71 (1) sentence 1 of the Asylum Procedure Act in conjunction with Section 51 (1) through (3) of the Administrative Procedure Act have been met. According to Section 71 (1) sentence 1 of the Asylum Procedure Act, after the withdrawal or non-appealable rejection of a previous asylum application, the Federal Office is to conduct a further asylum procedure in response to a follow-up application only if the conditions of Section 51 (1) through (3) of the Administrative Procedure Act are met. Under that provision, one of the requirements for an application for the resumption of proceedings is that a change has occurred in the situation of fact or

law, or new evidence is available, and it has been cogently shown that these circumstances are suitable for a decision more favourable to the applicant (see judgment of 25 November 2008 – BVerwG 10 C 25.07 – Buchholz 402.25 Section 71 Asylum Procedure Act, no. 15, at para. 11).

15 As this Court has already decided in its judgment of 9 December 2010 (BVerwG 10 C 13.09 – BVerwGE 138, 289 – para. 29), a subsequent change in the situation of law for applications for refugee status because of religious persecution, as a ground for resuming proceedings, occurred with the entry into force of the Directive Transposition Act of 19 August 2007 (Federal Law Gazette I p. 1970) on 28 August 2007 (Section 71 (1) sentence 1 Asylum Procedure Act in conjunction with Section 51 (1) no. 1 alt. 2 Administrative Procedure Act). At the relevant date of the decision of the court below, to be sure, it had not yet been finally clarified whether the transposition of Article 9 (1) and Article 10 (1) (b) of Directive 2004/83/EC in Section 60 (1) sentence 5 of the Residence Act changed the situation of law to the concerned persons' advantage in respect of persecution for religious reasons. But the uncertainty brought about by doubts concerning the interpretation of the requirements of Union law suffices to resume an asylum proceeding, and to have these question examined (judgment of 9 December 2010, op. cit.).

16 The Complainant was also timely in appealing on the basis of the change in the situation of law. Under Section 71 (1) sentence 1 of the Asylum Procedure Act in conjunction with Section 51 (3) of the Administrative Procedure Act, the application must be filed within three months; the time period begins with the date on which the person concerned receives knowledge of the reason for the resumption of proceedings. To that extent, for reasons of certainty and clarity of law, in the event of changes in the law, in refugee law at any rate, the beginning of the time period should not be based on the expiration of the transposition period (Article 38 (1) of Directive 2004/83/EC), but on the transposition by the national legislature as documented by promulgation in the Federal Law Gazette (28 August 2007) (judgment of 9 December 2010, op. cit., at para. 29). According to the findings of fact by the court below, which are binding upon this Court, the Complainant did not learn of the change in the law until 1 December 2008. It was only at that time that the

Complainant, who until then had not been represented by legal counsel, was informed by his present counsel that the change in the situation of law had occurred.

17 However, the court below is incorrect in holding that because Directive 2004/83/EC and the Directive Transposition Act do not include any retroactive effect, the resumed asylum proceedings do not give rise to a new review and assessment of the individual grounds for persecution prior to flight. If, because of a change in the law – as in the present instance – a further asylum proceeding is to be conducted, the matter at issue, refugee status, which is indivisible in fact and time, is subject in full to a new review by the court. In this regard, the Complainant might cite Article 4 (4) of the Directive if, on the basis of the new standard of the law, he is to be considered as having suffered previous persecution on the basis of circumstances of fact, even if these circumstances arose before the Directive entered into force. This does not mean, however, that in the present instance the court below must, sua sponte, re-examine the findings of fact and the assessment of the evidence in the Administrative Court's judgment of 22 May 2001, holding that the Complainant had not furnished adequate prima facie arguments about prior persecution. The court below may, instead, adopt the lower court's assessment of evidence as its own, unless the Complainant specifically shows what circumstances of fact in his situation before flight are in need of a new assessment by the trier of fact because of the change in the situation of law.

18 2. The court below affirmed that the Complainant is entitled to refugee status on grounds that do not stand up to review by this Court.

19 2.1 Under Section 3 (1) and (4) of the Asylum Procedure Act in conjunction with Section 60 (1) of the Residence Act – taking due account of the requirements of Union law – a foreigner is to be granted refugee status if he has a well-founded fear of being exposed in his country of origin to threats to his life, liberty, or other legal interests protected under Article 9 (1) of Directive 2011/95/EU (formerly: Directive 2004/83/EC) – hereinafter: the Directive – because of his race, religion, nationality, membership of a certain social group, or political opinions. A fear of persecution is well-founded if, in view of his individual situation, the foreigner is in

fact, i.e., with a considerable probability, threatened with the aforementioned dangers because of the circumstances prevailing in his country of origin.

20 Under Section 60 (1) sentence 5 of the Residence Act, Article 4 (4) and Articles 7 through 10 of the Directive are additionally to be applied in determining whether persecution within the meaning of sentence 1 exists. Under Article 9 (1) (a) of the Directive, acts are to be regarded as persecution within the meaning of Article 1 A of the Geneva Convention on Refugees (the Geneva Convention) if they are sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15 (2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). Under Article 9 (1) (b) of the Directive, an act of persecution may also be an accumulation of various measures, including violations of human rights, which is sufficiently severe as to affect an individual in a similar manner as mentioned in Article 9 (1) (a) of the Directive. Under Article 9 (3) of the Directive, there must be a connection between the reasons for persecution in Article 10 (1) of the Directive and the acts of persecution under Article 9 (1) of the Directive.

21 2.2 The court below correctly assessed the threat of persecution adduced by the Complainant as a member of the Ahmadiyya community (Ahmadi) as fear of an interference with freedom to practise a religion (Copy of the Decision, p. 13). According to the findings of the court below, the fact that Ahmadis are threatened in Pakistan with imprisonment and punishment is not merely because of their membership of that community of faith per se. Rather, the realisation of the danger proceeds from the voluntary conduct of the individual member of the community: the practice of his religion with public effect. In such cases the directly threatened intervention consists of a violation of the freedom to practise one’s own religion in accordance with the applicable rules of the faith and the believer’s religious understanding of himself, because the member of the religion can make his decision to practise or not to practise his religion in public only under the pressure of the danger of persecution with which he is threatened. By contrast, the intervention is not constituted by the violation of the legal interests that are threatened only in the event of such a practice (such as life, limb or personal freedom). Something else

applies when the person concerned has already practised his faith in his country of origin and merely for that reason – irrespective of any voluntary decision about his conduct in the future – is in immediate danger, for example, of imprisonment and punishment. But in the present instance, the court below has not found that there was such a prior persecution.

22 2.3 In response to the question referred by this Court, the European Court of Justice (ECJ) decided, in a judgment of 5 September 2012 (Joined Cases C-71/11 and C-99/11 – NVwZ 2012, 1612), the conditions under which interference with religious freedom may be viewed as an act of persecution within the meaning of Article 9 (1) (a) of the Directive.

23 2.3.1 The European Court of Justice views the right to freedom of religion, enshrined in Article 10 (1) of the Charter of Fundamental Rights of the European Union (the ‘Charter’), as a fundamental human right that is one of the foundations of a democratic society, and that corresponds to Article 9 of the ECHR. Interference with the right to religious freedom may be so serious as to be treated in the same way as one of the cases referred to in Article 15 (2) of the ECHR, to which article Article 9 (1) (a) of the Directive refers, by way of guidance, for the purpose of determining which acts must in particular be regarded as constituting persecution (ECJ, op. cit. at para. 57). However, not every interference with the right to religious freedom guaranteed by Article 10 (1) of the Charter constitutes an act of persecution within the meaning of Article 9 (1) of the Directive (at para. 58). First of all, there must be a violation of this freedom that does not fall under the limitations on the right to exercise fundamental rights as provided for by law, within the meaning of Article 52 (1) of the Charter. Furthermore, there must be a severe violation of rights, with a significant effect on the person concerned (at para. 59). According to Article 9 (1) (a) of the Directive, this presupposes that the infringing acts must be equivalent to an infringement of the basic human rights from which no derogation can be made by virtue of Article 15 (2) ECHR (at para. 61).

24 2.3.2 According to the case law of the ECJ, the acts which may constitute a serious violation of religious freedom within the meaning of Article 9 (1) (a) of the Directive include not only serious interference with the applicant’s freedom to prac-

tise his religion in private, but also interference with his freedom to live out his religion in public. The European Court of Justice does not deem it compatible with the broad definition of religion given by Article 10 (1) (b) of the Directive to distinguish the significance of an infringing act on the basis of whether the act interferes with the core areas of the exercise of religion in private ('forum internum') or with a broader area of religious activities in public ('forum externum') (at para. 62 et seq.). This Court adopts that interpretation, and therefore no longer adheres to the deviating interpretation of the law on protection of refugees that it had held before Directive 2004/83/EC entered into force (see judgment of 20 January 2004 – BVerwG 1 C 9.03 – BVerwGE 120, 16 <19 et seq.>). Consequently, the acts which may be regarded as constituting persecution, on account of their intrinsic severity in combination with their consequences for the person concerned, must be identified, not on the basis of the particular aspect of religious freedom that is being interfered with, but on the basis of the nature of the repression inflicted on the individual concerned and its consequences (at para. 65, with reference to point 52 of the Advocate General's Opinion).

25 Therefore, whether a violation of the right guaranteed by Article 10 (1) of the Charter constitutes persecution within the meaning of Article 9 (1) of the Directive depends on the severity of the measures and sanctions that are undertaken or that may be undertaken against the person concerned. Accordingly, a violation of the right to freedom of religion may constitute persecution within the meaning of Article 9 (1) (a) of the Directive where an applicant for asylum, as a result of exercising that freedom in his country of origin, runs a genuine risk of, inter alia, being prosecuted or subject to inhuman or degrading treatment or punishment by one of the actors referred to in Article 6 of the Directive (at para. 67). The European Court of Justice, in the German version of the judgment that is binding here (see Article 41 of the Rules of Procedure of the European Court of Justice of 25 September 2012, OJ L 265/1 of 29 September 2012), uses only the term 'Verfolgung', which means both 'persecution' and 'prosecution', without referring it expressly to criminal prosecution. But it would be circular to define the concept of 'persecution relevant to asylum' with 'persecution'. This reading is furthermore supported by a comparison of the German version of the judgment with the French, English and Italian versions. All three versions consulted for comparison refer to criminal prosecution.

Furthermore, in the case of the exercise of religion, the threat of an interference with life and limb and with (physical) freedom is also sufficiently serious for a violation of religious freedom to be considered an act of persecution.

26 2.3.3 A sufficiently severe interference with religious freedom under Article 9 (1) of the Directive does not presuppose that the foreigner does in fact exercise his religion, after returning to his country of origin, in a manner that exposes him to the threat of persecution. Rather, an abstention from practising a religion, when compelled under the pressure of the threat of persecution, may already achieve the quality of a persecution. This is evident in particular from the statement by the European Court of Justice at para. 69 that the mere prohibition of participation in formal worship in public may constitute a sufficiently serious act within the meaning of Article 9 (1) (a) of the Directive, and therefore, persecution where a breach of the prohibition gives rise to a genuine risk of the sanctions and consequences mentioned there. Therefore, if persecution may lie in the mere prohibition itself, the actual future conduct of the applicant and the associated interventions in other legal interests of the person concerned (e.g., life or liberty) are ultimately not material.

27 This understanding of the decision, which situates the protection of refugees at an earlier point than in the previous case law of the Federal Administrative Court, is not countered by the fact that the European Court of Justice bases its comments on the danger threatening the foreigner in ‘exercising that freedom’ (at para. 67 and 72) or ‘religious practices’ (at paras. 73, 78 and 79 et seq.). This is because this language merely reproduces the wording of the corresponding questions 2a and 3 referred by this Court, and does not represent a necessary prerequisite for granting refugee status. If the mere prohibition of certain forms of religious practice could not constitute an act of persecution within the meaning of Article 9 (1) (a) of the Directive, individuals concerned would be left unprotected in precisely those countries where the threatened sanctions are especially severe and so all-encompassing that believers would be constrained to abstain from practising their religion (concurring, Lübbe, ZAR 2012, 433 <437>). This extension to a compelled abstention is also consistent with the understanding of the British Upper Tribunal (Immigration and Asylum Chamber) in its guideline judgment of 14 November

2012 – MN and others [2012] UKUT 00389(IAC) at 79) concerning the religious persecution of Ahmadis in Pakistan, and the judgment of the Supreme Court of the United Kingdom of 7 July 2010 concerning persecution for homosexuality (HJ <Iran> <FC> <Appellant> v. Secretary of State for the Home Department [2010] UKSC 31 at 82). This Court follows that interpretation, and therefore no longer adheres to the deviating interpretation that it had held before Directive 2004/83/EC entered into force (see judgment of 20 January 2004, op. cit. <23>).

28 2.3.4 According to the case law of the ECJ, the assessment of when a violation of religious freedom is of the necessary severity to meet the requirements for an act of persecution within the meaning of Section 9 (1) (a) of the Directive depends on both objective and subjective factors (at para. 70). Objective aspects, in particular, are the severity of the violation of other legal interests, such as life and limb, with which the foreigner is threatened when practising his religion. The necessary severity may in particular be attained if the foreigner is threatened with injury to life, limb, or liberty, criminal prosecution, or inhuman or degrading treatment or punishment because of participating in formal worship in public (see 2.3.2 above). In the case of prohibitions reinforced with criminal penalties, to this extent, the relevant matter to be considered is the actual practice of criminal prosecution in the foreigner's country of origin, because a prohibition that is recognizably not enforced does not establish a significant threat of persecution (see also Advocate General Bot in his Opinion of 19 April 2012 (Joined Cases C-71/11 and C-99/11, at para. 82).

29 The European Court of Justice holds that the fact that the observance of a certain religious practice in public, which is subject the risks at issue, is of particular importance to the person concerned in order to preserve his religious identity is a relevant subjective factor in determining the severity of the threat of violation of religious freedom (at para. 70). This is because the scope of protection of religion extends not only to forms of conduct prescribed by religious doctrine, but to those which the individual believer considers to be necessary to him (at para. 71). Here the ECJ confirms this Court's opinion that the material point is the significance of a religious practice in preserving the religious identity of the individual foreigner, even if the pursuit of such a religious practice is not of central importance for the religious community concerned (see decision of 9 December 2010 – BVerwG 10 C 19.09 – BVerwGE 138, 270 – para. 43). The fact that a specific form of religious practice (e.g., missionary work) is a fundamental principle of faith according to the self-understanding of the community of believers to which the person seeking protection belongs may have an effect as circumstantial evidence in this regard. But the deciding factor is how the individual believer lives out his faith, and whether the religious practice that incurs persecution is necessary to him personally according to his understanding of his religion.

30 According to this Court's understanding, the standard developed by the ECJ that the pursuit of a certain religious practice is especially important in order to preserve one's religious identity does not presuppose that the person concerned must suffer a mental collapse or in any case would suffer severe emotional harm if he had to refrain from a corresponding practising of his faith (on the more rigorous standards of case law for the moral dilemma of conscientious objectors, see: judgment of 1 February 1982 – BVerwG 6 C 126.80 – BVerwGE 64, 369 <371> with further authorities). However, for the individual, the specific religious practice must be a central element of his religious identity, and in that sense must be necessary for him. It is not sufficient that the applicant for asylum has an intimate tie with his faith, if he does not live out that faith – at least in the host Member State – in a way that would expose him to the danger of persecution in his country of origin. The deciding factor for the severity of the violation of religious identity is the intensity of the pressure on the concerned individual's voluntary decision whether he should practise his faith in a manner that he feels is obligatory for him, or

should abstain from doing so because of the threatened sanctions. The fact that he considers the suppressed religious practice of his faith to be obligatory for himself in order to maintain his religious identity must be proved by the asylum-seeker to the full satisfaction of the court (as was already held in the decision of 9 December 2010, op. cit. at para. 43).

31 Religious identity, being an internal fact, can be determined only from the arguments of the asylum-seeker and by reverse deduction from external indications to the internal attitude of the person concerned. For that purpose, the religious self-understanding of an asylum-seeker both before and after leaving his country of origin is of fundamental significance. In the case of Ahmadis from Pakistan it must first be determined whether, and how long, they have belonged to the Ahmadiyya community. Here one option might be to obtain information from the headquarters of that community in Germany, which in turn can draw upon information from the world headquarters in London – particularly concerning the concerned individual's religious activity in Pakistan (so held as well by the British Upper Tribunal in its judgment of 14 November 2012, op. cit., headnote 5). More detailed findings about the religious activity of a foreigner prior to leaving his country also reduce the risk of an objectively inaccurate attribution to a given community (see also the situation report from the German Foreign Office dated 2 November 2012, p. 14). An additional possibility to be considered is questioning a representative of the local German Ahmadi congregation to which the asylum-seeker belongs. Finally, in a court proceeding, a detailed hearing of the person concerned in an oral hearing seems as a rule necessary. If the court arrives at the conclusion that the Complainant did not practise his faith in Pakistan in a manner affecting the public, the reasons for that abstention must be explored. This is because abstaining from a religious practice that is relevant to persecution in the country of origin is not a factor characterising a believer's religious identity if the practice was avoided because of a well-founded fear of persecution. If examination shows that the Complainant does not practise his faith in Germany in a manner that would expose him to the threat of persecution in Pakistan, this regularly argues that such a religious practice is not determinative for his religious identity, unless the person concerned can adduce significant reasons for the inaction. If, however, he does practise his religion correspondingly, it must furthermore be examined whether this form of practising his

faith is especially important to the Complainant in order to preserve his religious identity, and is not, for example, being done merely in order to obtain refugee status.

32 2.3.5 The prohibition on public religious activity, however, can in itself be considered a sufficiently severe violation of religious freedom, and therefore as an act of persecution within the meaning of Article 9 (1) (a) of the Directive, only if the asylum-seeker – above and beyond the objective and subjective factors just mentioned – does run a real risk, if he conducts the prohibited public practice of religion in his country of origin, of being subjected to injury to life, limb or liberty, criminal prosecution, or inhuman or degrading treatment or punishment. This means that there must be a considerable probability that the foreigner will be threatened with the aforementioned consequences and sanctions in his country of origin. This standard of probability, contained in the characterising element '... owing to a well-founded fear of being persecuted …' in Article 2 (c) of Directive 2004/83/EC (Directive 2011/95/EU: Article 2 (d)), is aligned with the case law of the European Court of Human Rights (ECtHR), which in its examination of Article 3 ECHR focuses on a 'real risk'; this corresponds to the standard of considerable probability (see judgment of 1 June 2011 – BVerwG 10 C 25.10 – BVerwGE 140, 22 – para. 22). The standard of probability presupposes that in a summary assessment of the existential issue submitted for examination, the facts arguing for the existence of persecution have a greater weight, and therefore prevail over the facts that speak against its existence. Here a 'qualifying' approach must be applied, in the sense of a weighting and weighing of all established circumstances and their significance. The material question is whether, in view of these circumstances, a fear of persecution can be induced in a reasonable, prudent person in the situation of the person concerned (see judgments of 5 November 1991 – BVerwG 9 C 118.90 – BVerwGE 89, 162 <169 f.> and 1 June 2011, op. cit. – para. 24). In the present case, the material question is whether the Complainant must justifiably fear a considerable probability of being threatened with serious violations of his legal interests, especially the danger of injury to life, limb or liberty, criminal prosecution, or inhuman or degrading treatment or punishment, because of a public religious activity in Pakistan that is of particular importance in order to preserve his religious identity (see 2.3.4 above).

33 According to the findings of the court below, mere membership of the Ahmadiyya community does not place Pakistani nationals in danger of persecution in their homeland such as would be relevant in asylum law (Copy of the Decision, p. 32). Such persecution threatens only ‘professing Ahmadis’ who ‘also wish to practise their faith in public in their homeland’ (Copy of the Decision, p. 33). The court below rightly holds that the standards applicable for group prosecution are not entirely transferable in determining the probability of persecution, insofar as a comparable examination of the number of acts of persecution that have taken place relative to the total number of all Ahmadis in Pakistan (about 4 million), or of professing Ahmadis (500,000 to 600,000), might fail to take account of a potentially large number of members of the faith who refrain from practising their religion in public for fear of persecution. However, if the danger of persecution depends on the voluntary conduct of the individual – the prohibited practice of the faith in public – then the prognosis of danger must be based on the group of the members of the faith who practise it in public despite the prohibitions. And in that case, it is not evident from the findings to date that the practice of religious worship in a place of prayer of the Ahmadis is in itself considered public practice, and is sanctioned in criminal law. The number of Ahmadis who practise their faith in a manner prohibited in criminal law must be determined – allowing for all the difficulties associated therewith, of which this Court is also aware – at least as an approximation. In a further step, it must then be determined how many acts of persecution affect the members of this group. Here it must in particular be determined with what probability an Ahmadi will be imprisoned and punished if, contrary to the provisions of the Pakistan Penal Code, he uses, in his practice of his religion, religious terms and rituals of Islam, professes his faith in public, or proselytises for it. In considering the ratio between the number of Ahmadis who practise their faith in public contrary to the prohibition, and the number of actual acts of persecution, it must be taken into account that this is an evaluative consideration which must also allow for any existing uncertainties and imponderables of the state’s practice of criminal prosecution. If, on the basis of such a prognosis, there is a real risk of persecution for the group – possibly not a numerous one – of members of the faith who practise their faith in a forbidden manner in public, the conclusion may be drawn on that basis that the entire group of Ahmadis, for whom these public practices of re-

ligion constitute a central element of their religious identity and in that sense are necessary, are also affected by the restrictions on their freedom of religion in a manner that is worthy of consideration in refugee law.

34 2.4 In examining an application for refugee status, all acts must be taken into account to which the applicant has been, or risks being, exposed, in order to determine whether, in the light of the applicant's personal circumstances, those acts may be regarded as constituting persecution within the meaning of Article 9 (1) of the Directive (see judgment of the ECJ of 5 September 2012, op. cit., para. 68). If there is no act of persecution under Article 9 (1) (a) of the Directive, it must furthermore be examined whether such an act proceeds from a general consideration under Article 9 (1) (b) of the Directive. Letter (a) concerns actions which are sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights. According to letter (b), an accumulation of various measures may also take on the nature of a violating act if the foreigner is affected by them in a similar manner as in the case of a serious violation of human rights under letter (a). The measures within the meaning of letter (b) may themselves be violations of human rights, but may also comprise discrimination which per se does not have the nature of a violation of human rights.

35 In letter (a), the severity of the acts of interference is founded on their 'nature or repetition'. While the 'nature' of the act describes a qualitative criterion, the term 'repetition' incorporates a quantitative dimension (so held also by Hailbronner/Alt, in: Hailbronner, EU Immigration and Asylum Law, 2010, p. 1072 at para. 30). In its judgment of 5 September 2012 (at para. 69), the European Court of Justice holds that the prohibition of participation in formal worship in public may constitute a sufficiently severe act within the meaning of Article 9 (1) (a) of the Directive. The qualification as 'a' prohibition is not counteracted by the fact that the prohibition is governed by various elements constituting an offence in multiple provisions of the Pakistan Penal Code. The prohibition may be of such a severe 'nature' that all by itself it satisfies the requirements for constituent elements under Article 9 (1) (a) of the Directive. Other measures, by contrast, may have effects of a severity comparable to a general prohibition only because of their repetition.

36 Therefore, if the satisfaction of the constituent elements under letter (a) presupposes a certain severe act of intervention, or the repetition of similar acts, the alternative constituent elements under letter (b), in an expanded perspective, make it possible to take into account an accumulation of various acts of intervention, examples of which are listed in Article 9 (2) of the Directive. The cumulative consideration is also consistent with the UNHCR's understanding of the concept of persecution in Article 1 A of the Geneva Convention on Refugees (see Handbook on Procedures and Criteria for Determining Refugee Status, 1979, at para. 53). The overall consideration necessary under Article 9 (1) (b) of the Directive may in particular include various forms of discrimination against the members of a certain community of believers, for example in respect of access to educational or health facilities, but also occupational or economic restrictions on earning a living (see UNHCR Guidelines of 28 April 2004 on Religion-Based Refugee Claims, HCR/GIP/04/06 at para. 17). The individual interfering acts need not in themselves have the nature of a violation of human rights, but must in their totality affect the individual in a way that is equivalent to the intensity of interference from a serious violation of human rights within the meaning of letter (a).

37 Therefore, in examining an act of persecution within the meaning of Article 9 (1) of the Directive, first all interfering acts that come under consideration must be examined, whether they be violations of human rights or other serious repressive measures, discrimination, disadvantages and impediments. In this phase of the examination, acts such as those listed as examples in Article 9 (2) of the Directive must not be excluded prematurely on the grounds that they constitute only discrimination but not a violation of human rights (similarly, Marx, Handbuch zum Flüchtlingsschutz – Erläuterungen zur Qualifikationsrichtlinie, 2nd ed., 2012, Chapter 4 Section 13 at para. 18). But one must first examine whether there is a violation of a basic human right within the meaning of Article 9 (1) (a) of the Directive. If that is not the case, it must be further examined whether the totality of the interferences to be taken into account under letter (b) leads to a violation of the concerned individual's rights of similar severity to a severe violation of basic human rights within the meaning of Article 9 (1) (a) of the Directive. Without a case-specific concretisation of the standard for a severe violation of basic human rights under Article 9 (1) (a) of the Directive, the evaluative assessment under letter (b)

of whether the individual asylum-seeker is exposed to various measures in such a serious accumulation that the effect on him is comparable to the one under letter (a) will not succeed. If, in respect of the constituent element of ‘affected in a similar manner’, the court omits to conduct a comparative consideration with the acts of persecution covered under Article 9 (1) (a) of the Directive, that omission is incompatible with Federal law.

38 2.5 The judgment of the court below is consistent with the requirements proceeding from the case law of the ECJ insofar as concerns the standards for assuming an act of persecution under Article 9 (1) (a) of the Directive in the event of a violation of religious freedom. The application of the major premises to the present case is objectionable only insofar as the sufficient probability of persecution is affirmed on the basis of a consideration of ratios that is incompatible with Federal law.

39 Consistently with the requirements of Federal law, the court below holds that the prohibition of the public practice of a religion is in itself already suitable grounds for a severe violation of the right of freedom of religion within the meaning of Article 9 (1) (a) of Directive 2011/95/EU (Copy of the Decision, p. 15). The court holds – consistently with the judgment of the ECJ of 5 September 2012 – that the scope of protection of religious freedom protected by Article 9 (1) of the Directive also includes the practice of religion in public, including the right to propagate the faith through proselytisation, and to persuade others to accept it (Copy of the Decision, p. 14). In a replicable manner, it views the prohibitions of the Pakistan Penal Code aimed at the Ahmadis as an act of persecution within the meaning of Article 9 (1) (a) of the Directive, if the individual believer is impeded from practising his faith in such a severe manner that the minimum standard of human rights is thereby violated (Copy of the Decision, p. 15). By the nature of the matter, this refers to the severe violation of basic human rights as required under Article 9 (1) (a) of the Directive. Such severe violations of human rights may, in the correct opinion of the court below, also be constituted by substantial restrictions or prohibitions on the public exercise of a faith if that exercise is ‘of fundamental importance’, according to the understanding of the given religion or – not necessarily entirely identically – the understanding of the individual believer (Copy of the Decision, p. 15 et seq.).

It is evident from the context of the grounds of the decision that by its nature, the standard of the court below therefore still suffices for the requirements of the ECJ – admittedly, formulated more narrowly – that the pursuit of a certain religious practice must be especially important to the individual believer in order to preserve his religious identity.

40 In the context of its subsumption, the court below views the freedom to practise a religion as having been violated by the restrictions and prohibitions that proceed, in particular, from the Pakistani Constitution, the provisions of Section 295 C, 298 B and 298 C of the Pakistan Penal Code, and from abuses by religious extremists. The findings and assessments made in this regard are unobjectionable upon review by this Court. However, the abuses by religious extremists cannot be viewed as an intervention of the same ‘nature’ as the state’s prohibition on the public practice of religion, and must therefore be taken into account only in the context of a cumulative consideration within the meaning of Article 9 (1) (b) of the Directive.

41 However, the prognosis of persecution posited by the court below is not consistent with Federal law. The Higher Administrative Court did not arrive at its result that the described dangers of persecution ‘exist for professing Ahmadis who also wish to practise their faith in public in their homeland ‘ (Copy of the Decision, p. 33) on the basis of a replicable prognosis of danger. There is no objection to the starting point that the Complainant cannot successfully invoke a well-founded fear of persecution from the viewpoint of a group persecution currently in existence (Copy of the Decision, p. 20). The court below explains the reasoning for this in a manner that this Court is able to replicate, in that the number of criminal proceedings, sentencings and acts of violence by religious extremists initiated against Ahmadis is not so great that the density of persecution necessary for a group persecution can be derived from it (Copy of the Decision, p. 33). However, the judgment does not show on the basis of what facts, and according to what standard of prognosis, the court then affirms a sufficient effect of persecution upon professing Ahmadis who also wish to practise their faith in public in their homeland. If the threat of persecution depends on a voluntary conduct – here: practising the faith in public – then the prognosis of danger must be based on the group of those members of the faith who practise their beliefs in exactly this way. This has not been done in the chal-

lenged decision. The court below neither determined – as it should have done, at least approximately – the number of Ahmadis practising their faith in public contrary to the stated prohibitions, nor did it establish how many acts of persecution affect the members of this group (see 2.3.5 above). Only if an evaluative consideration shows that there is a real risk of persecution for the group of Ahmadis practising their faith in public in Pakistan can the conclusion be derived from that consideration that the entire group of Ahmadis whose religious self-understanding includes practising their beliefs in public, which the court below also held was affected by persecution, is exposed to a considerable risk of persecution.

42 However, the copious findings by the court below regarding the Complainant's religious understanding of himself offer no cause for objection. The court found that although prior to leaving Pakistan, the Complainant held no exposed function or office in the local Ahmadiyya community, he did lead a religiously conditioned life. His religious activity there, the court found, did in any event speak for a close, binding commitment to the faith of the Ahmadiyyas. Since entering Germany in 2000 he was active in each of the Ahmadi congregations responsible for him, and went regularly to the mosque for prayer. In the community of B., the court found, he not only continued to carry out the aid services he had already performed in Pakistan, he now also became religiously active in public. For example, each month he had participated in a book stall in front of the railway station, and had approached members of other faiths with missionary intent. After relocating to O., the court found, the Complainant had particularly also continued and intensified these missionary activities. From this practice of the faith, the court below concluded, in a manner to which there can be no objection from this Court, that it is a deep need of the Complainant to persuade his own countrypeople to adopt his faith. As an argument for the Complainant's deep need to profess his religion in public as well, the court furthermore adduced the fact that the Complainant regularly participates in interregional public events held by his religious community. His endeavours to convey his religion to others, the court found, are also expressed in the religious education of his little daughter. This assessment, according to the replicable appreciation of the court below, is not contradicted by the fact that the Complainant has only limited theological knowledge. The court arrived at its findings on the basis of an intensive examination of the Complainant, lasting more

than an hour, during the oral hearing. Furthermore, the court had before it three attestations from Ahmadiyya Muslim Jamaat e.V., Headquarters for Germany, that provided evidence not only as to the Complainant's membership of the community, but also as to his religious practice in Germany. According to that evidence, he participates regularly in both local and central events held by the community.

43 However, if, according to the findings in the judgment by the court below, the Complainant's personality is conditioned by the fact that he is 'bindingly committed to his faith … and intends to exercise it, particularly also in public, especially by conducting missionary activities' (Copy of the Decision, p. 35), this conforms by its nature to the criterion of the ECJ that it is especially important to him, and in that sense necessary to him, to practise his religion in public, in a manner threatened with severe sanctions in Pakistan, in order to preserve his religious identity.

44 3. For lack of sufficient findings of fact by the court below concerning the probability of persecution of the Complainant in the event of a return to Pakistan, this Court cannot itself arrive at a final decision in the matter. The case is therefore to be remitted to the court below for further investigation, in accordance with Section 144 (3) sentence 1 no. 2 of the Code of Administrative Court Procedure.

45 In the findings to be reached about the (at least approximate) size of the group of Ahmadis who practise their faith in violation of the provisions of Section 295 C, 298 B and 298 C of the Pakistan Penal Code, the court below may, inter alia, draw upon the findings on which the British Upper Tribunal based its judgment of 14 November 2012 (op. cit. – particularly at 26 through 72) – including the detailed listing by Ahmadiyya Headquarters of incidents of persecution in the years 1984 through 2011 (drawn upon in the judgment of the Upper Tribunal at 30 – footnote 6 there, and at 103 with an assessment of the reliability of the list – also available at: http://www.persecutionofahmadis.org/wp-content/uploads/2012/02/ Persecution-of-Ahmadis-2011.pdf). If the available information is not sufficient, the court below will have to institute its own investigations and, if applicable, arrange to obtain an expert opinion. If the court arrives at the conclusion that the state prohibition of a practice of religion in public has not led to a practice of persecution that exposes an Ahmadi practising his beliefs in a forbidden matter to a considerable probability

of persecution, the court will furthermore have to examine whether a relevant threat of persecution results on the basis of an overall consideration of various violations of human rights and acts of discrimination within the meaning of Article 9 (1) (b) of the Directive (see 2.4 above). For this purpose, it will also need a specifically reasoned assessment, referred to the Complainant's situation, as to whether, and if applicable why, the totality of the interfering acts considered under letter (b) is so serious that the Complainant will be affected by them in a similar, i.e., comparable, manner as by a severe violation of religious freedom within the meaning of Article 9 (1) (a) of the Directive.

46 4. The disposition as to costs is reserved for the final decision. Court costs are not imposed, in accordance with Section 83b of the Asylum Procedure Act. The amount at issue proceeds from Section 30 of the Act on Attorney Compensation.

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

Fricke Dr Maidowski