



# FEDERAL ADMINISTRATIVE COURT

## IN THE NAME OF THE PEOPLE

### JUDGMENT

BVerwG 10 C 3.10

Released  
on 24 February 2011

In the administrative case

A. and R. versus Federal Republic of Germany

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 24 February 2011  
by Federal Administrative Court Justices Prof. Dr Dörig, Richter,  
Beck, Prof. Dr Kraft, and Fricke

decides:

Upon appeal by the Claimants, the decision of the  
Schleswig-Holstein Higher Administrative Court of  
9 August 2006 is set aside.

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

The disposition as to costs is reserved for the final deci-  
sion.

#### Reasons :

I

- 1 Die Complainants appeal the revocation of their refugee status.
- 2 Complainant 1, born in 1975, and his wife, Complainant 2, born in 1981, are Iraqi nationals from Central Iraq. They are of Arab (Complainant 1) and Kurdish (Complainant 2) ethnicity, and of the Islamic faith. The Complainants entered Germany and applied for asylum in January 2002. As grounds, they indicated that Complainant 1 was being pursued by the secret police as an active member of the 'Democratic People's Party', and that Complainant 2 had been abused on that account. By a final decision in February 2002, the Federal Office for the Recognition of Foreign Refugees (now the Federal Office for Migration and Refugees) – the 'Federal Office' – rejected the Complainants' application for asylum, but found that they met the requirements for refugee status under Section 51(1) of the Aliens Act of 1990 (now Section 3(1) of the Asylum Procedure Act in conjunction with Section 60(1) of the Residence Act), because the Complainants had to fear persecution in Iraq merely because of their appli-

cation for asylum, which was viewed as political opposition by the Iraqi authorities.

- 3 After the fall of the Saddam Hussein regime, in September 2004 the Federal Office initiated proceedings for revocation because of the change in political conditions in Iraq. After giving the Complainants a hearing, in a decision of 20 January 2005 it revoked their refugee status. In the complaint proceedings, the Administrative Court reversed the Federal Office's revocation decision in a judgment of 5 August 2005. The Respondent appealed that judgment. In the appeal proceedings, the Complainants argued that the leader of the 'Democratic People's Party' had gone into hiding several months ago. He had been seriously threatened after making grave accusations against the Shiites, they said. As an activist in that party, Complainant 1 would also be in danger upon his return. Moreover, they said, he had had difficulties with a Sunni group named 'Bedr', which collaborates with the state, as well as difficulties with the family of Complainant 2, whom he had married without their consent.
- 4 In a decision dated 9 August 2006, the Schleswig-Holstein Higher Administrative Court amended the decision at the first instance and denied the complaints. As grounds, it reasoned in substance that a radical and permanent change in the circumstances of fact had taken place in Iraq. The previous dangers of persecution no longer existed, the court said. Saddam Hussein's regime had been finally deposed. The Iraqi state, or dominant structures similar to the state, presented no further danger of persecution that related to lodging an application for asylum. General dangers, the court found, did not fall under the protection of either Section 60(1) of the Residence Act or Article 1 C (5) of the Geneva Convention on Refugees. There was also no threat of persecution for other reasons. The court found that the Complainants' arguments showed no reason for any assessment to the contrary. As Complainant 1 had been a simple, low-profile member, not outstanding in special offices, within the 'Democratic People's Party', whose leader had been a member of Parliament in Iraq after the elections of 30 January 2005, and Complainant 2 had neither participated in her husband's party activities nor knew of them, it was not evident that either one of them would be in danger everywhere in the country if they returned. No such danger emanated from either the Iraqi state or the multinational combat forces.

There was no palpable reason to believe in danger relevant to protection proceeding from non-state actors, such as the fears of difficulties with a 'Bedr' group. The alleged difficulties with the family of Complainant 2 did not pertain to the legal rights protected under Section 60(1) of the Residence Act. Section 73(1) sentence 3 of the Asylum Procedure Act did not stand in opposition to the decision to revoke. No compelling reasons deriving from previous persecutions had either been adduced or were otherwise evident that made a return to Iraq appear unreasonable. The Respondent had issued the revocation decision promptly within the meaning of Section 73(1) Sentence 1 of the Asylum Procedure Act. Moreover, the court said, this requirement served the public interest alone. The court ruled that it might set aside the question whether the one-year period under Section 49(2) sentence 2 and Section 48(4) of the Administrative Procedure Act should be complied with in revocation decisions, because that period had in fact been complied with. There was no need for the exercise of a discretionary decision.

- 5 In their appeals to this Court, the Complainants seek a reinstatement of the judgment at the first instance. In a decision of 31 March 2008 – BVerwG 10 C 32.07 – this Court stayed the proceedings and sought a preliminary ruling from the European Court of Justice to clarify the requirements for revoking refugee status under Article 11(1)(e) of Directive 2004/83/EC. The European Court of Justice answered the referred questions in a judgment of 2 March 2010.

## II

- 6 The Complainants' appeals to this Court are procedurally allowable and have merit. The decision of the appellate court affirming the legality of the appealed revocation decisions is founded upon a contravention of Federal law (Section 137(1)(1) Code of Administrative Procedure). The court below (1.) correctly held that the revocations do not suffer from a formal defect, and (2.) that the appealed decision is not unlawful merely on the grounds that the Federal Office for Migration and Refugees – the Federal Office – did not exercise its discretionary powers. However, (3.) with regard to the substantive requirements for revocation, the appealed decision conflicts with Section 73(1) sentences 1 and 2 of the Asylum Procedure Act, which in its turn is to be interpreted within the

meaning of Article 11 of Council Directive 2004/83/EC 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 EU L 304 of 30 September 2004 p. 12; corrected OJ EU L 204 of 5 August 2005 p. 24) and the associated case law of the European Court of Justice (ECJ) in its landmark judgment of 2 March 2010 (Cases C-175/08, C-176/08, C-178/08 und C-179/08, Abdulla et al. – InfAuslR 2010, 188). For lack of adequate findings on the part of the court below, this Court was unable to decide the matter finally itself. The matter was therefore to be remanded to the court below for further hearing and a decision (Section 144(3) sentence 1 no. 2 Code of Administrative Procedure).

- 7 The legal assessment of the appealed revocations is governed by Section 73 of the Asylum Procedure Act, in the version that has been in force since the effective date of the Act to Implement Residence- and Asylum-Related Directives of the European Union of 19 August 2007 (BGBl I p. 1970) – The Directive Implementation Act – on 28 August 2007 (new version of the Asylum Procedure Act promulgated on 2 September 2008, BGBl I p. 1798). According to the settled case law of the Federal Administrative Court, changes in law that take place after the appealed decision must be taken into account by the court deciding appeals on points of law, if the court below would have had to take account of them if it were to decide now (see judgment of 11 September 2007 – BVerwG 10 C 8.07 – BVerwGE 129, 251 <257 et seq.> at 19). Since this is a dispute in asylum procedure law, where according to Section 77(1) of the Asylum Procedure Act the court below must regularly focus on the status of the facts and the law at the date of its last oral hearing or decision, if that court were to decide now it would have to take the new status of the law as a basis (judgment of 25 November 2008 – BVerwG 10 C 53.07 – Buchholz 402.25 Section 73 Asylum Procedure Act no. 31).
- 8 According to Section 73(1) sentence 1 of the Asylum Procedure Act in the version under the Directive Implementation Act, a recognition of entitlement to refugee status is to be revoked without delay if the conditions on which such recognition is based have ceased to exist. According to Section 73(1) sentence 2 of the Asylum Procedure Act, this is in particular the case if, after the conditions

on which his recognition as being entitled to refugee status is based have ceased to exist, the foreigner can no longer refuse to claim the protection of the country of which he is a citizen, or if he, as a stateless person, is able to return to the country where he had his usual residence. According to Section 73(1) sentence 3 of the Asylum Procedure Act, sentence 2 is not to apply if the foreigner has compelling reasons, based on earlier persecution, for refusing to return to the country of which he is a citizen, or, if he is a stateless person, in which he had his usual residence.

- 9 In Section 73(1) sentence 2 of the Asylum Procedure Act, the German lawmakers transposed into national law the European Union's requirements under Article 11 (e) and (f) of Directive 2004/83/EC on the expiration of refugee status after the circumstances in connection with which the person has been recognised as a refugee have ceased to exist. Therefore the requirements for revocation under this provision must be interpreted in line with the corresponding provisions of the Directive, which take their orientation in turn from Article 1 C (5) and (6) of the Geneva Convention on Refugees – the GRC. This also applies for cases in which the underlying applications for protection, as here, were filed before the Directive took effect (see this Court's referral for a preliminary ruling dated 7 February 2008 – BVerwG 10 C 33.07 – Buchholz 451.902 Europ. Ausl- und Asylrecht no. 19).
- 10 1. The court below correctly held that the revocations do not suffer from formal defects. To that extent, they comply with the governing requirements of Section 73 of the Asylum Procedure Act in the version of the Immigration Act that took effect on 1 January 2005, which was in force at the time when the revocation was declared, and which otherwise remains in force unchanged today. In particular, the appealed decisions arouse no concerns in regard to either the promptitude of the revocations, within the meaning of Section 73(1) sentence 1 of the Asylum Procedure Act, or the one-year period under Section 49(2) section 2 and Section 48(4) of the Administrative Procedure Act. According to the settled case law of the Federal Administrative Court, the requirement of promptitude serves the public interest alone, so that any violation of it does not infringe any right of the foreigner concerned (judgment of 18 July 2006 – BVerwG 1 C 15.05 – BVerwGE 126, 243 at 13, with further authorities). This Court has

also ruled previously that the one-year period under Section 49(2) sentence 2 and Section 48(4) of the Administrative Procedure Act does not apply, at any event, in those cases where refugee status is revoked within the three-year period under Section 73(2a) of the Asylum Procedure Act (judgment of 12 June 2007 – BVerwG 10 C 24.07 – Buchholz 402.25 Section 73 Asylum Procedure Act no. 28, with further authorities). This provision lays down a special rule specific to this field that supersedes the general time period for revocation under the Administrative Procedure Act, and also applies for old recognitions of status.

- 11 2. The appealed decision is also not unlawful on the grounds that the Federal Office did not exercise discretionary powers. The decisive question for allowing the Complainants' appeals to this Court was whether the revocation of refugee status required a discretionary decision (formerly under Section 73(2a) sentence 3 Asylum Procedure Act; now under Section 73(2a) sentence 4 Asylum Procedure Act), and has been settled by the clarifying new provision under Section 73(7) of the Asylum Procedure Act. According to that provision, in cases like the present one, where the decision on recognising an entitlement to refugee status became non-appealable before 1 January 2005, the examination pursuant to Section 73(2a) sentence 1 of the Asylum Procedure Act was to be carried out no later than 31 December 2008. Thus the lawmakers provided a transitional provision for old recognitions of entitlement that became non-appealable before 1 January 2005, and specified the time by which they were to be reviewed for withdrawal or revocation. It follows that no discretionary decision is needed before such an examination and denial of the requirements for withdrawal and revocation in the proceeding prescribed since 1 January 2005 (negative decision) (judgment of 25 November 2008, *op. cit.*, with further authorities).
- 12 3. However, with regard to the substantive requirements for revocation, the appealed decision is incompatible with Section 73(1) sentence 1 and 2 of the Asylum Procedure Act, which must be construed in light of Directive 2004/83/EC, which has now been transposed into national law. According to Article 11(1)(e) of that Directive, a third country national ceases to be a refugee if he or she can no longer, because the circumstances in connection with which he or she has

been recognised as a refugee have ceased to exist, continue to refuse to avail himself or herself of the protection of the country of nationality. In examining this reason for revoking refugee status, Member States must have regard to whether the change of circumstances is of such a significant and non-temporary nature that the refugee's fear of persecution can no longer be regarded as well-founded (Article 11(2) of Directive 2004/83/EC).

- 13 a) In its judgment of 2 March 2010 (*op. cit.*), in a preliminary ruling sought in these proceedings, the European Court of Justice concretely clarified the requirements to be deduced from these provisions.
- 14 It ruled that refugee status ceases to exist when, having regard to a change of circumstances of a significant and non-temporary nature in the country of origin, the circumstances which justified the person's fear of persecution for one of the reasons referred to in Article 2(c) of Directive 2004/83/EC, on the basis of which refugee status was granted, no longer exist and that person has no other reason to fear being 'persecuted' within the meaning of Article 2(c) of that Directive (ECJ, judgment of 2 March 2010, *op. cit.*, at 76, first bullet point).
- 15 In this context the ECJ makes clear that the 'protection of the country' referred to in Article 11(1)(e) of Directive 2004/83/EC refers only to the protection that has up to that point been lacking, namely protection against the acts of persecution envisaged by the Directive (ECJ, judgment of 2 March 2010, *op. cit.*, at 67). The same, therefore, applies for the 'protection of the country' mentioned in Section 73(1) sentence 2 of the Asylum Procedure Act. It is immaterial whether the individual is threatened with other danger in his or her country of origin. In particular, the cessation of refugee status does not depend on whether the prerequisites for granting subsidiary protection within the meaning of Article 2 (e) of Directive 2004/83/EC are not met. To that extent, the Directive governs two distinct systems of protection (ECJ, judgment of 2 March 2010, *op. cit.*, at 78 et seq.).
- 16 It can further be deduced from the ECJ's judgment that the termination of refugee status because of changes in the country of origin is fundamentally a mirror image of the recognition of that status. Article 11(1)(e) of Directive 2004/83/EC,



like Article 1 C (5) of the GRC, provides that a person ceases to be classified as a refugee when the circumstances in connection with which he was recognised as such have ceased to exist, that is to say, in other words, when he no longer qualifies for refugee status (ECJ, judgment of 2 March 2010, *op. cit.*, at 65). According to Article 2 (c) of Directive 2004/83/EC, a refugee is a person who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country. If the circumstances in connection with which the person was recognised as a refugee change, and the original fear of persecution within the meaning of Article 2 (c) of Directive 2004/83/EC therefore no longer appears to be well founded, the national concerned can no longer continue to refuse to avail himself or herself of the protection of the country of nationality (ECJ, judgment of 2 March 2010, *op. cit.*, at 66). Therefore the circumstances that result in the recognition of refugee status, or conversely in the cessation of that status, are symmetrical opposites of one another (ECJ, judgment of 2 March 2010, *op. cit.*, at 68).

17 However, the ECJ also emphasises that in order for refugee status to lapse, the change in the circumstances on which it is founded under Article 11(2) of Directive 2004/83/EC must be of such a significant and non-temporary nature that the refugee's fear of persecution can no longer be regarded as well founded (ECJ, judgment of 2 March 2010, *op. cit.*, at 72). For that purpose, it must be clear that the factors which formed the basis of the refugee's fear of persecution and that resulted in the recognition of refugee status may be regarded as having been permanently eradicated (ECJ, judgment of 2 March 2010, *op. cit.*, at 73). As a rule, the change is permanent only if in the country of origin, a state or other actor of protection within the meaning of Article 7 of Directive 2004/83/EC is present, and has taken reasonable steps to prevent the persecution on which the recognition of refugee status was based (see ECJ, judgment of 2 March 2010, *op. cit.*, at 70 et seq.).

18 If the circumstances on which recognition of refugee status was granted have ceased to exist, before finding that that status has also ceased to exist the authorities must then verify whether there are other circumstances which may give

rise to a well-founded fear of persecution on the part of the person concerned (ECJ, judgment of 2 March 2010, *op. cit.*, at 82). Here a distinction must be made according to which of the reasons for persecution under Article 2 (c) of Directive 2004/83/EC the refugee has relied upon. If, in the revocation proceedings, the refugee relies on the same reason for persecution as that accepted at the time when refugee status was granted, and submits that the cessation of the facts which gave rise to the granting of that status was followed by the occurrence of other facts which gave rise to a fear of persecution for that same reason, the assessment to be carried out will normally be covered by Article 11(2) of Directive 2004/83/EC (ECJ, judgment of 2 March 2010, *op. cit.*, at 98). In that case, the authority must as a rule already take the asserted danger of persecution into account in assessing the question of whether there has at all been a significant and non-temporary change in the circumstances because of which the refugee's fear of persecution can no longer be considered well founded. However, if the refugee relies on a reason for persecution other than the one accepted at the time when refugee status was granted, there is a lack of connection with the circumstances on which the recognition of that status was based. Such an argument therefore does not raise the question of the cessation of the circumstances on which the recognition of refugee status was based. In that case, however, the facilitated standard of proof under Article 4(4) of Directive 2004/83/EC applies if there are earlier acts or threats of persecution which are connected with the reason for persecution now being examined (ECJ, judgment of 2 March 2010, *op. cit.*, at 96).

- 19 b) In this landmark decision the European Court of Justice clarified the requirements of European Union law that are material to a decision in the present proceedings. To the extent that at the hearing, the Complainants argued that the extinction of refugee status always presupposes the possibility of claiming effective protection by the state, irrespective of a concrete threat of persecution, this position cannot be deduced from the ECJ's decision. Instead, the ECJ differentiates between the reasons for persecution on which recognition of refugee status was based, and other reasons for persecution. As a rule, Article 11(2) of Directive 2004/83/EC applies only with regard to the reasons for persecution on which recognition was based. But with regard to other reasons for persecution, the same assessment applies as in the proceedings for the initial

recognition of refugee status (ECJ, judgment of 2 March 2010, *op. cit.*, at 83 and 88). Therefore the extinction of refugee status does not depend on whether comprehensive protection against any form of persecution is afforded in the country of origin.

20 c) In application of the requirements that proceed from Article 11 of Directive 2004/83/EC and the case law of the European Court of Justice, the court below was ultimately correct in holding that the threat of persecution on the basis of which the Complainants' refugee status was granted had ceased to exist. The Complainants were recognised as refugees by the Federal Office in its decision of 26 February 2002 because at that time the Federal Office held that the Iraqi authorities viewed a mere application for asylum in another country as political opposition. This fact, on which the Complainants' fear of persecution by the state was based, has permanently ceased to exist, according to the findings of the court below. According to those findings, the fall from power of the dictator Saddam Hussein and his regime is irreversible. A return of the Baath regime is viewed as out of the question. Neither the new Iraqi government nor other actors attach measures for persecution to applying for asylum in another country (copy of the decision, p. 7 *et seq.*). Since it is therefore clear that the Complainants no longer need to fear persecution from any side in Iraq because of their application for asylum, this also embraces the finding that a state actor of protection within the meaning of Article 7 of Directive 2004/83/EC is present, in the form of the new Iraqi government, which has eliminated the former state sanctions and abuses relating to applications for asylum, and has therefore taken sufficient appropriate steps to permanently prevent the persecution on which the recognition of refugee status was based.

21 However, in addition to the cessation of the danger of persecution on which the recognition of refugee status was based, a revocation of refugee status presupposes as well that the individual concerned also has no well-founded fear of persecution because of other circumstances. To that extent, Complainant 1 asserted in his brief during the appeal proceedings below that he was threatened with persecution upon his return, independently of the danger of persecution on which the recognition of his refugee status was based. In that connection, he referred in particular to his active membership in the 'Democratic Peo-

ple's Party'. Its leader, he said, has now had to go into hiding for fear of persecution. Additionally, the Complainant fears that he may have difficulties with a Sunni group named 'Bedr' that collaborates with the state. The court below did not give the Complainant a hearing on these other circumstances, but decided by order, without a hearing, that these arguments offered no basis for persecution (copy of the decision, p. 11).

- 22 This finding is based on too narrow a foundation of fact, and does not meet the requirements for a formation of judicial opinion (Section 108(1) Code of Administrative Procedure). Once the Complainant had claimed in the appellate proceedings that he now had to fear persecution in Iraq within the meaning of Article 2 (c) of Directive 2004/83/EC because of other circumstances, the court below should have given him an opportunity to state his case in this regard – for example at an oral hearing – and should then have examined the credibility and materiality of the Complainant's fears on the basis of the sources of information. Only a foundation of fact prepared in this way would have provided a reliable basis for an assessment as to whether there was indeed no reason to believe there might be persecution in this regard.
- 23 This constitutes a breach of substantive law with respect to Complainant 1, because to this extent the court below misconstrued the requirements for a revocation under Section 73(1) sentence 2 of the Asylum Procedure Act. But this error of law also has effects for Complainant 2. To be sure, she did not claim any reasons for persecution of her own. But if her husband continues to be threatened with persecution, and if the revocation of his refugee status is therefore invalid, she would then be entitled to family refugee status under Section 26(4) of the Asylum Procedure Act. In that case, however, her own refugee status also could not be revoked.
- 24 4. With regard to the further course of the proceedings, this Court points out that the court below must in particular clarify whether Complainant 1 is threatened with persecution in Iraq because of other facts or circumstances, now that the danger of persecution connected with the recognition of his refugee status no longer exists. On this point, it must give the Complainant a hearing with regard to the other dangers of persecution that he claims, and must find to what

extent these are based upon the same reason for persecution, in accordance with Article 2 (c) of Directive 2004/83/EC, as the recognition of his refugee status. Here one might especially start from the premise of a danger of persecution linked to membership in the 'Democratic People's Party.' The Complainant claimed in the proceedings for refugee status that even before leaving the country, he had been involved in this party, which was then in opposition to Saddam Hussein's regime. Although the recognition of his refugee status was not founded on this argument, it was nevertheless connected with opposition to the regime at the time – which was presumed by the Iraqi authorities because he had filed an application for asylum – and was therefore connected with political opinion as a reason for persecution. If the Complainant is threatened with persecution in relation to his involvement with the 'Democratic People's Party', this would indeed need to be taken into account in the examination under Article 11(2) of Directive 2004/83/EC, with regard to the question of whether the established change in circumstances – specifically, the cessation of persecution by the Saddam Hussein regime and the establishment of a new government as an actor of protection within the meaning of Article 7 of Directive 2004/83/EC – is sufficiently significant that the Complainant's fear of persecution should no longer be considered well founded (ECJ, judgment of 2 March 2010, *op. cit.*, at 98 et seq.). If the court below concludes that the Complainant is threatened with persecution at least in parts of Iraq, it would finally also have to examine the requirements for availability of an alternative means of escape within the country, under Section 60(1) of the Residence Act in conjunction with Article 8 of Directive 2004/83/EC.

- 25 The disposition as to costs is reserved for the final decision. No court costs will be charged, in accordance with Section 83b of the Asylum Procedure Act. The value at issue proceeds from Section 30 of the Attorneys' Compensation Act.

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Beck

Prof. Dr Kraft

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