Case Summary

Country of Decision/Jurisdiction	**Germany**
Case Name/Title	
Court Name *(Both in English and in the original language)*	Federal Administrative Court
Neutral Citation Number	9 C 36/98
Other Citation Number	
Date Decision Delivered	29/06/1999
Country of Applicant/Claimant	Iraq
Keywords	Credibility; Duty of applicant; Burden of proof; Safe third country
Head Note (Summary of Summary)	Appeal against refusal to grant refugee status on the grounds that the applicants lacked documentation to prove that they have entered Germany by an air route.
Case Summary (150-500)	The complainants were Iraqi nationals of Kurdish origin who – according to their submission – had left their country via Turkey with the help of a facilitator. They claimed to have entered Germany by an air route, but to have given away all written documentation, in particular false passports, upon arrival.
Facts	The Federal Office for the Recognition of Foreign Refugees has dismissed the applicants' application for asylum. The Bayreuth Administrative Court decided in favour of the applicants. On appeal, the Munich Higher Administrative Court overruled the judgement as it found that the complainants have failed to demonstrate that they have not entered Germany via a safe third country, i.e. by an air route as they lacked respective flight documentation. The complainants appealed the judgement to the Federal Administrative Court.
Decision & Reasoning	The Federal Administrative Court found that even though administrative proceedings are governed by the principle of investigation *ex officio*, the participants are obliged to contribute to the establishment of the facts (Section 86(1) sentence 1 Code of Administrative Court Procedures). This rule applies in particular to applicants for asylum (Articles 15 and 26 Asylum Procedures Act). It remains nevertheless incumbent upon the court to investigate the determinative facts, to conduct the necessary fact-finding and to gain a conviction (Sections 86(1), sentence 1, 108 para. 1, sentence 1 Code of Administrative Court Procedures). Basically, the duty of participants to contribute to the establishment of facts does, therefore, not absolve the court from its own duty to investigate. A violation of the participant's duty can, however, lower the standard as regards the courts duty to investigate. It is held to be settled through consolidated practice of the Federal

	Administrative Court that the courts duty to investigate is limited wherever the applicants' submission does not offer any factual cause for further investigation. Accordingly, such a factual cause does not exist whenever an asylum seeker has not coherently demonstrated his good reasons for the threat of persecution in violation of the duty to contribute to the establishment of the facts incumbent upon him (quoting: Federal Administrative Court, decision of 19 March 1991, 9 B 56.91; judgement of 10 Mai 1994, 9 C 434.93). *„Auch in dem vom Untersuchungsgrundsatz beherrschten Verwaltungsprozeß sind die Beteiligten verpflichtet, an der Erforschung des Sachverhalts mitzuwirken (§ 86 Abs. 1 Satz 1 2. Halbsatz VwGO). Im Asylverfahren gilt dies, wie dargelegt, in besonderem Maße für den Asylbewerber (§ 15 und § 25 AsylVfG). Gleichwohl ist und bleibt es Aufgabe des Gerichts, von sich aus den maßgeblichen Sachverhalt zu ermitteln, dazu von Amts wegen die erforderlichen Sachverhaltsaufklärungen zu betreiben und sich seine eigene Überzeugung zu bilden (§ 86 Abs. 1 Satz 1, § 108 Abs. 1 Satz 1 VwGO). Die Mitwirkungspflichten der Beteiligten entbinden das Gericht daher grundsätzlich nicht von seiner eigenen Aufklärungspflicht. Eine Verletzung der Mitwirkungspflichten durch die Beteiligten kann allerdings die Anforderungen an die Ermittlungspflicht des Gerichts herabsetzen. In der Rechtsprechung des Bundesverwaltungsgerichts ist geklärt, daß die gerichtliche Aufklärungspflicht dort ihre Grenze findet, wo das Vorbringen des Klägers keinen tatsächlichen Anlaß zu weiterer Sachaufklärung bietet. So besteht im Asylrechtsstreit Anlaß zu weiterer Sachaufklärung generell dann nicht, wenn der Asylbewerber unter Verletzung der ihn treffenden Mitwirkungspflichten seine guten Gründe für eine ihm drohende politische Verfolgung nicht unter Angabe genauer Einzelheiten schlüssig schildert (vgl. z.B. BVerwG, Beschluß vom 19. März 1991 - BVerwG 9 B 56.91 - Buchholz 310 § 104 VwGO Nr. 25; Urteil vom 10. Mai 1994 - BVerwG 9 C 434.93 Buchholz 402.25 § 1 AsylVfG Nr. 170)."* With respect to the findings of the case, the Federal Administrative Court stated that whether further investigations are to be conducted by the court, in case of a claimed but not proven entry by air route, is a question at the discretion of the trial court judge in every individual case. It held that a cause for further investigation does not exist when the applicant has made no verifiable declaration concerning his entry. If the applicants makes respective declarations the court is bound to consider them. In this context, it is free to assess that the applicant has entered Germany with false documents, that he claims to have given significant documents away upon arrival and why he did not file his application days or weeks later instead of directly upon arrival. *„Ob bei einer vom Asylbewerber behaupteten, aber nicht belegten Einreise auf dem Luftweg weitere Ermittlungen durch das Gericht anzustellen sind, ist eine Frage der Ausübung tatrichterlichen Ermessens im Einzelfall. Ein Anlaß zu weiterer Aufklärung ist beispielsweise dann zu verneinen, wenn der Asylbewerber keine nachprüfbaren Angaben zu seiner Einreise gemacht hat und es damit an einem Ansatzpunkt für weitere Ermittlungen fehlt. Macht der Asylbewerber Angaben, so hat das Gericht diese zu berücksichtigen. Es kann in diesem Zusammenhang insbesondere frei würdigen, daß und aus welchen Gründen der Asylbewerber mit falschen Papieren nach Deutschland*

	eingereist ist, daß und warum er - wie im vorliegenden Fall behauptet - Reiseunterlagen, die für die Feststellung seines Reiseweges bedeutsam sind, nach seiner Ankunft in Deutschland aus der Hand gegeben hat und schließlich, daß und weshalb er den Asylantrag nicht bei seiner Einreise an der Grenze, sondern Tage oder Wochen später an einem anderen Ort gestellt hat." According to the ruling, a court is not inhibited from taking an applicant's submission as true, without taking evidence, particularly in a situation of lack of evidence. However, it is taken to need no further explanation that the trial judge is under an obligation to carefully and critically examine the submission, when – as in the present case – the situation of lack of evidence is submitted to have been caused by the applicant himself. While the applicant is under no duty to provide evidence, the court can assess the alleged negligence in presenting evidence to the detriment of the applicant as in the case of lack of evidence. If the claimed way of entry remains unable to be clarified, the applicant is found to carry the material burden of proof for establishing that he has entered Germany without previous contact to a safe third country according to Article 16(2) Basic Law, Section 26a Asylum Procedures Act. This is held to follow from the object and purpose of the safe third country rule as applicable in material law as well as in general principles of burden of proof. In application of the aforementioned principles, the court of appeals is found to have erroneously negated the applicants entitlement to asylum in application of the safe third country rule on the grounds that the applicants could "not prove" their entry via an air route. This is, in a way, deemed to lead to an imposition of duty to provide evidence upon the applicants, incompatible with federal law.
Outcome	The case was remanded to the court of appeal.