FEDERAL ADMINISTRATIVE COURT

IN THE NAME OF THE PEOPLE

DECISION

BVerwG 10 C 43.07
VGH 13a B 05.30833

Released
on 24 June 2008
by Ms. Förster
Senior Court Assistant
as Clerk of the Court

in the administrative case

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

the Tenth Division of the Federal Administrative Court
upon the hearing of 24 June 2008
Federal Administrative Court Justice Dr. Mallmann sitting as Presiding Justice, assisted by Federal Administrative Court Justices Dr. Dörig, Richter, Beck and Dr. Kraft

decides:

The appeal proceedings are terminated insofar as concerns the withdrawal of refugee status (Nos. 1 and 2 of the decision of the Federal Office for Migration and Refugees of 26 April 2005).

For the remainder (as concerns the petition for a finding of a prohibition on deportation under Section 60 (2), (3) and (7) Sentence 2 of the German Residence Act, or alternatively under Section 60 (5) and (7) Sentence 1 of the Residence Act with reference to Iraq), the decision of the Bavarian Higher Administrative Court of 1 February 2007 is set aside and the matter is remanded to that court for a further hearing and a decision.

The Complainants shall bear half the cost of all levels of the proceedings to date. The remainder of the decision on costs is reserved.

Reasons:

I

1 The Complainants are seeking protection from deportation under European law, on the grounds of danger from an internal armed conflict (in accordance with the conditions for subsidiary protection under Art. 15 Letter c of Directive 2004/83/EC, known as the ‘Qualification Directive’). Alternatively, they seek protection from deportation under German law, on the grounds of the danger to life and limb under Section 60 (7) Sentence 1 of the Residence Act.

2 The Complainants are a married couple, and are Iraqi citizens of Kurdish ethnicity. Complainant 1 was born in January 1967 in Halabaja, in Suleimaniya province. After immigrating to Germany, in June 1996 he filed an application for asylum with the Federal Office for the Recognition of Foreign Refugees (now

the Federal Office for Migration and Refugees) – the ‘Federal Office’. As grounds he cited his involvement in the Communist movement in his native city of Halabaja, which was dominated by militant Islamists, and his entire family’s opposition to the ruling regime of Saddam Hussein. By a final decision dated 12 September 1996, the Federal Office found that the conditions for asylum status under Section 51 (1) of the Aliens Act of 1990 were present.

3 Complainant 2, born in 1974 in Kirkuk, applied in October 1999 for asylum in Germany. As grounds for her application for asylum she cited her father’s and brother’s activities for the Communist party in Iraq, as a consequence of which she herself had undergone interrogation by the security service on multiple occasions. The Federal Office granted Complainant 2 asylum status under Section 51 (1) of the Aliens Act of 1990 in July 2001.

4 By a decision of 26 April 2005 the Federal Office revoked both Complainants’ refugee status because of the change in the political conditions in Iraq. At the same time, it found that there were no prohibitions on deportation under Section 60 (2) through (7) of the Residence Act.

5 In the original proceedings on the complaint, in a judgment of August 2005 the Administrative Court lifted the Federal Office’s withdrawal decision. In a judgment of 1 February 2007, the Higher Administrative Court modified the decision of the court below and rejected the appeal. As grounds, it stated in substance that the revocation was legally correct because following the collapse of Saddam Hussein’s regime in 2003, the Complainants no longer had any need to fear persecution in Iraq such as would justify their refugee status. Nor could the Complainants lay claim to a finding of prohibitions on deportation under Section 60 (2) through (7) of the Residence Act. The court found that the conditions for a prohibition on deportation under Section 60 (2) through (5) of the Residence Act were not present. Nor was there an entitlement to a suspension of deportation under Section 60 (7) Sentence 1 of the Residence Act, because, said the court, if the Complainants returned to Iraq they would not be exposed to any substantial concrete danger to life and limb or liberty. Insofar as the Complainants cited the general situation in Iraq, which also was stated to in-

clude the danger of being the victims of criminal attacks as returnees from abroad, they were relegated to the protection from deportation to Iraq afforded to them by order of the Bavarian Ministry of the Interior. The Complainants had no entitlement, said the court, to subsidiary protection under Art. 15 Letter c of Council Directive 2004/83/EC of 29 April 2004. The court held that in this regard the minimum necessary conflict situation of a certain duration and intensity, which must presumably be comparable to a state of civil war, did not exist. The court held that it was not apparent from the evidence filed in the proceedings that a state of civil war existed nationwide in Iraq. Even if one were to assume that conditions at least similar to a civil war prevailed in Baghdad and other cities, especially the so-called ‘Sunni Triangle’ in central Iraq, this could not lead to an entitlement to protection conferred through a direct application of Art. 18 in conjunction with Art. 15 Letter c of the Directive. This is because, the court reasoned, it appeared possible to escape to other parts of the country within Iraq, and thus internal protection within the meaning of Art. 8 of the Directive was ensured. Apart from that consideration, said the court, the situation established by the order of the Bavarian Ministry of the Interior, which affords comparable protection against deportation in conditions of general danger, presumably also argued against granting subsidiary protection under the Directive.

6 In the present appeal, admitted in full by the Higher Administrative Court, the Complainants – after withdrawing, at the hearing, their appeal against the withdrawal of refugee status – primarily appealed against the fact that the appellate court had denied the presence of the conditions for subsidiary protection under Art. 15 Letter c of Directive 2004/83/EC, which by now has been transposed into German law by Section 60 (7) Sentence 2 of the Residence Act. In particular, they object that the court failed to appreciate the conditions for this protection, and particularly also the possibility of finding internal protection in Iraq.

7 The Respondent objects to the appeal.

II

8 Following the Complainants' withdrawal of the associated part of the appeal, the present appeal proceedings were to be terminated insofar as concerns the withdrawal of refugee status (No. 1 and 2 of the decision of the Federal Office for Migration and Refugees – the 'Federal Office' – of 26 April 2005) (Section 141 Sentence 1, Section 125 (1) Sentence 1, and Section 92 (3) Sentence 1 of the Code of Administrative Court Procedure).

9 The appeal, which now is directed only against the denial of protection against deportation under Section 60 (2) through (7) of the Residence Act, has merit. In this regard, the lower appellate court's decision is founded on a violation of federal law (Section 137 (1) No. 1 of the Code of Administrative Court Procedure). This is because that decision denied that the Complainants were entitled to a finding of a prohibition on deportation under Section 60 (7) Sentence 2 of the Residence Act on grounds that do not withstand review on points of law. For lack of adequate findings in the lower appellate court's decision, this Court itself cannot reach a final decision as to whether such a prohibition on deportation exists, and therefore the case must be remanded to the Higher Administrative Court for a further hearing and a decision (Section 144 (3) Sentence 1 No. 2 of the Code of Administrative Court Procedure).

10 The deciding factor in the legal assessment of whether the Complainants are entitled to the protection against deportation they seek is the new situation of law that has been in effect since the Act Implementing European Union Directives on Residency and Asylum of 19 August 2007 (BGBl I 2007, 1970) – hereinafter: the Directive Implementation Act – went into force on 28 August 2007. The Federal Administrative Court has consistently found that changes in the law that go into effect after a lower appellate court's decision must be taken into account by the court hearing the higher level of appeal on points of law, if the appellate court below would have to take those changes into account if it were deciding the case now. Since the present case concerns a dispute regarding asylum law in which, according to Section 77 (1) of the Asylum Procedure Act, the court below must regularly base its considerations on the situation of fact and law at the date of the last hearing or decision, that court would have to take the new situation of law as a foundation if it were to decide now (see deci-

sion of 11 September 2007 – BVerwG 10 C 8.07 – BVerwGE 129, 251 <257 f.> marginal No. 19).

11 1. The change in the law that took effect during the present appeal proceedings has the consequence that by law, in asylum cases the matter at issue in regard to findings about prohibitions on deportation under Section 60 (2) through (7) of the Residence Act has changed, and in the prior stage of the case, with regard to the dangers alleged by the Complainants in the event of a return to Iraq, the prohibitions on deportation under Section 60 (2), (3) and (7) Sentence 2 of the Residence Act would constitute a separate matter at issue or a separable portion of the matter at issue, which must be reviewed prior to the other prohibitions on deportation under the laws concerning foreigners that relate to country of origin. At this Court's suggestion, the Complainants responded allowably to this change in the legal situation during the present appeal proceedings, and in conformity with the new legal situation, amended the details of their petitions such that now they primarily claim an obligation to find that there is a prohibition on deportation under Section 60 (2), (3) and (7) Sentence 2 of the Residence Act (meeting the conditions for subsidiary protection under Art. 15 of Council Directive 2004/83/EC of 29 April 2004 regarding the 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 conferred – Official Journal L 304 p. 12; corr. Official Journal of 5 August 2005, L 204 p. 24 – the 'Qualification Directive'), and in the event that their complaint fails in this regard, as an alternative they seek an order to find that there is a prohibition on deportation under Section 60 (5) and (7) Sentence 1 of the Residence Act in regard to Iraq. This differentiation takes account of the change in the matter at issue since the Directive Implementation Act went into force, in regard to findings as to prohibitions on deportation under Section 60 (2) through (7) of the Residence Act, and it now conforms to the typical situation of interests of a complainant – as in the prior stage of the case – seeking protection against deportation under the laws governing foreigners after a final withdrawal of asylum status in regard to his country of origin.

12 Under the old legal situation that applied before the Immigration Act went into force on 1 January 2005, the decisions of the Federal Administrative Court consistently proceeded on the assumption that in deciding about the existence of an impediment to deportation under Section 53 (1), (2) and (4) of the Aliens Act, as well as in deciding about the presence of the requirements of fact under Section 53 (6) Sentence 1 of the Aliens Act in a given case in asylum proceedings, these matters in controversy were independent of one another, or at least separable, and that according to the recognizable regulatory intent of the Asylum Procedure Act and the Aliens Act they stood in a particular ranking, in the sense that in granting protection against alleged dangers in the country of origin or another country to which deportation is proposed, priority should be given to the level that provides the more comprehensive protection. Consequently in asylum proceedings before the Immigration Act took effect, petitions for protection against deportation under the laws regarding foreigners – unless by exception it was clearly recognizable that such petitions should be restricted – should pertinently be construed in the sense (Section 86 (3), Section 88 of the Code of Administrative Court Procedure) that – in each case with regard to the country to which deportation is intended – protection against impending deportation should be sought primarily under Section 53 (1), (2) and (4) of the Aliens Act, and that protection against deportation under Section 53 (6) Sentence 1 of the Aliens Act should be sought as an alternative at the most (see decision of 15 April 1997 – BVerwG 9 C 19.96 – BVerwGE 104, 260 <262 f.>).

13 Here we may set aside the question of whether the new provisions of the Immigration Act, which have been in force since 1 January 2005, have changed anything in this picture. In any event, since the Directive Implementation Act took effect, the key considerations in deciding the matter at issue result in a reassessment. In this Act, the German Parliament amended the prohibitions on deportation that have been applicable to foreigners since the Immigration Act, under Section 60 (2) through (7) of the Residence Act, and incorporated requirements on subsidiary protection from Directive 2004/83/EC into Section 60 (2), (3) and (7) Sentence 2 of the Residence Act (see statement of reasons for the federal government’s bill on Section 60 of the Residence Act, BTDrucks 16/5065 p. 186). Here the legislators laid down the positive conditions for sub-

sidiary protection status under Art. 15 of the Directive as absolute prohibitions on deportation, and only the Federal Office is to decide about whether those conditions are present in the case of applicants for asylum. However, the new legislation treated the reasons for exclusion from subsidiary protection status under Art. 17 of the Directive as reasons to refuse a residence permit under Section 25 (3) of the Residence Act, and here the foreigners authority is to make the decision, albeit with the involvement of the Federal Office. The consequence is that in regard to the country of origin, the prohibitions on deportation under the Qualification Directive's concept of subsidiary protection constitute a matter in controversy independent from the other (national) prohibitions on deportation under the laws concerning foreigners, and according to the typical situation of interests of a person seeking protection, a finding regarding prohibitions under the Directive must be given priority over some other finding about a prohibition on deportation relating to the person's country of origin under the laws concerning foreigners. This is because a finding by the Federal Office that there is a prohibition on deportation, which at the same time bindingly establishes that the person meets the conditions for subsidiary protection status under the Directive, regularly gives the person seeking protection broader rights than a finding of any other (national) prohibition on deportation under the laws concerning foreigners. For example, under Art. 24 (2) of the Directive, a person entitled to subsidiary protection is also entitled to be issued a residence permit unless such a permit is opposed by compelling reasons of national security or public order. By contrast, a finding by the Federal Office of a prohibition on deportation under the German laws concerning foreigners has the consequence merely that the person is to be granted a residence permit in the absence of the reasons for refusing such a permit as listed under Section 25 (3) Sentence 2 of the Residence Act (see Section 25 (3) Sentence 1 of the Residence Act), and thus even if it is found that there are no reasons to deny protection, the foreigners authority retains a (residual) discretionary power, albeit limited to atypical cases. It is true, to be sure, that in the case of a person entitled to subsidiary protection under Directive 2004/83/EC, Section 25 (3) of the Residence Act must be interpreted in conformity with the Directive as meaning that a residence permit may be denied only if opposed by compelling reasons of national security or public order. Nevertheless, because of the distribution of du-

ties between the Federal Office and the foreigners authority as prescribed by law, this interpretive requirement presupposes that the foreigners authority must be able to distinguish whether a prohibition on deportation found by the Federal Office under the laws concerning foreigners is founded on the conditions under Art. 15 of the Directive, or only on German law. It would contravene the regulatory purpose of subsidiary protection under the Directive if in findings to be made under Section 60 (2) through (7) of the Residence Act by the Federal Office in regard to the country of origin, the prohibitions on deportation established by the implementation of Art. 15 of the Directive were treated as one single, indivisible matter in controversy conjointly with the purely national prohibitions on deportations, since in such a case the Federal Office could leave undecided whether the conditions established under Art. 15 of Directive 2004/83/EC were present, and could limit itself to a finding as to a national prohibition on deportation. Additionally, the presumption that these are separate matters or portions of matters at issue tends to be more consistent with the recognition of subsidiary protection status provided under Art. 18 of Directive 2004/83/EC.

14 A finding of a prohibition on deportation under the conditions for subsidiary protection under Art. 15 of Directive 2004/83/EC, which is thus typically to be sought as a priority by a person seeking protection, subsumes the prohibitions on deportation governed by Section 60 (2), (3) and (7) Sentence 2 of the Residence Act. The latter prohibitions tie into circumstances that are deemed serious harm under Art. 15 of the Directive, and thus can be allocated in terms of content to the regulatory sphere of subsidiary protection under the Directive. Consistently with this fact, the German legislators also provided in Section 60 (11) of the Residence Act that certain provisions of the Qualification Directive would apply directly only for these prohibitions on deportation. Subsidiary protection under the Directive furthermore refers only to risks that a person seeking protection faces in his country of origin (Art. 2 Letter e of the Directive). The Directive defines the country of origin as the country or countries of nationality or, for stateless persons, of former habitual residence (Art. 2 Letter k of the Directive). If the individual seeking protection is threatened with deportation to a different country and cites dangers within the meaning of Section 60 (2) through (7) of the Residence Act in regard to this (third) country, the applicability of the

Directive is not involved; the case then pertains solely to a grant of national protection against deportation under the laws concerning foreigners.

15 At any event, since the Directive Implementation Act went into force, protection against deportation under German laws concerning foreigners has at the same time lost its former distinction between mandatory impediments to deportation (formerly Section 53 (1), (2) and (4) of the Aliens Act) and optional impediments to deportation (formerly Section 53 (6) of the Aliens Act). This is because in the case of applicants for asylum, and provided the requirements of law have been met, the Federal Office is now also responsible for the discretionary decision under the laws concerning foreigners as to whether deportation should not be ordered, in accordance with Section 60 (7) Sentence 1 of the Residence Act (see decision of 11 September 2007 – BVerwG 10 C 8.07 – BVerwGE 129, 251 <261> marginal No. 23). Hence a positive decision by the Federal Office under this (residual) discretionary power now results in the same legal consequences as would a finding of some other prohibition on deportation under the country's laws concerning foreigners (see Section 25 (3) and Section 59 (3) of the Residence Act). Thus the prohibitions on deportation under the German laws concerning foreigners – with reference to the country to which the individual in question is to be deported – are a single, indivisible matter at issue.

16 2. In keeping with the Complainants' differentiated appeal, a decision must first be made on the principal application for an order to find a prohibition on deportation with regard to Iraq under Section 60 (2), (3) and (7) Sentence 2 of the Residence Act. The present appeal has not raised any objection in regard to the Higher Administrative Court's denial of a prohibition on deportation under Section 60 (2) and (3) of the Residence Act, so that only the claim founded on Section 60 (7) Sentence 2 of the Residence Act remains to be examined. The Higher Administrative Court has made mistakes of law in interpreting several of the conditions for granting this protection against deportation as provided for under European law. The court's decision is founded on a breach of the law.

17 The prohibition on deportation under Section 60 (7) Sentence 2 of the Residence Act, newly included in the Residence Act by the Directive Implemen-

tation Act of 19 August 2007, serves to implement the provision for subsidiary protection under Art. 15 Letter c of Directive 2004/83/EC (see the statement of reasons for the German government's bill of 23 April 2007 concerning Section 60 of the Residence Act, BTDrucks 16/5065 p. 187, regarding Letter d). Under Section 60 (7) Sentence 2 of the Residence Act, deportation of a foreigner to another country is not to be ordered if, as a member of the civilian population, he would be exposed there to a substantial individual danger to life or limb as a result of an international or internal armed conflict. Despite minor differences in wording, the provision follows the model of Art. 15 Letter c of the Directive (see 3b below regarding the characteristic of a threat 'by reason of indiscriminate violence', which is not explicitly mentioned in Section 60 (7) Sentence 2 of the Residence Act).

18 a) The Higher Administrative Court denied that the conditions for a prohibition on deportation as now contained in Section 60 (7) Sentence 2 of the Residence Act were present, primarily on the grounds that there was no nationwide armed conflict within the meaning of this provision in Iraq (p. 19 of the copy of the decision). Here the court applied overly rigorous standards for the presence of such a conflict.

19 aa) Section 60 (7) Sentence 2 of the Residence Act – like the provision of Art. 15 Letter c of the Directive that it implements – presupposes an international or internal armed conflict. Under those terms, exposed civilians are not recognised as needing protection until conflicts come to have such a nature. The concept of international and internal armed conflict must be interpreted in the light of the importance of this term in humanitarian international law. In this regard, the four Geneva Conventions on International Humanitarian Law of 12 August 1949 (Sartorius II No. 53 ff.) must be consulted in particular. Interpreting the terms used in Section 60 (7) Sentence 2 of the Residence Act and Art. 15 Letter c of the Directive consistently with international humanitarian law conforms to the context of the Directive as expressed in the Directive's Recitals 11 and 25, which refer to binding the Member States to meet their obligations under international law. The statement of reasons for the bill for the Directive Implementation Act also indicates that the term 'armed conflict' is to be under-

stood as a concept from international law (see statement of reasons for the federal government's bill, loc. cit.).

20 The subject matter of the four Geneva Conventions of 1949 – GC 1949 – is the amelioration of the condition of the wounded and sick in armed forces in the field (1st Convention – BGBl 1954 II p. 783), of wounded, sick and shipwrecked members of armed forces at sea (2nd Convention – BGBl 1954 II p. 813), the treatment of prisoners of war (3rd Convention – BGBl 1954 II p. 838) and the protection of civilian persons in time of war (4th Convention – BGBl 1954 II p. 917, corr. 1956 II p. 1586). Virtually every country in the world has signed the Conventions, which can therefore also be viewed as customary international law (see Greenwood, in: Fleck, *Handbuch des humanitären Völkerrechts in bewaffneten Konflikten* [Handbook of International Humanitarian Law in Armed Conflicts], Munich 1994, p. 20 f. marginal No. 125). Article 3 of each of the Conventions describes internal armed conflict using identical wording; at the same time, provisions are included for the humane treatment of persons taking no active part in the hostilities, as well as for the care of the sick and wounded, including the involvement of employees of the International Red Cross. Article 3 of GC 1949 defines internal armed conflict only generally, as 'armed conflict not of an international character occurring in the territory of one of the High Contracting Parties'.

21 Further specificity of the term is provided by the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts, which was signed on 8 June 1977 (Additional Protocol II – AP II). Additional Protocol I (AP I), of the same date, relates to international armed conflicts (BGBl 1990 II p. 1551), while Additional Protocol II relates to non-international armed conflicts (BGBl 1990 II p. 1637). Additional Protocol II defines non-international armed conflict in its Art. 1 No. 1, and in No. 2 it distinguishes that conflict from situations of 'internal disturbances and tensions' that are not covered by the definition (on the genesis of the accords, see Ipsen, *Völkerrecht* [International Law], 5th ed. 2004, p. 1210 - 1220). The provision reads as follows:

Art. 1 Material field of application

1. This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions or application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organised armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

2. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.

22 Accordingly, an internal armed conflict within the meaning of international humanitarian law exists at any rate if the conflict meets the criteria of Art. 1 No. 1 of AP II. And it does not exist if the exclusionary conditions of Art. 1 No. 2 of AP II are present, and thus there are only internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, which are not armed conflicts. In internal crises falling in between these two forms of manifestation, it is this Court’s opinion that the presumption of an armed conflict within the meaning of Art. 15 Letter c of the Directive is not automatically excluded. But in any event, to satisfy the conditions the conflict must present a certain degree of intensity and permanence. Typical examples are civil-war conflicts and guerrilla wars. The concept of ‘armed conflict’ under international law was chosen to show clearly that only conflicts of a certain magnitude fall within the purview of this provision (see statement of reasons for the federal government’s bill, loc. cit.). Here there is no need for a final decision as to whether the parties to the conflict must be so highly organised as would be necessary to meet the obligations under the Geneva Conventions of 1949 and for the involvement of the International Red Cross. The orientation toward criteria of international humanitarian law runs up against its limits in any case where it is contradicted under Art. 15 Letter c of the Directive by the purpose of

granting protection to persons seeking refuge in third countries (see the decision of the UK Asylum and Immigration Tribunal – AIT – which is responsible for appeals in asylum matters, of 1 February 2008, KH <Article 15(c) Qualification Directive> Iraq CG [2008] UKAIT 00023, marginal No. 54 <not final>). But this does not mean that a so-called ‘low intensity war’ cannot also have the quality of an internal conflict within the meaning of Art. 15 Letter c of the Directive, especially because the concept does not seem very precise (for a different opinion, see Marx, *Handbuch zur Flüchtlingsanerkennung - Qualifikationsrichtlinie* [Handbook on Refugee Status – Qualification Directive], status: November 2006, Section 40 marginal No. 7 – 18, and concurring, the Schleswig Higher Administrative Court, decision of 21 November 2007 – 2 LB 38/07 – juris; Bothe argues for the exclusion of ‘low level violence’ from Art. 3 of the GC 1949 in: Graf Vitzthum, *Völkerrecht* [International Law], 4th ed., 2007, p. 722, marginal No. 123, with further authorities).

23 Further bases for the interpretation of the concept of internal armed conflict may be derived from international criminal law, particularly from the decisions of the International Criminal Courts (see, for example, the decision of the Appeals Chamber of the International Criminal Court for the former Yugoslavia of 2 October 1995, ICTY-Appeals Chamber Prosecutor v. Tadic., No. IT-94-1, www.un.org/icty/tadic/appeal/decision-e/51002.htm, marginal No. 70; quite recently, decision of 3 April 2008, ICTY-Trials Chamber Prosecutor v. Haradinaj et al., No. IT-04-84-T, www.un.org/icty/haradinaj/trialc/judgement/tcj080403e.pdf, marginal No. 49).

24 However, criminal violence is presumably not to be taken into account in determining whether an internal armed contract exists, if the violence is not committed by one of the parties to the conflict (see also the British AIT in its decision of 1 February 2008, KH <Article 15(c) Qualification Directive> Iraq CG [2008] UKAIT 00023, marginal No. 95 ff., although it discusses this aspect in the context of the qualifying condition of ‘indiscriminate violence’; see also the International Criminal Courts’ distinction between a ‘war crime’ and ‘purely domestic offence’, for example in the decision of the Appeals Chamber of the International Criminal Court for the former Yugoslavia of 12 June 2002 – ICTY-Appeals

Chamber Prosecutor v. Kunarac et al.; No. IT-96-23&23/1, www.un.org/icty/kunarac/appeal/judgement/index.htm, marginal No. 58 f.).

25 bb) In the appealed decision, the Higher Administrative Court improperly applied the standard of a nationwide situation of conflict as a condition for granting protection under Art. 15 Letter c of the Directive (p. 19 of the copy of the decision). But an internal armed conflict also exists if the above conditions are satisfied in only part of the country's territory. This is already evident from the fact that according to Section 60 (11) of the Residence Act, the rules for internal protection under Art. 8 of the Directive also apply to a finding as to a prohibition on deportation under Section 60 (7) Sentence 2 of the Residence Act. But someone who has fled from his country of origin can be relegated to an internal alternative for protection within that country only if that alternative for protection lies outside the territory of an internal armed conflict. This acknowledges that an internal conflict need not extend to the entire territory of the country. Under Art. 1 of AP II as well, it is sufficient if the armed groups commit acts of war in a 'part of its territory'.

26 b) To the extent that the Higher Administrative Court also found there was no prohibition on deportation under Section 60 (7) Sentence 2 of the Residence Act, which now applies, on the grounds that even assuming an armed conflict in parts of Iraq, the Complainants could in any case find internal protection in other parts of Iraq (p. 19 of the copy of the decision), this reason is likewise incompatible with federal law, because it was based on too narrow a foundation of fact.

27 Under Section 60 (11) of the Residence Act, the possibility of finding internal protection in the case of a claimed prohibition on deportation within the meaning of Section 60 (7) Sentence 2 of the Residence Act is to be determined in accordance with Art. 8 of Directive 2004/83/EC. Under Art. 8 (1), an applicant is not in need of international protection if in a part of the country of origin there is no real risk of suffering serious harm and the applicant can reasonably be expected to stay in that part of the country. Additionally, under Art. 8 (2) of the Directive, the general circumstances prevailing in that part of the country and the

personal circumstances of the applicant at the time of the decision must be taken into account. No such findings are evident in the decision of the appellate court below. That decision even omits findings as to what regions of Iraq offer no danger to the Complainants within the meaning of Art. 8 (1) of the Directive. The Higher Administrative Court merely took into consideration that ‘in Baghdad and other cities, especially in the so-called “Sunni Triangle” of central Iraq, conditions at least similar to a civil war prevail’ (p. 19 of the copy of the decision), but said nothing as to whether and why there was no real risk of suffering serious harm in other parts of Iraq yet to be specified. The general referral to the Situation Report of the German Foreign Office of 11 January 2007, with no indication of what findings of fact are to be consulted regarding escape to what parts of Iraq, does not suffice. To that extent, the comments of the appellate court also do not suffice in the context of the withdrawal of refugee status.

28 Furthermore, the Higher Administrative Court also made no findings of fact as to whether and why the Complainants could reasonably be expected to escape to the regions of Iraq yet to be concretely specified, on the grounds of the general circumstances prevailing there and the personal circumstances of the Complainants. Among the personal circumstances, it would also have been necessary to take into account the Complainants’ region of origin, and whether in the territory of internal protection, in any case, they have an assurance of at least a minimum livelihood (on the further conditions for internal protection under Art. 8 of the Directive, see the decision of 29 May 2008 – BVerwG 10 C 11.07 – planned for publication in BVerwGE, marginal No. 3b and 4b).

29 c) The decision of the appellate court below also does not withstand review on points of law in that the Higher Administrative Court supplementarily based its decision on the finding that ‘presumably also the situation under the order described above, which offers comparable protection in the conditions of general danger connected with an armed conflict,’ is opposed to a grant of subsidiary protection under the Directive (p. 19 of the copy of the decision). Here the Higher Administrative Court refers to an order from the Bavarian Ministry of the Interior from 2003 and subsequent regulations, under which the deportation of Iraqi citizens in general was suspended (p. 18 of the copy of the decision).

30 The Higher Administrative Court should not have declined to review the substantive conditions for a prohibition on deportation under Section 60 (7) Sentence 2 of the Residence Act by simply referring to the aforementioned situation under the order. This is because the provision now embodied in Section 60 (7) Sentence 3 of the Residence Act, which relegates foreigners seeking protection against deportation in the case of general danger to a suspension of deportation by order of the foreigners authorities, must be interpreted consistently with the Directive as not applying to those situations in which the conditions for granting subsidiary protection under Art. 15 Letter c of Directive 2004/83/EC have been met.

31 Under Section 60 (7) Sentence 3 of the Residence Act, dangers within the meaning of Section 60 (7) Sentence 1 or Sentence 2 of the Residence Act, to which the population, or the segment of the population to which the foreigner belongs, are generally exposed, are to receive due consideration in dispositions pursuant to Section 60a (1) Sentence 1 of the Residence Act. Section 60a (1) Sentence 1 of the Residence Act authorises the supreme Land authority to suspend the deportation of foreigners from specific states, or of categories of foreigners defined by any other means, for a maximum of six months. A foreigner who meets the conditions under Art. 15 Letter c of the Directive – as has already been discussed under 1 above – is entitled to a residence permit in accordance with Art. 24 (2). It would be contrary to the terms of Directive 2004/83/EC if a foreigner entitled to subsidiary protection under Art. 15 Letter c of the Directive, and not covered by the conditions for exclusion under the second half of the sentence in Art. 24 (2), were not granted a residence permit, but only a sufferance through a suspension of deportation under Section 60a of the Residence Act. For that reason, Section 60 (7) Sentence 3 of the Residence Act must be construed in conformity with the Directive as meaning that if the conditions for subsidiary protection under Art. 15 Letter c of the Directive are met, the blocking effect will not apply. The Higher Administrative Court therefore should not have omitted to review the substantive conditions for a prohibition on deportation under Section 60 (7) Sentence 2 of the Residence Act simply because

according to its findings, in Bavaria there was an order suspending deportations that was in the Complainants' favour.

32 The interpretation of Section 60 (7) Sentence 3 of the Residence Act in conformity with the Directive does not affect the consistent rulings of the Federal Administrative Court that when protection from deportation under Section 60 (7) Sentence 1 of the Residence Act is granted to foreigners under national law in situations of general danger, those foreigners fundamentally can be relegated to a decision by the highest Land authority under Section 60a of the Residence Act, and in the absence of such a decision, the Federal Office arrived at a finding as to a prohibition on deportation under Section 60 (7) Sentence 1 of the Residence Act only if needed to avert an unconstitutional gap in protection (see decision of 12 July 2001 – BVerwG 1 C 2.01 – BVerwGE 114, 379 <381 f.>; decisions of 23 August 2006 – BVerwG 1 B 60.06 – Buchholz 402.242 Section 60 (2) ff. of the Residence Act. No. 19, marginal No. 4, and of 27 November 2007 – BVerwG 10 B 119.07 – juris, marginal No. 4).

33 3. Since the lower appellate court's decision does not include adequate findings as to the conditions under Section 60 (7) Sentence 2 of the Residence Act, which implements Art. 15 Letter c of Directive 2004/83/EC, the proceedings must be remanded to the Higher Administrative Court for a further hearing and a decision. In the renewed appellate proceedings, the Higher Administrative Court will have to supply the missing findings as to the presence of an internal armed conflict and the further conditions under Section 60 (7) Sentence 2 of the Residence Act, including the possibility of obtaining internal protection under Section 60 (11) of the Residence Act in conjunction with Art. 8 of the Directive. In so doing, it will have to take account of the following aspects:

34 a) If the appellate court reaches the conclusion that an internal armed conflict exists in Iraq, nationwide or regionally, for example in the Complainants' region of origin, it will then further have to examine whether this conflict poses a substantial individual danger to the life and limb of the Complainants, as members of the civilian population within the meaning of Section 60 (7) Sentence 2 of the Residence Act. The distinguishing characteristics of 'substantial individual dan-

ger to life and limb' are equivalent to those of a 'serious and individual threat to [a civilian's] life or person' within the meaning of Art. 15 Letter c of the Directive. In deciding, the court must examine whether the threat arising for a large number of civilians out of an armed conflict – and thus a general threat – is so concentrated in the person of the Complainants as to represent a substantial individual danger within the meaning of Section 60 (7) Sentence 2 of the Residence Act. In this Court's opinion, even a general danger that proceeds from an armed conflict may be concentrated individually, and may thus satisfy the conditions of Section 60 (7) Sentence 2 of the Residence Act and Art. 15 Letter c of the Directive. There may be doubt under Community law regarding under what conditions this may be the case, and ultimately that doubt would have to be clarified by the European Court of Justice. To that extent, this Court also refers to the now-pending proceedings on the reference from the Dutch Raad van State (C-465/07, filed on 17 October 2007, OJ C 8 of 12 January 2008, p. 5).

35 However, this Court proceeds on the assumption that normally an internal armed conflict does not have such a density of danger that all residents of the involved territory will be personally seriously exposed. This proceeds, among other sources, from Recital 26 of Directive 2004/83/EC, according to which risks to which a population of a country or a section of the population is generally exposed do normally not create in themselves an individual threat which would qualify as serious harm. However, such an exposure of the entire population or an entire section of the population is not excluded, as is already evident from the wording 'normally' used in Recital 26. The adverb 'normally', according to information from the representative of the German Ministry of the Interior in the hearing before this Court, was added later to Recital 26, which had been proposed by Germany, so as to mitigate the stricter version proposed by Germany. But a general danger can in particular be made more acute by individual circumstances that increase the danger. Such individual circumstances that increase the danger may also proceed from one's membership in a group. In this context for Iraq, lower courts' decisions have mentioned membership in one of the political parties there, for example, or membership in the occupational group of journalists, professors, physicians and artists (see Mannheim Higher Administrative Court, decision of 8 August 2007 – A 2 S 229/07 – NVwZ 2008, 447

<449>). However, in the case of soldiers, it must be taken into account that persons with combatant status are not considered members of the civilian population within the meaning of Section 60 (7) Sentence 2 of the Residence Act, and therefore are not protected by this provision. At the same time, this Court remarks that from its viewpoint the general threats to life that are purely a consequence of an armed conflict – for example, through a resulting deterioration in supply conditions – cannot be included in the assessment of the density of danger (see also Funke-Kaiser, InfAuslR 2008, 90 <94>). For the rest, similar criteria may apply for the finding as to density of danger as apply in asylum law for the determinative concept there of density of persecution in the case of the persecution of a group (see decisions of 12 June 2007 – BVerwG 10 C 24.07 – Buchholz 402.25 Section 73 of the Asylum Procedure Act, No. 28 marginal No. 21 through 23, and of 18 July 2006 – BVerwG 1 C 15.05 – BVerwGE 126, 243 marginal No. 20 through 25), unless opposed by particular characteristics of subsidiary protection under Section 60 (7) Sentence 2 of the Residence Act (on the requirement of density of danger, see also Münster Higher Administrative Court, decision of 21 March 2007 – 20 A 5164/04.A – juris, marginal No. 30; Schleswig Higher Administrative Court, decision of 21 November 2007 – 2 LB 38/07 – juris, marginal No. 49). However, the Complainants must present cogent reasons why, if they return to Iraq, they would in fact be exposed to a threat as described in Art. 15 Letter c of the Directive (see Art. 2 Letter e of the Directive).

36 b) In examining whether the Complainants must fear substantial individual danger to life and limb within the meaning of Section 60 (7) Sentence 2 of the Residence Act, the Higher Administrative Court will also have to take into account that the Complainants must be threatened with danger as a consequence of ‘indiscriminate violence’. Although this requirement is not mentioned explicitly in Section 60 (7) Sentence 2 of the Residence Act, the statement of reasons for the government’s bill points out that the provision encompasses ‘the distinguishing characteristics under Article 15 Letter c of the Qualification Directive’, and explicitly mentions as the regulatory content of Art. 15 Letter c of the Directive, which is to be implemented, the granting of subsidiary protection ‘in cases of indiscriminate violence’ in connection with armed conflicts (see statement of

reasons for the federal government's bill of 23 April 2007, loc. cit., p. 187 under Letter d). This Court views the question of the content of this characteristic as a matter of doubt under European law that ultimately can be clarified only by the European Court of Justice.

37 It is conceivable that this characteristic – similarly to the concept of internal armed conflict – must be construed in the light of international humanitarian law. This interpretation is argued by the British Asylum and Immigration Tribunal in its decision of 1 February 2008 (KH <Article 15(c) Qualification Directive> Iraq CG [2008] UKAIT 00023, marginal No. 85 through 94), and following the lead of that tribunal, by the representatives of the German Federal Ministry of the Interior in the hearing before this Court. According to them, the concept of what in English is termed 'indiscriminate violence' is intended to embrace only those acts of violence that are committed in violation of the rules of international humanitarian law, particularly the Geneva Conventions of 1949 and the Additional Protocols of 1977 adopted to clarify them. This particularly refers to violence that does not discriminate between civilian and military targets (in English, 'indiscriminate attacks' – see Art. 51 (4) and 5 AP I and Art. 13 AP II). It is additionally supposed to include attacks that are not directed against the opposing party in the conflict, but against the civilian population (on this, see Bothe, in: Graf Vitzthum, *Völkerrecht*, 4th ed. 2007, p. 689 ff. marginal No. 65 f.). The concept furthermore extends to acts of violence in which the means and methods disproportionately strike the civilian population (such as chemical weapons). If the appellate court arrives at the conclusion that the Complainants are exposed to acts of violence contrary to international law within the meaning described in further detail here, the characteristic of indiscriminate violence that must be included in an examination under Section 60 (7) Sentence 2 of the Residence Act may well be satisfied anyway.

38 According to a different position, the characteristic of 'indiscriminate violence' is intended to set a limit on the conditions established for the existence of substantial individual danger within the meaning of Section 60 (7) Sentence 2 of the Residence Act. This is argued on the basis of the absence of specific targets in indiscriminate acts of violence (French term: *violence aveugle* – blind violence).

If acts of violence are not committed specifically against certain persons or groups of persons, but arbitrarily, those exposed might as a general rule present no individualising characteristics that would distinguish them from others (see Hruschka/Lindner, NVwZ 2007, 645 <649>). A similar direction is pursued by the further opinion that the requirement of indiscriminate violence is intended to limit the scope of application of Recital 26 of the Directive, according to which general risks by themselves do not normally constitute an individual threat. If the situation in the country of origin is characterised by patterns of indiscriminate violence, a situation of purely general violence is alleged not to prevail (see Marx, loc. cit., marginal No. 50).

39 If the appellate court finds that the matters of doubt under European law as addressed above are deemed material to a decision on the basis of its findings of fact, that court must permit a further appeal, so as to open the way for this Court to request a preliminary ruling from the European Court of Justice.

40 4. Since, in the remanded proceedings, the appellate court must examine whether the Complainants are entitled to protection against deportation under Section 60 (7) Sentence 2 of the Residence Act, this Court did not have to decide on the claim asserted here as an alternative, for protection against deportation under Section 60 (7) Sentence 1 of the Residence Act.

41 The decision as to costs is founded on Section 154 (1) and Section 155 (2) of the Code of Administrative Court Procedure, since the Complainants withdrew their appeal in regard to the withdrawal of their refugee status, and to that extent the rejection of their appeal by the appellate court has become final, so that they must bear the expense of the first and second levels of the proceedings as the losing party. In regard to the finding as to prohibitions on deportation under Section 60 (2) through (7) of the Residence Act, the decision on costs is reserved for the final decision. No court costs will be charged, pursuant to Section 83b of the Asylum Procedure Act. The amount at issue proceeds from Section 30 of the Act on Attorneys' Fees.

Dr. Mallmann Prof. Dr. Dörig Richter

Beck Prof. Dr. Kraft

Field: BVerwGE: Yes

Asylum law Professional press: Yes

Sources in Law:

Residence Act	Section 25 (3), Section 60 (1), (7) Sentence 2 and 3, (11), Section 60a
Directive 2004/83/EC	Art. 2 Letter b, Art. 8, 15 Letter c, Art. 17, 18
Geneva Conventions of 12 August 1949	Art. 3
Additional Protocol I of 8 June 1977	Art. 51
Additional Protocol II of 8 June 1977	Art. 1, 13

Headwords:

Protection from deportation because of internal armed conflict (Iraq); indiscriminate violence; serious and individual threat; substantial individual danger; subsidiary protection; international humanitarian law; matter at issue in protection against deportation under European and German law.

Headnotes:

1. Since the Directive Implementation Act has gone into force, an application for an order to find a prohibition on deportation under Section 60 (2) through (7) of the Residence Act, with reference to the country of origin, can be pertinently interpreted in asylum proceedings to the effect that a finding of a prohibition on deportation under Section 60 (2), (3) or (7) Sentence 2 of the Residence Act is to be sought first, and as an alternative, a finding of a prohibition on deportation is to be sought under Section 60 (5) or (7) Sentence 1 of the Residence Act.

2. The concept of international or internal armed conflict in Section 60 (7) Sentence 2 of the Residence Act and Art. 15 Letter c of Directive 2004/83/EC (known as the ‘Qualification Directive’) is to be construed taking international humanitarian law into account (see in particular the four Geneva Conventions on International Humanitarian Law of 12 August 1949 and Additional Protocol II of 8 June 1977).

3. An internal armed conflict within the meaning of Section 60 (7) Sentence 2 of the Residence Act and Art. 15 Letter c of Directive 2004/83/EC need not extend to the entire territory of the country.

4. The provision of Section 60 (7) Sentence 3 of the Residence Act, relegating foreigners seeking protection from deportation to suspensions of deportation by order of the foreigners authorities, is to be construed, in keeping with the Directive, as not applying to those cases in which the conditions for granting subsidiary protection under Art. 15 Letter c of Directive 2004/83/EC are met.

Decision of the 10th Division of 24 June 2008 – BVerwG 10 C 43.07

I. Munich Administrative Court, 09.08.2005 – Case No.: VG M 3 K 05.50773 -
II. Munich Higher Administrative Court, 01.02.2007 – Case No.: VGH 13a B 05.30833 -