

Opinion

German Courts and their Understanding of the Common European Asylum System

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1. Introduction

The member states of the European Union have decided to create a Common European Asylum System (CEAS). Europe's common asylum policy has its foundation in article 78 of the Treaty on the Functioning of the European Union (TFEU). According to that provision, the EU shall develop legislation for a common European asylum system comprising inter alia a uniform status of asylum and of subsidiary protection, common procedures for the granting and withdrawing of that status, and criteria and mechanisms for determining which member state is responsible for considering an asylum application. A large number of directives and regulations have been enacted in the last ten years. National laws have had to be changed and adjusted to the CEAS. The process of unification began in 2004 with the Directive on the criteria to qualify as a refugee (Qualification Directive - QD), and was continued in 2005 with the Asylum Procedures Directive (Procedures Directive - PD), and has been accompanied, since 2003, by the Dublin-Regulation, which determines the competent member state to decide on the individual asylum claim. The Qualification Directive was amended in 2011, the Procedures Directive and the Dublin Regulation in 2013. The national courts have to apply the law of the European Union, and are functional Union Law Judges. This is a great challenge, which leads to a judicial dialogue between national courts of different member states, but also between national courts and the Court of Justice of the European Union (CJEU). The CJEU can be asked by national courts to give a binding interpretation on Union Law (article 267 TFEU). This Opinion describes how German courts - especially the German Federal Administrative Court (GFAC) as the national supreme court in asylum law - have coped with the problem of interpreting supranational asylum law, applicable in more than twenty member states of the

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EU. The author has played an active role in that process as one of the five judges in the asylum senate of the GFAC for more than ten years. The Opinion will refer to:

- the criteria to qualify as a refugee,
- the criteria for exclusion from refugee status,
- the criteria for cessation of refugee status,
- the organization of the asylum system according to the Dublin-Regulation.

2. The definition of who qualifies to be a refugee

To qualify as a refugee a person must meet the standards as prescribed in the Geneva Convention of 1951, the EU Qualification Directive of 2004 (QD) and the provisions of national law. Article 2(c) QD defines a refugee as follows:

‘Refugee’ means a third country national 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 ...

The term consists of two elements:

- (a) an act of persecution;
- (b) certain reasons for persecution.

Acts of persecution are defined in article 9 QD, the recognized reasons for persecution are defined in article 10 QD. Acts of persecution within the meaning of article 9 QD must:

- (a) be 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; or
- (b) 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 (a).

Under article 15(2) of the European Convention on Human Rights (ECHR) no derogation can be made from the right to life, the prohibition of torture and inhuman or degrading treatment or punishment, the prohibition of slavery and the prohibition of punishment without law.

Having regard to this definition, the German Federal Administrative Court (GFAC) came to the conclusion that inter alia the following acts constitute persecution:

Judgment of 5 May 2009: the extremely serious physical abuse that a Chechen claimant had suffered from the Russian security forces. It represented a

serious violation of fundamental human rights – here, the prohibition of inhuman or degrading treatment within the meaning of article 3 ECHR – and thus met the definition of an act of persecution (article 9(1)(a) QD).¹

Judgment of 26 February 2009: the deprivation of citizenship, amounting to a severe violation of human rights, and an act of persecution.² The critical factor in regard to the severity of the violation of rights was that the state deprived the individual of the fundamental status of a citizen, and thus denied residency protection, thereby rendering the person stateless and unprotected – in other words: they were excluded from the state's system of protection and peace.

Judgment of 20 February 2013: the threat of severe punishment on the exercise of one's religion in public, a severe violation of the right to practise one's religion and therefore persecution.³ The GFAC came to that conclusion after consulting the CJEU in the preliminary reference procedure of article 267 TFEU. The CJEU answered the German questions in September 2012.⁴

The preliminary reference procedure is a very helpful dialogue between the CJEU and national courts. The CJEU has made clear that it is not necessary that the asylum seeker would be prepared to exercise his religion after return to his home country in a forbidden way. The prohibition to exercise one's religion may, therefore, amount to persecution if it is severe enough in an objective and a subjective way. The objective severity would be reached in the case of a threat of imprisonment or treatment that violates article 3 ECHR. The subjective severity would be reached if the forbidden religious practice is of particular importance to the person concerned in order to preserve his religious identity.

In transforming the CJEU judgment, the German Federal Administrative Court had four cases to decide on 20 February 2013 and remanded all to the courts below to discover the necessary facts. First, they had to assess the objective severity, because they did not know how many members of the Ahmadiyya faith in Pakistan have become victims of punishment and imprisonment due to the exercise of their religion. The UK Upper Tribunal (Immigration and Asylum Chamber)⁵ and the German High Court of Baden-Württemberg⁶ judged that there is a real risk of becoming a victim of these laws.

¹ BVerwG 10 C 21.08, <http://www.bverwg.de/informationen/english/decisions/10_c_21_08.php>.

² BVerwG 10 C 50.07, <http://www.bverwg.de/informationen/english/decisions/10_c_50_07.php>.

³ BVerwG 10 C 23.12, <http://www.bverwg.de/informationen/english/decisions/10_c_23_12.php>.

⁴ CJEU Judgment of 5 Sept 2012, C-71/11 and C-99/11.

⁵ Judgment of 14 Nov 2012, *MN and others* [2012] UKUT 00389(IAC).

⁶ Judgment of 12 June 2013, *A 11 S 757/13*, para 116 and following.

In relation to the subjective severity, the GFAC stressed that it is not necessary that the individual asylum seeker would suffer a mental collapse, or would suffer severe emotional harm, if he had to refrain from practising his faith, as with the more rigorous standards of German case law for the moral dilemma of conscientious objectors.⁷ 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 individual's voluntary decision to practise his faith in a manner that he feels is obligatory for him, or to abstain from doing so because of the threatened sanctions. The fact that he considers the suppressed religious practice of his faith to be obligatory in order to maintain his religious identity must be proved by the asylum seeker to the full satisfaction of the court.

Religious identity, being an internal fact, can be determined only from the arguments of the asylum seeker, or by reverse deduction from external indications to the internal attitude of the person concerned. The four cases, which the GFAC had to decide in February 2013,⁸ were different:

Case 1 (Saxonia), the participant in a violent conflict: the applicant was active in a violent conflict between two opposing groups of inhabitants in his home village in Pakistan. He participated in fighting, on the side of the Ahmadis. The court of fact did not regard him as persecuted in Pakistan. In Germany, he had prayed alone, he had not tried to find other Ahmadis to practise his faith with, and did not try to preach to others from his faith. In this case the applicant will have only a limited chance of qualifying for refugee status, if he can show additional religious activities since the previous hearing at the court below.

Case 2 (Saxonia), the supporter in administrative matters: there are contradictory statements about the applicant's religious practise in Pakistan. He said he had prayed and conducted missionary activities. The German embassy says he had not been known as a practising Ahmadi. In Germany, he supports a local Ahmadi community by working as an electrician and by performing administrative work (registration of young Ahmadis, etc). These activities alone do not demonstrate the particular importance of religious practice in public.

Case 3 (Northrhine-Westfalia), the ordinary believer: the claimant was a teacher for the children of his local community in Pakistan. He is a decent but

⁷ Judgment of 20 Feb 2013, fn 3, para 30.

⁸ Judgments of 20 Feb 2013, BVerwG 10 C 20.12, 10 C 21.12, 10 C 22.12 and 10 C 23.12, the last is the leading judgment and has therefore been translated into English, see n 3 above.

ordinary member of his local Ahmadi community in Germany. He has no functions in this community and has not shown any special activities. He has not conducted missionary activities. He will only be recognized as a refugee, if (as in Case 1) he can show additional religious activities since the previous hearing at the court below.

Case 4 (Baden-Württemberg), the Conductor of Missionary Activities in Germany: the applicant had worked at a book stall in front of the railway station each month, and had approached members of other faiths with missionary intent. After relocating to another town he had continued and intensified his missionary activities. He has been recognized as refugee on this basis.

When the Court comes to the conclusion that there has been an act of persecution, it has to discover if there is a recognized reason for the persecution, in the sense of article 10 QD. This provision defines what amounts to persecution for reasons of race, religion, nationality, political opinion or membership of a particular social group.

The CJEU decided, in November 2013, that homosexuals can be regarded as a particular social group, in the meaning of article 10(1)(d) QD, if they are specifically targeted by criminal law.⁹ The Court has further decided that an imprisonment that sanctions homosexual acts against prisoners must be regarded as a punishment that is disproportionate or discriminatory, and thus constitutes an act of persecution in the sense of article 9 QD. As in its judgment on religious persecution, the CJEU has stressed that an asylum seeker cannot reasonably be expected to conceal his homosexuality in his country of origin, or to exercise reserve in the expression of his sexual orientation in order to avoid the risk of persecution.

The Court, however, does not say anything regarding the situation where an asylum seeker faces the risk of persecution only if he demonstrates his homosexuality in public. In such cases, the criterion of the CJEU Judgment on religion should apply. That would mean that an individual can only be recognized as a refugee if the freedom to demonstrate such behaviour in public is of particular importance to him to preserve his sexual identity. I would use the same standard to define persecution by interference in a person's political opinion. The subjective criterion in all these cases should be the particular importance of a certain religious, sexual or political behaviour for the applicant's personal identity.

3. The exclusion clause

According to article 12(2) QD there are three reasons to exclude a person from Convention refugee status:

⁹ CJEU Judgment of 7 Nov 2013, *C-199/12 to C-201/12 - X, Y and Z*, para 49.

Non-combatant are serious reasons for considering that:

- (a) he or she has committed a crime against peace, a war crime or a crime against humanity;
- (b) he or she has committed a serious non-political crime outside the country of refuge prior to his admission in that country as a refugee;
- (c) he or she has been guilty of acts contrary to the purposes and principles of the United Nations.

In two judgments, of 24 November 2009¹⁰ and 16 February 2010,¹¹ the German Federal Administrative Court decided what the criteria for a war crime are in the sense of article 12(a) QD. Both cases dealt with Chechen fighters who had killed Russian soldiers. The lower German courts had rejected exclusion, because the claimants' acts had been directed against combatants and not against the civilian population. The Federal Court held that a war crime is defined in the Rome Statute of the International Criminal Court. According to article 8(2)(c) of the Rome Statute, a war crime can also be committed against members of armed forces who have laid down their arms or if the killing is performed treacherously (article 8(2)(e)(IX)) and the acts directed against the adversary combatant can be of a terrorist nature if a large number of civilians are affected (for example, the attacks in Moscow on the musical theatre in 2002).

In October and November 2008, the GFAC made two references to the CJEU to answer questions on the exclusion clauses.¹² The references asked for guidance on the exclusion clauses (b) and (c), referring to a serious non-political crime and an act contrary to UN principles. The first question asked the CJEU to decide whether exclusion takes place if the applicant has belonged to an organisation that appears on the EU list of persons, groups and entities that have been enacted to combat terrorism, and the applicant actively supported the armed struggle of that organisation. In its judgment, of 9 November 2010, the Court decided that terrorist acts, which are characterised by their violence towards civilian populations, even if committed with a purportedly political objective, fall within the meaning of serious non-political crimes under article 12(b).¹³ They may also fulfill the criteria of the exclusion clause in article 12(c), because in Resolutions 1373 (2001) and 1377 (2001) the UN Security Council takes as its starting point the principle that international terrorist acts are contrary to the purposes and principles of the United Nations. But an individual assessment of the personal responsibility of the person in question is required. The Court then decided that exclusion from refugee status is not conditional on the person concerned representing a present danger to the host state,¹⁴ or on an

¹⁰ BVerwG 10 C 24.08, <http://www.bverwg.de/informationen/english/decisions/10_c_24_08.php>.

¹¹ BVerwG 10 C 7.09, <http://www.bverwg.de/informationen/english/decisions/10_c_7_09.php>.

¹² Reference of 14 Oct 2008, BVerwG 10 C 48.07; Reference of 25 Nov 2008, BVerwG 10 C 46.07, <http://www.bverwg.de/informationen/english/decisions/10_c_48_07.php>.

¹³ CJEU Judgment of 9 Nov 2010, C-57/09 and C-101/09 - *B and C*, para 81.

¹⁴ *ibid* para 105.

assessment of proportionality in relation to the particular case.¹⁵ The decision of the CJEU has clarified and answered many questions on exclusion.

The German Federal Administrative Court has also decided the cases referred to Luxembourg on 7 July 2011, which concerned a PKK-member and a left-wing activist from Turkey.¹⁶ The GFAC remanded the cases to the High Administrative Court for further consideration of whether the high-ranking PKK-member and the Turkish left-wing activist had participated in crimes in the sense of article 12(b), or had such an influential position in the terrorist organisation that his acts could be regarded as fulfilling the criteria of article 12(c). The German Court also agreed with the Court of Appeal for England and Wales that a criminal liability is not necessary in order to determine that a person fulfils the criteria of article 12(c).¹⁷ The PKK activist had belonged to the forty-one-member executive committee of the PKK, but the lower court had not examined for how long. After the case had been remanded, the court below diligently investigated what crimes the PKK had committed during the period when the asylum seeker had held a leading position within the organisation. On the basis of these findings, the court below concluded, in July 2013, that the PKK high-ranking official should be excluded.¹⁸ For the left-wing activist, the High Administrative Court decided differently. It pointed out that the person did not have a leading position in the organisation, his task was restricted to the transport of goods and to guiding guerrilla fighters to fixed places.¹⁹

In making decisions the GFAC stressed that there has to be detailed information regarding the position held by the asylum seeker in the terrorist organisation, and what political, logistical or financial support he gave.²⁰ It can suffice even when his role within the terrorist organisation was non-combatant, but it must have been one of specific importance.²¹

4. The cessation clause

The German Federal Administrative court has also asked the CJEU for a preliminary ruling on the cessation clause in articles 11 and 14 QD. The CJEU answered the questions in the Judgment of 2 March 2010.²²

¹⁵ *ibid* para 111.

¹⁶ BVerwG 10 C 26.10 (PKK) and BVerwG 10 C 27.10 (DHKP/C), <http://www.bverwg.de/informationen/english/decisions/10_c_26_10.php>.

¹⁷ [2009] EWCA Civ 226, para 30, Judgment of 24 Mar 2009.

¹⁸ High Administrative Court of Northrhine-Westfalia, Judgment of 2 July 2013, *8 A 5118/05.A*, para 144 and following.

¹⁹ *ibid*, *8 A 2632/06.A*, para 201 and following.

²⁰ Judgment of 4 Sept 2012, BVerwG 10 C 13.1, para 30.

²¹ Judgment of 19 Nov 2013 - BVerwG 10 C 26.12, paras x, y.

²² CJEU Judgment of 2 Mar 2010, *C-175/08, Abdullah*.

According to article 11 QD a person shall cease to be a refugee, if he can no longer continue to refuse to avail himself or herself of the protection of the country of nationality, because the circumstances in connection with which he has been recognised as a refugee have ceased to exist.

In Germany, thousands of Iraqi citizens, who were recognized as refugees, ceased to be refugees after the fall of the Saddam Hussein regime in 2003. The main question was if it is sufficient that the danger of persecution, which was the basis for the recognition in the time of Saddam Hussein, has diminished with the fall of the regime, or whether there must be a stable security situation within a state to protect the individual effectively from persecution.

The CJEU decided that refugee status ceases to exist where a refugee is no longer exposed to circumstances that demonstrate that his home country is unable to guarantee him protection against acts of persecution. The change of circumstances, however, must be of a significant and non-temporary nature. In order to arrive at the conclusion that the refugee's fear of being persecuted is no longer well founded, the competent authorities must verify that the authorities in his home country have taken reasonable steps to prevent the persecution, that they therefore operate, *inter alia*, an effective legal system for the detection, prosecution and punishment of acts constituting persecution, and that the national concerned will have access to such protection.

The German Federal Administrative Court decided the relevant cessation cases on 24 February 2011 - which concerned Iraqi citizens - on the basis of the CJEU judgment. It has denied the refugees' appeal in two cases, and has remanded three other cases to the High Administrative Court for a new hearing and a decision.²³ In these Iraqi cases the Court agreed with the conclusion of the lower courts that the reason for the refugee status granted before 2003 has - as a rule - ceased to exist. Iraqi refugees were recognised in the years before 2003 because, at that time, the Federal Office held that the Iraqi authorities viewed an application for asylum in another country as political opposition. This fact, on which the refugees' fear of persecution by the state was based, has permanently ceased to exist, because the fall from power of the dictator Saddam Hussein's regime is irreversible. A return of the Baath regime is viewed as impossible. Neither the new Iraqi government nor other actors attach measures for persecution to applying for asylum in another country. Since it is therefore clear that the former refugees 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 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

²³ BVerwG 10 C 3.10, <http://www.bverwg.de/informationen/english/decisions/10_c_3_10.php>.

appropriate steps to permanently prevent the persecution on which the recognition of refugee status was based.

In another judgment the GFAC has also tried to define more precisely what it means by the change of circumstances having to be of a significant and non-temporary nature.²⁴ According to that judgment the change of circumstances is significant, if the factual circumstances in the country of origin have changed noticeably and substantially. New facts have to constitute a significantly and substantially changed basis for the prediction of persecution, so that a real risk of persecution no longer exists. A change is durable, if a prediction shows that the change of circumstances is stable, that means that the cessation of the factors that have constituted persecution will persist for a foreseeable future. The GFAC has recognised those significant and stable changes in Iraq, but remanded a case from Algeria to the court below for a further hearing and a new decision.²⁵

5. The organization of the asylum system according to the Dublin Regulation

In the Common European Asylum System there exist rules defining which state is competent to decide on the single asylum application. These rules have been laid down in the Dublin Regulation. They shall prevent forum shopping and define the member state that has the highest responsibility for the asylum seeker's presence in Europe, eg, because he has crossed the EU borders into the state, or because the state has issued him an entry visa. The CJEU has clearly pointed out, in the judgment of 21 December 2011, that the CEAS is based on the assumption that EU member states will observe fundamental rights and their other international obligations, and that member states can have confidence in each other in that regard.²⁶ It is precisely because of that principle of mutual confidence that the European Union legislature adopted the Dublin Regulation. It will rationalise the treatment of asylum claims, avoid blockages in the system as a result of the obligation on state authorities to examine multiple claims by the same applicant, and it shall increase legal certainty with regard to the determination of the state responsible for examining the asylum claim. It would not be compatible with the aims of the Dublin Regulation if any infringement of the Rules were sufficient to prevent the transfer of an asylum seeker to the member state primarily responsible. The Rules of the Dublin System may only be unapplied if there are systemic flaws in the asylum procedure and reception conditions for asylum applicants in

²⁴ Judgment of 1 June 2011, BVerwG 10 C 25.10, paras 20 and 24, <http://www.bverwg.de/informationen/english/decisions/10_c_25_10.php>.

²⁵ *ibid* para 24f.

²⁶ CJEU Judgment of 21 Dec 2011, C-411/10, NS/UK and Ireland, para 78 and following.

the member state responsible. Those systemic flaws must result in an inhuman or degrading treatment within the meaning of article 3 ECHR. In this case a transfer of asylum seekers to the member state is not allowed.

The European Court of Human Rights (ECtHR) and the CJEU have identified those systemic flaws in Greece.²⁷ Several German courts of first instance had already stopped Dublin transfers to Greece at that time. Similar judgments by lower German courts have followed concerning Italy, Hungary and other eastern European states. The ECtHR however has, up to now, seen no reason to stop a transfer to Italy.²⁸ Even if the living conditions of asylum seekers in Italy may disclose some shortcomings, the ECtHR has not identified a systemic failure to provide support or facilities catering for asylum seekers as members of a particularly vulnerable group, as was the case in *MSS v Belgium and Greece*.²⁹ The Dublin-III-Regulation, which enters into force in 2014, contains a provision that an asylum seeker must be granted an effective remedy against a transfer decision (article 27). Germany had already introduced such a regulation (German Asylum Procedure Act, Section 34a, paragraph 2).

The Dublin system only works if member states can identify the asylum seeker. The most important means of identification is the evaluation of fingerprints by the Eurodac database. In this way, national authorities can discover whether the person concerned has already entered another EU member state and lodged an asylum application there. The national laws that demand asylum seekers provide fingerprints pursue an objective of general interest recognised by the Union and are a legitimate intervention in the rights recognised by articles 7 and 8 of the EU-Charter of Fundamental Rights.³⁰ The German Federal Administrative Court had to decide whether the national asylum office is entitled to discontinue an asylum procedure and terminate an asylum seeker's right to stay in Germany if he has manipulated his fingerprints. In September 2013, the GFAC decided that German law, as well as EU law, supports this.³¹ Article 20(1) Asylum Procedure Directive offers member states two alternatives on the failure of an asylum seeker to cooperate with the competent authorities: discontinue the examination, or reject the application. Manipulation of fingertips is a form of non-cooperation. According to article 11(1) Asylum Procedure Directive, member states may impose the obligation to cooperate with the competent authorities upon asylum seekers, insofar as such an obligation is necessary for the processing of the application. The taking

²⁷ ECtHR Judgment of 21 Jan 2011, 30696/09, *MSS/Belgium and Greece*.

²⁸ ECtHR Judgment of 2 Apr 2013, 27725/10, *Hussein/Netherlands and Italy*, para 78.

²⁹ However, a new Dublin case concerning Italy has been transferred to the Grand Chamber, see App No 29217/12, *Tarakhel/Switzerland*.

³⁰ CJEU Judgment of 17 Oct 2013, *C-291/12, Schwarz/City of Bochum*, para 38 and following.

³¹ Judgment of 5 Sept 2013, BVerwG 10 C 1.13, <http://www.bverw.de/informationen/english/decisions/10_c_1_13.php>.

of fingerprints is necessary for the processing of the application, in order for results from the Eurodac database to be obtained, to check whether the applicant has already lodged a claim in another EU member state. The German Asylum Procedure Act therefore requires asylum seekers to refrain from interfering with fingertips, in any way that would jeopardize the evaluation of their prints. If signs of manipulation are discovered, the Federal Asylum Office may issue an order to the applicant to give non-manipulated fingerprints within one month. In cases of non-compliance, the asylum procedure is discontinued and the foreigner is required to leave the country, except where there are obstacles to deportation, eg, reasons for subsidiary protection.

6. Conclusions and perspectives

The Common European Asylum System is without a realistic alternative. The European Union has common external borders. A foreigner crossing one of these borders will - as a rule - not be subject to further control when he moves from one member state to another. The Union therefore needs common criteria for who qualifies as a refugee and common rules of procedure that have to be observed. The EU also needs rules to determine which member state is competent to decide on an individual asylum claim, has to bear the costs of the asylum seeker's presence in the country, and has to issue a residence permit, if the claim is well-founded. EU member states and their courts now have nearly ten years experience of the new common asylum rules. A common understanding on many important problems of refugee law has been reached, eg, on persecution by interference in a person's religion or sexual identity, on exclusion, and on cessation of refugee status. The EU has moved forward in the unification process by issuing a revised version of the Qualification Directive in 2011 and of the Procedures Directive in 2013. The member states, as well as the national courts, now need sufficient time to implement and interpret the new rules. The unification process will only succeed if all member states follow the rules agreed. Therefore the recognition procedure and the reception conditions in several member states - not only in Greece - have to be improved. The rules of the revised Dublin Regulation (Dublin III), which enter into force in 2014, can only be applied if there are no systemic flaws in the asylum systems of member states. If systemic flaws, such as those identified in Greece, persist and spread to other member states, the Common European Asylum System will collapse.