Bled 2011 - IARLJ World Conference

Prof. Dr. Harald Dörig:
Current Problems in Asylum and Protection Law: the German Judicial Perspective

1. General Remarks

In Germany the courts have three sources of law to solve the current problems of asylum and protection law. The first source is international law, especially the 1951 Convention relating to the Status of Refugees – the 'Geneva Convention'. The second source is the law of the European Union, especially the Directives on the Refugee Qualification and on the Asylum Procedure. And the third source is the national written law, especially the Residence Act and the Asylum Procedure Act.

The most precise or detailed law is our national law. But in order to understand it and to interpret it, we very closely look to the European Directives and to the Geneva Convention. As we all know the Geneva Convention is already 60 years old, but from its text and from the drafting protocols we can extract the intention of the Convention, which is the basis of European and national law. Or in the word of the Court of Justice of the European Union delivered in a judgement of 2 March 2010[1], the Geneva Convention constitutes the cornerstone of the international legal regime for the protection of refugees.

The German Judicature and namely my Court as the Supreme Administrative Court of Germany observes closely the court decisions in other countries outside Germany. And we have brought several important questions how to interpret refugee law to the responsible supranational court, the Court of Justice of the European Union (CJEU). In the following minutes I will try to give you an insight in only a very limited scope of our current problems. This insight relates to the exclusion clause and the cessation clause.

2. The Exclusion Clause

According to Art. 1 F of the Geneva Convention there are three reasons to exclude a person from refugee status:

There 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 of a serious non-political crime outside the country of refuge prior to his admission in that country as a refugee;
(c) has been guilty of acts contrary to the purposes and principles of the United Nations.

[1] Case C-175/08 – B and C v Germany, para. 52

These three reasons are the basis for exclusion also in the EU Qualification Directive (Article 12) and in German refugee law (Article 3 (2) Asylum Procedure Act).

My court has decided on various exclusion cases in the last three years. In October and November 2008 my court made two references to the CJEU to answer questions on the exclusion clauses.[2] The CJEU has the competence to rule on these legal questions with authority for all 27 member states of the European Union, since the exclusion clauses are part of the EU Qualification Directive. The references asked for guidance to the exclusion clauses (b) and (c), that means the commitment of a serious non-political crime and of an act contrary to the UN principles. With our first question we 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 which have been enacted to combat terrorism, and the applicant actively supported the armed struggle of that organisation. In his judgement 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 to be regarded as serious non-political crimes within the meaning of point (b).[3] And they may also fulfill the criteria of the exclusion clause Art. 1 F (c), that means that a person with a terrorist background can be regarded to have acted against the purposes and principles of the United Nations. But the Luxembourg Court has pointed out that in any case an individual assesment 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.[4] So he can be excluded even if he has left the terrorist scene. And exclusion is not conditional on an assessment of proportionality in relation to the particular case.[5] Proportionality is already included in the high Convention standards for exclusion. The decision of the European Court of Justice has cleared a lot of questions on exclusion, at least for Europe. And the German Supreme Administrative Court has decided the cases referred to Luxembourg on 7 July 2011, which concern a PKK-members and a left-wing activist from Turkey, on the basis of the CJEU judgement.[6] The Supreme Court remanded the cases to the Higher Administrative Court for further findings whether the high-ranking PKK-member and the Turkish left-wing activist have participated in crimes in the sense of Art. 1 F (b) or had such an influencial position in the terrorist organisation that their acts can be regarded to fulfil the criteria of Art. 1 F (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 Art. 1 F (c).[7]

---

[2] Reference of 14.10.2008 - BVerwG 10 C 48.07; Reference of 25.11.2008 - BVerwG 10 C 46.07 - http://www.bverwg.bund.de/enid/44c2fb8cf1cafde25e2535d5e6a25931,0/Decisions_in_Asylum_and_Immigration_Law/BVerwG_ss__C_48__7_km.html

[3] Cases C-57/09 and C-101/09 - B and C v Germany, para. 81

[4] ibid para. 105

[5] ibid para. 111

[6] BVerwG 10 C 26.10 (PKK) and BVerwG 10 C 27.10 (DHKP/C)

[7] [2009] EWCA Civ 226, para. 30, Judgement dated 24 March 2009

In two judgements of 24 November 2009[8] and 16 February 2010[9] my court decided what the criteria for a war crime are in the sense of Article 1 F (a) of the *1951 Convention*. 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 Administrative Court of Germany quashed these decisions and held that war crimes can also be committed against soldiers and the lower courts, now, must examine if the assumptions for such war crimes against combatants are fulfilled. The Federal Administrative Court also held that a war crime is defined in the Rome Statute of the International Criminal Court. According to Art. 8 (2) (c) of the Rome Statute a war crime can be also committed against members of armed forces who have laid down their arms or if the killing is performed treacherously (Art. 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 another case a Rwandan rebel leader was excluded from refugee status because there were serious reasons for considering that he was responsible for war crimes and acts contrary to the purposes and principles of the United Nations. The decision dates from 31 March 2011.[10] The facts stated by the Higher Administrative Court of Bavaria are as follows: Since the civil war in Rwanda in 1994, Dr. M. has been involved in Rwandan exile organisations in Germany, primarily in a leadership capacity. In 2000 he was recognised as a refugee on the basis of his political activities in exile. In 2001 - that means one year after his recognition as a refugee - Dr. M became President of the Hutu rebel organization FDLR and kept his presidency until now. He is also the chief military commander of the rebel group. The FDLR consists of 6,000 to 15,000 fighters, they operate in the east of the Democatic Republic od Congo, that is in the provinces of North and South Kivu, near to Rwanda. FDLR units systematically attack the civilian population in the east of Congo, rape women and recruit children as soldiers.

In 2003 and 2005 the UN Security Council adopted Resolutions (1493/2003 and 1596/2005), which define, that the situation in the Democratic Republic of the Congo constitutes a threat to international peace and security in the region. The resolutions decided that all States should take the necessary measures to prevent the direct or indirect supply, sale or transfer of arms and any related material, to all armed groups and militias operating in the territory of North and South Kivu. A UN Committee was installed to enact a list of individuals, which should be subject to sanctions and restrictions. Dr. M was put on this list. In Februar 2006 the German authorities revoked the refugee status, which had been granted to Dr. M. In November 2009, Dr. M and the deputy chairman of the FDLR were arrested in Germany, after pressure applied by the United Nations. The responsible judge at the Federal Criminal Court (Bundesgerichtshof) issued a warrant for arrest based on the

---

[8] BVerwG 10 C 24.08 - http://www.bverwg.bund.de/enid/44c2fb8cf1cafde25e2535d5e6a25931,0/Decisions_in_Asylum_and_Immigration_Law/BVerwG_ss__C_24__8_ma.html

[9] BVerwG 10 C 7.09 http://www.bverwg.bund.de/enid/44c2fb8cf1cafde25e2535d5e6a25931,0/Decisions_in_Asylum_and_Immigration_Law/BVerwG_ss__C_7__9_nf.html

[10] BVerwG 10 C 2.10 http://www.bverwg.bund.de/enid/1443fd5a6b96382685ebda711b86a64c,0/Decisions_in_Asylum_and_Immigration_Law/BVerwG_ss__C_2_ss__pm.html

commitment of war crimes and crimes against humanity. In May 2011 the main court proceedings have started.

My court has decided on 31 March 2011 that the recognition of refugee status must be revoked if the person concerned may be excluded from refugee status after he has been recognized. In this case the rules of the cessation of refugee status apply as are to be found in Art. 1 C Geneva Convention. German academics and lawyers had tried to convince the Court of an opposite opinion without success. But we decided in accordance with the UNHCR Guidelines on Exclusion and on Cessation. They say, where a refugee engages in conduct falling within Article 1F(a) or 1F(c) Geneva Convention, this would trigger the application of the exclusion clauses and the revocation of refugee status, provided all the criteria for the application of these clauses are met.[11]

We have also come to the conclusion that Dr. M has committed war crimes and crimes against humanity. A UN Group of Experts and the German Chief Prosecutor have found out, that Dr. W - as President of FDLR - exercised influence over policies, and maintained command and control over the activities of FDLR forces. In telefone communication with FDLR military field commanders he gave military orders to the high command; He held command responsibility for recruitment and use of children by the FDLR in Eastern Congo. He is responsible for killing and raping of thousands of people. My Court ruled that his responsibility follows from Art. 28 (a) of the Rome Statute which rules the responsibility of military commanders. And we decided that there are strong arguments that he is also guilty of acts contrary to the purposes and principles of the United Nations in the sense of Art. 1 F (c) Geneva Convention. The Court of Justice of the European Union has decided on 9 November 2011 (C-C-57/09): Acts contrary to the purposes and principles of the United Nations are those which are referred to in the preamble to the Charter of the United Nations and in Articles 1 and 2 of that Charter and which are among the acts identified in UN Resolutions. Here the armed conflict in eastern Congo was identified by UN Resolutions to be a threat to international peace and security in the region. And a UN Committee has put Dr. M on a list of persons who shall be subject to sanctions because he exercised influence on the conflict as a military commander and was regarded to be responsible for the trafficking of arms in the region. My Court did not follow the UNHCR Guidelines on Exclusion as far as they say that the exclusion clause covers only persons who held a position of power in a State or a State-like entity.[12] We have followed the judicature of the Supreme Court of Canada in the case Pushpanathan v. Canada[13] and held that the exclusion clause - under certain narrow conditions - also applies to non-state actors. But those non-state actors must have a significant influence on the breach of international peace, for example as the political representatives or leaders of paramilitary associations or militias. This was the case here.

3. The Cessation Clause

[11] UNHCR Guidelines on the Application of the Exclusion Clauses (4 September 2003) Section 6; UNHCR Guidelines on the Cessation of Refugee Status (10 February 2003) Section 4; UNHCR Background Note on the Application of the Exclusion Clauses (2003) Section 15 to 17

[12] UNHCR Guidelines on the Application of the Exclusion Clauses (4 September 2003) Section 17 and 26

[13] Supreme Court of Canada, Judgement of 4 June 1998, Pushpanathan v. Canada [1998] 1 S.C.R. 982 para 65-68; compare also Court of Appeal for England and Wales, Judgement of 10 December 2010, Secretary of State for the Home Department v. DD (Afghanistan), [2010] EWCA Civ 1407

In Germany 38.556 refugee recognitions have been revoked between 2005 and 2010 because the circumstances which constitute persecution have changed. One example is the fall of Saddam Hussein's regime in Iraq in 2003. The German Courts had to decide on the requirements which have to be met for such a revocation. In German Law as well as in European Law we have a cessation clause similar to Art. 1 C (5) Geneva Convention.

According to Article 1 C (5) of the Convention a person shall cease to be a refugee, if he can no longer continue to refuse to avail himself 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.

For the German courts 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 after the fall of the regime or whether there must be a stable security situation with a state protecting the individual effectively from persecution. So the German Supreme Administrative Court made a reference to the Court of Justice of the European Union. The CJEU gave his judgement on 2 March 2010.[14] He decided that the circumstances which demonstrate the country of origin's inability or, conversely, its ability to ensure protection against acts of persecution constitute a crucial element in the assessment to grant or to withdraw Convention refugee status.[15] Consequently, refugee status ceases to exist where a refugee is no longer exposed to circumstances which 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.[16] 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, if he ceases to have refugee status.[17]

The refugee status can also be withdrawn if in the person's home country there exists a situation which constitutes a danger to his life or his personal integrity which grants him subsidiary protection. The CJEU states that refugee status and subsidiary protection are two distinct systems of protection.[18] Having made the point, the CJEU did not even mention refraining from cessation when the living conditions in the appellant's home country are poor. We had asked this question because refugee organizations and advocates had claimed this would be another requirement for revocation.

On the basis of the European judgement my Court has decided the relevant cessation cases on 24 February 2011. We have denied the refugees' appeal in two cases and have remanded three other cases to the Higher Administrative Court for a

[14] Case C-175/08 – Abdullah v Germany
[15] ibid para. 68
[16] ibid para. 73
[17] ibid para. 70
[18] ibid para. 80

new hearing and a decision.[19] In two cases the danger resulting from Saddam Hussein's regime has ceased to exist and the claimants have not convinced the court to be in fear of a different danger today. One claimant only declared that a person he had problems with in the past still lives in Kirkuk (BVerwG 1 C 6.10), the other only referred to the unstable security situation in Iraq (BVerwG 1 C 9.10).

In the three other cases the claimants had already told the German Refugee Office in the recognition procedure that they had been threatened by specific dangers before leaving Iraq. The courts had not examined that because they recognized the claimants as refugees solely on the ground that they had filed asylum applications in Germany which caused persecution by the former Saddam Regime. If the specific danger results from the same reason for persecution as the one which was the basis for recognition (here: political reasons) the Court must examine very closely if the danger has really ceased to exist. If the danger results from another reason for persecution (f.ex. religious grounds) than the one accepted at the time when refugee status was granted, there is a lack of connection with the circumstances on which the recognition of that status was based. Such an argument therefore does not raise the question of the cessation of the circumstances on which the recognition of refugee status was based. In that case, however, the facilitated standard of proof under Article 4(4) of Directive 2004/83/EC applies if there are earlier acts or threats of persecution which are connected with the reason for persecution now being examined.

In one of the cases which were remanded to the Higher Administrative Court the complainant had claimed in the proceedings for refugee status that even before leaving the country, he had been involved in the Democratic People's Party, which was then in opposition to Saddam Hussein's regime. Although the recognition of his refugee status was not founded on this argument, it was nevertheless connected with opposition to the regime at the time – which was presumed by the Iraqi authorities because he had filed an application for asylum – and was therefore connected with political opinion as a reason for persecution. If the complainant is threatened with persecution in relation to his involvement with the 'Democratic People's Party', this would indeed need to be taken into account to answer the question of whether the established change in circumstances is sufficiently significant that the complainant's fear of persecution should no longer be considered well founded.[20] In the second case remanded the complainant had claimed that he had been reproached for having performed an act of sabotage against the Saddam Government and still feared persecution resulting from that reproach (10 C 5.10). In the third case the complainant had claimed he feared persecution because his family had close contacts to the Communist Party, so that the fear of political persecution had not ceased (10 C 7.10). Those arguments already disclosed in the recognition procedure have to be examined now in order to give a correct judgement on cessation.

In a recent judgement my court has also tried to define more precisely what it means that the change of circumstances must be of a significant and non-temporary

[19] BVerwG 10 C 3.10, 10 C 5.10, 10 C 6.10, 10 C 7.10, 10 C 9.10 http://www.bverwg.bund.de/enid/37b96a3115646eac613283de17d48c12,0/Decisions_in_Asylum_and_Immigration_Law/BVerwG_ss__C_3_ss__pn.html

[20] BVerwG 10 C 3.10 para. 24

nature.[21] According to that judgement the change of circumstances is significant, if the factual circumstances in the country of origin have changed noticeably and substancially. New facts have to constitue a significantly and substancially 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 which have constituted persecution will persist for a foreseeable future.

8.8.2011

[21] BVerwG 10 C 25.10 – Judgement dated 1 June 2011 para 20 and 24 (just translated into English – soon to be put on the Court's webside)