Association des Conseils d'Etat et des Juridictions administratives suprêmes de l'Union européenne a.i.s.b.l.

Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union i.n.p.a.

Conseil du Contentieux des Etrangers de Belgique– Raad van Vreemdelingenbetwistingen van België

Association of the Councils of State and the Supreme Administrative Jurisdictions of the European Union
With scientific support of the Council of Alien Litigations of Belgium

Asylum and immigration law: the national judge between national and european standards

GERMANY

Brussels
- 17 December 2010 –

Seminar organised with the support of the European Commission

QUESTIONNAIRE

PRELIMINARY REMARK

Actions filed by foreign nationals should be understood as those actions concerning asylum-related issues (as per Article 78 of the Treaty on the Functioning of the European Union), and immigration-related issues (as per Article 79 of the Treaty on the Functioning of the European Union).

1. EVIDENCE LAW IN COMPETENT NATIONAL COURTS WITH REGARD TO ACTIONS FILED BY FOREIGN NATIONALS

A) RULES OF EVIDENCE

1. Are the rules of evidence in actions filed by foreign nationals laid down specifically in internal law?

Art. 86 of the German Code of Administrative Court Procedure (= Verwaltungsgerichtsordnung = VwGO) stipulates, that the court examine the facts of the case ex officio with the assistance of the parties (principle of investigation or inquisitorial system in contrast to the adversary system in the civil procedure, where the parties have to present the evidence). The principle of investigation applies in all administrative cases including asylum and immigration cases. The rules of evidence do not distinguish between German and foreign claimants.

1.1. Do national law or case law rule out certain types of evidence? Where applicable, make a distinction between those actions relating to asylum and those relating to immigration.

Admissible types of evidence in German procedural law are: the testimony of witnesses or of the parties themselves, legal inspection, party's submission, expert testimony and documents. In **asylum cases**, it's in the nature of things that the focus is on the applicant's submissions as far as the alleged persecution in his country of origin in the past is concerned. To assess the credibility of these submissions and the probability of the proclaimed fear of persecution, the judge will consider expertises, reports and statements e.g. of the Foreign Office, UNHCR and amnesty international concerning the circumstances in the claimant's country of origin.

1.2. Do national law or case law allow certain presumptions (e.g. in asylum cases, in the event of past persecution or safe countries of origin)? Where applicable, make a distinction between those actions relating to asylum and those relating to immigration.

Asylum cases:
Past persecution: If - according to former case law - the court found the applicant's submissions concerning past persecution not credible and decided therefore he had not been persecuted yet, the claim was only successful if there was a real risk of persecution in the future. If the court found, however, the applicant had been persecuted in the past, a lower grade of probability was deemed sufficient to assume a relevant danger of future persecution. Meanwhile Art. 4 Abs. 4 Council Directive 2004/83/EC has been transferred into German Law. Therefore the standard of probability is always the same (real risk), but in the case of former persecution the applicant profits from this (refutable) presumption of future persecution.
Safe countries of origin: Art. 16a Para. 3 of the German Constitution (= Grundgesetz = GG) and Art. 29a of the Code of Asylum Procedure (= Asylverfahrensgesetz = AsylVfG) provide that an application of a foreign person from the listed states generally has to be dismissed. The concept of safe countries of origin however is only shaped as a refutable presumption.

B) BURDEN OF PROOF

2. What is the role of the parties in the administration of evidence in actions filed by foreign nationals? Where applicable, make a distinction between those actions relating to asylum and those relating to immigration.

3. Can trial judges play a role in the administration of evidence in actions filed by foreign nationals? If so, on what terms (e.g. do trial judges have the authority to examine evidence in detail or do they give a more marginal assessment)? Where applicable, make a distinction between those actions relating to asylum and those relating to immigration.

As mentioned above (see under A 1) the Administrative Court procedure follows the inquisitorial system. The court ascertains the facts of the case ex officio with the assistance of the parties (principle of investigation). Hence in all administrative cases including asylum and immigration cases the court may and, if that is necessary to state the relevant facts, has to go beyond the submissions and the evidence presented by the parties. The court conducts its own investigation of the case. It has the authority to request information from the Ministry of Foreign Affairs or other government departments, from UNHCR, amnesty international and other NGOs. It often relies on opinions sought from private experts for the applicant's country of origin. Even reliable press reports may be taken into consideration as an additional source of information. Expert opinions received by one court are shared with other courts. Thus over the years each court has acquired a huge amount of resource materials on conditions in countries of origin and other asylum related questions. Owing to the constitutional right of the parties to be heard and be informed about the evidence the court deems relevant, the

material used in each case has to be disclosed to the parties early enough to allow for a thorough preparation.
The claimant may also file a motion to take evidence. The court has to grant that motion, if the fact is relevant to the issue and the court has not yet enough information concerning that question (e.g. treatment of a minority in the applicant's country of origin). The court cannot deny such a motion in anticipating the evidence only because it finds the reverse being true.
In **asylum-cases** however the responsibility for establishing the facts of a case is shared between the court and the applicant. Thus there are a number of provisions which call upon the asylum-seeker to cooperate and which lead to an accelerated procedure if he fails to do so. One of his main obligations is to submit to the court all the facts and evidence on which his claim is based within one month after the decision of the Federal Office was served upon him (Art. 74 Para. 2 AsylVfG). In addition, the court may order the asylum-seeker to specify certain statements or to produce evidence for certain individual assertions within a time limit. If the asylum-seeker fails to do so the court may decide not to consider belated statements and evidence and to decide without further investigation.
Immigration law - Example: Art. 16 Para. 2 Council Directive 2003/86/EC on the right to family reunification orders that an application for entry and residence for the purpose of family reunification can be rejected, where it is shown that the marriage was contracted for the sole purpose of enabling the person concerned to enter or reside in a Member State. Therefore the German Federal Administrative Court (Bundesverwaltungsgericht) has found that the applicant has to carry the burden of proof for his wish to live in a real marital or family relationship.

C) WEIGHT OF EVIDENCE

4. How and on what terms do trial judges weight the various types of evidence submitted to them in asylum and immigration cases? Is any such weighting determined by national law or by case law? Where applicable, make a distinction between those actions relating to asylum and those relating to immigration.

Art. 108 Para. 1 of the German Code of Administrative Court Procedure (= Verwaltungsgerichtsordnung = VwGO) stipulates that the court decide the case on the base of its conviction developed from the whole procedure. This obliges the court to take all relevant material gathered during the proceedings into consideration entirely and exhaustively (e.g. the court record, the administration's record, the submissions of the claimant, the expert opinions of UNHCR and so on), but leaves it free to assess the weight of the different items of evidence (principle of the free assessment of evidence). There are no further rules of weighing evidence. To ascertain a fact demands the court's (full) conviction beyond a reasonable doubt. Some special provisions may establish

a lower standard of evidence, either for the claimant's benefit or to his disadvantage.
In **asylum-cases** the applicant typically has difficulties to present physical evidence or witnesses for his former persecution. Therefore case law provides to weigh his submissions benevolently within the bounds of possibility. Finding his assertion concerning his former persecution credible, the court may find his action to be well founded even without more substantive proof. This facilitation of evidence has been respected by German case law long before Art. 4 Para. 5 of the Council Directive 2004/83/EC came into force.
Art. 12 Para. 2 Council Directive 2004/83/EC might be considered as an example for a lower standard of evidence to the claimant's disadvantage. That provision orders the applicant to be excluded from being recognized as a refugee if *there are serious reasons for considering* that he has committed a crime against peace, a war crime etc.

5. What powers of review does the supreme administrative court have in assessing the evidential weighting of documents? Where applicable, make a distinction between those actions relating to asylum and those relating to immigration.

Generally the Federal Administrative Court cannot consider new evidence, because the appeal to it (Revision) is in principle limited to reviewing points of law. So the Federal Administrative Court's review is restricted to ascertaining whether the court of the lower instance has observed the rules of substantive law and, in stating the facts, has taken all relevant material into account and assessed and weighed the evidence without logical mistakes or procedural errors. In regard to the matters of fact the Federal Administrative Court quashes a judgment only if there are logical mistakes in the conclusions of the Court of Appeal or a procedural objection has to be sustained, e.g. because the court of lower instance has unlawfully denied a motion to take evidence. This leaves the court of lower instance rather a wide scope for assessing and weighing the evidence. The intensity of review concerning the assessment of evidence is limited not only with regard to documents, but to all types of evidence. The limitations of review on appeal in third instance (Revision) regard all issues including asylum and immigration cases.

2. COMPETENCE OF THE NATIONAL COURT TO ACT OF ITS OWN MOTION IN A EUROPEAN CONTEXT

1. Where the parties raise preliminary questions, can procedural restrictions be applied? For example, at what point in proceedings may the parties submit preliminary questions? Do those questions have to be submitted in a specific written procedural document or can they be submitted at any time, including at the hearing?

Preliminary questions concerning the interpretation of European law can be raised in any phase of the proceed-

ings. The court has to go into that matter ex officio and has to consider whether it is necessary to request the European Court to give a ruling (Art. 267 TFEU). A party's motion to this effect may be filed, but is not requisite.

2. Has the national court already ruled on the issue of direct applicability in your country of Articles 18 and 47 of the Charter of Fundamental Rights of the European Union? If so, is the national court which has jurisdiction to rule on disputes concerning actions filed by foreign nationals able or obliged to raise, of its own motion, arguments from these provisions?

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3. THE NATIONAL COURT AND EUROPEAN INSTRUMENTS

1. Do you regularly refer to European case law when handing down judgements? Have you ever referred to the case law of other Member States when handing down judgements?

German administrative courts of all levels refer regularly to the decisions of the CJEU and EGMR. In asylum cases the Federal Administrative Court has also referred to decisions of the British Supreme Court, the Conseil d'Etat, the US Supreme Court, the Supreme Court of Canada etc. To establish a discourse between the Supreme Courts of the member states the Federal Administrative Court publishes important decisions concerning asylum and immigration law in English (www.bverwg.de).

2. Can the national court autonomously interpret Article 1(A) to (F) of the Geneva Convention of 28 July 1951, specifically when abstracting information from Council Directive 2004/83/EC (the so-called Qualification Directive)? Has a conflict ever arisen between the two standards (e.g. in terms of their criteria of attachment or exclusionary clauses)? What solution(s) did the national court adopt, if any?

Art. 60 Para. 1 of the Residence Act (Aufenthaltsgesetz = AufenthG) defines the criteria and standards to be fulfilled to obtain the refugee status "*in application of the Geneva Convention*" (literal). The same provision says that in assessing any such application Art. 4 Para. 4 and Art. 7 - 10 of the Council Directive 2004/83/EC are to be applied. Therefore the law assumes there is no conflict between these two standards.

There is a difference however between the constitutional right for asylum (Art. 16a Grundgesetz = GG) and the criteria for the refugee status, which are influenced by European law. The constitutional court (Bundesverfassungsgericht) holds that Art. 16a GG guaranteeing the constitutional right for asylum doesn't provide an exclusion clause like Art. 1 F Geneva Convention. Meanwhile Art. 12 Para. 2 Council Directive 2004/83/EC provides such an exclusion clause. Therefore the Federal

Administrative Court has presented to the CJEU the question whether the interpretation of Art. 16a GG cited above is in accordance with the Council Directive mentioned (Case Number C-57/09 and C-101/09 5th question).

3. Some European Directives contain provisions which do not have to be transposed, including Articles 5(3), 8(1) and (3), and 17(3) of Council Directive 2004/83/EC (the so-called Qualification Directive), Articles 26 and 27 of Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (the so-called Procedure Directive) and Articles 4(2) and (3), and 7(1) and (2) of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification. Where these provisions have not been transposed, does the national court attach a level of importance to them anyway (soft law, minimal standards, etc.)?
