11 A 10349/99.OVG
3 K 938/98.KO

HIGHER ADMINISTRATIVE COURT
RHINELAND-PALATINATE

INTERLOCUTORY
JUDGEMENT
IN THE NAME OF THE PEOPLE

In the administrative legal dispute

Unification Church of Germany (*Vereinigungskirche e.V.*), represented by its board, Schillerstr. 18, 63189 Schmitten,

- plaintiff and appellant –

Counsel for the plaintiff:

,

v e r s u s

the Federal Republic of Germany,
represented by the Federal Minister of the Interior, 53117 Bonn 1,

- defendant and respondent –

on the grounds of refusal of entry (Republic of Korea)

the 11th division of the Higher Administrative Court of Rhineland-Palatinate in Koblenz, based on the hearing on 13 September 2000 in which the following persons took part

presiding judge at the Higher Administrative Court
judge at the Higher Administrative Court
judge at the Higher Administrative Court
Honorary judge, housewife
Honorary judge, director of operations,

held that

there is a right of appeal and a right of action;

the decision on costs will be made in the final judgement

the appeal on questions of law is allowed.

Statement of facts

The plaintiff seeks to establish that the order to refuse entry to Mr. and Mrs. Moon is unlawful.

The plaintiff is a registered association which unites the German members of the "Unification Church International". Its founder and worldwide leader is Mr. Sun Myung Moon. Mr. Moon and his wife Hak Ja Han Moon are citizens of the Republic of Korea (South Korea) with legal residence status in the USA.

The "Women's Federation for World Peace" (*Frauenförderation für den Weltfrieden e.V.*), a sub-grouping of the plaintiff, issued an invitation to an event in Frankfurt/Main on 12 November 1995 during which Mr. Moon was to speak.

In response to written requests from the Federal Ministry of the Interior dated 3 and 10 November 1995, the Frontier Protection Headquarters (*Grenzschutzdirektion*) in Koblenz issued an order denying Mr. and Mrs. Moon entry pursuant to Article 95 para. 2 of the Schengen Convention for an initial period of three years. The entry ban was extended for a further three years at the end of October 1998. The following reasons for the entry ban were given to Mr. and Mrs. Moon in a letter dated 28 October 1998: Mr. Moon is the leader of the Moon movement/Moon sect in which Mrs. Moon occupies a leading role alongside her husband. In the opinion of the German government, the Moon movement is one of the so-called youth sects and psycho groups whose activities could represent possible risks for the social relations and personality development of young people. In addition to this, the aim of all activities of the Moon movement was to establish a world governed by Korea under the leadership of the "Moon Family". A public appearance of Mr. and Mrs. Moon would encourage the spread of this movement and lead to strong public reaction. It would therefore be detrimental to public order and national security and to significant interests of the Federal Republic of Germany, thus providing sufficient reason to order refusal of entry pursuant to Article 96 para. 2 of the Schengen Convention.

After Mr. Moon's application for temporary relief was rejected by the Administrative Court of Cologne on 10 November 1995, Mr. and Mrs. Moon were refused entry at Paris-Orly

airport on 11 November 1995 and prevented from travelling on to Spain and from here to Germany.

On 7 December 1995 the plaintiff brought action before the Administrative Court of Cologne which then referred the case to the Administrative Court of Koblenz by a decision issued on 9 March 1998. In the statement of grounds for the action the plaintiff essentially argued that, whilst it had no right arising from Article 4 of the German Constitution (GG) to Mr. and Mrs. Moon being allowed to enter the country for the spiritual guidance of its members - rather the defendant must decide freely on granting entry to Mr. and Mrs. Moon after due assessment of the circumstances - it did have a valid public right under procedural law to consideration, which was free from discretionary error, of its interest in its members receiving spiritual guidance from Mr. and Mrs. Moon within the scope of this discretionary decision. The defendant had not given due consideration to this interest. Furthermore, the defendant had made a discretionary error because it had wished to prevent a specific ideological view and had based its decision on an incorrect foundation of facts. The accusations of the defendant were incorrect. Neither the plaintiff nor Mr. Moon, nor the Unification Church as a whole were striving for world dominion. Young people were not at risk through indoctrination. The teachings were represented only in a generally accepted and moderate manner. The importance of marriage and the family was emphasised. The objectives and intentions of the Unification Church were in line with those of a religious community. The influence exercised by the Unification Church did not go beyond that of other religious communities. The economic activities of Mr. and Mrs. Moon or the political activities of the members of the Unification Church did not conflict with this. Furthermore, some of the source material used by the defendant no longer applied and could not be considered as a serious source of information. The Federal Office of Criminal Investigation (*Bundeskriminalamt*) was also forced to admit that the defendant had not come into contact with the prosecuting authorities. Finally, the plaintiff had an interest in determining the unlawfulness of the order to refuse entry to Mr. and Mrs. Moon because it was to be feared that such a measure would be repeated in future, upholding the very same accusations.

The plaintiff requested that

> it be established that the order issued by the defendant to refuse entry to Mrs. Hak Ja Han Moon and Mr. Sun Myung Moon is unlawful.

The defendant requested that

the action be dismissed

and essentially gave the following reasons for this request: the ban was based in law on Article 60 para. 3 and Article 7 of the German Aliens Act (AuslG) in connection with Articles 96 and 5 para. 2 sentence 1 of the Schengen Convention. Accordingly, foreigners such as Mr. and Mrs. Moon, who are exempt from the requirement of a residence permit for a temporary stay in Germany, can be refused entry under the same conditions which are also applied to a residence permit. If, as in this case, there is no legal entitlement to a residence permit, the granting of such to foreigners who have not already entered the country is subject to the particularly broad discretion of the authorities. Irrespective of this, social and fundamental public interests of the Federal Republic of Germany, and thus its interests within the meaning of Article 7 para. 2 no. 3 of the German Aliens Act, would be affected by the presence of Mr. and Mrs. Moon. The Moon movement belonged to one of the so-called youth sects and psycho groups. Some of their objectives and intentions were not compatible with those of a religious association. The activities would endanger the social relations and the personality development of young people. The Federal Government was aware of cases in which young people had not only become psychologically dependent but had also suffered damage from indoctrination, necessitating psychiatric treatment. The ideas of the Moon movement on marriage and the family were not compatible with the understanding of these institutions in civil law as protected by the German Constitution, and in some cases even ran contrary to them. The universally exclusive political objective of the Moon movement to achieve a world governed by Korea under its leadership using all available means was also contrary to the fundamental democratic order of the Federal Republic of Germany and the catalogue of values laid down in the German Constitution. Mr. and Mrs's Moon's "religious" political activity of missionary intent would be contrary to the public interest of the Federal Republic of Germany. The interest of the followers of the Moon movement living in the Federal Republic of Germany to spiritual guidance from their foreign head therefore had to give way. In view of the fact that the Moon movement could not be seen as a religious association, its interests could not be attributed any special importance when considering the public interests set out above. The normal reason for refusal contained in Article 7 para. 2 no. 3 of the German Aliens Act applied to the presence of Mr. and Mrs. Moon in Germany also in view of

public security. After the planned entry of Mr. and Mrs. Moon and the arranged event on 12 November 1995 had aroused public interest (ZDF programme: “Kennzeichen D” on 1 November 1995, questions from members of the German Bundestag, press reports etc.), strong public reactions were to be expected if Mr. and Mrs. Moon were to make a public appearance. This assessment still held true.

On 9 November 1998 the Administrative Court dismissed the action, giving the following main reasons: The plaintiff had no right of action. Whilst there was much in favour of classifying it as a religious community and thus in principle as a subject of the German Constitution pursuant to Article 4 therein, the order to refuse entry to Mr. and Mrs. Moon did not affect the freedom of religion of the plaintiff or its members within the meaning of Article 4 para. 1 of the German Constitution, because neither had their belief been prohibited nor had they been prevented from exercising their belief. Furthermore, the freedom to practise a religion was no protection against the spiritual leader of the plaintiff being refused entry to the country. The order to deny entry did not concern Article 4 para. 2 of the German Constitution. It remained possible for the plaintiff and its members to continue to practise their beliefs without restriction. This applied also with respect to the so-called “blessings” because the simultaneous presence of Mr. and Mrs. Moon and the person to be blessed was not necessary; the blessings could be made by electronic media. On the other hand, the entry of the spiritual head into the country could not be viewed as belonging to the freedom to practise a religion. Article 4 para. 2 of the German Constitution was primarily a defensive law and therefore the state was not required to further optimise the room given for the exercising of a religion. In addition, it should be remembered that the plaintiff and its members had lived without the physical presence of its spiritual head for many years. Furthermore, the order to deny entry was primarily aimed at Mr. and Mrs. Moon: under the legal system it was therefore their responsibility to defend themselves through legal remedies. The entitlement of a third party to legal protection from official action which was only perceived by the third party as a burden through the sphere of another, and which at best constituted only a secondary legal relationship, was to be denied in principle. On this understanding, the possibility of the rights of the plaintiff being violated pursuant to Article 4 para. 1 and 2 of the German Constitution was to be ruled out from the start; Article 4 of the German Constitution gave the plaintiff and its members no right to entry and residence of their spiritual head.

The plaintiff gave the following reasons for its appeal against this decision, which was then allowed by the court division in its decision dated 19 February 1999 – 11 A 10101/99.OVG: not only the addressee of an official action is entitled to litigate but also third parties if this official action affects their protected legal sphere. In this event, the third party is entitled to directly cite legal positions protected by the Constitution. Whilst Article 4 of the German Constitution did not grant a religious community an "automatic" right to the entry of their spiritual head, according to the judicial decisions of the Federal Administrative Court the interest of members of a religious community living in the Federal Republic of Germany in spiritual guidance was to be taken into consideration in the discretionary decision in the light of the constitutional freedoms embodied in Article 4 para. 1 and 2 of the German Constitution. The disregard of a correct discretionary decision embodied in this legal position gave the affected religious community a right to bring action within the meaning of Article 42 para. 2 of the Rules of the Administrative Courts (VwGO). The personal guidance from its religious leader was an outstanding spiritual and emotional event for the members of a religious community and of far greater importance than a mere 'play-in' via television or other media. Furthermore, the state was not entitled to determine the form in which a religious community cultivated the belief of its members, which meant that the defendant was also not entitled to stipulate the importance attributable to a personal meeting between Mr. and Mrs. Moon and their members. It was also irrelevant that their members had had to forgo a visit from Mr. Moon in Germany for so many years, particularly since this state of affairs was precisely attributable to the entry ban. Finally, the action was also well-founded. In this respect the plaintiff referred to its statements of the first instance in which it was argued that the order to refuse entry was not free from discretionary error. The reasons specified could only override its basic right to religious freedom if they stood up to scrutiny. This was not the case, as the reasons it had given showed.

The plaintiff requested that

> it be established that the defendant's order to refuse entry pursuant to Article 96 of the Schengen Convention of the end of October 1998 against Mrs. Hak Ja Han Moon and Mr. Sun Myung Moon is unlawful.

The defendant requested that

the appeal be dismissed,

arguing the following: there is already no determinable legal relationship between the plaintiff and itself because the order to refuse entry was merely an internal administrative matter without direct legal outward effect. At best a legal relationship existed between Mr. and Mrs. Moon and the defendant. Furthermore, the plaintiff's own rights could not be affected. The order to deny entry as such could not infringe these rights, but only a later refusal of entry. If Mr. and Mrs. Moon were unable to derive a right to entry from Article 4 of the Constitution, this applied most definitely to the plaintiff. Irrespective of this, the annulment of an entry ban on a foreigner could not be demanded by a third party based on his own rights because the decision could only be made once and could not be split as dependent, for example, on whether the foreigner or the third party had filed the action. Article 4 of the German Constitution did not give a religious community and its members a right to express its religious beliefs with state support. Furthermore, the action filed for a declaratory judgement was secondary to an action for performance such as annulment of the order to refuse entry which, however, only Mr. and Mrs. Moon themselves could file pursuant to Article 111 of the Schengen Convention. In addition, there was no special interest in a declaratory judgement filed by a third party. In the case of an entry ban, temporary relief could be sought. Finally, the plaintiff also failed to have a general interest in legal redress because it was unable to achieve the entry of Mr. and Mrs. Moon with its legal action. Even if the order to refuse entry were to be deleted in the Schengen information system (SIS), Mr. and Mrs. Moon could still be refused entry to Germany pursuant to Article 60 para. 3 and Article 7 para. 2 of the German Aliens Act (AuslG). At all events, the action was without merits, in respect of which the defendant referred to its arguments of the first instance. Accordingly, the assertion that discretion had not been applied was unfounded. Furthermore, no other decision would have been made even under explicit consideration of Article 4 of the German Constitution because the reasons for the order to deny entry would override the religious freedom of the plaintiff as an immanent barrier.

The further details of the statement of facts and dispute are contained in the written statements of the case plus appendices of the parties involved submitted to the court files and the defendant's administrative files, which were all subject matter of the hearing.

Ratio decidendi

I

There is a right of appeal; it was in particular substantiated by the counsel's pleadings received on 23 March and thus within one month of issuing the decision on admissibility of 26 February 1999.

II.

The case is ready for a decision to be made with respect to the question in dispute between the parties involved concerning admissibility of the action. The administrative court denied this and therefore dismissed the action. The court division, however, believes it to be admissible but cannot currently allow it. A final decision in the matter itself is not possible also in view of the extensive documents submitted and mentioned only during the hearing. The court division also does not believe that a final decision which would conclude the work of the court of appeal by annulling the challenged judgement and referring the case back to the administrative court pursuant to Article 130 para. 1 no. 1 of the German Rules of the Administrative Courts (VwGO), is expedient because the administrative court would not deal any better with the matter of the case (cf. Meyer-Ladewig in: Schoch/Schmidt-Assmann/Pietzner, VwGO-Kommentar, § 130 marginal no. 11 at the end with further references), an additional second instance pursuant to Article 124 of the German Rules of the Administrative Courts (VwGO) would not be opened under all circumstances and the administrative dispute proceedings have already been pending for a considerable period of time. This is why the court division makes a provisional decision on the admissibility of the appeal at its discretion pursuant to Article 109 of the German Rules of the Administrative Courts (VwGO) (cf. in this respect BVerwG, judgement dated 4 February 1982 – 4 C 58.81 – BVerwGE 65, 27 (29)) and on the admissibility of the action.

III.

The action for a declaratory judgement filed by the plaintiff within the meaning of Article 43 para. 1 of the German Rules of the Administrative Courts (VwGO) is admissible.

1. Contrary to the view of the defendant, a determinable legal relationship does exist between the parties involved. The plaintiff is of the opinion that its own rights have been violated through the order to refuse Mr. and Mrs. Moon entry pursuant to Article 96 para. 2 of the Schengen Convention because the interests of its members to religious guidance by its spiritual leader has not or only insufficiently been taken into consideration. The defendant argues, however, that the plaintiff's own rights have not been affected by the order in question to refuse entry. The question consequently in dispute between the parties involved as to whether and which legal relationships arise between them on the basis of these actual circumstances and the law specified can be clarified by a court. Contrary to the assumption of the defendant, this is not only the question of a legal relationship between itself and Mr. and Mrs. Moon, and thus not a so-called action for a third party declaratory judgement. The assumption of a legal relationship within the meaning of Article 43 para. 1 alternative 1 of the German Rules of the Administrative Courts (VwGO) does not conflict with the opinion of the defendant that an order for entry within the meaning of Article 96 para. 2 of the Schengen Convention has no direct outward legal effect because this is merely a preparatory administrative measure for the final decision on entry. The existence of a "legal relationship" within the meaning of Article 43 para. 1 alternative 1 of the German Rules of the Administrative Courts (VwGO) does not necessarily require an "administrative measure" to have been issued.

2. The plaintiff has right of action.

   a) The plaintiff is an institution embodied in the basic right arising from Article 4 of the German Constitution. According to Article 19 para. 3 of the German Constitution, the basic right arising from Article 4 of the German Constitution is also attributable to associations devoted to cultivating a religion or *Weltanschauung* (cf. BVerfG, decisions dated 4 October 1965 – 1 BvR 498/62 – BVerfGE 19, 129 (132) and dated 16 October 1968 – 1 BvR 241/66 – BVerfGE 24, 236 (246 f,)). The teachings of Sun Myung Moon as supported and propagated by the plaintiff constitutes a religion in this sense if based on "a

reality which transcended man", a "certainty associated with the person on specific statements on the world in its entirety and on the origin and purpose of human life" (cf. BVerwG, judgements dated 23 March 1971 – 1 C 54.66 – BVerwGE 37, 344 (363), dated 14 November 1980 – 8 C 12.79 – BVerwGE 61, 152 (154 and 156 with further references) and dated 27 March 1992 – 7 C 21.90 – BVerwGE 90, 112 (115)).

Moon's teachings, essentially contained in the book entitled "The Divine Principles", are based on an eternal God of Creation who gives and takes with his Creation. According to this theory, God wishes to feel joy and happiness when he views his Creation. The Creation does not only consist of a visible but also of an invisible, spiritual world. Man is at the centre of the Creation. After attaining perfection he is to be the main object of God's love and joy. This perfection is to be achieved in three steps. In the first step, the spirit and body of man must become a single entity directed at God: man then feels like God and can therefore no longer sin (1st blessing). In the second step, a perfect man and a perfect women are to form a single entity directed at God in marriage and produce pure good children (2nd blessing). In the third step, the perfect people are to dominate the entire Creation directed at God (3rd blessing). In this way an ideal world is to be created without sin, a so-called "kingdom of heaven on earth". The "Heavenly Kingdom of God" is only reached once a perfect person living in the "kingdom of heaven on earth" passes into the invisible spiritual world after his physical death with his "spiritual body" or his "spiritual self", where he then enjoys eternal life. However, this Divine Plan of Creation was – to begin with - frustrated by the "Fall of Man": the archangel Lucifer, jealous of God's greater love of man than of himself, tempted Eve, the first worldly woman, to engage in sexual relations (spiritual fall) who then – in knowledge of her own purpose of producing children with Adam, the first worldly man – also had sexual relations with him although she was not yet perfect (physical fall). Adam received all elements which Eve had received from Lucifer who had fallen to Satan; these were then passed down to their descendants, causing a Satanic blood line which is why mankind has since been awaiting redemption through the restoration of the original Divine Order of Creation. God has been working on this ever since. However, because he cannot do this on his own

owing to the freedom given to man and because man cannot free himself from his demise alone, God sent mediators and the "Messiah" in the shape of Jesus of Nazareth who, as the "Second Adam" or as the "True Father" is to redeem mankind by its physical and spiritual rebirth. As a result of the crucifixion of Jesus initiated by Satan, Jesus was unable to restore a woman to the "True Eve", to have pure children of good with her and establish a "kingdom of heaven on earth". He was merely able, after his resurrection, to promise together with the Holy Ghost as the "Second Eve" redemption for all those who had believed in him to the last in that, after their physical death, they alone could enter into "paradise", which itself is a mere preliminary stage to the "Heavenly Kingdom of God", however. Therefore (a) Christ as man would have to come (again) in order to restore the physical world, satisfy God's three blessings and finally achieve the "heavenly kingdom of God". The "Lord of the Second Coming" or the "Lord of the Second Advent" or the "Third Adam" would also have to physically overcome Satan again, then restore a human woman to the "True Eve" and produce pure children of good with her as "True Parents". In addition he will fulfil the missions of the main representatives of all non-Christian religions whose appearance is awaited by all followers. If they believe him and serve him in the fulfilment of the will of God, he will unite all religions with Christianity as the focal point, thus ultimately redeeming their followers (cf. "The Divine Principles" in its entirety as well as Flasche, Hauptelemente der Vereinigungstheologie (in Kehrer, Das Entstehen einer neuen Religion), p. 48 ff.: Handbuch Religiöse Gemeinschaftern, 4th edition, p. 821 (825 to 829); Minhoff/Lösch, Neureligiöse Bewegungen, 2nd edition, p. 61 (93 to 96); Schwarzenau, Die Göttliche Prinzipien – Anmerkungen zum grundlegenden Buch der Vereinigungskirche (in: Stellungnahmen zu Theologie und Praxis der Vereinigungsbewegung), p. 8 ff.). Moon has since confirmed that he and his wife Hak Ja Han Moon are "Messiahs" and the "True Parents" (cf. Flasche, loc. cit., p. 75 with further references; Gandow, Mun-Bewegung, p. 114 with further references; Handbuch Religiöse Gemeinschaften p. 827 ff. with further references; Lindner, Kulturelle und semantische Probleme beim Studium einer neuen Religion (in Kehrer, Das Entstehen einer neuen Religion), p. 228 f; Redhardt, Sachverständigengutachten zum Glaubenssystem, zum Fremd- und

Selbstverständnis und zur missionarischen Aktivität der Vereinigugnskirche, p. 29 f.; cf. also Mun, Die wahre Familie und ich, p. 11 f, and p. 12 f. as well as Vereinigungskirche e.V., Segen der Liebe, p. 25 with further references). Now that – as a result of a "third world war" which the forces of Satan were destroyed by the heavenly army – communism has collapsed and the foundation for a unification of the whole of mankind has been laid, the opportunity exists to extend the "kingdom of heaven on earth", as it evidently already exists to a small extent today, and to establish this everywhere (cf. primarily Lindner, loc. cit., with further references; cf. also Gandow in: Lexikon der Sekten, Sondergruppen und Weltanschauungen, 4th edition, column 696 f.; Handbuch Religiöse Gemeinschaften p. 828 f. and Minhoff/Lösch, loc. cit., p. 81 and 84 f.) and thus to complete God's redemption work by restoring the original Order of Creation. To work towards this goal is the task of the members of the "Unification Church", who understand the blessing of couples by Mr. and Mrs. Moon not only as a blessing of their marriage by the "True Parents" but also as a personal purification from the corruptive relationship of Adam and Eve and as a link to a new line of descent and thus as an act of redemption (cf. Vereinigungskirche e.V., loc. cit., p. 26 and in this respect also Handbuch Religiöse Gemeinschaften, p. 835, Informationen über neue religiöse und weltanschauliche Bewegungen und sog. Psychogruppen (edited by Berliner Senatsverwaltung), p. 74 as well as Lindner, loc.cit., p. 229 f.).

The teachings supported by the plaintiff constitute a statement on the world in its entirety and on the origin and purpose of mankind based on a transcendental reality. The plaintiff is therefore a religious community within the meaning of Article 4 of the German Constitution. It is of no relevance here that Moon and/or his followers also operate to a considerable extent in political and economic fields (cf. in this respect the statements - described by the plaintiff as inapplicable in part - in the so-called Fraser Report, p. 325 to 332 and 338 to 387 (German translation of a part of the Fraser Report, p.25 to 36 and 47 to 124), by Gandow in: Lexikon der Sekten, Sondergruppen und Weltanschauungen, column 691 f., in Handbuch Religiöse Gemeinschaften p. 833 f. as well as by Minhoff/Lösch, loc. cit., p. 75 f., 78, 80 ff. and 96 f.). Any

dangers which may be associated with such non-religious activities of a religious community are not to be dealt with by a restrictive definition of the circumstances of basic rights but by applying pertinent general laws in addition to Article 4 of the German Constitution, through to the legal consequence of dissolving the religious community under certain circumstances. Accordingly, the protection afforded by Article 4 of the German Constitution remains intact in principle and merely gives way to the extent necessary to protect conflicting legal interests (cf. BVerwG, judgements dated 23 March 1971, loc. cit., p. 362 ff. and dated 27 March 1992, loc. cit., p. 116 ff.). Something different would only apply if the religious teachings of Moon were only to serve him and his followers as a pretext for political and economic activities and if these were merely "embellished" with religious goals. Only in this case could Moon and his followers be accused of abusing the right to cultivate a religion which would lift the protection afforded by Article 4 of the German Constitution (cf. BVerwG, judgement dated 27 March 1992, loc. cit. P. 118). The court division is unable to recognise anything of this kind. Moon, who was born and grew up in a Japan-occupied Korea, started to preach his religious teachings back in 1945 or 1946 before he personally encountered difficulties with communism. Following Moon's torture and imprisonment by the North Korean communists from 1947 to 1950 he was not reported to have engaged primarily in political agitation, but rather in daily worship. Furthermore, he was barred from the Presbyterian Church as early as 1948 owing to his different religious teachings. These facts alone prove that Moon's teachings have a religious foundation and do not result solely from his personal experience with communism. As far as the economic activities of Moon and his followers are concerned, it must be seen that the "Divine Principles" were written between December 1930 and May 1952 and were published in 1957. Moon officially founded his movement in May 1954, and not as a political party. Only at the beginning of the sixties did political - anticommunist - organisations develop which were dependent on him. Moon also sent missionaries to Japan and the USA in 1958 and 1959 respectively. It was not until December 1959, however, that Moon set up his first commercial enterprise (cf. primarily Handbuch der Religiösen Gemeinschaften, p. 822 f. and Minhoff/Lösch, loc. cit., p. 65 ff.).

b) However, the fundamental freedom of belief, including the freedom to practise a religion without impediment within the meaning of Article 4 para. 1 and 2 of the German Constitution, are not there to guarantee foreign religious leaders of a religious community a right to entry and residence for the spiritual guidance of their followers which would not otherwise exist. In the same way, Article 4 para. 1 and 2 of the German Constitution do not grant a religious community domiciled in Germany a right to entry and residence of their foreign religious leaders for the spiritual guidance of their followers which would not otherwise exist (cf. BVerwG, decisions dated 6 May 1983 – 1 B 58.83 – NJW 1983, 2587 and dated 8 November 1983 – 1 A 77.83 – InfAuslR 1984, 71 (72)). Therefore, insofar as the circumstances for the order to deny Mr. and Mrs. Moon entry within the meaning of Article 96 para. 2 of the Schengen Convention exist and the discretion provided by this position has been exercised correctly, the rights of the plaintiff arising from Article 4 para. 1 and 2 of the German Constitution cannot be said to be violated. However, when making discretionary decisions on facilitating entry and residence to the religious head of a religious community or on refusing such, the interests of the members of a religious community living in the Federal Republic of Germany in spiritual guidance are also to be given consideration in the light of the significance of fundamental freedoms arising from Article 4 para. 1 and 2 of the German Constitution (cf. BVerwG, decisions dated 6 May and 8 November 1983, loc. cit.). This does not constitute a mere reflex action in favour of the plaintiff. Rather, the plaintiff has a public right under procedural law to discretion being correctly exercised in connection with its legal position (under substantive law) resulting from Article 4 para. 1 and 2 of the German Constitution. This is derived from the following: against the background of Article 111 of the Schengen Convention, the exercising of discretion contained in Article 96 para. 2 of the Schengen Convention serves not only the public interest but also the protection of private interests affected by the order to refuse entry. Article III of the Schengen Convention gives any person the right to file action for an annulment of an order which affects him or to file action for damages. Mr. and Mrs. Moon could litigate for annulment of the order to refuse entry within the meaning of Article 96 para. 2 of the Schengen Convention and request that its lawfulness be scrutinised. It would also have to be thoroughly checked – and this is not

disputed by the defendant - whether discretion was exercised on the correct factual basis and with due consideration of the interests of Mr. and Mrs. Moon, which include amongst other things their interest, as religious leaders of the "Unification Church", in providing spiritual guidance to the members of the plaintiff. Running parallel to this interest of Mr. and Mrs. Moon is the interest of the plaintiff in this very same spiritual guidance of its members by its religious leaders which – as already set out above – is similarly to be taken into consideration when exercising discretion in the light of the significance of the fundamental freedoms derived from Article 4 para. 1 and 2 of the German Constitution. This justifies the assumption that the exercising of discretion in Article 96 para. 2 of the Schengen Convention – as a result of the effect of Article 4 para. 1 and 2 of the German Constitution in the application of this law by a German authority - also serves the purpose of protecting the interests of the plaintiff.

Contrary to the assumption of both Administrative Court and defendant, the situation regarding interests is in principle comparable with that of married couples living in Germany in which one spouse is required to leave Germany by virtue of an order issued under the law relating to foreigners. In this context it is generally recognised that the spouse who is not the addressee of such an order is entitled to file action owing to the possible associated violation of his or her own rights arising from Article 6 para. 1 of the German Constitution. Since Article 6 para. 1 of the German Constitution does not necessarily protect the foreign partner in a marriage between a German national and foreigner from having his or her residence permit annulled, (cf. only the judgement of the Federal Administrative Court dated 3 May 1973, also cited by the Administrative Court – 1 C 20.70 – NJW 1973, 2077 (2078)) the only right that exists – insofar as the respective order issued under the law relating to foreigners is a discretionary decision and Article 6 para. 1 of the German Constitution does not already influence the understanding of the objective features of the case - is one to discretionary consideration of the protective effects following from Article 6 para. 1 of the German Constitution (cf. both the judgement of the Federal Administrative Court dated 3 May 1976, loc. cit., p. 2077 f. as well as the other judgement passed by the Federal Administrative

Court dated 27 August 1996 – 1 C 8.94 – BVerwGE 102, 12 (23) and cited by the Administrative Court). Contrary to the assumption of the Administrative Court, the Federal Administrative Court in the latter case did not substantiate the right to action by the fact that "the protective area of Article 6 of the German Constitution" was affected in its core, but considered it to be sufficient that the plaintiff argued that "its asserted right arising from Article 6 para. 1 of the German Constitution had been violated by the challenged decision because this right evidently and unambiguously exists or is attributable to the plaintiff after consideration of all aspects" (loc. cit. p. 15). Whether ultimately the protection embodied in Article 6 para. 1 of the German Constitution is applicable, because the consequences of ending residence and expelling one spouse are disproportionately hard on the interests of marriage and the family by comparison with the importance of public interest, was looked into by the Federal Administrative Court – in agreement with the generally recognised principles of procedural law - (loc. cit. p. 19 f. and 23) only when determining the admissibility of the action. In the former case too, however, the Federal Administrative Court substantiated the right of action by the fact that Article 6 para. of the German Constitution did not only guarantee the integrity of marriage and the family but also developed more extensive protective effects (cf. loc.cit. p. 2077).

The decision of the Federal Administrative Court of 24 August 1979 cited by the defendant (1 B 76.76 – Buchholz 402.24 Article 2 AuslG No. 16) does not speak against the assumption of the plaintiff's public right under procedural law to exercise discretion free from error in association with its legal positions under substantive law arising from Article 4 para. 1 and 2 of the German Constitution. In the case upon which this decision is based, in which foreigners were refused entry to a political meeting owing to an official discretionary decision and a national who, citing a violation of his fundamental right to freedom of information arising from Article 5 para. 1 sentence 1 of the German Constitution, sought to establish the unlawfulness of this entry ban, the Federal Administrative Court decided that whilst the significance of the freedom of information is to be taken into consideration in the official discretionary decision in a democratic constitutional state, it does not negate the entitlement

of the plaintiff to take action in this connection, but – within the framework of an investigation into whether there is good cause for the litigation – a violation of the own rights of the plaintiff. This is because the reasons which spoke against the entry of the foreign political meeting participant should have been included in the considerations and the Court therefore rejected the establishment of unlawfulness of the entry ban. Also in earlier decisions of the Federal Administrative Court cited by the defendant in this connection, an application for declaratory action was also viewed as unfounded on the merits under such circumstances (cf. BVerwG, judgements 11 June 1975 – 8 C 63.73 – BVerwGE 48, 331 (335) and of 22 September 1976 – 1 C 9.71 – BayVBl. 1977, 153 (154)).

Finally, the fact that "the decisions are issued only once" and "cannot be split", depending on whether the spiritual leader of the religious community or the religious community files the action, as argued by the defendant in the pleadings dated 15 October 1999 and placed at the centre of its statements in the hearing, does not conflict with the assumption of right of action. In its decision of 6 May 1983 (loc. cit) the Federal Administrative Court did not simply "graphically elaborate" the rules of law, as the defendant believes, but merely stated that Article 4 para. 1 and 2 of the German Constitution granted neither a foreigner an otherwise non-existent right of residence for spiritual guidance of members of a religious community nor an otherwise non-existent right of entry of this foreigner for the spiritual guidance of his followers (see above). As for the rest, the assumption of the defendant that the decision on an action filed by Mr. and Mrs. Moon could have no other outcome than that of action taken by the plaintiff is incorrect. The plaintiff is asserting a violation of its <u>own</u> rights and is thus asserting the existence of a legal relationship other than that upon which action of Mr. and Mrs. Moon would be based. The decisions could therefore be different for reasons of procedural law alone (cf. in this respect the case upon which the judgement of the Federal Administrative Court of 27 August 1996 (loc. cit.) is based in which the action of one spouse against refusal to extend a residence permit is rejected on the grounds of failing to meet the time-limit for lodging an objection, but where the refusal was annulled in reaction to action filed by the other spouse on the

grounds of discretionary error). The decisions could also be different for reasons of substantive points of law because within the framework of the discretion granted by Article 96 para. 2 of the Schengen Convention not only the interests of Mr. and Mrs. Moon in the spiritual guidance of the members of the plaintiff are to be considered but also other interests of the former in entering and residing in the Federal Republic of Germany. But even if it were possible to decide uniformly on the actions filed by Mr. and Mrs. Moon and by the plaintiff, this would not mean that the right of action of the plaintiff – or of Mr. and Mrs Moon - would have to be denied but that this would have to be taken into consideration by summoning the interested parties within the meaning of Article 65 para. 2 of the German Rules of Administrative Courts (VwGO).

3. The plaintiff has a justified interest in establishing the legal relationship in dispute between itself and the defendant in the near future.

Since an order to refuse entry to Mr. and Mrs. Moon is currently in force they must in principle be refused entry to the area in which the Convention applies and thus – in particular – to Germany pursuant to Article 5 para. 2 sentence 1 of the Schengen Convention. This is why the spiritual guidance of the members of the plaintiff by Mr. and Mrs. Moon in Germany is currently impossible. Contrary to the assumption of the defendant, this is not a preventive action for a declaratory judgement. And the plaintiff cannot be instructed to first seek judicial remedy when Mr. and Mrs. Moon have once again – also - been refused entry to Germany. In such a case the purpose of entry and residence would take care of itself before completion of the legal proceedings whilst in mere preliminary legal proceedings the lawfulness of the entry ban could not or not completely and finally be investigated. This would also make it impossible for the plaintiff to make serious plans and arrangements concerning visits of Mr. and Mrs. Moon to Germany for the spiritual guidance of their members. Quite apart from this, the plaintiff correctly asserts that the danger of - renewed - extension of the entry ban for Mr. and Mrs. Moon exists, and with it a “danger of repetition”.

The defendant cannot argue here that despite the entry ban Mr. and Mrs. Moon would be permitted to enter pursuant to Article 9 para. 3 of the German Aliens Act (AuslG),

because this would be possible only under the very narrow conditions specified therein and for a short time only. For this reason, the plaintiff can be denied a justified interest in a declaratory judgement or general legal protection just as little as an expelled foreigner, for example, could be denied the general interest in legal protection for a right of appeal against the expulsion order, simply because short-term entry into the Federal Republic of Germany can nevertheless be permitted under the conditions of Article 9 para. 3 of the German Aliens Act (AuslG).

Similarly, the defendant cannot assert that the plaintiff has no general interest in legal protection because it could not necessarily achieve the entry of Mr. and Mrs. Moon solely through the success of its action for a declaratory judgement, because then under certain circumstances the entry ban could once more be issued against Mr. and Mrs Moon pursuant to Article 96 para. 2 of the Schengen Convention on the grounds of a new discretionary decision, or they could be banned from entry pursuant to Article 60 para. 3 and Article 7 para. 2 of the German Aliens Act (AuslG) despite final deletion from the Schengen Information System. For this reason, a justified interest of the plaintiff in the scrutiny of the lawfulness of a discretionary decision cannot be denied, because otherwise a general legitimate interest in legal redress would never exist, despite a public right to a correct discretionary decision in connection with a legal position for the scrutiny of discretionary decisions. Something different could apply here if, for other reasons not considered in the discretionary decision made, Mr. and Mrs. Moon were to be banned from entry once again pursuant to Article 96 para. 2 of the Schengen Convention or if they had to be banned from entry pursuant to Article 60 para. 3 and Article 7 para. 2 of the German Aliens Act (AuslG) because in this respect the discretion would be reduced to “zero”. The defendant does not assert this itself, and it is also not evident.

4. Finally, the admissibility of the action does not conflict with Article 43 para. 2 of the German Rules of the Administrative Courts (VwGO) according to which the establishment of a legal relationship cannot be requested insofar as the plaintiff can pursue or could have pursued his rights through action requesting a change of a legal right or status or action for performance. In keeping with its purpose, this regulation is to be interpreted and applied restrictively. If there is no threat of circumvention of the provisions on deadlines and preliminary proceedings particularly applying to actions

for avoidance (*Anfechtungsklage*) and action by public procedure against a public authority to compel the performance of an administrative act for one's own benefit (*Verpflichtungsklage*), Article 43 para. 2 of the German Rules of Administrative Courts (VwGO) is not against the action for a declaratory judgement against a public authority because it is to be expected that it will acknowledge a right without enforcing it (cf. BVerwG, judgement dated 27 October 1970 – 6 C 8.69 – BVerwGE 36, 179 (181 f.); cf. also BVerwG, judgement dated 29 April 1997 – 1 C 2.95 – NJW 1997, 2534 (2535) with further references). There is no danger of specific provisions for an action for avoidance or an action to compel performance (Article 68 ff. VwGO) being circumvented here. The order to refuse entry pursuant to Article 96 para. 2 of the Schengen Convention is not an administrative act within the meaning of Article 35 VwVfG because, as the defendant itself states, it is not outwardly geared to a direct legal effect. Rather, the order to refuse entry is made in such a way that personal data of the foreigner are stored in the SIS, a supranational computer-supported police search system, which can then be called up in automatic procedures to grant residence permits, in particular visas as well as in entry checks (cf. in detail Westphal, InfAuslR 1999, 361 as well as in: Huber, Handbuch des Ausländer- und Asylrechts, preliminary remarks 1 to 3 on Article 92 ff. and Article 96 margin no. 1 of the Schengen Convention as well as Würz, Das Schengen Durchführungsübereinkommen, marginal no. 152 ff.). The order to refuse entry is therefore merely a basis of information for a future decision on an entry request and is thus of purely internal significance for the authorities. Article 5 para. 2 sentence 1 in connection with para. 1 letter d of the Schengen Convention only obliges the contracting states to refuse entry to foreigners from outside the scope of the Convention against whom an entry ban has been issued, but does not apply directly to the relationship between the contracting state and said foreigner (cf. Westphal InfAuslR 1999, 361 (363)). An action for avoidance against the order to refuse entry would not therefore be admissible and an action with the objective of annulling the order to refuse entry would only be admissible as a general action for performance (cf. Westphal, loc. cit. p. 364 f. as well as on the order pursuant to Article 30 BGSG, the judgement of the division dated 20 November 1995 – 11 A 12260/95.OVG -).The action for a declaratory judgement would therefore not be secondary itself even if the plaintiff were able to file a general action – not limited to deadlines - for annulment of the entry ban on Mr. and Mrs. Moon in the SIS in its place. It can therefore remain open whether the plaintiff could file action itself for

annulment of the order refusing entry to Mr. and Mrs. Moon on the basis of its right to a decision free from discretionary error in connection with its legal positions deriving from Article 4 para. 1 and 2 of the German Constitution – possibly extending beyond the wording of Article 111 of the Schengen Convention – which does not rule out more extensive legal protection in the individual contracting states (cf. also Würz, loc. cit. margin no. 387). It can therefore also remain open whether, conversely, the action for declaratory judgement filed by the plaintiff is the only possible course of action it can take, or whether the action for declaratory judgement provides it with at least the most effective legal protection as stated in detail by the Administrative Court, making reference to the judgement of the Federal Administrative Court of 29 April 1997 (loc. cit. p. 2535), hence also the reason why it is not secondary.

IV.

The decision as to costs shall be reserved for the final judgement (cf. Kopp/Schenke, VwGO-Kommentar, 12th edition, a § 161 marginal no. 2 with further references).

V.

The appeal on questions of law is to be allowed pursuant to Article 132 para. 1 and 2 no. 1 of the German Rules of Administrative Courts (VwGO) because the question of relevance to the decision as to whether a religious community has right of action if there is an entry ban on its foreign spiritual leader is not yet clarified in the rulings of the Federal Administrative Court.