Special field:

Official Reporter of the Decisions of the Federal Administrative Court (BVerwGE): yes

Law on administrative court proceedings
Law on aliens

Trade press: yes

Legal sources:

German Constitution (GG) Art. 4 (1) and (2)
Rules of the Administrative Courts (VwGO) Art. 42 (2), Art. 43
Aliens Act (AuslG) Art. 7 (1) and (2), Art. 60 (3)
Schengen Convention Art. 96 (2)

Headwords:
Action for a declaratory judgement; admissibility; legal relationship in respect of which a declaratory judgement can be passed; right of action; order to refuse entry; refusal of entry; legal protection of a third party; right to a decision free from discretionary error; Schengen Information System (SIS); religious freedom; religious association; religious leader; Unification Church; Moon Movement.

Judgement dated 10 July 2001 – Federal Administrative Court 1 C 35.00

Headnote:

A domestic religious association appealing against the order to refuse entry of its foreign spiritual leader in the Schengen Information System by means of action for a declaratory judgement may have a right of action derived from its basic right to practise a religion (Art. 4 (1) and (2) of the German Constitution).

Judgement of the 1st division dated 10 July 2001 – Federal Administrative Court 1 C 35.00

I. Administrative Court Koblenz dated 09.11.1998 – Ref.: VG 3 K 938/98.KO
II. Higher Administrative Court Koblenz dated 13.09.2000 – Ref: OVG 11 A 10349/99

FEDERAL ADMINISTRATIVE COURT

JUDGEMENT
IN THE NAME OF THE PEOPLE

BVerwG 1 C 35.00
OVG 11 A 10349/99

Pronounced
on 10 July 2001
Battiege
Court Clerk
Court Records Clerk

In the administrative legal dispute

Federal Republic of Germany, represented by
the Federal Ministry of the Interior – Bonn –
Graurheindorfer Straße 198, 53117 Bonn,

defendant, appellee on questions of fact and law
and appellant on questions of law only

versus

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

plaintiff and appellant on questions of fact and
law and appellee on questions of law only,

- Counsel of the plaintiff:

the first division of the Federal Administrative Court, during the hearing on 10 July 2001 in which the following persons took part

presiding judge at the Federal Administrative Court
judges at the Federal Administrative Court
judge at the Federal Administrative Court
judge at the Federal Administrative Court,

held that

the appeal on questions of law only against the interlocutory judgement of the Higher Administrative Court Rhineland-Palatinate of 13 September 2000 is dismissed,

the decision on costs of the appeal proceedings will be made in the final judgement.

R a t i o d e c i d e n d i

I.

The parties to the legal action dispute the admissibility of the action for a declaratory judgement filed by the plaintiff.

The plaintiff is a registered association which unites the German members of the “Unification Church International”. Its founder and leader is Sun Myung Moon. He and his wife Hak Ya Han Moon are citizens of the Republic of Korea (South Korea) with legal residence in the USA. As part of a series of appearances in Europe, Mr. Moon was to speak at an event in Frankfurt/Main before members of the Unification Church and invited guests on the subject of “The True Family and I” on 12 November 1995.

At the beginning of November 1995 upon instruction of the Federal Ministry of the Interior, the Frontier Protection Headquarters (*Grenzschutzdirektion*) in Koblenz issued an order denying Mr. and Mrs. Moon entry pursuant to Art. 96 (2) of the Schengen Convention for an initial period of three years. This order was based on the view that the entry of Mr. and Mrs. Moon would be highly detrimental to the interests of Germany and that there was therefore sufficient reason to order refusal of entry at the border pursuant to Art. 60 of the German Aliens Act (AuslG). It was argued that 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. The aim of this movement is to establish a world governed by Korea under the leadership of the “Moon Family”. It must be assumed that Mr. and Mrs. Moon would encourage the spread of their movement and that a public appearance in the Federal Republic of Germany would lead to strong reactions from the public. Upon their arrival from Budapest at the airport in Paris on 11 November 1995, Mr. and Mrs. Moon were refused entry by the French authorities and prevented from travelling on to Madrid and from here to Germany with reference to the order to refuse entry. Mr. and Mrs. Moon then flew back to Budapest.

The Frontier Protection Headquarters in Koblenz has since extended in the Schengen Information System (SIS) the order to refuse entry in force until 3 November 1998 by a further three years to 2 November 2001. Mr. and Mrs. Moon have not appealed against this action.

In December 1995 the plaintiff brought action to establish the unlawfulness of the entry ban on Mr. and Mrs. Moon. It essentially argued that as a religious association pursuant to Art. 4 (1) and (2) of the German Constitution (GG) and Art. 9 of the EMRK it had a public right that its interest in its members receiving spiritual guidance from Mr. and Mrs. Moon had to be taken into consideration – in a manner free from discretionary error - in the decision on permitting entry of the same. This right had been violated by the order to refuse entry. The defendant had made a discretionary error because the reproaches against Mr. and Mrs. Moon and the Unification Church were based on incorrect facts and were incorrect. In addition, it had failed to recognise the significance of the freedom of the Unification Church and its members to practise religion.

The Administrative Court rejected the action as inadmissible because the plaintiff had no right of action. There was evidently no infringement of the rights of the plaintiff. Outside third parties could not derive any own rights with respect to the entry ban from Art. 96 (2) of the Schengen Convention. In this respect Art. 111 of the Schengen Convention only gave the affected foreigner direct rights. The plaintiff could also not derive any possible violation of law through the entry ban directly from Art. 4 (2) of the German Constitution. The freedom to practise a religion protected by the German Constitution did not cover granting the spiritual head of a religious community entry into the Federal Republic of Germany.

In its appeal the plaintiff asserted that its rights had indeed been affected by the entry ban in question and its extension by a further three years. 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 if he were merely to appear 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.

By means of interlocutory judgement the Higher Administration Court decided that there was a right of appeal and action, essentially arguing that the conditions for the admissibility of the action for a declaratory judgement pursuant to Art. 43 of the

German Rules of the Administrative Courts (VwGO) were satisfied. In particular, the plaintiff had a right of action. The plaintiff was holder of the basic right derived from Art. 4 (1) and (2) of the German Constitution which, pursuant to Art. 19 (3) of the German Constitution, can also be attributable to associations devoted to cultivating a religion or *Weltanschauung*. The teachings of Moon as represented by the plaintiff constitute a religion in this sense because they are a statement on the world in its entirety as well as on the origin and purpose of human life based on a transcendental reality. The additional political and economic activity did not alter this. However, Art. 4 (1) and (2) of the German Constitution did not give a religious community in Germany a right which would not otherwise exist to entry and residence of its foreign religious leaders for the spiritual guidance of their followers. Nevertheless, in making the discretionary decision pursuant to Art. 96 (2) of the Schengen Convention in the case of a spiritual leader the interests of those members of a religious community living in Germany are also to be taken into consideration in view of the basic freedoms bestowed by Art. 4 (1) and (2) of the German Constitution.

With its appeal on questions of law only, the defendant aspires to restore the decision of the court of first instance.

II.

The defendant's appeal on questions of law only is dismissed on the merits. The Higher Administrative Court correctly viewed the action for a declaratory judgement to be admissible.

Pursuant to Art. 43 of the German Rules of the Administrative Courts (VwGO), a party can request that it be established whether or not a legal relationship exists if the plaintiff has a justified interest in this being established quickly (paragraph 1) and he is not able or would not have been able to pursue his rights through action requesting a change of a legal right or status (*Gestaltungsklage*) or action for performance (*Leistungsklage*) (paragraph 2). These conditions are satisfied here.

With its action the plaintiff seeks to establish the existence of a legal relationship within the meaning of this regulation. As the appeal court correctly explained, despite the unclear formulation on this point in the demand for relief, the plaintiff is not seeking to establish a legal relationship between the Federal Republic of Germany against which action is brought and Mr. and Mrs. Moon, which exists due to the continuing order to refuse entry, but rather seeks to establish its own legal relationship with the defendant which it believes to have been brought about by the entry ban on Mr. and Mrs. Moon. This is not therefore a so-called third party action for a declaratory judgement but rather the plaintiff evidently seeks to establish that when deciding on the order ban on Mr. and Mrs. Moon, the defendant must consider the plaintiff's own rights particularly arising from Art. 4 (1) and (2) of the German Constitution.

This petition refers to concrete legal relationships which are disputed by the parties and which are therefore capable of a declaratory judgement. This is not altered by the defendant's objection that the order to refuse entry is a mere internal administrative measure which only has outside effect with rejection at the border. It is irrelevant whether the view of the appeal court applies that the order is not an administrative act but an internal administrative measure which merely constitutes a means of assistance for the border authority in making any future decision on the rejection of the foreigner at the border pursuant to Art. 60 of the German Aliens Act (AuslG) (cf. also Higher Administrative Court of Koblenz, judgement of 20 November 1995 – OVG II A 12260/95 – unpublished). Because irrespective of its legal character the order ban in the Schengen Information System (SIS) pursuant to Art. 96 (2) of the Schengen Convention of 19 June 1990 (BGBl 1993 II p. 1013) already has a sufficiently concrete effect on the persons affected by the intended entry refusal due to its international significance. Pursuant to Art. 5 (1) letter d and (2) of the Schengen Convention, the order regularly leads to rejection at the outer borders of the Schengen area by the border authorities of the respective contracting state to the Schengen Convention. By contrast to a purely national order to refuse entry, it is not therefore necessarily implemented in Germany by the German authorities by rejection at the border with the appropriate legal protection possibilities, but also by the remaining contracting states who in their turn may check the authorisation of the order from the other contracting state to a limited extent only at best (cf. in this

respect Westphal, InfAuslR 1999, 361, 363 et seq.). Accordingly, upon issue of the order to refuse entry the all-important decision has also been made vis-à-vis the plaintiff, this concretises the legal relationship with the defendant within which it requests consideration of its rights. The plaintiff has a justified interest in clarifying this legal relationship because the defendant has basically denied such a right of the plaintiff.

The action for a declaratory judgement is also not inadmissible from the point of view of subsidiarity (Art. 43 (2) of the German Rules of the Administrative Courts – VwGO) because the provisions applicable to the actions for avoidance (*Anfechtungsklage*) and to actions by public procedure against a public authority to compel the performance of an administrative act for one's own benefit (*Verpflichtungsklage*) concerning the deadlines and preliminary proceedings are not circumvented (cf. in this respect judgement dated 29 April 1997 – BVerwG 1 C 2.95 – Buchholz 310 Art. 43 VwGO No. 127 with further references).

Finally, the Higher Administrative Court correctly confirmed a right to action within the meaning of Art. 42 (2) of the German Rules of the Administrative Courts (VwGO). According to this provision, which is applied appropriately to the action for a declaratory judgement pursuant to Art. 43 of the German Rules of the Administrative Courts (VwGO) (stRspr, cf. judgement dated 28 June 2000 – BVerwG 11 C 13.99 – BVerwGE 111, 276), the action is only admissible if the plaintiff argues that its rights have been infringed. It is sufficient for this purpose that the infringement of rights appears to be possible. This is already to be assumed if an infringement of the plaintiff's own rights is not evidently and clearly ruled out after scrutiny from every angle (stRspr, cf. judgements dated 29 June 1995 – BVerwG 2 C 32.94 – BVerwGE 99, 64, 66 with further references and dated 27 February 1996 – BVerwG 1 C 41.93 – BVerwGE 100, 287, 299). This is the case here.

According to the findings of the appeal court, which were attacked without justification, the plaintiff is an association which – irrespective of other economic or political activities – is also devoted to the spiritual cultivation of a religion. At any rate it is to be assumed when scrutinising the admissibility of the action that, pursuant to Art. 19 (3) of the German Constitution, the plaintiff is entitled to the basic right of

freedom to practise a religion pursuant to Art. 4 (1) and (2) of the German Constitution (generally in respect of the requirements placed on religious communities cf. judgement dated 27 March 1992 – BVerwG 7 C 21.90 – BVerwGE 90, 112, 115 et seq.).

However, contrary to the view of the appeal court, a right of the plaintiff cannot be substantiated by arguing that Art. 96 (2) of the Schengen Convention is – at least also – a law with protective effect in favour of third parties which gives the plaintiff a legal position in connection with the religious freedom protected by the German Constitution. Art. 96 (2) of the Schengen Convention stipulates the reasons upon which decisions to refuse entry which are to entered in the SIS can be based according to national law. In view of the concept of the Schengen Convention there is much in favour of the fact that, in the same way as the regulations on the entry ban in Art. 5 (1) and (2) of the Schengen Convention, this provision only entitles and obliges the contracting states of the Schengen Convention and develops no direct effect on the party affected (cf. in general on the direct applicability of the Schengen Convention: Hailbronner, Ausländerrecht, March 2001, Art. 60 AuslG marginal no. 33 with further references). In particular, a general protection effect – also in favour of third parties as is the plaintiff – is also not derived from the fact that Art. 109 to 111 of the Schengen Convention give the persons (foreigners of third countries) against whom a ban has been issued their own right to information and action. What is more, as explained in the appeal hearing, the plaintiff primarily seeks legal protection against the defendant's decision, upon which the order in the SIS to refuse entry is based, that the conditions for a refusal of entry of Mr. and Mrs. Moon to Germany exist. The legal basis of importance to this decision was correctly viewed by the defendant to be embodied in Art. 7 (1) and (2) of the German Aliens Act (AuslG). Accordingly, a foreigner who, in the same way as Mr. and Mrs. Moon as South Korean citizens, is exempted from the requirement of a residence permit for a temporary visit to the Federal Republic of Germany, can be rejected at the border if this visit impairs or endangers the interests of the Federal Republic (cf. Art. 7 (2) No. 3 of the German Aliens Act (AuslG)). The plaintiff therefore complains that the defendant failed to sufficiently consider the rights derived from Art. 4 (1) and (2) of the German Constitution in exercising the discretion bestowed upon it by these provisions.

The fact that such a duty to consider exists in favour of a religious association with respect to the entry of its spiritual leader is not ruled out from the beginning and from every point of view. The provisions under the German Aliens Act regulating the entry and stay of foreigners do not usually have any protective effect in favour of third parties, so that in principle only the affected foreigner himself may take action against a refusal to permit entry or to issue a residence permit (cf. judgement of 27 February 1996 – BVerwG 1 C 41.93 – BVerwGE 100, 287, 299 et seq.). But if the law does give the authority a degree of discretion – as in this case in Art. 60 (3) in connection with Art. 7 (1) and (2) of the German Aliens Act (AuslG) – then decisions and basic rights of third parties are also to be taken into consideration in the exercising of this discretion if and insofar as they are affected by a decision under the German Aliens Act. This duty also basically corresponds with the right of the affected holder of basic constitutional rights with the result that the law opening up the possibility of the discretion also develops a protective effect in his favour in the light of the basic rights. The court already made this decision on the basic right derived from Art. 6 (1) of the German Constitution (GG) to family life (cf. judgement dated 27 August 1996 – BVerwG 1 C 8.94 – BVerwGE 102, 12, 18 et seq.). In principle, the situation is no different for the consideration of Art. 4 (1) and (2) of the German Constitution (GG).

It also appears possible that the decision of the defendant in question affects the area of protection of the basic right attributable to the plaintiff as religious community. The right of religious associations to exercise a religion in the community without disturbance covers not only cult acts and the exercising of and respect for religious customs such as services, church collections, prayers, receiving of the sacraments etc. but also religious education, religious and atheistic celebrations as well as other expressions of religious and philosophical life (BVerfG, decision dated 16 October 1968 – 1 BvR 241/66 – BVerfGE 24, 236, 246). It is not restricted to the classic function of a defensive right but also imposes the duty on the state to secure an area of activity for the individual and religious communities to develop in the religious and philosophical sphere (BVerfG, decision dated 16 May 1995 – 1 BvR 1087/91 – BVerfGE 93, 1, 16). Accordingly, it cannot be ruled out from the start that the interest in the personal presence of a foreign leader of a religious association at religious events can be protected by Art. 4 (1) and (2) of the German constitution, depending

on his position in the religious association. Such an understanding underlies the two decisions made by the lower courts (decisions dated 6 May 1983 – BVerwG 1 B 58.83 – Buchholz 402.24 Art. 5 of the German Aliens Act (AuslG) no. 2 and dated 8 November 1983 – BVerwG 1 A 77.83 – InfAuslR 1984, 71 et seq.). The court emphasised here that Art. 4 (1) and (2) of the German Constitution granted members of a religious community living in the Federal Republic of Germany no right to foreigners being granted entry and residence for the purposes of practising a religion outside the statutory procedures. At the same time it emphasised that the interest of the members of a religious community in spiritual guidance can be given consideration in the discretionary decision on granting a visa in view of the significance of the constitutional freedoms arising from Art. 4 (1) and (2) of the German Constitution.

In view of the breadth of the constitutional protective area of the freedom to practise a religion and with respect to the fact that this basic right does not provide the religious community in the legal relationship between state and its foreign leader with an independently assertable legal position, the duty of the state to consider the interests of this religious community exists only to the extent that the refusal to permit entry does not substantially impair the religious interests of the community in its own understanding of belief. Only then can the protective area of Art. 4 (1) and (2) of the German Constitution (GG) be affected in a legally significant manner with the result that the basic right gives the decisive provisions of aliens law a subjective legal character in favour of the religious community. This will particularly come into question if the visit of the leader to Germany has a special significance for the exercising of the religion according to the beliefs of the religion which extends beyond the usual character of a religious encounter.

The fact that a visit from Mr. and Mrs. Moon can have such a special significance for the plaintiff and its members is at least conceivable according to the findings of the appeal court and in view of the beliefs of the Unification Church which are strongly associated with its spiritual leader. This is sufficient for the assumption of a right of action within the meaning of Art. 42 (2) of the German Rules on Administrative Courts VwGO). Whether in the application of these criteria a right of the plaintiff to appropriate consideration of its interest in the encounter with the spiritual leaders is to

be confirmed within the framework of a discretionary decision under the law governing aliens and which consequences result for the discretionary decision made and upheld by the defendant will be a matter to be addressed by the Higher Administrative Court when assessing the merits.