7 A 11437/06.OVG
3 K 938/98.KO

RHINELAND-PALATINATE ADMINISTRATIVE APPEALS COURT

JUDGMENT

IN THE NAME OF THE PEOPLE

In the administrative matter of

Vereinigungskirche e.V., [Unification Church] represented by the management board, Schillerstrasse 18, 63189 Schmitten,

- Plaintiff and Appellant -

Legal representatives: Aderhold v. Dalwigk Knüppel Rechtsanwaltsgesellschaft GmbH, Subbelrather Strasse 15 A, 50823 Köln,

v .

the Federal Republic of Germany, represented by the Federal Minister of the Interior, Alt Moabit 101 D, 10559 Berlin,

- Defendant and Appellee -

Legal representatives: Lenz und Johlen, attorneys at law, Kaygasse 5, 50676 Köln,

c o n c e r n i n g entry prohibition

the 7th Senate of the Rhineland-Palatinate Appeals Court, Koblenz, held as follows on the basis of the oral arguments of April 19, 2007, in which the following justices participated:

Presiding Administrative Appeals Court Justice Wünsch
Administrative Appeals Court Justice Dr. Holl
Administrative Appeals Court Justice Wolff
Administrative Appeals Court Volunteer Justice, Hotelier Kauth
Administrative Appeals Court Volunteer Justice, Ms. Nickel:

:

By way of modification of the judgment of the Koblenz Administrative Court dated November 9, 1998, the declaratory finding is hereby made that the Defendant's listing of Ms. Hak Ja Han Moon and Mr. Sun Myung Moon for the purpose of entry prohibition is unlawful.

The Defendant shall bear the costs of the proceeding.

The judgment is provisionally enforceable with respect to costs.

The Defendant is permitted to avert enforcement by the Plaintiff by posting security in the amount of the costs being enforced, unless the Plaintiff first posts security in the same amount.

A *Revision* appeal [second-level appeal of legal issues] is not permitted.

S t a t e m e n t o f f a c t s

The Plaintiff association seeks a declaratory finding that the listing of its church leader, Mr. Sun Myung Moon, and his wife Hak Ja Han Moon for the purpose of entry prohibition in accordance with Art. 96 par. 2 of the Schengen Implementation Convention (SDÜ) - of June 19, 1990, was unlawful. Mr. Moon is the founder of the Unification Church, which is represented worldwide and whose followers in the Federal Republic of Germany are organized by the Plaintiff. According to the

Official Inquiry Report of the 13th German Bundestag dated June 9, 1998, the Unification Church combines Christian and Far Eastern traditions. Family and parents are of central importance in the Unification Church. Reverend Moon and his wife are seen as the “perfect parents” who function as God’s representative with the task of establishing a “perfect family” that is to enable a perfect mankind. The “true family” is supposed to enable the “restoration” of the “perfection” that was lost and destroyed by original sin. As the new perfect Adam and the new perfect Eve, they are supposed to lift original sin—which came into existence as a result of Satan’s seduction of Eve—and thereby complete Jesus’ work of creating a new sinless, perfect family. Moon’s marriage to Hak Ja Han in 1960 is understood as the “marriage of the lamb” and atonement for the crucifixion, by means of which the requirement is met for producing “sinless children” and thus establishing a real blood line that does not belong to the “Eve-Satan line,” but instead inaugurates a godly blood line of human perfection, of the “heavenly kingdom”. The goal is the comprehensive implementation of the heavenly kingdom on earth by means of final battle or “World War Three” with the satanic forces, including at the same time the redemption of the dead spirits from their intermediate realm. This view explains the overall intensive missionary activity. In the Unification Church, “family” and “parenthood” are particularly highly respected, however, in the form of strict orientation and subjection to the “true family,” which is expressed, for example, in the “vow.” This is expressed, in particular, by the ritual of the “blessing” of couples (also referred to “mass marriage”): Because in the “blessing” the couples are “adopted” and thereby become children of the “true family.” The “marriage” thus leads to a new “childhood relationship,” and the establishment of the couple’s own family—at least in some cases at Moon’s suggestion (the so-called “matching”), even if is not generally the case and there is a right to refuse consent—shifts the parents back into the status of children, now in relation to the “true family.”

The federal government informed the public about the Unification Church in a brochure entitled “The Moon Movement,” which was published in 1997 at the

behest of the Federal Ministry for Family, Seniors, Women and Youth, and pointed out purportedly looming dangers, which led to administrative court lawsuits concerning the lawfulness of this publication.

Entry of the Federal Republic of Germany by Mr. and Mrs. Moon was planned at the end of 1995 as part of a world tour. According to the visit itinerary, Mr. Moon was supposed to give a lecture entitled “The True Family and I” at an event held by an association affiliated with the Plaintiff; in addition, Mr. and Mrs. Moon were supposed to conduct discussions with their followers. Pursuant to an instruction by the Federal Ministry of the Interior, the then Border Protection Directorate, Koblenz, ordered an entry prohibition listing in the Schengen countries on November 9, 1995.

After the Plaintiff pointed out that its rights as a religious organization had been affected in light of the prevention of a pastoral meeting with its religious leader, it was stated by way of justification for the listing that the Moon movement is, in the assessment of the federal government, among the so-called youth sects and *Psychogruppen* [psycho-groups], from whose activities potential dangers for the social interests and personality development of young people could emanate. According to this explanation, the movement’s goal is a world governed from Korea under the rule of the Moon Family. The public appearance of the religious leader and his wife would, according to the explanation, encourage the spread of this movement. The explanation further stated that the listing countered a negative influence on public safety and order and substantial interests of the country.

It was stated, in substantial part, concerning the extension of the measure announced in 1998 and 2002 that the Unification Church had not recognizably separated itself from its potential of conflict of its basis; the only reason conflicts had not become manifest was because of the heretofore guaranteed absence of Mr. and Mrs. Moon from the Federal Republic of Germany up to that point in time.

After an emergency judicial relief petition before the Cologne Administrative Court failed, the Plaintiff filed a complaint there by means of a pleading that was received by the court on December 7, 1995, and by which the Plaintiff requested a declaratory finding that the entry prohibition listing was unlawful. By way of justification, the Plaintiff stated in substantial part that the fundamental right of freedom of religion also applies to newer religious communities of Asian origin: The entry prohibition listing, which had, on the basis of the initiative of the Federal Republic of Germany, led to entry difficulties in all Schengen countries, also negatively affected the national religious associations, because the meetings with the leader were important for purposes of the exercise of religion. According to the Plaintiff, this is an encroachment upon the core of the fundamental right of freedom of religion.

In opposition, the Defendant contended that a declaratory judgment action was procedurally impermissible from the outset, since the Plaintiff could not have its own right in this regard; the law governing foreigners—as recognized in the case law—does not provide for a right of entry for a foreign leader of a religious community. According to the Defendant, the Foreigner Office's discretion concerning the granting of entry is particularly broad. Finally, the Defendant asserted, this is not a typical religious community, and, based on the available knowledge, which had purportedly also been confirmed by a resolution motion by a Parliamentary committee of the EU Parliament, the Federal Republic of Germany could have no interest in missionary activity by Mr. and Mrs. Moon.

After the Cologne Administrative Court had, by order dated March 9, 1998, transferred the lawsuit to the Koblenz Administrative Court, which had territorial jurisdiction, the complaint was dismissed by judgment dated December 9, 1998, on the grounds that it was procedurally impermissible, since the court assumed that, although the Plaintiff might possibly be able to invoke fundamental rights protection under Art. 4 par. 1 GG [German Federal Constitution] as a religious community, there was an absence of any conceivable interference with such right

in the instance case, because the Plaintiff was, in reality, asserting a claim for entry by its foreign leader, but no such right is recognized in the well-settled case law.

In response to the Plaintiff's appeal of that judgment, the 11th Senate of the adjudicating court decided by interim judgment dated September 13, 2000, that the declaratory judgment action was procedurally permissible and referred by way of explanation—as did the Federal Administrative Court in its judgment dated July 10, 2001, that rejected the *Revision* appeal—to the fact that, according to well-settled case law, persons protected by fundamental rights, such as spouses, are able to assert rights to another person's residency and entry. According to the 11th Senate, it must be conceded to the Plaintiff that it is possible for the Plaintiff to have a right to the error-free exercise of discretion that takes into account the fundamental right of freedom of religion.

By judgment dated June 7, 2002, the 12th Senate of the adjudicating court dismissed the complaint on the merits, however, and stated by way of explanation that, according to the case law of the Federal Administrative Court, an obligation to take the fundamental right of freedom of religion into account is only recognized in cases involving a decision concerning a right of residency if more than insubstantial importance is attributed to the affected action within the religious community context. However, the 12th Senate held, this cannot be assumed to be the case based on the factual situation under adjudication. According to the theology of the Unification Church, the 12th Senate asserted, no particular importance is attributed to the visit by Mr. and Mrs. Moon with respect to the communal exercise of religion by the Plaintiff's members. A meeting marked by the presence of Mr. Moon did not, in the view of the 12th Senate, constitute anything more than an extraordinary event for the members. However, the 12th Senate held, these effects do not have any specific religious content, such as in the form of a revelatory experience, but are instead the effects that exist with any encounter with a leader of a church.

By order dated October 4, 2003, the Federal Administrative Court rejected the nullification appeal of that decision and noted that, although the standards established by the Administrative Appeals Court were, viewed in the abstract, too narrow, there was a lack of an adequate showing that the specific 1995 visit program under adjudication was affected thereby in a manner that interfered with freedom of religion; the Federal Administrative Court held that it was unnecessary to decide the question of how future visit programs would have to be adjudicated in this respect.

By order dated October 24, 2006, the Federal Constitutional Court vacated the judgment of the adjudicating court pursuant to the Plaintiff's constitutional appeal and declared the order of the Federal Administrative Court to be moot. By way of explanation, the Federal Constitutional Court stated in substantial part that the judgment had violated the Plaintiff's fundamental right arising from Art. 4 par. 1 and par. 2 GG [German Federal Constitution], because protection exists for more than merely the bare minimum existence of religion. According to the Constitutional Court, the religious community itself is entitled to assess the religious significance of the pastoral visits, and restraint must be imposed on the state in the evaluation of religious questions in this context. The Constitutional Court held that it is necessary that there be a weighing against the state interests identified in Art. 96 par. 2 SDÜ [Schengen Implementation Convention]. The fundamental right violation is not irrelevant, according to the Constitutional Court, since it is not foreseeable that such weighing will come out against the religious community.

The Plaintiff asserts the following in the reopened appellate proceeding: It is able to demand the declaratory finding that the entry prohibition listing was unlawful because the authorities have heretofore neglected the weighing required by the Federal Constitutional Court and that an entry prohibition in the Schengen system is also not justified in light of the possible result of such weighing. The Plaintiff contends that the Defendant stuck to the inadequate justification for the listing in

spite of the fact that a new pastoral trip was planned in 2005. Due to the defective decision, the Plaintiff asserts, Mr. and Mrs. Moon, as well as the Plaintiff, felt compelled to bring the complaint on November 2, 2005, with respect to the deletion of the listing (Koblenz Administrative Court - 3 K 2086/05.KO -). In the Plaintiff's view, Art. 96 par. 2 SDÜ does not constitute an adequate legal basis for the measure contested in the instance case, and therefore the fundamental right of freedom of religion is violated. According to the provision, the Plaintiff points out, a listing can only be justified on the grounds that entry represents a danger to public safety and order or national security. As the Federal Constitutional Court stated, danger with a certain degree of substantiality is necessary (reprint p. 13), since this is apparent from the examples cited in detail in the text of the convention, which refers, namely, to criminal acts of substantial weight committed by the foreigner or feared criminal acts of the foreigner. The Plaintiff contends that it is the view of the Federal Constitutional Court that it is certainly not apparent that the visit by Mr. and Mrs. Moon will bring with it dangers that, upon the requisite consideration of the constitutional interests, could justify the entry prohibition. The Plaintiff asserts that, when one takes into account the fact that, according to the case law of the Federal Constitutional Court, internal matters of faith are withheld from evaluation by the state, there has not even been a showing of a negative effect on the public interests of the Federal Republic of Germany.
The Plaintiff contends that, to the extent that the opposing party's presentation focuses from a factual standpoint on the continued "potential for conflict of the basis" of the Unification Church, there is no basis therein to justify the entry prohibition. The Plaintiff asserts that—as the Federal Constitutional Court emphasized—a religion is, with respect to the content of its principles, not bound by the notions of the Federal Constitution; moreover, according to the Plaintiff, the Official Inquiry Report (1998) emphasized that no dangers emanated from religious minorities. The "potential for conflict" invoked by the Defendant does not correspond to reality, the Plaintiff asserts: It cannot be said that there is an effort to achieve world domination; such interpretations of religious texts are misleadingly translated; there are no factual indications of the implementation of such efforts.

Moreover, the Plaintiff states, there are no concerns with respect to public reactions in connection with pastoral visits, as numerous visits by Mr. and Mrs. Moon to other countries, as well as earlier visits to the Federal Republic of Germany, have already demonstrated. According to the Plaintiff, Great Britain has abandoned its earlier misgivings about a visit. In particular, the Plaintiff contends, the stated interests of the Federal Republic of Germany are not of sufficient gravity to withstand a weighing against the interests protected by freedom of religion. In the Plaintiff's view, consideration should also be given to the fact that the religious life of the Unification Church in the Federal Republic of Germany has been substantially restricted in the manner described for more than ten years.

The Plaintiff moves

> that, by way of modification of the judgment of the Koblenz Administrative Court dated November 9, 1998, the declaratory finding be hereby made that the Defendant's listing of Ms. Hak Ja Han Moon and Mr. Sun Myung Moon for the purpose of entry prohibition is unlawful.

The Defendant moves

> that the appeal be dismissed.

The Defendant contends that the listing of November 9, 1995, and the extensions that followed are lawful and did not violate the Plaintiff's rights. They were, according to the Defendant, originally evaluated on the basis of §§ 60 par. 3, 7 par. 1 and par. 2 no. 3 AuslG [Foreigner Act] and, after the enactment of the Immigrant Act, § 15 par. 3 AufenthG [Residency Act] and § 5 par. 1 no. 3 AufenthG, each in conjunction with Art. 96 par. 2 SDÜ [Schengen Implementation Convention]. On this basis, the Defendant contends, the Plaintiff has no right regarding the entry of its religious leader, but merely a right to a decision free of abuse of discretion, which is not absent in this case. With respect to the required weighing, the Defendant asserts that the interests of the Federal Republic of

Germany outweigh the asserted fundamental right of freedom of religion. The Defendant asserts that no right to entry exists according to the well-settled case law of the Federal Administrative Court (BVerwGE [Decisions of the Federal Administrative Court] 114, 356); as the Federal Constitutional Court emphasized (reprint p. 12), religious communities are not excluded from the statutes that are applicable to everyone.
According to the Defendant, a danger to the public safety arises from the sources quoted in the document published by the Federal Administrative Office; the Defendant asserts that the factual presentation in said document set forth in the case law of the Cologne Administrative Court has remained substantially uncontested with relatively minor exceptions. According thereto, the Defendant asserts, the Unification Church is interested in the creation of a worldwide theocracy, the abolition of the social market economy, strict hierarchical thinking and the compulsory measures associated therewith, such as forced marriages, some of which are equivalent to the commission of criminal offenses. According to the Defendants, the German courts had recognized the nullity of such marriages under these conditions. The Defendant asserts that unions of couples on the basis of acts of blessing had even taken place in the absence of one of the partners and their validity was recognized by the Unification Church. According to the Defendant, the association employs rigorous member recruitment methods and monitors members by means of totalitarian measures, and therefore the state has a duty arising from Art. 2 par. 2 sentence 1 GG to protect the victims; fraudulent acts take place within the framework of the principle of so-called heavenly deception that the movement practices, particularly with respect to money collections for sham purposes. In sum, according to the Defendant, the commission of criminal acts is incited in this way. Contrary to isolated opinions by religious scientists, the Defendant asserts, there are no findings in support of a fundamental departure from these occurrences. The Defendant argues that the cited Official Inquiry Report cannot be utilized as evidence of innocuousness, since the individual religious communities and occurrences were not examined in detail therein. In the Defendant’s view, the association cannot distance itself from

these occurrences, but instead bears responsibility for them, and these occurrences must be imputed to the association from the legal standpoint of *Zweckveranlassung* [incitement—on the basis of acts that, viewed in isolation, are lawful—of third parties to endanger or disrupt public safety]. All actions go back to the teachings of Moon, according to the Defendant. In light of this, the Defendant claims, a situation of increased danger will arise if the encounter with the religion's founder is permitted. In the Defendant's view, therefore, the public interests in favor of entry prohibition predominate, even taking into account the interests in the religious activity. Moreover, according to the Defendant, it is necessary to take into account the fact that the state's discretion with respect to the decision to admit a foreigner into its sovereign territory is particularly broad; the discretionary decision can also include consideration of the question of whether mere interests of the Federal Republic of Germany would be violated; in this regard, the federal government has a prerogative with respect to its factual assessments. The Defendant contends that the discretionary leeway is likewise protected by the listing system in the Schengen Implementation Convention, in order preserve the importance of individual countries' national foreigner law. In light of the elimination of border controls, the Defendant contends, national sovereignty could not otherwise be preserved in this respect. Thus, the Defendant contends, the term "public safety" within the meaning of Art. 96 par. 2 SDÜ must be interpreted in such a manner that it also protects national decision-making sovereignty with respect to entry approval. The Defendant contends that, according to the well-settled case law, this discretionary decision can, moreover, still be supplemented in the judicial proceeding.

In its reply, the Plaintiff contends that there is no factual proof of the risks specifically cited by the Defendant; even to the extent that admitted individual occurrences are involved, these are individual occurrences from the 1970s and 1980s that can no longer be described as current. Moreover, according to the Plaintiff, the order by the Cologne Administrative Court from 1997 prohibited substantial individual assertions.

Concerning the further details of the legal and factual situation, reference is made to the pleadings exchanged by the parties, as well as the court records that were brought into the case, all of which were a subject matter of the oral argument.

Grounds for decision

The Plaintiff appeal is successful.

The complaint for declaratory judgment is procedurally permissible, as established on the basis of the finality of the interim judgment dated September 13, 2000; it is also well-founded on the merits.

The listing of Mr. and Mrs. Moon for the purpose of entry prohibition is unlawful and violates the Plaintiff's rights as a religious community (§ 43 in conjunction with § 42 par. 2 VwGO [Code of Administrative Procedure] *mutatis mutandis*). The listing violates the constitutionally protected right to freedom of religion set forth in Art. 4 par. 1 and par. 2 GG [German Federal Constitution].

According to the case law of the Federal Constitutional Court in the instant lawsuit (order dated October 24, 2006 - 2 BvR 1908/03 -, InfAuslR 2007, 99), violation of the Plaintiff's rights cannot be denied based on the justification that a pastoral visit like the one planned for Mr. and Mrs. Moon in the Federal Republic of Germany in 1995 has no particular significance to the communal exercise of religion by the Plaintiff's members and no specifically-religious content for them. Such visit plans are part of the religion the Plaintiff represents, whose founder and religious leader is Sun Myung Moon. The entry planned for him and his wife for the purpose of a pastoral visit with speeches before believers serves—at least in part—to provide believers with contact with the founder of the religion, to which central religious importance is attributed according to the Unification Church's self-image. In light of the preeminent position of the religion's founder for the belief system focused on him personally—the situation is comparable in the case of his wife in light of the

fact that Mr. and Mrs. Moon have, according to the doctrine, a sacral significance as the “true parents” of the believers and their families—any justification of a contrary assessment with respect to the importance of the visit to the Plaintiff would have required a concrete specific indication (which is not ascertainable here) of the purely touristic nature of the stay (see BVerfG, id., reprint p. 12). The special importance of the visit with respect to the question of the effect on the protected sphere of freedom of religion is determined specifically according to the assessment of the affected religious community itself, because the weighing of genuine religious interests must be assigned to the internal sphere of such community, and state agencies are, in principle, barred therefrom (see BVerfG, id., p. 10, with reference to BVerfGE 102, 370, 394). This right of determination is specifically part of the constitutionally guaranteed freedom of religion. Even if a connection with the exercise of religion is not necessarily apparent when viewed from the outside, the respective religious community's self-image alone can— aside from obviously extra-religious aspects associated with the encounter— be determinative with respect to the personal encounter by members of a religious community with their leader since this does not affect activities, by which the religious community goes beyond the circle of its members and effects society, but instead core issues of the cultivation and promotion of their faith are affected that, in the absence of “insight and suitable criteria” (BVerfGE 102, 370, 394), are withheld from evaluation by state agencies. In light of the asserted self-image of the Unification Church, therefore, there are no doubts with respect to the fact that the protected sphere of freedom of religion is affected in this case.

This constitutional status on the part of the Plaintiff under Art. 4 par. 1 und par. 2 GG in the form of freedom of belief and creed, as well as the freedom of exercise of religion, is not merely affected by the listing of the religious leader and his wife for the purpose of entry prohibition; it is also violated under the existing circumstances.

The constitutional protection of the Plaintiff's religious community does not, according to the case law of the Federal Constitutional Court (id., reprint p. 12), result in the Plaintiff's religious community being excluded from the outset from the provisions of law applicable to everyone. Accordingly, a “right to entry” for the parties desiring entry or for the religious community interested in their entry cannot be derived directly from Art. 4 par. 1 and 2 GG, because the situation cannot be any different from that that applies to other constitutionally protected statuses, such as those arising from Art. 6 par. 1 GG (see in this regard BVerfGE [Decisions of the German Federal Constitutional Court] 76, 1, 47, 49 ff.). However, it is necessary when interpreting and handling the ordinary statutory provisions concerning the entry and residency of foreigners, which in this case provide for visa-free entry and thereby “permit” the temporary stay in principle, to take into account to the greatest extent possible the self-image of the religious community, to the extent that it is rooted in the sphere of the freedom of belief and creed guaranteed by Art. 4 par. 1 GG and realized in the exercise of religion protected by Art. 4 par. 2 GG (BVerfG, id., p. 13, with reference to BVerfGE 83, 341, 346).

The violation of the Plaintiff's rights follows, firstly, from the fact that the legal basis relied upon by the Defendant for the entry prohibition listing in accordance with the Schengen Implementation Convention is not capable of supporting the measures from a substantive standpoint, particularly with respect to the intervention thresholds that are provided (1.). In addition, a violation of rights arises from the fact that—even assuming a broader factual formulation of the bases for the listing under the national foreigner law governing foreigners—the weighing of the concerns and interests of the Federal Republic of Germany against the Plaintiff's fundamental right to freedom of religion, which is required within the framework of the decision in favor of the listing, was not adequately carried out and must lead to the finding that the measure taken against the Plaintiff was unlawful (2.).

1. According to the case law of the Federal Constitutional Court (id., p. 13), the necessary weighing must take into account the fact that, within the framework of

the Schengen Implementation Convention of June 19, 1990 (BGBl. [Federal Statutory Gazette] II 1993, p. 1013) – SDÜ - the legislature committed itself—beyond § 60 par. 3 in conjunction with § 7 par. 2 no. 3 AuslG (now § 15 par. 3 in conjunction with § 5 par. 1 no. 3 AufenthG)—inasmuch as the entry prohibition listing pursuant to Art. 96 Abs. 2 SDÜ, which is binding in principle on all Schengen countries, requires the existence of dangers to public safety and order or national security. Accordingly, it simultaneously follows from the examples listed in Art. 96 par. 2 sentence 2 SDÜ that, for purposes of assuming the existence of such a dangers that relate to committed or feared criminal acts of the foreigner, the dangers associated with the foreigner's presence must have a certain level of substantiality.

The Senate does not fail to recognize the fact that the listing itself does not involve a direct regulation of entry, but instead involves the entry of the data of a foreigner from a third-party country into a central database at the behest the individual countries and forms the basis for subsequent entry prohibition measures by the border police at the national law level—under German law, accordingly, on the basis of the foreigner law provisions cited by the Defendant. Separate and apart from the question of whether, therefore, the ordering of the listing would be classified as an administrative act, it represents a targeted act of intervention that cannot be solely attributed to the “practical indirect fundamental rights impairments” that do not fall within the “statutory reservation” [i.e., the constitutionally granted authority to restrict fundamental rights by or on the basis of a statute—Trans.], and [depend] first upon state-instigated conduct of third parties (see BVerfGE 105, 279 - Osho -, NJW 2002, 2626, 2629); from the standpoint of the state, the order is directly aimed at the entry behavior of the affected persons. The effect of the entry prohibition resulting from listing in the Schengen Information System (SIS) is also not fully covered by the individual country’s foreigner law provisions concerning entry prohibition, because the effects and impairments are clearly more extensive: According to Art. 5 par. 2 in conjunction with Art. 5 par. 1 letter d SDÜ (now identically

regulated in terms of content in the so-called Schengen Border Code, Regulation EC-562/2006), the foreigner from a third-party country must, in principle, be refused entry if he is listed in the Schengen Information System for the purpose of entry prohibition. The listing therefore generally leads to entry prohibition in the territory of all of the countries affiliated with the Implementation Convention (currently 26 countries - see in this regard Westphal, InfAuslR 1999, 361). Given this factual situation, Art. 96 par. 2 SDÜ does not merely constitute a norm of international law that binds the individual countries, but is instead, on the basis of the transformation legislation, the domestically effective legal provision that is in conformity with the statutory reservation and against which the "informational intrusion" must be measured. Whereas in the case of so-called *Positivstaater* [citizens of countries whose citizens are able to enter for short visits without a visa], refusal of entry at the border of the Federal Republic of Germany is possible in accordance with §§ 15 par. 3, 5 par. 1 no. 3 AufenthG if merely "interests of the Federal Republic of Germany are impaired or endangered," the listing in accordance with Art. 96 par. 2, which is effective with respect to all external borders of the Schengen countries, requires that the decision be based on "the danger to public safety and order or national security." If the authorization limits of this definition are exceeded, this therefore results, in and of itself, in a violation of the constitutionally protected sphere of freedom, in this case the freedom of religion of the Plaintiff, whose interest in the encounter with its religious leader is affected by the entry prohibition.

The listing of Mr. and Mrs. Moon that is under adjudication in this case is unlawful, because it is not covered by the listing requirements set forth in Art. 96 par. 2 SDÜ. The listings are, as provided in Art. 96 par. 1 SDÜ, based on the decisions of the nationally competent authorities. The danger to public safety and order or national security necessary under par. 2 of the provision is not present in the instant case.

a) The Senate does not concur with the Defendant's view that a danger to the public safety and order of one of the participating nations could be assumed to exist in this sense if the protection of its national sovereignty with respect to its foreigner law norms concerning entry refusal so requires. Instead, it must be assumed in the spirit of the decision of the Federal Constitutional Court (id.) that, within the framework of international law cooperation for the purpose of protection of the external borders of the common internal territory, the legislature agreed to commit itself to stricter intervention requirements for purposes of listing. With respect to the entry refusal provisions under national foreigner law (§ 15 par. 3 in conjunction with § 5 par. 1 no. 3 AufenthG), it may well be that prevention of entry into the Federal Republic of Germany is possible for foreigners from third-party states—even in the case of so-called *Positivstaater* that do not require a visa for a short-term stay—on the basis of an impairment of the mere "interests" of the state. With the elimination of internal borders, protection of the interests of the individual states in a common territory with personal traffic without border controls requires, in and of itself, the shifting of the relevant instruments to the external borders of the affected common territory; in light of the diversity of interests, however, it cannot be assumed within the framework of a policy of visa-free traffic with third-party states that any given national interest in the expulsion of persons will be able to meet with mutual recognition; instead, based on the intent and purpose of the shifting of controls to the external borders, the common interest is focused on guaranteeing each member state a minimum level of protection of public safety and order. Only this can be the content of the joint policy of the Schengen countries, based on a proper interpretation. It is unnecessary in this case to decide the question of whether this also has repercussions with respect to the exercise of discretion within the framework of a mere national entry prohibition (see also, concerning this context of a joint mobility policy within the Schengen territory, Renner, Ausländerrecht [Foreigner Law], 8th ed., § 6 margin no. 9 ff.). The interpretation preferred herein is also supported by the fact that the Schengen countries have

committed themselves to a joint policy with respect to personal traffic under Art. 9 par. 1 SDÜ.

The exception reservations provided in Art. 5 par. 2 SDÜ (now in the so-called Schengen Border Code) for the granting of entry by individual nations are not capable of changing anything with respect to this interpretation. Accordingly, if an entry prohibition listing exists, each of the countries must refuse entry, unless a treaty state deemed it necessary to deviate from this principle for humanitarian reasons, reasons of national interest or on the basis of international obligations. Such deviation entails a duty to notify the other treaty states. Separate and apart from the substantial substantive legal difficulties for the listed person in obtaining entry to individual countries, the listing creates a virtually comprehensive exclusion effect with respect to the entire Schengen territory from a practical standpoint, in spite of the exception reservation. In other words, the exception reservation cannot get around the fact that the threshold for listing authorization in Art. 96 par. 2 SDÜ must in a certain sense be viewed as heightened compared to mere “interests” under individual nations’ foreigner law.

The question as to whether—as the Plaintiff attempted to demonstrate by way of supplement during the oral argument—the term public safety and order under Art. 96 par. 2 SDÜ must be interpreted in conformity with the case law of the European Court of Justice in the area of “justification” for interventions into fundamental freedoms under EC law (see in this regard the case law of the EuGH [European Court of Justice] for those with rights of free mobility or association entitlement, such as Orfanopoulos and Olivieri, Slg [Collection] I 2004, 5257 margin no. 106, Nazli, Slg I 2000, 957), and whether, in particular, this term would therefore have to be interpreted narrowly, may appear doubtful, because the instant case involves the entry of foreigners from a third-party country; however, it is unnecessary to decide this question here. The Senate concurs with the Federal Constitutional Court

(id.) to the extent that, simply in light of the listing of examples in the provision itself, the predicted violation of public safety and order must be of a certain level of substantiality. Accordingly, public safety and order are specifically affected in the case of a foreigner from a third-party country who has been convicted of a criminal act punishable by a sentence of imprisonment of at least one year or a foreigner from a third-party country suspected of having committed serious criminal acts or concerning whom concrete evidence exists that he is planning such acts within the sovereign territory of a treaty state. Therefore, a substantial concern of the legal system must be affected, if the protection of public safety involves protection of other state interests outside of the aforementioned criminal offenses.

b) The Defendant is not able to demonstrate that serious public concerns of this sort will be violated as a consequence of the granting of entry to Mr. and Mrs. Moon. The grounds for entry prohibition asserted by the Defendant throughout the course of entire proceeding are not capable of justifying the listing in this sense of the statutory elements of Art. 96 par. 2 SDÜ. To the extent that the Defendant originally also referred to the fact that it was necessary to avert feared public outrage associated with the visit, it did not stick to this assertion in this form in the oral argument. Such grounds could not satisfy the elements of Art. 96 par. 2 SDÜ, if the person desiring entry and that person's intentions do not establish a "danger."

The other stated grounds likewise either do not reach the substantiality threshold required for Art. 96 par. 2 SDÜ or, under the existing factual circumstances, lack the "basis" required under that provision, because the prediction in this regard is not made on an adequately secure basis.

aa) To the extent that it was initially asserted that the Plaintiff was among the newer religious movements that were capable of endangering the development of young people because young people could become

heavily dependent on the movement—possibly while acquiescing to disadvantages in their development and education and with respect to conflicts with their existing familiar and social environment—this does not reach the threshold of danger to public safety and order necessary in this instant case. As stated in the Official Inquiry Report by the commission appointed by the 13th German Bundestag (BT-Drs. [German Bundestag Printed Item] 13/10950 dated June 9, 1998, hereinafter referred to as the: Official Inquiry Report), the state does have a duty to protect the fundamental rights of its citizens and must take into account the fact that far-reaching consequences from a mental or financial standpoint can arise depending on the duration and intensity of the individual's dealings with such groups; in light of neutrality and tolerance toward the individual's acts of expression of their beliefs and world view, however, limits are therefore placed on the state, unless targeted criminal acts or conduct by the groups can be ascertained (see also in this regard BVerfGE 105, 279, - Osho -). This does not affect the reasonable and non-discriminatory investigation of such occurrences. However, the commission refrained from the assumption of mental exigency in favor of broader explanatory sentences. In this regard, it is necessary to refrain from blanket attribution of the ascertained modes of conduct of individual groups to others, because only a portion of the investigated groups had serious potential for conflict, and group development in the direction of an opening or "normalization," etc., must be taken into consideration. Only pronounced, to a certain extent notorious, "conflict potential" in the aforementioned sense can be a cause for preventative state measures. Beyond that, state interventions must remain restricted to specific concrete individual cases. The report does not ascribe a special role to the Unification Church—in contrast to another association—with respect to special potential for conflict. With respect to the situation of children and young people in new religious and ideological communities, the Official Inquiry Report (p. 85) does point out concerning the Unification

Church that children could also be oriented toward Moon's unconditional "divine authority." This orientation toward irrefutable authority and the tendency toward devaluation of the parents as personally responsible identification figures for the children could make it difficult for the children to establish an autonomous lifestyle in the future. However, these results could not be generalized if they could also suggest a pedagogical problem zone within the parent-child relationship. However, such dangers must be also taken into account in accordance with the stated standards, possibly by means of measures by state juvenile assistance agencies in individual cases. A blanket change of the evaluation of the association as such as a direct "cause of danger" does not follow from this. Overall, the Official Inquiry Report comes to the conclusion that, viewed at the current point in time from an overall societal standpoint, the newer religious and ideological communities and *Psychogruppen* [psycho-groups] do not represent a danger to the state or society or to societally relevant sectors (id., p. 148, 149).

The Senate also concurs with the evaluation in the dissenting opinion therein (pp. 163, 165) that, in particular, manipulative persuasion attempts did not, according to the individual expert opinions obtained, go beyond the level that exists in comparable conflict situations in everyday society and that the widespread view that it is nearly impossible for people to leave a newer religious movement on their own is not empirically confirmed by the individual studies.

In light of the fact that the listing involved the consequence of an entry prohibition in the entire Schengen territory and the fact that the taking of preventative measures by the foreigner police constitutes a substantially stronger intrusive measure than mere clarification of the elements of danger emanating from the groups, the aforementioned evidence is not sufficient to assume the existence of the specific dangerous situations

necessary in this regard with respect to, for example, feared fundamental rights violations against the young people who are supposed to be protected.

bb) To the extent that criminal coercion is detected with respect to prevention of departure from the Unification Church, there is a lack of evidence of a connection to the visit by the community's leader and any substantial danger caused by him. If, specifically, measures are to be taken against the association as such or against its leader in order to avert such dangers, it is necessary to take into consideration the case law of the Federal Constitutional Court concerning relevant attribution criteria (see BVerfGE 102, 370 = NJW 2001, 429, 431 – Jehovah's Witnesses). Accordingly, a religious community can be expected to obey the law and the factual conduct of a religious community and its members can be evaluated according to secular criteria at the outset when it comes to the affirmation of the laws applicable to everyone. However, not every individual violation by a member affiliated with the community calls into question the legal obedience of the association as such or can be imputed to the leader on the basis of his teaching and leadership authority. Therefore, the legal construction of *Zweckveranlassung* [incitement—on the basis of acts that, viewed in isolation, are lawful—of third parties to endanger or disrupt public safety] sought by the Defendant can also only be given limited consideration. The issue depends on whether it can be said of the community that it is fundamentally unwilling to comply with the law and statutes. The Defendant has not been able to present sufficient evidence of this—and it was the Defendant's responsibility to do so. Moreover, it would not be sufficient for this purpose to refer to findings like those that can be found in the so-called Fraser Report (see, for example, footnote 18, 22, 77, 78, 84, 131 of the document of the Federal Administrative Office, p. 750 of the GA) on conditions in the U.S. in relation to a point in time

approximately 30 years earlier. Particularly from the standpoint that an opening and so-called “normalization” has often occurred over the course of time with respect to the effects among newer religious communities, the retention of the danger assessment would depend on more recent findings, which, however, are largely lacking.

cc) Also to the extent that the Defendant focuses on the assertion that a danger to public safety and order arises from the fact that the Unification Church seeks the creation of a worldwide theocracy and the abolition of the social market economy, this cannot support the assumption of the existence of the danger that is necessary in this regard. It is true that it is said of the Moon movement that, according to the contents of the beliefs and the doctrine it advocates, the religious leader holds a messianic position and that the goal is the establishment of a heaven on earth, i.e., the unification of all religions under the leadership of Moon. According to the case law of the Federal Constitutional Court (E 102, 370 = NJW 2001, 429, 432), state decisions vis à vis religious communities may take into consideration the question of whether the prohibition against a state church and the principles of neutrality and equity remain untouched. However, in respect for the self-image and the specifically religious content of the goals of a faith community, the assessment of the danger may not be made without taking into account the objective and actual weight of the direct conduct of the community and its members. The theological statements, particularly with respect to the goal of the Unification Church, do not necessary have to be interpreted to mean the establishment of a political system of rule. The Defendant has not shown efforts from a practical standpoint, particularly from the recent past, that the actual conduct of the Unification Church and its members would aim for a political implementation that was not averse, for example, to inclusion of methods of political violence. Nor can the substantiality of danger required in this case be ascertained in this regard in

consideration of the actual size of the group, which, according to its own statements (which are even stated relatively high, according to other estimates), has at most about 1,300 members and a circle of friends of a few thousand in the Federal Republic of Germany.

dd) To the extent that the Defendant seeks to derive the necessary danger to public safety and order from the fact that the Unification Church is distinguished by strict hierarchical thinking, which is accompanied by coercive measures against members, particularly forced marriages, any assumption that danger exists could only be well-founded if documentable criminal offenses were committed in this way and the incidents could, in terms of their representativeness, be imputed to the influence of the community or the leader. The same applies, finally, to the accusation that rigorous methods of member recruitment have been noted and that the recruited members are monitored by means of totalitarian measures and the accusation that, in such contexts, the principle of so-called heavenly deception is applied and that fraudulent actions can occur in this regard, for example, in the case of money collections. If this merely involves isolated documentable cases, the state is required to pursue this for the usual grounds and, if appropriate, individually subject the relevant parties to criminal punishment; however, this cannot be an occasion to impose sanctions on the Unification Church as such.

With the exception of the reference to descriptions in the sources that are no longer adequate for a current evaluation, the Defendant has not been able to provide any indication that such incidents occurred in the Federal Republic of Germany to a comparable degree and not merely in isolated cases. Thus, there may have been occasion for public clarification acts that maintained adequate distinctions; however, this does not demonstrate the degree of danger necessary in this case for the entry

prohibition listing, because there has not been a showing of, for example, a single conviction of a member of the Unification Church in the last 10 years pertinent in this context, let alone a showing of the aforementioned imputation criteria with respect to the Unification Church itself.

The declaratory finding that the listing of Mr. and Mrs. Moon for entry prohibition was unlawful in relation to the Plaintiff therefore follows from the violation of Art. 4 par. 1 and 2 GG as a result of non-satisfaction of the factual requirements for intervention set forth in Art. 96 par. 2 SDÜ.

2. However, the violation of the aforementioned fundamental rights of the Plaintiff also independently arises from the fact that, if the concerns and interests of the Federal Republic of Germany on the basis of national law norms pertinent to entry prohibition (refusal of entry), namely, §§ 15 par. 3, 5 par. 1 no. 3 AufenthG (formerly § 60 par. 3 in conjunction with § 7 par. 2 no. 3 AuslG), are lawfully weighed against the Plaintiff's fundamental right of freedom of religion, the latter is entitled to precedence; in any case, the weighing that becomes necessary on this basis was not undertake by the Defendant in a lawful manner.

   According to the case law of the Federal Administrative Court (NJW 1983, 2587), the fundamental freedoms of belief, conscience and creed, including the freedom of exercise of religion (Art. 4 par. 1 and 2 GG), are not intended to guarantee foreigners otherwise non-existent rights to entry and residency. Accordingly, it is in any case an interest of the Federal Republic of Germany, which must be preserved, that entry not take place in violation of the necessary entry formalities (visa requirement in that case). The same applies to the legal status of a religious association that asserts an interest in entry. However, this does not preclude the possibility of taking into consideration the interests of the members of a religious community living in the Federal Republic of Germany in light of the importance of the fundamental freedoms arising from Art. 4 par. 1

and 2 GG when making a decision concerning the granting of entry (BVerwG, id.).

The Senate can leave undecided in this context the question of whether, in the case of exemption from the visa requirement for short stays, as here in the case of Mr. and Mrs. Moon as so-called *Positivstaater* [citizens of countries whose citizens are able to enter for short visits without a visa], it was necessary in making the decision within the framework of § 60 par. 3 in conjunction with § 7 par. 2 no. 3 AuslG to take into account the fact that "the stay was thereby permitted in principle" (see BVerfG, id., reprint p. 13). It may be—as the Defendant asserts in this context—that the structuring of the visa procedure does not simultaneously fundamentally modify the substantive legal situation under which a decision on residency permission can be made. However, it probably cannot be denied that the decision on visa-free entry for short stays has at least a certain degree of importance within the framework of the discretionary deliberations. In any case, the grounds invoked by the Defendant were not, taking into account the necessary weighing against the Plaintiff's freedom of religion, capable of justifying a decision to prohibit entry based on the appropriate exercise of discretion. The defectiveness of the deliberations with respect to the intended entry refusal must thus reverberate back to the declaratory finding of the unlawfulness of the listing. The Senate must review the question of whether the statutory limits of discretion are exceeded or whether discretion was used in a manner not in conformity with the purposes for the authorization (§ 114 sentence 1 VwGO *mutatis mutandis*).

In the instant case, the exercise of discretion was possible in accordance with § 7 par. 2 no. 3 AuslG, because it cannot be assumed that a general ground for denial within the meaning of this provision precludes entry. It must be taken into consideration in this regard that even an entry prohibition for deported persons does not preclude a short stay for personal interests in accordance with § 9 par. 3 AuslG (entry permission), if there are other compelling grounds in favor of the

short stay (see in this regard Renner, Ausländerrecht [Foreigner Law], 7th ed., § 9 AuslG, margin no. 11). In light of the weight of the constitutional right of freedom of religion (Art. 4 par. 1 und 2 GG), which must be taken into consideration in the instant case, an exceptional case is present that precludes the “interests” of the Federal Republic of Germany in preventing the stay as a general ground for refusal. The same applies with respect to acceptance of satisfaction of the general issuance prerequisites (impairment of the interests of the Federal Republic of Germany in accordance with § 15 par. 3 in conjunction with § 5 par. 1 no. 3 AufenthG).

It is true that, at a point of departure, the foreigner law discretion granted by § 7 par. 1 AuslG with respect to the admission of a foreigner into the sovereign territory of the country is broad, in principle. However, obligations arise with respect to short stays, firstly, arising from the aforementioned personal constitutionally protected interests, but secondly in light of the framework of the joint visa policy and the agreed upon opening vis à vis citizens of countries that do not require a visa for short stays (see also Art. 9 par. 1 SDÜ). At a minimum, it follows from these provisions that no typical foreigner policy interests are negatively affected by the short state of such persons. Due to this starting point, individual persons from this group cannot, without substantive evidence, virtually be designated "*persona non grata*" with respect to entry without addressing exceptions in detail in this regard. The instant case does not, for example, involve the protection of foreign relations of the Federal Republic of Germany, which would have to be taken into account with respect to the evaluation of a visit by politically undesired persons. Instead, this case involves a pastoral trip that is subject to the constitutional protection of Art. 4 par. 1 in conjunction with 2 GG.

In light of the great constitutional significance, addressed in the decision of the Federal Constitutional Court, of the pastoral visit for purposes of the exercise of the Plaintiff's fundamental rights according to its self-image as a religious

community, only concerns of some gravity could be asserted against the granting of a short visit stay. This is all the more true given that any concerns with respect to negative effects on public safety and order that arise during the course of the visit could also be taken into account by means of later intervention. The concerns asserted by the Defendant in the course of the proceeding do not rise to this level. In this regard, the Senate can refer to the discussions concerning the operative elements under the Schengen Implementation Convention. Due to the great importance of the protection of the Plaintiff's freedom of religion, the grounds asserted by the Defendant must clearly take a backseat, because the fundamental right of freedom of religion does not have to give away too vaguely asserted fears in the manner invoked by the Defendant.

The decision on costs is based on § 154 par. 1 VwGO; provisional enforceability with respect to the costs is based on § 167 VwGO in conjunction with § 708 no. 10 and § 711 sentence 1 ZPO [German Code of Civil Procedure].

The *Revision* appeal cannot be permitted, because no grounds of the type stated in § 132 par. 2 VwGO are present.

Instruction on appellate remedies

The denial of permission to file a *Revision* appeal can be contested by means of ***Beschwerde*** [protest] to the Federal Administrative Court.

The protest must be filed **within one month** from service of this judgment with the **Oberverwaltungsgericht Rheinland-Pfalz [Rhineland-Palatinate Administrative Appeals Court]**, Deinhardplatz 4, 56068 Koblenz, e-mail address: gbk.ovg@ovg.jm.rlp.de, in writing or electronic form. The protest must identify the contested judgment.

The statement of grounds must be **provided within two months** of service of the judgment. The statement of grounds must likewise be submitted to the **Oberverwaltungsgericht Rheinland-Pfalz** in writing or electronic form. The statement of grounds must describe the fundamental significance of the legal matter or identify the decision of the Federal Administrative Court, the Joint Senate of the Highest Courts of Justice of the Federal Government or the Federal Constitutional Court, from which the judgment deviates, or a procedural defect on which the judgment can be based.

The electronic form requirement is satisfied by a qualified signed file that is in conformity with the instructions of the State Regulations of December 22, 2003, concerning Electronic Legal Relations (GVBl. [Statutory and Regulatory Gazette] 2004 S. 36, BS 320-1), as amended, and must be transmitted as an attachment to an electronic message (e-mail).

An attorney or legal instructor at a German university within the meaning of the University Framework Act qualified to hold the office of judge must file and prepare the statement of grounds for the protest in his or her capacity as legal representative. Public legal entities and government agencies can also be represented by civil servants or salaried employees qualified to hold the office of judge, as well as graduate jurists in senior civil service; municipal corporations can also be represented by civil servants or salaried employees, qualified to hold the office of judge of the competent supervisory authority or the respective league of municipalities of the state to which they belong as a member.

signed Wünsch signed Dr. Holl signed Wolff