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Germany: Higher Administrative Court for Berlin and Brandenburg, 4th September 2018, OVG 3 S 47.18, OVG 3 M 52.18

Country of Decision:

Germany

Country of Applicant:

Iraq

Date of Decision:

04-09-2018

Citation:

OVG 3 47.18, OVG 3 ; 52.18

Court Name:

Higher Administrative Court for Berlin and Brandenburg (Oberverwaltungsgericht für Berlin und Brandenburg - OVG)

Keywords:

Dependant (Dependent person)

Family reunification

Relevant Documentation

Relevant Facts

Visa

Relevant Legislative Provisions:

Council of Europe Instruments > [EN - Convention for the Protection of Human Rights and Fundamental Freedoms](#) [1]

Council of Europe Instruments

Headnote:

A birth certificate is not a decision within the meaning of paragraph 108 FamFG. As a child grows older the need of being looked after by both its parents decreases. There is no necessity for interim order in the case of family reunification, when the child is about to come of age, as the right to subsequent immigration is not lost upon the child's coming of age

according to the CJEU.

Facts:

By way of interim order, an Iraqi applicant seeks to receive a visa for subsequent immigration to reunite with his daughter, who lives in Germany. His daughter and her maternal mother are both recognised refugees living in Germany. In the Iraqi documents, not the maternal mother, but the wife of the applicant is documented as the daughter's mother. According to the applicant, his daughter's maternal mother waived her right to custody over the child voluntarily. In the opinion of the appellant, the daughter has a right derived from paragraph 36 sections 1 and 2 AufenthG to live with her rightful parents who also are entitled to custody over her.

Decision & Reasoning:

First, the Higher Administrative Court (OVG) examines the question of whether the daughter's descent is to be determined according to Iraqi or German law. According to Art. 1 section 1 sentence 1 EGBGB, the descent of a child is to be determined according to the law of the state in which the child has its habitual residence. The applicant argues that his daughter's Iraqi descent continues to exist, despite her move to Germany, as her habitual residence used to be Iraq and her move to Germany was caused only by flight. The OVG however decided that a person's status of descent can change and determines the daughter's descent according to German law, arguing that German law is more effective in helping the daughter to live with her maternal mother.

The OVG then examines the question of whether the daughter's birth certificate constitutes a decision within the meaning of paragraph 108 FamFG. According to paragraph 108 section 1 FamFG, except for decisions in marital matters, foreign decisions are to be recognised in Germany and there is no need for a special procedure. Paragraph 108 FamFG, however, requires that the decision in question settles a legal question or a legal consequence finally as a result of a substantive review of the facts. In the view of the OVG, it does not follow from the birth certificate that a substantive examination of facts took place and no legal consequence is to be derived from it. Therefore, the birth certificate does not constitute a decision within the meaning of paragraph 108 FamFG.

Furthermore, the OVG stated that it is a prerequisite for the right to subsequent immigration derived from paragraph 36 section 1 AufenthG, that no parent entitled to custody lives in Germany. The appellant argues that according to the case law of the German Constitutional Court (BVerfG) and the European Court of Human Rights (ECtHR) the child's contact with both its parents is in its best interests. The OVG however noted that the BVerfG and the ECtHR determine the scope of the right defined in Art. 6 GG and Art. 8 ECHR in the light of the child's age. It concludes that in the case of the applicant's daughter, due to the fact that she is nearly of age, the need for contact with her other parent has significantly decreased.

Finally, the OVG finds that there is no need for interim relief in a case of subsequent immigration, where a child is about to come of age, as ? according to the case law of the CJEU - the right to subsequent immigration is not lost upon the child's coming of age. The time limit of three months after protection has been granted - determined by the CJEU - within which subsequent immigration can be applied for, is not applicable to the case where an application has been made before the child has come of age.

Outcome:

Appeal denied.

Attachment(s):



[OVG Berlin.pdf](#)[2]

Other sources cited:

Domestic Case Law

VG Berlin, 18th July 1018 ? 4 L 150/18

OLG Hamm, 28th March 2012 ? 12 UF 295/11

OLG Celle, 22nd May 2017 ? 17 W 8/16

OLG Hamm, 18th June 2004 ? 9 UF 153/02

OLG Karlsruhe, 30th Dezember 1998 ? 13 U 69/98

BVerfG, 23rd January 2006 ? 2 BvR 1935/05

BVerfG, 11th Oktober 2017 ? 2 BvR 1758/17

BVerwG, 18th April 2013 ? 10 C 9/12

National / Other Legislative Provisions:

[Germany - paragraphs 114](#) [3]

[122](#) [4]

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[Germany - paragraph 108 FamFG](#) [14]

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Links:

- [1] <http://www.asylumlawdatabase.eu/en/content/en-european-convention-protection-human-rights-and-fundamental-freedoms-echr>
- [2] <https://www.asylumlawdatabase.eu/sites/default/files/aldfiles/OVG%20Berlin.pdf>
- [3] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/germany-paragraphs-114>
- [4] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/122>
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- [9] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/162>
- [10] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/166-vwgo>
- [11] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/germany-%E2%80%93-paragraphs-127>
- [12] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/920-zpo>
- [13] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/germany-art-19-egbgb>
- [14] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/germany-paragraph-108-famfg>
- [15] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/germany-%E2%80%93-paragraphs-5>
- [16] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/6>
- [17] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/25>
- [18] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/29>
- [19] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/36-aufenthg>
- [20] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/germany-%E2%80%93-art-6-gg>
- [21] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/germany-paragraphs-47>
- [22] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/52>
- [23] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/53>
- [24] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/66>
- [25] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/68-gkg>