

## Higher Administrative Court North Rhine-Westphalia (OVG NRW), 13.03.2020, 14 A 2778/17.A

**Country of Decision:**

Germany

**Country of Applicant:**

Syria

**Date of Decision:**

13-03-2020

**Citation:**

14 A 2778/17.A

**Court Name:**

Higher Administrative Court North Rhine-Westphalia

**Keywords:**

Family member  
Political Opinion  
Protection  
Refugee Status

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**Relevant Legislative Provisions:**

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

Council of Europe Instruments

Council of Europe Instruments > [EN - Convention for the Protection of Human Rights and Fundamental Freedoms](#) [1] > [Article 3](#) [2]

European Union Law > [EN - Qualification Directive, Directive 2004/83/EC of 29 April 2004](#) [3] > [Art 2](#) [4] > Art 2 (j)

European Union Law > [EN - Qualification Directive, Directive 2004/83/EC of 29 April 2004](#) [3] > [Art 2](#) [4]

European Union Law > [EN - Qualification Directive, Directive 2004/83/EC of 29 April 2004](#) [3] > [Art 4](#) [5]

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**Headnote:**

The parents and minor siblings of a Syrian national, who was recognised as a refugee, cannot claim refugee status in terms of international protection for family members, if the beneficiary, although a minor when he was registered as an asylum applicant, was no longer a minor at the time of the court hearing.

### **Facts:**

The complainants are a Syrian couple and their minor daughter, who entered Germany via the Balkan route and filed an asylum application. One month later the Federal Office for Migration and Refugees (Bundesamt für Migration und Flüchtlinge, BAMF) granted them subsidiary protection. The application regarding refugee status was refused. At the same time their son/brother, who had entered Germany together with them, was recognised as a refugee in a separate asylum procedure.

The complainants have filed a complaint against the BAMF's decision. In their complaint, the complainants argue that they are entitled to refugee protection pursuant to §26 para 3 Asylum Act (AsylG) as parents/sister of the son/brother recognised as a refugee. In support of their claim, they argue that it is irrelevant that the son/brother was of full age at the time of the applicants' formal application for asylum and at the time of the decision of the Administrative Court. According to §26 para 3 AsylG, they argue that the relevant time for family asylum pursuant to §26 para 3 AsylG is the time of registration as an asylum applicant. At this time the son/brother was therefore still a minor, so that the requirements for §26 para 3 AsylG are fulfilled.

The lower court has rejected the complaints of the couple and their daughter. The present appeal is directed against the first-instance decision.

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### **Decision & Reasoning:**

The complaint is admissible but unfounded.

The complainants have neither a claim to refugee status on the basis of their own political persecution, nor pursuant to international protection for family members according to §26 para 3 AsylG.

#### **No refugee status due to own political persecution**

The Court denied a claim to refugee status, because the Court found that the complainants were not subject to any political persecution. The complainants left the country primarily out of fear of the effects of the war and out of concern that their sons would be drafted into the military. This alone does not constitute a considerable probability of political persecution. Furthermore, the Court judged the actual situation in Syria to be such that returning Syrian asylum applicants are not threatened with political persecution because of an alleged anti-government sentiment. The fact that the complainants have moved from an area formerly dominated by rebels is also not a sufficient indication of the considerable probability of political persecution.

#### **No refugee status due to the military service flight of the sons**

The complainants argue that their five sons had escaped military service, so that the complainants themselves would have to expect punishment by way of clan persecution if they returned. The Court continues to uphold its former case law in stating that there are no factual indications that the Syrian state accuses military service withdrawer of having an anti-government attitude. For military service withdrawer, the danger of political persecution is only likely to exist if the person concerned is considered to be oppositional or critical of the regime. Therefore, it cannot be

assumed that the relatives of a military service withdrawer are threatened with persecution on the grounds of §3 para 1 no. 1 AsylG.

### **No refugee recognition under international protection for family members according to §26 para 3 and 5 AsylG**

The Court furthermore states that a claim for refugee recognition does not arise from international protection for family members according to §26 para 3 and 5 AsylG. In the case of the protection for family members, parents or minor siblings of a minor who is unmarried and entitled to international protection are recognised as refugees upon application if (1.) the recognition of the person entitled to international protection is incontestable, (2.) the family already existed in the state in which the person entitled to international protection is politically persecuted, (3.) they entered the country prior to the recognition of the beneficiary of international protection or they submitted the application for asylum immediately after entry, (4.) the recognition of the beneficiary of international protection is not to be revoked or withdrawn, and (5.) they are in charge of the personal care of the beneficiary of international protection.

According to the Court these requirements are not met, since the son/brother as the original beneficiary was no longer a minor at the time of the oral hearing of the lower court and not even at the time of the Federal Office's decisions on his and the complainant's asylum applications.

In principle, according to §77 para 1 sentence 1 AsylG, the factual and legal situation at the time of the last oral hearing must be taken into account. At that time, the son/brother was no longer a minor. In some cases, the Asylum Act, in derogation from this general principle, does not refer to the factual and legal situation at the time of the last hearing, but to the time of the asylum application of the person claiming family protection. Such an advance shift occurs, for example, when minor unmarried children apply for family protection. In the present case, there is no corresponding regulation, nor is this time shift appropriate. Therefore, the date of the last oral hearing at which the son/brother was no longer a minor is still relevant.

Furthermore, the son/brother was never an "underage unmarried person entitled to protection" as required by §26 para 3 AsylG, but only an "underage unmarried asylum applicant", since he turned 18 before being recognised as entitled to protection. The Court does not accept the argument that the granting of refugee status is a declaratory act so that the son/brother was already entitled to international protection before the recognition by the BAMF. The Court refers to the fact that the law for family asylum is based precisely on the recognition and on the incontestability of the refugee status and not merely on the claim to recognition. This interpretation is also supported by European Union law, which, when defining a family member under Article 2(j) of Directive 2011/95/EU, does not refer to a person who is entitled to international protection, but to a person "who has been granted international protection", thus also referring to the act of recognition.

Thus, the son/brother was no longer a minor, so that the applicants cannot claim refugee status according to §26 para 3 and 5 sentences 1 and 2 AsylG.

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#### **Outcome:**

Appeal denied

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#### **Subsequent Proceedings :**

Court did not allow the revision. The complainants may appeal against this, on which the Federal Administrative Court will decide.

### Observations/Comments:

This summary was written by Theresa Richter, LL.M. student at Queen Mary University London.

### Attachment(s):



[Oberverwaltungsgericht NRW 277817a.pdf](#)[6]

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### Other sources cited:

Federal Foreign Office, Statement dated 12.10.2016 towards the Administrative Court of Trier, Az. 313-516.00 SYR

Swiss Refugee Aid, information from the SFH country analysis dated 21.3.2017, Syria: Return

Federal Foreign Office, Statement dated 20.11.2019 on the situation in Syria

Hailbronner, Ausländerrecht, Loseblattsammlung (Stand: 56 Dezember 2019), § 26 AsylG

Epple in: GK-AsylG, Loseblattsammlung

(Stand: 124. Lfg.), § 26 AsylG

Marx, AsylG, 10. Aufl., § 26 AsylG

### National / Other Legislative Provisions:

[Germany - Administrative Court Act \(VwGO\) - Art. 113 para 5](#) [7]

[Germany - Administrative Court Act \(VwGO\) - Art. 154.2](#) [8]

[Germany - Administrative Court Act \(VwGO\) - Art. 132 Abs 2](#) [9]

[Germany - AsylG \(Asylum Law\) - Article 3c](#) [10]

[Germany - AsylG \(Asylum Law\) - Article 3a \(1\)](#) [11]

[Germany - AsylG \(Asylum Law\) - Article 3 \(1\)](#) [12]

[Germany - AsylG \(Asylum Act\) - Article 14](#) [13]

[Germany - AsylG \(Asylum Law\) Article 26 para 3](#) [14]

[Germany - AsylG \(Asylum Act\) - Article 26 para 5](#) [15]

[Germany - AsylG \(Asylum Act\) - Article 63a](#) [16]

[Germany - AsylG \(Asylum Act\) - Article 77 para 1 sentence 1](#) [17]

[Germany - AsylG \(Asylum Act\) - Article 83b](#) [18]

[Germany - ZPO \(Code of civil procedure\) - §711](#) [19]

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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/node/195#toc\\_12](https://www.asylumlawdatabase.eu/node/195#toc_12)

[3] <http://www.asylumlawdatabase.eu/en/content/qualification-directive>

[4] <http://www.asylumlawdatabase.eu/en/content/qualification-directive#Art%20%20QD>

[5] <http://www.asylumlawdatabase.eu/en/content/qualification-directive#Art 4 QD>

[6]

<https://www.asylumlawdatabase.eu/sites/default/files/aldfiles/Oberverwaltungsgericht%20NRW%2027781>

[7] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/germany-administrative-court-act-vwgo-art-113-para-5>

[8] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/germany-administrative-court-act-vwgo-art-1542>

[9] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/germany-administrative-court-act-vwgo-art-132-abs-2>

[10] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/germany-asylg-asylum-law-article-3c>

[11] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/germany-asylg-asylum-law-article-3a-1>

[12] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/germany-asylg-asylum-law-article-3-1>

[13] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/germany-asylg-asylum-act-article-14>

[14] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/germany-asylg-asylum-law-article-26-para-3>

[15] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/germany-asylg-asylum-act-article-26-para-5>

[16] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/germany-asylg-asylum-act-article-63a>

[17] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/germany-asylg-asylum-act-article-77-para-1-sentence-1>

[18] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/germany-asylg-asylum-act-article-83b>

[19] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/germany-zpo-code-civil-procedure-%C2%A7711>