ADMINISTRATIVE COURT KARLSRUHE

Decision

In administrative law matters

- APPLICANT -

[redacted],

AUTHORIZED TO PROCESS:

[redacted],

VS

- RESPONDENT -

FEDERAL REPUBLIC OF GERMANY,

REPRESENTED BY THE FEDERAL MINISTER OF THE INTERIOR AND HOMELAND,
THEY ARE REPRESENTED BY THE HEAD OF THE FEDERAL OFFICE FOR MIGRATION AND REFUGEES
- KARLSRUHE BRANCH OFFICE -
BUILDING F - PFIZERSTR. 1, 76139 KARLSRUHE, AZ: 8841695-368

Re: Asylum application (above),

Application in accordance with Section 80 Paragraph 5 VwGO

The Karlsruhe Administrative Court - 6th Chamber - has **Judge Croissant** as a single judge decided on January 22, 2024:

> The suspensive effect of the applicant's lawsuit in proceedings A 6 K 3956/23 against the deportation threat (point 5) contained in the decision of the Federal Office for Migration and Refugees dated September 18, 2023 is ordered.
>
> The respondent bears the costs of the proceedings, which are free of court costs.

REASONS

The corresponding application of the applicant, a US citizen born in 1988, to order the suspensive effect of his lawsuit against the deportation threat in paragraph 5 of the decision of the Federal Office for Migration and Refugees dated September 18, 2023, has success.

It is permissible (I.) and also justified (II.).

I.

The urgent application is admissible according to Section 36 Paragraph 3, Section 75 Paragraph 1 AsylG in conjunction with Section 80 Paragraph 5, Paragraph 2 Sentence 1 No. 3 VwGO after the Federal Office for Migration and Refugees (hereinafter: Federal Office) has accepted the asylum application from the rejected applicant as clearly unfounded.

Otherwise, there are no serious concerns about its admissibility. In particular, the applicant has now credibly demonstrated that the shared accommodation in Pfinztal is still his address for summons (see Section 81 Para. 1 Sentence 1 VwGO).

II.

The application is also successful in this matter. The suspensive effect of the action brought by the applicant in proceedings A 6 K 3956/23 on October 4, 2023 must be ordered.

1.

If the Federal Office has rejected the applications for the granting of refugee status, for recognition as a person entitled to asylum and for subsidiary protection as clearly unfounded, the court will order the suspension of the deportation if at the relevant time of the court decision (see Section 77 Para 1 sentence 1 paragraph 2 AsylG) there are serious doubts about the legality of the Federal Office's decision (Art. 16a Para. 4 Sentence 1 GG and Section 36 Para. 4 Sentence 1 AsylG). The concept of serious doubt

must be interpreted broadly in view of the EU law requirement to ensure effective legal protection while respecting the principle of non-refoulement.

The starting point for the judicial review is the question of whether the Federal Office rightly rejected the application as clearly unfounded. In this case, the Federal Office initially justified the rejection by saying that the applicant was obviously not a refugee, since the dangers he referred to were not linked to a corresponding characteristic - for example in the form of a political penalty. He is obviously not at risk of serious harm. The question of the appropriateness of a punishment imposed or expected in the country of origin does not fall within the scope of Article 3 ECHR. In addition, the applicant does not have to expect any discriminatory punishment. In addition, the asylum application was to be rejected as obviously unfounded in accordance with Section 30 Paragraph 4 in conjunction with Section 3 Paragraph 2 Sentence 1 No. 2 AsylG because the applicant had committed a serious non-political crime. This exclusion also relates to the granting of subsidiary protection. After all, there are no bans on deportation. The applicant is a potentially dangerous criminal.

The single judge has serious doubts that the rejection can withstand legal review as clearly unfounded. Specifically:

a.

A rejection of the asylum application according to Section 30 Paragraph 4 AsylG as clearly unfounded is not an option in the applicant's case. Section 30 (4) AsylG is a case of fictitious obviousness, so that the application of this provision does not require that the asylum application must initially be simply unfounded (see Heusch in BeckOK Ausländerrecht, 30th edition, as of October 1st .2023, § 30 AsylG Rn. 53; Lehnert Huber/Mantel, Residence Act/Asylum Act, 3rd edition 2021, § 30 AsylG Rn. 23; Hailbronner in Hailbronner, Aliens Law, as of June 2023, § 30 AsylG, 103, 103a).

Insofar as, according to Section 30 Paragraph 4 AsylG, an asylum application is to be rejected as obviously unfounded if the requirements of Section 60 Paragraph 8 Sentence 1 Residence Act are met and the person concerned therefore represents a danger to

public safety or the general public, the existence of these requirements is currently not proven in the applicant's case (see b.bb. below). In addition, a rejection according to Section 30 Paragraph 4 AsylG in conjunction with Section 60 Paragraph 8 Sentence 1 Residence Act requires an intensive official examination of individual cases in relation to Section 60 Paragraph 8 Residence Act (cf. Bergmann in ibid./Dienelt, Aliens Law, 14th edition 2022, Section 30 AsylG Rn. 19), which is missing in the present case because the Federal Office (alone) relied on Section 30 Paragraph 4 in conjunction with Section 3 Paragraph 2 Sentence 1 No. 2 AsylG.

In this case, the regulation of Section 30 Paragraph 4 in conjunction with Section 3 Paragraph 2 AsylG cannot justify a rejection of the asylum application as obviously unfounded. Without prejudice to the fact that there are already fundamental concerns under Union law with regard to the obviousness judgment based on this provision (cf. Blechinger in BeckOK Migration Law, 17th Edition, as of October 15, 2023, Section 30 AsylG Rn. 87), Section 30 Para 4 AsylG only applies to refugee protection in accordance with Section 3 AsylG and therefore does not justify extending the verdict of obviousness to the granting of subsidiary protection (cf. Bruns in Hofmann, Aliens Law, 3rd edition 2023, Section 30 AsylG No. 49).

b.

In all likelihood, the applicant's asylum application is not entirely satisfactory § 30 Para. 1 AsylG to be rejected as obviously unfounded.

aa.

The rejection of the granting of refugee protection and the recognition as a person entitled to asylum as obviously unfounded does not raise any legal concerns. In this respect, the respondent must be agreed that the dangers in the USA referred to by the applicant are obviously not linked to any feature relevant to refugee or asylum law.

As a convicted or criminally sanctioned sexual offender, the applicant cannot be assigned to a social group within the meaning of Section 3b Paragraph 1 No. 4 Asylum Act, since this group of people is not linked by a common characteristic from birth or by another

characteristic that particularly defines their identity. Rather, in the applicant's case, the conceivable connection between convicted or legally sanctioned criminals in the USA results solely from the legal requirements that apply to them - especially in cases of sentence suspension on probation. However, the state categorization of a certain group of people and the associated legal behavioral requirements cannot in themselves constitute a social group (see VG Karlsruhe, judgment of September 13, 2022 - A 5 K 7903/18 -, juris).

bb.

With regard to the applicant's claim to be granted subsidiary protection in accordance with Section 4 Paragraph 1 Sentence 2 No. 2 AsylG, however, the single judge has serious doubts that this obviously should not be considered.

According to Section 4 Paragraph 1 AsylG, the right to subsidiary protection requires the threat of serious harm in the country of origin. According to Section 4 Paragraph 1 Sentence 2 No. 2 AsylG, torture or inhumane or degrading treatment or punishment is considered serious damage.

Whether the legal requirements applicable to offenders on criminal probation in the applicant's country of origin or residence (Arizona) constitute, as such, an intentional and consistent infliction of psychological suffering or serious humiliation by a state actor (for the requirements regarding registered criminals in the state of Florida: VG Karlsruhe, judgment of September 13, 2022, a.a.O.), it is not relevant to the decision. After weighing up all the circumstances of the present individual case, the single judge does not consider it to be out of the question that the applicant will, in the event of his return, be subject to a grossly disproportionate and therefore a violation of Article 3 ECHR or Article 4 due to the credibly demonstrated violation of his probation conditions. There is a risk of imprisonment based on the GrCh.

The respondent rightly objects that it is not the task of the Convention States to decide what the prison sentence or other measure should be for a specific crime (see VG

Karlsruhe, judgment of September 13, 2022, a.a.O. m.w.N.). It follows that a grossly disproportionate prison sentence does not exist simply because the sentence to be enforced can only be viewed as extremely harsh and could no longer be considered appropriate if assessed solely on the basis of German constitutional law. Since the Basic Law is based on the incorporation of Germany into the international legal system of the community of states, the structures and contents of foreign legal systems must be respected even if they do not correspond in detail with the German domestic views (cf. VG Karlsruhe, judgment of July 18 .2023 – A 1 K 2085/21 –, juris). Courts may therefore only consider the violation of the indispensable principles of the German constitutional order as an insurmountable obstacle to extradition or deportation (cf. BVerfG, decision of February 28, 2016 - 2 BvR 1468/16 -, juris para. 42). This case law of the Federal Constitutional Court, which was developed for extradition law, affects immigration law (cf. VGH Baden-Württemberg, decision of November 20, 2007 - 11 S 2364/07 -, juris Rn. 12) and must also be observed in the asylum procedure (see VG Karlsruhe, judgment of July 18, 2023, ibid.; judgment of September 13, 2022, ibid). However, in the present case it is by no means ruled out from the outset that, given the circumstances of the individual case, the punishment awaiting the applicant in the event of his return is unbearably harsh and therefore unreasonable from every conceivable point of view, which is why the principle that the concrete danger of one person is determined according to the legal system of another State lawful punishment of deportation (cf. § 60 para. 6 AufenthG) can be breached in exceptional cases (cf. VGH Baden-Württemberg, decision of November 20, 2007, a.a.O.).

The applicant has credibly demonstrated that he can expect a prison sentence of at least 15 years due to the revocation of his probation. Interpol's "Red Notice" submitted as Annex A1 to the application, dated June 20, 2023, shows that an arrest warrant was issued against the applicant on May 5, 2022, which is based on the fact that he violated his probation conditions must serve a prison sentence of at least five and a maximum of 15 years for each of the three original counts. If the applicant returns, he will have to serve a prison sentence of at least 15 years and a maximum of 45 years.

The applicant was imprisoned for one year due to his crime(s) committed in 2010 and then placed under house arrest (with an electronic ankle bracelet) for a further three years. The crime involved downloading several images of child pornography (photos and videos) from the Internet - in a total of three legally separate cases. According to the court probation agreement, page 288 of the Federal Office file, these crimes were expressly classified as “non-dangerous, non-repeating” crimes. At the time of the commission of the offense (cf. Section 2 Paragraph 1, Paragraph 3 StGB), the acquisition of child pornography depicting an actual or realistic event was prohibited under German law in accordance with Section 184b Paragraph 4 StGB in the version valid from November 5, 2008 to January 26, 2015, is punishable by a fine or imprisonment of up to two years.
The probation agreement, which the applicant agreed to in 2013, then provided for lifelong probation for each criminal charge. At the time the applicant left the USA, the probation period had already been around nine years. This contrasts with the maximum permissible probation period in Germany of five years (see Section 56a StGB).

From the point of view of the single judge, what is decisive for the (possible) assessment of the sentence of at least 15 years in prison based on the applicant's breach of probation as unbearably harsh and unreasonable from every conceivable point of view is that the applicant has credibly demonstrated that there was an immediate reason for his departure - the obligation imposed on him during the trip was to undergo so-called ammonia therapy. The written statement dated October 11, 2023 from a former state official who worked in probation supervision and was familiar with the applicant's case (presented as an appendix to the written statement dated November 14, 2023) shows that the applicant is undergoing ammonia therapy and that a rejection would most likely have led to a revocation of probation. Regardless of the question of whether the circumstances of the implementation of this therapy (by means of technical monitoring of possible erections) alleged by the applicant are correct, the obligation to carry out such therapy, which poses significant health risks, is considered to be inconsistent with the European Convention on Human Rights. The therapy stipulates that whenever the test subject reacts to certain stimuli with sexual arousal, a negative impulse should be given by opening an ammonia ampoule that is held under the nose. However, it is generally known that ammonia has a

strong alkaline effect on the mucous membranes of the eyes and throat and that inhalation of the corresponding vapors leads to coughing, nausea, nausea and headaches. If larger quantities are inhaled, there is even a risk to life due to edema or severe damage to the mucous membranes of the respiratory system, including pulmonary edema. The eyes are at risk because diffusion can take place into the inside of the eye. It is therefore recommended to wear a full-face mask when handling ammonia (see the list of health risks posed by ammonia at www.uni-muenster.de/chemie). The fact that the practical implementation of the therapy can lead to corresponding “side effects” in the test person is evident from a form sent to the applicant at the time (p. 241 of the Federal Office file), which expressly states nosebleeds, watery eyes, coughing, breathing difficulties, headaches, etc. and contains corresponding boxes to tick (apparently when the corresponding symptoms occur during the course of therapy). Science has proven that ammonia therapy as a so-called pure behavioral therapy for sexual offenders has not proven to be useful and in some cases has even led to an increase in the number of recidivism (cf. Nowara et al., therapeutic measures for sexual offenders, Deutsches Ärzteblatt 1998, 95ff).

In the overall view of the circumstances regarding the crime committed, the one-year prison sentence already served as well as the three-year house arrest and the subsequent probation for several years, it can be linked to the applicant's unauthorized departure from the country to avoid ammonia therapy at least 15 years' imprisonment as grossly inappropriate or simply intolerable. In this respect, treatment that violates human rights does not appear to be obviously ruled out.

That the applicant would have to expect further, additional punishment due to his departure due to failure to comply with reporting requirements under US federal law or the law of the state of Arizona (see § 13-3821, §13-3824 and § 13-601 of the 2022 Arizona Revised Status), it is not relevant to the decision in this respect.

It is also by no means obvious that the granting of subsidiary protection in accordance with Section 4 Paragraph 2 Sentence 1 AsylG would be excluded.

According to Section 4 Paragraph 2 Sentence 1 AsylG, the person concerned is excluded from being granted subsidiary protection if, among other things, there are serious reasons justifying the assumption that he has committed a serious crime (No. 2) or that he poses a danger to the general public or the security of the Federal Republic of Germany (No. 4).

The reason for exclusion of the commission of a serious crime provided for at the European level, which has been standardized nationally by Section 4 Paragraph 2 Sentence 1 No. 2 AsylG, serves the purpose of excluding persons unworthy of protection in order to maintain the overall credibility of the European asylum system (cf. ECJ , judgment of September 13, 2018 - C 369/17 -, NVwZ-RR, 119 <121> = beck online Rn. 51). When assessing the seriousness of the crime, the criterion of the penalty provided for in the criminal law provisions of the Member State concerned is of particular importance, although all factual circumstances, as far as they are known, must be taken into account (cf. ECJ, judgment of September 13, 2018, a.a.O. Rn. 55). This includes, for example, the type of crime and the damage caused by it (see ECJ, judgment of September 13, 2018, a.a.O. Rn, 56).

Based on this, the crime committed by the applicant in his home country in 2010 is not to be viewed as a serious crime within the meaning of Section 4 Paragraph 2 Sentence 1 No. 2 Asylum Act.

In the Federal Republic of Germany, a fundamental revision of the provision of Section 184b of the Criminal Code took place on July 1, 2021, which resulted in the retrieval and acquisition of child pornographic representations that have an actual or realistic event as their subject, were upgraded to a crime and are currently punished with a minimum sentence of one year in accordance with Section 184b Paragraph 3 of the Criminal Code. However, the principle of “nulla poena sine lege”, which was spelled out in Article 7 Paragraph 1 Sentence 2 ECHR and Article 49 Paragraph 1 Sentence 2 GRCh, states that no more serious offense than that threatened at the time of the commission is imposed Penalty may be imposed, but the applicant's behavior from 2010 should be measured against the national tightening of penalties that occurred much later. In

addition, there are currently plans to reverse this tightening with regard to accessing or obtaining actual or realistic depictions of child pornography. A current draft bill from the Federal Ministry of Justice envisages reducing the minimum sentence provided for in Section 184b Paragraph 3 of the Criminal Code to three months. This would (again) eliminate the classification as a crime. The background to this is the demand made by various institutions - such as the German Bar Association and the German Association of Judges - for the possibility of being able to stop corresponding proceedings in accordance with Sections 153 or 153a of the Code of Criminal Procedure or to dispose of them by means of a penalty order if the respective requirements are met (cf. www.bmj.de).

The manner in which the crime was committed, namely the retrieval and, if necessary, storage of the child pornography photos and videos, suggests that, according to the assessment of the US courts in the applicant's home country, these were “harmless, non-repetitive” crimes acted, as well as the fact that no minor was directly affected by the applicant's specific behavior, contradict the classification as a serious crime. The applicant still denies an actual (attempted) incident involving a minor in his country of origin.

The reason for exclusion of the existence of a danger to the general public according to Section 4 Paragraph 2 Sentence 1 No. 4 AsylG may not (only) refer to past misconduct by the person concerned, but rather presupposes a prognostically given future danger (cf. Bergmann in ibid./Dienelt, Aliens Law, a.a.O., § 4 AsylG Rn. 18). The wording of the provision, according to which “serious reasons” must justify the assumption of danger, does not refer to the threatened legal interests or the expected damage, but to the probability of (further) damage occurring (cf. Kluth in BeckOK Immigration Law, a.a.O., § 4 AsyG Rn. 40; Hailbronner in ibid., Aliens Law, a.a.O., § 4 AsylG Rn. 94).

Given this, it is not obvious at the relevant time of the decision (see Section 77 Paragraph 1 Sentence 1 AsylG) that the reason for exclusion in Section 4 Paragraph 2 Sentence 1 No. 4 AsylG would apply. There are currently no sufficient indications that the applicant is likely to be in danger. An investigation is pending because the applicant is said to have installed cameras etc. in the room that he (shared) used and is suspected of trying to

approach a minor in the shared accommodation. However, the results of the investigation are not available, so these circumstances must be left to be clarified in the legal proceedings.

2.

The cost decision is based on Section 154 Paragraph 1 VwGO. The exemption from court costs follows from Section 83b AsylG.

This decision is unappealable (§ 80 AsylG).

Croissant