Headnote:

No refugee status without intention to persecute for a Convention ground (Eritrea)

Sources of law:

Asylum Act	Sec. 3(1) and (4), Sec. 3a(1) and (3), Sec. 3b(1) no. 4(a) and (b) and no. 5, Sec. 3b(2), Sec. 26(2) and (5) sentence 1
Residence Act	Sec. 25(2) sentence 1 alternative 2 and (3) sentence 1, Sec. 27(1), Sec. 29(3) sentence 1, Sec. 30(1) sentence 1 no. 3(e), Sec. 60(1), (5) and (8) sentences 1 and (3), Sec. 104(13) sentences 1, 2 and 3
ECHR	Art. 3
Code of Administrative Court Procedure	Sec. 134(4), Sec. 137(2), Sec. 173 sentence 1
Code of Civil Procedure	Sec. 557(3) sentence 2
TFEU	Art. 267
Directive 2011/95/EU	Art. 4(3) and (4), Art. 9(1) and (3), Art. 10(1)(d) and (e), Art. 10(2)

Judgment of the First Division of 19 April 2018 – BVerwG 1 C 29.17

Reasons:

I

1 The Complainants are Eritrean nationals, of Tigrinya ethnicity, and of the Christian Orthodox religion. The first Complainant is the mother of the second Complainant, a boy born in the federal territory in December 2015. They seek a grant of refugee status, and furthermore the mother Complainant, in the alternative, seeks a finding of national protection from deportation.

2 In January 2015, the mother Complainant entered into a marriage with a countryman, who by her account had deserted from the Eritrean National Service in April 2015 and fled to Sudan. In September 2015 she entered the federal territory by land. At the end of February 2016 she applied for a grant of asylum status for herself and her Complainant son. In a decision dated 23 August 2016, the Federal Office for Migration and Refugees accorded the Complainants subsidiary protected status. Otherwise it rejected the application for asylum. It declined to make any findings concerning a national prohibition of deportation.

3 In the challenged decision, the Administrative Court denied the Complainants' petition seeking to have the Respondent ordered to grant refugee status, or in the alternative to make a finding of a national prohibition of deportation. The court found that the mother Complainant was not a refugee. She was not threatened with a substantial probability of persecution because of a reason for persecution. The court did allow that in the event of her return, she had reason to be concerned about inhuman or degrading treatment, because there was a substantial probability that owing to her illegal emigration and the associated evasion of National Service, as well as her position as a family member of a deserter, she would be at risk of a prison sentence and subsequent conscription into the National Service. However, in that case punishment would not be imposed on grounds of a reason for persecution. This was found to apply both with reference to a punishment for desertion or refusal of duty, as well as in combination with the evasion of service through her illegal emigration and her

application for asylum in another country. The acts of persecution, the court found, were not connected with a political opposition attributed by the Eritrean authorities, or with some other characteristic relevant for protection as a refugee. Moreover, the court held that the younger Complainant, born in Berlin in December 2015, was also not a refugee.

4 In their leapfrog appeal to this Court, the Complainants complain of a violation of federal law. With reference to the recognition of refugee status that they seek, they argue that in holding that the Eritrean state does not presume that an opposing political opinion is held by all persons who emigrate illegally, who evade National Service, and/or whose family members desert from National Service, the assessment by the court below conflicts with Section 3 in conjunction with Section 3b(1) no. 5 and Section 3b(2) of the Asylum Act. The challenged judgment, they argue, is furthermore incompatible with Section 3 in conjunction with Section 3b(1) no. 4 und Section 3b(2) of the Asylum Act, because the Administrative Court failed to recognise that the link with membership of the family constitutes a further reason for persecution, namely “membership of a particular social group”.

II

6 The Complainants” leapfrog appeal to this Court does not meet with success. The rejection of the action directed to recognition of refugee status (1.), or alternatively to a finding that the requirements for a national prohibition of deportation are present with reference to the mother Complainant (2.), is not based on a violation of federal law (Section 137(1) no. 1 Code of Administrative Court Procedure).

7 This case is governed by the Asylum Act in the version promulgated on 2 September 2008 (BGBl. I p. 1798), as last amended by the Act for the Improved Enforcement of the Emigration Obligation of 20 July 2017, which went into force on 29 July 2017 (BGBl. I p. 2780), – the Asylum Act – and by the Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory (the Residence Act) of 30 July 2004 in the version promulgated on 25 February

2008 (BGBl. I p. 162), as last amended by Article 1 of the Act of 8 March 2018 (BGBl. I p. 342).

8 1. This Court finds no objection to the standards on which the Administrative Court founded its decision on recognising refugee status (a), and the application of those standards in the present specific case (b).

9 Under Section 137(2) of the Code of Administrative Court Procedure, the Federal Administrative Court is bound by the findings of fact made in the challenged judgment, unless admissible and well-founded reasons for review are adduced with reference to those findings. Under Section 134(4) of the Code of Administrative Court Procedure, a leapfrog appeal to this Court cannot be founded on procedural deficiencies, so that in the instant proceedings, assessments by the judge of fact can be reviewed only for compliance with the general principles for the assessment of evidence attributable to substantive law, and – in accordance with Section 173 sentence 1 of the Code of Administrative Court Procedure in conjunction with Section 557(3) sentence 2 of the Code of Civil Procedure – for those procedural deficiencies that are to be given consideration *ex officio* at every stage of the proceedings and that prevent a judgment on matters of law alone in the matter.

10 a) Under Section 3(4) of the Asylum Act, a foreigner who is a refugee under subsection 3(1) of the Asylum Act shall be granted refugee status unless he meets the requirements of Section 60(8), first sentence, of the Residence Act or the Federal Office for Migration and Refugees has decided not to apply Section 60(1) of the Residence Act pursuant to Section 60(8), third sentence, of the Residence Act. Under Section 3(1) of the Asylum Act, a foreigner is a refugee as defined in the Convention of 28 July 1951 on the legal status of refugees (BGBl. II, pp. 559, 560) if he, owing to well-founded fear of persecution in his country of origin on account of his race, religion, nationality, political opinion or membership of a particular social group, resides outside the country (country of origin) whose nationality he possesses and the protection of which he cannot, or, owing to such fear does not want to avail himself of.

11 Under Section 3a(1) of the Asylum Act, acts constitute persecution within the meaning of Section 3(1) if 1) they are sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the Convention of 4 November 1950 for the Protection of Human Rights and Fundamental Freedoms (BGBl. 1952 II p. 685, 953), – the ECHR – or if 2) they are an accumulation of various measures, including violations of human rights, which is sufficiently severe as to affect an individual in a similar manner as mentioned in no. 1. This legal definition of an act of persecution, implementing Article 9(1) of Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast, OJ L 337 p. 9) – Directive 2011/95/EU – is configured with a non-exhaustive catalogue of guiding examples in Section 3a(2) of the Asylum Act, consistently with Article 9(2) of Directive 2011/95/EU. The assumption of an act of persecution presupposes a deliberate interference with a legal interest protected under Article 9(1) of Directive 2011/95/EU (Federal Administrative Court, judgment of 19 January 2009 – 10 C 52.07 – BVerwGE 133, 55 para. 22).

12 Section 3b(1) of the Asylum Act lays down in specific form the reasons for persecution mentioned in Section 3(1) of the Asylum Act. Under Section 3b(2) of the Asylum Act, when assessing whether an applicant has a well-founded fear of being persecuted it is immaterial whether the applicant actually possesses the characteristic relevant for refugee protection, provided that the agent of persecution attributes such a characteristic to the applicant.

13 Under Section 3a(3) of the Asylum Act, there must be a connection between the reasons for persecution listed in Section 3(1) no. 1 in conjunction with the reasons for persecution listed in Section 3b, and the acts defined as persecution in subsections 1 and 2 or the lack of protection against such acts. The measure must be intended to affect the person concerned specifically in connection with one or more reasons for persecution. Whether the persecution takes place “be-

cause of" a reason for persecution, and therefore either the act of persecution, or the lack of protection from persecution, or both, are attributable to one of the reasons for persecution listed in Section 3b of the Asylum Act, must be assessed on the basis of the character of their content as a function of the perceivable directed nature of the measure, but not, however, on the basis of the subjective reasons or motives that guide the agent of persecution in its actions (cf. Federal Constitutional Court, decision of 1 July 1987 – 2 BvR 478/86, 2 BvR 962/86 – BVerfGE 76, 143 <157, 166-167>). It must be possible to assume this directed nature not only with reference to the violation of a legal interest brought about by the act of persecution, but also with reference to the reasons for persecution within the meaning of Section 3b of the Asylum Act with which the act is associated (Federal Administrative Court, judgment of 19 January 2009 – 10 C 52.07 – BVerwGE 133, 55 para. 22 and decision of 21 November 2017 – 1 B 148.17 – *juris* para. 17). For a "connection", a link in the sense of a contributing effect is sufficient. Precisely with a view to matters that are not infrequently complex and involve multiple causes, one cannot expect that one particular reason for persecution will be the central motivation or sole cause of a measure of persecution. Nevertheless, a merely remote, hypothetical connection with a reason for persecution does not meet the requirements of Section 3a(3) of the Asylum Act (Hailbronner, *Ausländerrecht*, version of January 2018, Section 3a Asylum Act paras. 37 et seqq.).

14 Within the meaning of Section 3(1) of the Asylum Act, a fear of persecution is well-founded if the foreigner is threatened in fact, meaning with a substantial probability ("real risk"), with the aforementioned dangers because of the circumstances prevailing in his country of origin, in light of his individual situation (established case law, cf. Federal Administrative Court, judgment of 20 February 2013 – 10 C 23.12 – BVerwGE 146, 67 para. 19 and decision of 15 August 2017 – 1 B 120.17 – *juris* para. 8). The probability standard requires that in an overall assessment of the life circumstances submitted for examination, the circumstances that argue for persecution possess a greater weight, and therefore prevail over the facts that argue against it. This assessment must be performed on the basis of a "qualifying" approach in the sense of a weighing and balancing of all established circumstances and their significance. In this regard, under Ar-

ticle 4(3) of Directive 2011/95/EU, account must be taken of not only all relevant facts as they relate to the country of origin, but also, among others, the relevant statements and documentation presented by the applicant, and his individual position. The deciding factor is whether, in view of these circumstances, a reasonably thinking, judicious person in the position of the person concerned could be induced to fear persecution (Federal Administrative Court, judgment of 20 February 2013 – 10 C 23.12 – BVerwGE 146, 67 para. 32 with further references). Here highly relevant importance attaches to the qualitative criterion of reasonable expectation. Accordingly, there is a substantial probability of persecution if it seems unreasonable to expect a judicious and reasonably thinking person in the asylum seeker's position, after weighing all known circumstances, to return to his home state (established case law, cf. Federal Administrative Court, decision of 7 February 2008 - 10 C 33.07 – Buchholz 451.902, *Europ. Ausl.- und Asylrecht* no. 19 para. 37).

15 According to Article 4(4) of Directive 2011/95/EU, the fact that an applicant has already been subject to persecution or serious harm, or to direct threats of such persecution or such harm, is a serious indication of the applicant's well-founded fear of persecution, unless there are good reasons to consider that such persecution will not be repeated. This provision confers on circumstances from the past an evidential value indicating that those circumstances will be repeated in the future (cf. Dörig, Asylum Qualification Directive 2011/95/EU, Article 4 para. 30, in: Hailbronner/Thym, *EU Immigration and Asylum Law*, 2nd ed. 2016). If the foreigner adduces previous acts of persecution or threats of persecution in support of his well-founded fear of renewed persecution in the event of his return to his homeland, he then benefits from the facilitated standard of proof under Article 4(4) of Directive 2011/95/EU. The evidential value attached to the earlier acts or threats must be taken into account by the competent authorities, on the condition, stemming from Article 9(3) of Directive 2011/95/EU, that those acts and threats are connected with the reason for persecution relied on by the person applying for protection (CJEU, judgment of 2 March 2010 – C-175/08 et al. [ECLI:EU:C:2010:105], Abdulla and Others v. Federal Republic of Germany – NVwZ 2010, 505 para. 94). Absent such a connection, the facilitated standard of proof does not intervene. The refutable presumption relieves a previously

persecuted person from the need to present good reasons why the circumstances on which persecution is founded will arise once again upon his return to his country of origin. It is refuted if good reasons indicate that such persecution is unlikely to be repeated. This assessment is subject to the free assessment of the evidence by the judge of fact (Federal Administrative Court, judgment of 27 April 2010 – 10 C 5.09 – BVerwGE 136, 377 para. 23).

16 The Administrative Court obviously proceeded on the basis of these standards in its decision.

17 b) With no violation of federal law (Section 137(1) no. 1 Code of Administrative Court Procedure), the Administrative Court arrives at the conclusion that accordingly, neither the mother Complainant (aa) nor the son Complainant (bb) should be granted refugee status.

18 aa) This Court finds no objection to the Administrative Court's assessment that in the event of her return to Eritrea, the mother Complainant would have to contend with an act of persecution in the form of inhuman or degrading treatment within the meaning of Article 3 of the ECHR, but that neither the threat of imprisonment (1) nor a possible conscription for National Service (2) would be prompted by a reason for persecution within the meaning of Section 3b of the Asylum Act (original copy of the decision, pp. 18 to 21).

19 (1) The appeal to this Court is not directed against the Administrative Court's finding that in the event of her return to Eritrea, there is a substantial probability that the mother Complainant would be threatened with execution of an extrajudicial punishment, imposed on her by the authorities, of imprisonment under inhuman conditions of confinement, because of her illegal emigration at an age subject to conscription, and because of her husband's desertion. The court's assessment that the threatened execution of punishment under inhuman conditions of confinement constitutes an act of persecution within the meaning of Section 3a of the Asylum Act is unobjectionable.

20

The appeal is unsuccessful against the Administrative Court's assessment that the imprisonment with which the mother Complainant is threatened would not be prompted by a reason for persecution within the meaning of Section 3b of the Asylum Act, but would instead be imposed to sanction the mother Complainant's violation of her national service obligation (original copy of the decision, pp. 20 and 11 – 16) and – insofar as concerns her husband, who evaded service – to compel him to return to Eritrea because of the threatened imprisonment of his wife (original copy of the decision, p. 17).

21 (a) This Court finds no objection to the Administrative Court's assessment that although the mother Complainant is threatened with imprisonment, this is not because of an opposing political opinion attributed to her within the meaning of Section 3(1) and Section 3b(1) no. 5 of the Asylum Act. A foreigner is persecuted because of a political opinion if the persecution takes place because the foreigner holds an opinion, thought or belief on a matter related to the potential agents of persecution mentioned in Section 3c of the Asylum Act, and to their policies or methods (Section 3b(1) no. 5 Asylum Act). Here it suffices that this opinion is attributed to the foreigner by the agent of persecution (Section 3b(2) Asylum Act).

22 Political opinion is suppressed in a material manner when, with the resources of criminal law or otherwise, a state interferes with an individual's life, limb or personal freedom merely because that individual outwardly expresses his political opinion that does not accord with reasons of state, and thus necessarily exercises an intellectual effect on the environment and has an opinion-forming influence on others (cf. Federal Administrative Court, judgment of 19 May 1987 – 9 C 184.86 – BVerwGE 77, 258 <265-266> with further references). This may in particular be presumed if the individual suffers treatment that is harsher than is otherwise customary within the persecuting state in the prosecution of similar – non-political – criminal offences that pose a comparable degree of danger (the so-called "Politmalus" or "political penalty") (cf. Federal Constitutional Court, decision of 10 July 1989 – 2 BvR 502/86, 2 BvR 1000/86, 2 BvR 961/86 – BVerfGE 80, 315 <338> and chamber decision of 4 December 2012 – 2 BvR 2954/09 – NVwZ 2013, 500). By contrast, according to the case law of the Fed-

eral Administrative Court, there is no sanctioning of a political opinion if the state's measure serves solely to enforce a duty that affects all citizens equally. The Federal Administrative Court has so decided, among other instances, in the case of sanctions that are linked to evasion of a military service, even if these are imposed by totalitarian states (Federal Administrative Court, judgments of 19 August 1986 – 9 C 322.85 – Buchholz 402.25 Section 1 Asylum Procedure Act no. 54, pp. 191-192, of 6 December 1988 - 9 C 22.88 – BVerwGE 81, 41 <44> – concerning the evasion of military service by a person of Eritrean ethnicity – and of 25 June 1991 – 9 C 131.90 – Buchholz 402.25 Section 2 Asylum Procedure Act no. 21 p. 63). Such measures establish a basis for a fear of persecution that is relevant in refugee law only if they are supposed to affect the person concerned above and beyond the penalisation of a violation of a general duty, owing to his political opinion or some other characteristic that is relevant for asylum (cf. Federal Administrative Court, judgments of 24 October 1995 – 9 C 3.95 – Buchholz 402.25 Section 1 Asylum Procedure Act no. 180 pp. 63-64 and of 26 February 2009 – 10 C 50.07 – BVerwGE 133, 203 para. 24, and decision of 24 April 2017 – 1 B 22.17 – NVwZ 2017, 1204 para. 14). Indiciations of such a condition might be a disproportionate scope of the sanctions, or their discriminatory nature.

23 In its approach, the Administrative Court correctly first adopts a qualifying overall consideration and assessment of all submitted findings, in order to reach its conclusions concerning the substantial probability of persecution because of an attributed political opinion. This Court finds no cause to object to the fact that as a basis for arriving at its decision, the Administrative Court held, among other matters, that the criminal penalties currently imposed in Eritrea for desertion are less than the maximum penalties provided by law (original copy of the decision, p. 12), that the conditions for the execution of punishment are equally harsh for deserters and other convicts (original copy of the decision, p. 13), that fleeing National Service in Eritrea has become a mass phenomenon (original copy of the decision, pp. 13-14), and that the development and promotion of the Eritrean economy, including its enterprises closely associated with the state, made it necessary to ensure an adequate number of persons in the services (original copy of the decision, pp. 14-15). The court also held that the option of-

fered to deserters abroad to exempt themselves from punishment by paying a "diaspora tax" shows that the Eritrean state waives its claim to punishment on a basis of economic interest, and attributes no decisive significance to a political opinion that might possibly stand behind a desertion (original copy of the decision, p. 15); it found that this was the case irrespective of any ability, willingness or reasonable expectation of the ability to pay this tax in a specific instance. Insofar as the mother Complainant is also threatened with imprisonment because of her husband's desertion, the Administrative Court assesses this risk, with no violation of federal law, as indicating that the imprisonment is not linked with a political opinion attributed to the mother Complainant, but rather pursues the goal of determining the whereabouts of her husband or compelling him to return (original copy of the decision, p. 17).

24 In its assessment of the facts and evidence, the Administrative Court held, without violating law subject to appeal in these proceedings, that the mother Complainant cannot rely on the facilitated standard of proof of a prior persecution under Article 4(4) of Directive 2011/95/EU (original copy of the decision, pp. 6 et seqq.). It holds that even an imprisonment or conscription for National Service with which she was already threatened at the time of her emigration did not constitute a reason for persecution under Section 3b of the Asylum Act.

25 On the basis of the assessment of the situation of persecution by the judge of fact, which is at least defensible, there is no call to seek a preliminary ruling from the Court of Justice of the European Union under Article 267 of the Treaty on the Functioning of the European Union (TFEU) concerning the question proposed for referral in this appeal, as to whether Article 10, and particularly Article 10(1)(e) in conjunction with Article 10(2), of Directive 2011/95/EU, opposes the interpretation of a national legal norm under which the reason for persecution of a political opinion is not said to exist if there is an abstract possibility of paying the Eritrean state a "diaspora tax" and signing a declaration of repentance, yet making the declaration of repentance and payment of the tax cannot reasonably be expected in the specific case and the person concerned would also not be assured of any certainty upon a return to Eritrea. The Administrative Court specifically did not proceed on the understanding that a political opinion does not

apply as a reason for persecution when there is an abstract possibility of obtaining diaspora status. In this regard, in the context of an overall assessment of the submitted findings, including those concerning diaspora status, the court arrived at the conclusion that the circumstances that argue for the attribution of an opposing political opinion should not be accorded any greater weight than the circumstances that argue against such an attribution (original copy of the decision, p. 12), and that “fleeing national service, without the addition of special circumstances in the specific case, does not [suffice] for the assumption of a political reason for persecution” (original copy of the decision, p. 16); only after that finding, consistent in particular with Article 4(3)(b) and (c) of Directive 2011/95/EU, did it assess the mother Complainant’s individual history of persecution (original copy of the decision, p. 17). Irrespective of that factor, it is self-evident and does not represent a matter of doubt under Union law that Article 10 of Directive 2011/95/EU does not prevent one from also taking into account the general practice of the diaspora tax and declaration of repentance in assessing whether threatened measures of persecution are linked to political opinion as a reason for persecution. In this context it is immaterial whether the mother Complainant is also able and can reasonably be expected to avoid punishment in this manner. The only factor to be judged here is the directed nature of the threatened act of persecution – which the Administrative Court does not deny. Such a directed nature self-evidently does not depend on whether the person concerned is indeed able to avert the act of persecution, but rather concerns an entirely different question. Equivalent considerations apply to a “punishment” of the mother Complainant for her illegal emigration and her subsequent application for asylum.

26 The complaint submitted in the present appeal also falls short against the decision of the Administrative Court that for the connection between acts of persecution and reasons for persecution that is required under Section 3a(3) of the Asylum Act, a connection is also sufficient in the sense that one out of multiple reasons for persecution may have contributed to the act of persecution in a non-immaterial manner. This is because the Administrative Court specifically did not arrive at the holding that the state of Eritrea automatically, with no further evidence, attributes an opposing political opinion to all deserters and evaders of

military service and to their family members, and that one should therefore assume a politically directed nature of the extrajudicial and arbitrary imprisonment of family members. Nor does it proceed on the assumption that the persecution threatening the mother Complainant is at least partially based on her “political opinion” (original copy of the decision, pp. 11 and 16).

27 The appeal to this Court also does not meet with success in that it is directed against the assessment of the facts by the Administrative Court. Under Section 137(2) of the Code of Administrative Court Procedure, the Federal Administrative Court is bound by this assessment of the facts and evidence by the court below, because there is no reason to believe that this assessment is founded on an error of law or is incompatible with general principles for the assessment of evidence, and particularly is incompatible with legislated rules of evidence, rules of interpretation, laws of thought, or general empirical principles, still less does it overreach the limits of an objective, non-arbitrary assessment (cf. Federal Administrative Court, decision of 2 November 1995 – 9 B 710.94 – Buchholz 310 Section 108 Code of Administrative Court Procedure no. 266 p. 20).

28 (b) The appeal furthermore does not meet with success in that it is directed against the Administrative Court’s assessment that the persecution threatening the mother Complainant is also not linked with membership of a particular social group as a reason for persecution within the meaning of Section 3b(1) no. 4 of the Asylum Act.

29 According to Section 3b(1) no. 4 of the Asylum Act, a group shall be considered to form a particular social group where in particular: a) members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and b) that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society. In accordance with Article 10(1)(d) of Directive 2011/95/EU and the associated case law of the Court of Justice of the European Union (CJEU, judgments of 7 November 2013 – C-199/12, C-200/12, C-201/12 [ECLI:EU:C:2013:720], Minister voor Immigratie en Asiel v. X and Y,

and Z v. Minister voor Immigratie en Asiel – NVwZ 2014, 132 para. 45 – and of 25 January 2018 – C-473/16 [ECLI:EU:C:2018:36], F v. Bevándorlási és Állampolgársági Hivatal – para. 30), the requirements of Section 3b(1) no. 4 first clause of the Asylum Act, identified under letters a and b, must be met cumulatively.

30 It is unobjectionable upon review by this Court that the Administrative Court ultimately held, on the basis of its findings of fact, that a “particular social group” as a reason for persecution is not present here (original copy of the decision, pp. 11 and 20). No such particular social group is constituted here either by the family of a deserter or a collective group of families of Eritrean deserters, or by the collective group of persons closely associated with a deserter.

31 There is no need to go further into the limits within which a family inherently constitutes a “particular social group” within the meaning of Section 3b(1) no. 4 of the Asylum Act or Article 10(1)(d) of Directive 2011/95/EU. On the basis of the Administrative Court’s findings, which are binding on this Court under Section 137(2) of the Code of Administrative Court Procedure, the court below’s assessment that it was not evident that Eritrean society perceives persons with such a background as being different (original copy of the decision, p. 20) proves to be unobjectionable upon review by this Court. The same applies for the Administrative Court’s holding, *mutatis mutandis,* that the group of family members of the mother Complainant’s husband has no distinct identity, nor is attributed any such distinct identity by the Eritrean state, because it is not perceived as being different by the surrounding society (cf. original copy of the decision, p. 20). The presumption raised in the appeal to this Court, with reference to recital 36 of Directive 2011/95/EU, that a member of the family of a person who is politically persecuted is himself threatened with political persecution (cf. also Federal Administrative Court, judgments of 27 April 1982 – 9 C 239.80 – BVerwGE 65, 244 <249-250> and of 2 July 1985 – 9 C 35.84 – Buchholz 402.25 Section 1 Asylum Procedure Act no. 34 pp. 102-103), cannot call the ultimate result into question. This presumption is conditional on the assumption that the person of reference, in this case the mother Complainant’s husband, is himself threatened with persecution because of a reason for persecution. But

for such a transfer of a persecution to family members, in the instant case there are no corresponding findings by the Administrative Court that the mother Complainant's husband may possibly be persecuted because of a reason for persecution in a manner that is relevant to refugee protection. For that reason, there is no cause for a further reference to the Court of Justice of the European Union for a preliminary ruling on the question said to need clarification in the present appeal, as to whether Article 10, and particularly Article 10(1)(d) in conjunction with Article 10(2) of Directive 2011/95/EU, contradicts the interpretation of a norm of national law by which a particular social group, as a reason for persecution, is not supposed to be relevant if a member of a (nuclear) family is threatened with acts of persecution precisely because of the conduct of another member of the (nuclear) family. Article 10(1)(d) of Directive 2011/95/EU, in conjunction with the case law of the Court of Justice cited above, makes it sufficiently clear that a particular social group in this sense does not exist if the group concerned does not have a distinct identity in the relevant country, or is not perceived as being different by the surrounding society.

32 There is no need to decide whether the population of all families of Eritrean deserters have a common background that cannot be changed, within the meaning of Section 3b(1) no. 4(a) Asylum Act, or a characteristic that is so fundamental to identity or conscience that a person should not be forced to renounce it. In any case, for the reasons already cited above, in this regard as well the requirement under Section 3b(1) no. 4(b) of the Asylum Act is absent, because the Administrative Court's findings of fact give no indication that such a group is perceived as being different by the surrounding society, and therefore has a distinct identity in Eritrea.

33 The entire population of persons closely associated with a deserter is too heterogeneous to permit the assumption that the requirements of Section 3b(1) no. 4(a) of the Asylum Act are met, because these persons do not even have the shared feature of an unchangeable common background or a characteristic that shapes their identity. In this regard as well one cannot assume that the requirements of Section 3b(1) no. 4(b) of the Asylum Act are otherwise present.

34 There is no facilitated standard of proof here under Article 4(4) of Directive 2011/95/EU for the existence of a particular social group. The Administrative Court has found no prior persecution linked to this reason for persecution.

35 (2) Furthermore, the Administrative Court does not violate Section 3(1) no. 1 in conjunction with Section 3b(1) and (2) of the Asylum Act in its assessment that any conscription into the Eritrean National Service that may threaten the mother Complainant in the event of her return has no evident link to a reason for persecution (original copy of the decision, pp. 6-7 and 21).

36 We may leave aside the question of whether conscription into the Eritrean National Service should qualify as an act of persecution within the meaning of Section 3a of the Asylum Act – without itself making any further findings of fact in this regard, the Administrative Court held that because of the conditions to which those in the service are exposed, conscription into the National Service "might well" be considered inhuman or degrading treatment within the meaning of Article 3 of the ECHR (original copy of the decision, p. 6) – and of whether

the mother Complainant was in fact threatened with such conscription in the event of her return (cf. original copy of the decision, p. 18). This is because there is no cause for this Court to object to the Administrative Court's assessment that any conscription with which she might be threatened after her return was not linked with a substantial probability to a reason for persecution within the meaning of Section 3(1) in conjunction with Section 3b of the Asylum Act. If – as the Administrative Court has bindingly found – practically all adult Eritrean citizens are affected equally, without regard to their personal characteristics (original copy of the decision, pp. 6-7), then in particular there is no reason to believe that any inhuman treatment that might occur during National Service would be connected with an opposing political opinion attributed to the mother Complainant. By the same reasoning, in these proceedings one cannot assume that the group of persons subject to service is considered as being different by Eritrean society and therefore has a distinct identity, within the meaning of Section 3b(1) no. 4(b) of the Asylum Act.

37 (3) Furthermore, there is no cause for reservation in these proceedings against the Administrative Court's assessment that the genital mutilation suffered by the mother Complainant prior to her emigration is incapable of establishing a presumption of a persecution relevant to refugee protection (original copy of the decision, p. 17).

38 It is conceivable that a genital mutilation may take place as an act of persecution within the meaning of Section 3a(2) no. 6 of the Asylum Act in connection with the concerned woman's or girl's membership of a particular social group within the meaning of Section 3b(1) no. 4 clause 4 of the Asylum Act, according to which a group is also considered a particular social group within the meaning of Section 3(1) no. 1 of the Asylum Act if it is associated solely with gender or sexual identity. However, in the present case there is no serious indication that in the event of her return to Eritrea, the mother Complainant would in fact run the risk of suffering a gender-specific persecution. The presumption under Article 4(4) of Directive 2011/95/EU must be viewed as having been refuted here by the Administrative Court, because there are good reasons to consider that the genital mutilation already suffered by the mother Complainant will not be re-

peated. This too is unobjectionable upon review by this Court. The mother Complainant has not adduced any other risk of gender-specific persecution.

39 bb) Furthermore, the Administrative Court's decision to find against the Complainants with reference to the son Complainant's application for a grant of refugee status is not incompatible with federal law (Section 137(1) no. 1 Code of Administrative Court Procedure).

40 The son Complainant, born in the federal territory in 2015, has not suffered prior persecution. On the basis of the Administrative Court's assessment of the found facts, which is binding on this Court under Section 137(2) of the Code of Administrative Court Procedure, in the event of his immigration to Eritrea there is also no substantial probability that he must fear acts of persecution because of a reason for persecution. In accordance with the above, there is no reason to believe that the Eritrean state attributes an opposing political opinion to him and/or that the existence of the requirements for a reason for persecution under Section 3b(1) no. 4 of the Asylum Act should be assumed with an eye to his position as a family member of a deserter and a woman subject to national service who emigrated without permission.

41 It already stands to oppose a grant of refugee status under Section 26(5) sentence 1 of the Asylum Act that under the terms of Section 26(2) of that Act, a child who is a minor and unmarried is to be granted refugee status, upon application, only if the foreigner parent's refugee status is incontestable and there is no reason to repeal or withdraw this status. As already explained under aa) above, the mother Complainant was not to be granted refugee status.

42 2. The appeal to this Court complains without success that, with reference to the rejection of the mother Complainant's petition for a finding of a national prohibition of deportation with reference to Eritrea