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REFERENCE : LA/COD/35

27 February 2012

Dear Mr. Huth,

I acknowledge receipt, with thanks, of your letter dated 17 February 2012 transmitting the comments of the Government of Germany on the questions identified at paragraphs 40 and 41 of the report of the International Law Commission on the work of its sixty-third session (A/66/10), regarding the topic "Expulsion of Aliens".

Yours sincerely,



Václav Mikulka
Director
Codification Division
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New York, 17.02.2012

Dear Mr. Mikulka,

With reference to the Report of the International Law Commission on its sixty-third session (doc. A/66/10), I have the pleasure to transmit to you in your capacity as Secretary of the ILC the attached answers of the Federal Republic of Germany to questions nos. 40 and 41 regarding the topic "Expulsion of aliens". I should be grateful if you could bring these answers to the attention of the Commission.

Sincerely,

(Martin Huth)

Counsellor and Legal Adviser

Answers

Provided

by

The Federal Republic of Germany

With

**Reference to the Report
of the International Law Commission
Sixty-third Session**

(26 April-3 June and 4 July-12 August 2012)

UN Doc. A 66/10 (page 9)

Chapter III

**Specific Issues on which Comments
Would be of a Particular Interest to the Commission**

B. Expulsion of Aliens

Questions 40 and 41

February 2012

Question 40: With regard to the topic "Expulsion of aliens", the Commission would like to know from States whether, in their national practice, suspensive effect is given to appeals against an expulsion decision:

- relating to an alien lawfully in the territory;
- relating to an alien unlawfully in the territory;
- relating to either, irrespective of category.

Answer:

The entry, stay and economic activity of foreigners is regulated in the Federal Republic of Germany by the "Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory", in short the "Residence Act" (*Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet*). The Residence Act also serves to control and restrict the influx of foreigners into the Federal Republic of Germany, see section 1 (1) thereof.

The law relating to aliens is part of German administrative law. The relevant procedural provisions are thus mainly found in the "Code of Administrative Court Procedure" (*Verwaltungsgerichtsordnung*).

Under the terms of German administrative law, an expulsion decision (*Ausweisung*) is an administrative act which obliges the alien to leave the Federal territory. It can be enforced by way of deportation (*Abschiebung*).

Section 80 (1) of the Code of Administrative Court Procedure stipulates as a general rule that objections and recissory actions shall have suspensive effect. However, exceptions to this general rule are to be found in section 80 (2) of this Code and in several provisions of the Residence Act.

The most notable exceptions are:

- Section 84 (1) of the Residence Act, according to which an objection or legal action against the refusal of an application for a residence title (issuance or extension) does not have suspensive effect;
- Section 52 (1) sentence 1 no. 4 of the Residence Act in conjunction with section 75 (2) of the Asylum Procedure Act, which together stipulate that no suspensive effect is accorded to the revocation of an alien's residence title;
- Section 80 (2) sentence 1 no. 4 of the Code of Administrative Court Procedure also stipulates that there is no suspensive effect in cases in which the authority that has issued the administrative act separately orders immediate execution in the public interest.

Even in those cases where suspensive effect is accorded, the Residence Act stipulates that the operative effect of an expulsion or an administrative act which terminates the lawfulness of the residence shall not be affected by any objection or legal action (section 84 (2)).

The Code of Administrative Court Procedure also contains rules on how immediate legal protection can be obtained in cases where no suspensive effect is accorded. Pursuant to section 80 (5), the competent administrative court may grant suspensive effect by way of a court order in those cases where suspensive effect would not otherwise apply due to section 80 (2). In other cases, applicants can try to obtain an interim order under section 123 (1) of the Code of Administrative Court Procedure.

The question of whether or not suspensive effect depends on the lawfulness of the alien's residence has to be answered in the negative: suspensive effect applies irrespective of the lawfulness of an alien's residence. It only fails to apply in certain

enumerated cases. In fact, the expulsion decision makes the alien's residence unlawful and obliges him or her to leave the Federal territory since the residence title expires or cannot be issued, section 51 (1) or section 50 (1) of the Residence Act respectively. Deportation (*Abschiebung*) enforces the alien's obligation to leave the Federal territory. According to section 58 (2) of the Residence Act, this obligation is enforceable in certain enumerated cases. In principle it is only enforceable if the administrative act which requires the alien to leave the territory is itself enforceable. However, the German States (*Länder*) may determine that appeals do not have suspensive effect insofar as they address measures taken in administrative execution, see section 80 (2) sentence 2 of the Code of Administrative Procedure.

There are two immediate legal remedies against deportation: First, a request for an interim order according to section 123 (1) of the Code of Administrative Court Procedure to obtain an injunction prohibiting deportation, and second, a request under section 80 (5) of the Code aimed at obtaining a court order giving suspensive effect. Regarding the question of whether or not suspensive effect depends on the lawfulness of the alien's residence it has to be said that deportation presupposes unlawful residence, i.e. a situation where the alien is obliged to leave the territory.

Question 41: Does a State which has such practice consider it to be required by international law?

Answer:

Section 80 (1) and (5) of the Code of Administrative Court Procedure reflect the fundamental constitutional guarantee of judicial review laid down in Article 19 (4) of the German Basic Law (*Grundgesetz*). Insofar, German administrative law is mainly influenced and directed by German constitutional law.