Judgment of 22 August 2017 - BVerwG 1 A 3.17

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Deportation order against a person posing a threat of Islamic terrorism

Headnotes

1. A deportation order does not expire following its enforcement (see BVerwG, judgment of 14 December 2016 - 1 C 11.15).

2. Judicial assessment of a deportation order that has been enforced must be based on the factual and legal situation prevailing at the time of the deportation.

3. A deportation order pursuant to section 58a AufenthG requires a threat situation determined on the basis of facts in which the risk of an act endangering security or a terrorist act resulting from the foreign national can evolve at any time and become a specific threat (see BVerwG, decisions of 21 March 2017 - 1 VR 1.17 and 1 VR 2.17).

4. The lawfulness of a deportation order made pursuant to section 58a AufenthG does not depend on the lawfulness of a ban on entry and residence issued at the same time.

5. A deportation ban under section 60 (1) to (8) AufenthG related to the state to which the individual is to be deported results in the (partial) unlawfulness of a deportation order made pursuant to section 58a AufenthG.

Sources of law

Residence Act	AufenthG, *Aufenthaltsgesetz*	sections 11, 58a, 60 (1) to (8)
European Convention on Human Rights (ECHR)		article 3
Directive 2008/115/EC		article 11

Summary of the facts

The claimant, a national of state N., challenges a deportation order made pursuant to section 58a of the Residence Act (AufenthG, *Aufenthaltsgesetz*).

The claimant was born on ... 1994 in the city of G. to a father having the nationality of state N. and a mother having the nationality of state I. Until his deportation, the claimant and his brother lived with his mother. According to the claimant, he had little contact with his father. In 1995, he was granted a residence title for exceptional purposes (*Aufenthaltsbefugnis*) and in 2011 a permanent settlement permit (*Niederlassungserlaubnis*). Before his deportation, the claimant was preparing for a subject-restricted higher education entrance qualification (*Fachabitur*) and worked as a trainee in a tailoring workshop, which according to the findings of the security authorities functioned as an entry point for a neo-Salafist group with jihadist tendencies that had emerged from the scene surrounding the proscribed organisation "Caliphate State" ("*Kalifatstaat*").

On 9 February 2017, the claimant was arrested following a large-scale raid and taken into detention. By notice of 15 February 2017, the defendant Ministry ordered, on the basis of section 58a AufenthG, the deportation of the claimant to state N. (no. 1). At the same time, it was determined that no deportation bans pursuant to section 60 (1) to (8) AufenthG were in existence (no. 3) and the decision was taken to impose no time limit on the ban on entry and residence pursuant to section 11 (5) AufenthG (no. 4). The deportation order was issued on the grounds that, having regard to a fact-based threat assessment (*tatsachengestützte Gefahrenprognose*), the claimant posed a particular threat (*besondere Gefahr*) within the meaning of section 58a AufenthG. It stated that, according to the findings of the security authorities, the claimant was considered to be a "person posing a terrorist threat" (*Gefährder*) in the "role of a participant" as a member of the radical Islamist scene in the city of G., to sympathise with the proscribed terrorist organisation "Islamic State" ("IS") and to have been occupied since 2016 at the latest with the commission of a serious act of violence in Germany. His conspiratorial behaviour supported the assumption that an attack was imminent. It was stated further that, in exercising its discretion, the Ministry had taken account of the personal interests of the claimant, who was born and whose roots were in Germany, and of the particular importance thereof. However, on account of his behaviour and the resulting extreme threat situation, these were of secondary importance to the public interest in averting the threats that he posed. On 16 February 2017, the claimant was taken into detention pending deportation.

On 22 February 2017, the claimant brought an action before the Federal Administrative Court (BVerwG, *Bundesverwaltungsgericht*).

After compiling a list of evidence on the situation in state N. on matters relevant to deportation and obtaining information from the Federal Foreign Office (*Auswärtiges Amt*), the Senate by decision of 21 March 2017 - 1 VR 2.17 - rejected the claimant's request to order the suspensive effect of his action, subject to the direction that the authorities in state N. were not to be given any details of the reasons for his deportation. By decision of 4 April 2017 - 2 BvR 743/17 -, the Federal Constitutional Court (BVerfG, *Bundesverfassungsgericht*) refused to admit the constitutional complaint lodged challenging the decision of the Senate. On ... 2017, the claimant was deported to state N.

Reasons (abridged)

11 The action against the deportation order contained in the Ministry's notice of 15 February 2017 is admissible but without merit.

12 1. The admissibility of the action is not precluded by the subsequent deportation of the claimant. This has not caused the expiry of the deportation order issued against the claimant. An administrative act expires only when it is no longer suitable to produce legal effects or when the regulatory function originally inherent in the act has lapsed (BVerwG, judgment of 25 September 2008 - 7 C 5.08 - (...)). Measured against that, the deportation order did not expire on the enforcement of the deportation as it continues to produce legal effects (BVerwG, judgment of 14 December 2016 - 1 C 11.15 - para. 29 (...)). The deportation order forms the basis not only for the expiry by force of law of the permanent settlement permit issued to the claimant (section 51 (1) no. 5a AufenthG) but also for the lawfulness of the deportation and the legal consequences resulting therefrom, for example, the liability of the claimant for the costs arising in connection with his deportation as provided for in sections 66 and 67 AufenthG.

13 2. The action is, however, without merit. The deportation order contained in the Ministry's notice of 15 February 2017 is lawful and does not violate the claimant's rights (section 113 (1) Code of Administrative Court Procedure (VwGO, *Verwaltungsgerichtsordnung*)).

14 For the judicial assessment of a deportation decision, the factual and legal situation that is decisive is, in cases in which the foreign national has neither been deported nor left the territory voluntarily, that which pertains at the time of the last oral hearing or the decision of the court responsible for finding the facts (see BVerwG, judgment of 22 March 2012 - 1 C 3.11 - Rulings of the Federal Administrative Court (BVerwGE, *Entscheidungen des Bundesverwaltungsgerichts*) 142, 179 para. 13); in the case of a deportation order made on the basis of section 58a AufenthG that is the time of the last oral hearing or the decision of the competent Senate which, in accordance with section 50 (1) no. 3 VwGO, rules on the action in first and last instance. If, on the contrary, as is the case here, the foreign national has already been deported by virtue of enforcing the

deportation order issued against him, this does not generally result in the expiry of the deportation order. However, by virtue of its enforcement the objective pursued by way of the deportation order has been realised and consideration of new circumstances arising following the deportation - both to the advantage and disadvantage of the individual concerned - would contradict its character as an enforcement measure (...). For that reason, developments arising after deportation must be considered in proceedings brought under section 11 AufenthG. Also for the purposes of the examination, as an incidental question, of any deportation bans, what is crucial is whether these existed at the time of deportation. This is in line with the case-law of the European Court of Human Rights (ECtHR) which, when considering whether a risk of treatment that is contrary to human rights existed in the state to which a person is deported, relies on the facts at the time of deportation and has regard to information that comes to light subsequently only on a subsidiary basis (ECtHR, judgment of 14 March 2017 - Application no. 47287/15, Ilias and Ahmed/Hungary - para. 105 with further references).

15 The legal basis for the deportation order is section 58a (1) first sentence AufenthG. According to that provision, the supreme authority of a federal state may issue a deportation order against a foreign national, without a prior expulsion order and based on an assessment of facts, in order to avert a particular threat to the security of the Federal Republic of Germany or a terrorist threat.

16 2.1 That provision is in accordance with the constitution both in formal and substantive terms (see BVerfG, chamber decisions of 24 July 2017 - 2 BvR 1487/17 - (...) para. 20 et seqq. and of 26 July 2017 - 2 BvR 1606/17 - (...) para. 18; BVerwG, decisions of 21 March 2017 - 1 VR 1.17 - (...) para. 6 et seqq. and - 1 VR 2.17 - (...) para. 9 et seqq.).

17 2.2. The deportation order is - as was stated in the proceedings for interim protection - lawful from a formal perspective.

18 a) It is not incumbent on the foreigners authority (*Ausländerbehörde*) to issue a deportation order pursuant to section 58a AufenthG, rather it is incumbent on the supreme authority of a federal state, in other words, here, on the Ministry which acted. This, too, is unobjectionable under constitutional law (BVerwG, decisions of 21 March 2017 - 1 VR 1.17 - (...) para. 9 and - 1 VR 2.17 - (...) para. 12).

19 b) The claimant was given the opportunity to submit observations prior to the issue of the order such that it is unnecessary to consider here whether in the case of a deportation order under section 58a AufenthG, having regard to the seriousness of the interference with a basic right (*Grundrechtseingriff*) associated with such an order and to ensure the rights of the defence, a hearing must be held - at the very least - shortly before the notification of the order (see BVerwG, decision of 13 July 2017 - 1 VR 3.17 - (...) para. 22).

20 2.3 Nor is the order objectionable (...) on substantive grounds. The deportation order under section 58a AufenthG is, with respect to expulsion under sections 53 et seqq. AufenthG, an independent instrument for prevention of threats provided for under the law relating to foreign nationals. Its objective is to avert a particular threat to the security of the Federal Republic of Germany and/or a terrorist threat. A fact-based assessment indicated that the claimant posed a threat of that kind at the time of his deportation.

21 a) According to the jurisprudence of the Senate, the term "security of the Federal Republic of Germany" - mentioned also, with identical wording, in section 54 (1) no. 2 and section 60 (8) first sentence AufenthG - must be interpreted more strictly than the term of "public security" within the meaning of general police law. The security of the Federal Republic of Germany comprises internal and external security and protects, from an internal perspective, the continued existence and functioning of the state and its institutions. That includes protection against the effects of violence and threats thereof on the carrying out of state functions (BVerwG, judgment of 15 March 2005 - 1 C 26.03 - BVerwGE 123, 114 <120>). In this sense, acts of violence committed against bystanders aimed at propagating general insecurity are also targeted against the internal security of the state (BVerwG, decisions of 21 March 2017 - 1 VR 1.17 - (...) para. 15 and - 1 VR 2.17 - (...) para. 17).

22 The term "terrorist threat" relates to the emerging threats that have evolved following the events of 11 September 2001. These threats are not territorially limited in their radius of action and endanger the security interests also of other states. Although the Residence Act does not contain a definition of what constitutes terrorism, the provisions of the law on residence related to the fight against terrorism presuppose a notion of terrorism that allows the law to be applied. Even if previous attempts at international law level to develop a generally accepted treaty definition of terrorism have not been fully successful, the jurisprudence of the Federal Administrative Court has clarified in principle the circumstances in which the pursuit of political objectives using terrorist means and outlawed under international law must be presumed. Important criteria can be obtained in particular from the definition of terrorist offences contained in article 2 (1) (b) of the International Convention for the Suppression of the Financing of Terrorism of 9 December 1999 (Federal Law Gazette (BGBl., *Bundesgesetzblatt*) II p. 1923), from the European Community level definition of terrorist offences set out in Council Framework Decision 2002/475/JHA of 13 June 2002 (OJ L 164 p. 3) and the Council Common Position 2001/931/CFSP on the application of specific measures to combat terrorism of 27 December 2001 (OJ L 344 p. 93) (see BVerwG, judgment of 15 March 2005 - 1 C 26.03 - BVerwGE 123, 114 <129 et seq.>). Despite a certain definitional imprecision concerning the notion of terrorism, according to the jurisprudence of the Senate, a pursuit of political objectives using terrorist means that is outlawed under international law exists in any event where political objectives are pursued using weapons that constitute a public danger or by way of attacks on the lives of bystanders (BVerwG, judgment of 25 October 2011 - 1 C 13.10 - BVerwGE 141, 100 para. 19 with further references). The same applies for the pursuit of ideological objectives. A terrorist threat can be posed not only by organisations but also by individuals who are not integrated as members or supporters in a terrorism organisation or not having a relationship of that kind with such an organisation. In principle, also included are intermediate levels of loosely coupled networks, (virtual or real) communication relationships or "involvements in a scene", which influence a person's view of reality and are apt to trigger or encourage their willingness in an individual case (BVerwG, decisions of 21 March 2017 - 1 VR 1.17 - (...) para. 16 and - 1 VR 2.17 - (...) para. 18).

23 The requirement of a "particular" threat in the first alternative of section 58a (1) first sentence AufenthG relates solely to the weight and significance of the legal interests at risk and to the weight of the offences that it is feared the individual will commit and not to the probability of occurrence at a specific time. In this sense, by reason of the same requirements to interfere with an individual's rights, the particular threat to internal security must attain a threat dimension comparable to that of a terrorist threat. This interpretation is supported by section 11 (5) AufenthG, which places a deportation order in a series alongside crimes against peace, war crimes and crimes against humanity. Where it is a question of averting the most serious offences, intended as part of a "political/ideological struggle" to unsettle the population in Germany or to coerce state institutions of the Federal Republic of Germany into taking certain actions, it must be presumed ordinarily that a particular threat to the security of the Federal Republic of Germany exists and in any event that a terrorist threat exists. As it is a question of averting offences of that kind, it is not necessary that the preparation or execution thereof has begun in such a manner as to constitute the elements of an offence and resulting, for example, in the opening of criminal investigations (BVerwG, decisions of 21 March 2017 - 1 VR 1.17 - (...) para. 17 and - 1 VR 2.17 - (...) para. 19).

24 The situation of particular threat required under section 58a AufenthG must result from an assessment based on facts. It follows from the spirit and purpose of the provision that the threat situation must result directly from the foreign national in whose civil liberties the provision interferes. Notwithstanding its independent legal regulation, the deportation order resembles in its effects an expulsion declared immediately enforceable coupled with a notice of intention to deport. In order to expedite the procedure, however, it involves curtailments in the procedure and in legal protection. In particular, the deportation order is by virtue of law immediately enforceable (section 58a (1) second sentence first half-sentence AufenthG). As no notice of intention to deport is necessary (section 58a (1) second sentence second half-sentence AufenthG), there is also no need to specify a period for voluntary return. Competence in the matter does not lie with the foreigners authorities but, as a rule, with the supreme authorities of the federal states (section 58a (1) first sentence and section 58a (2) AufenthG). The competence to issue a deportation order establishes at the same time, pursuant to section 58a (3) third sentence AufenthG, a competence of the same authority to examine the deportation bans specified in section 60 (1) to (8) AufenthG without being bound by findings reached in that connection in other proceedings. The judicial review of a deportation order and its enforcement is in first and last instance a matter for the Federal Administrative Court (section 50 (1) no. 3 VwGO); an application for the grant of interim protection must be made within seven days (section 58a (4) second sentence AufenthG). The differences that this form of procedure entails in comparison with an expulsion can only be justified by a terrorist and/or equivalent threat to the security of the Federal Republic of Germany that results directly from the foreign national (BVerwG, decisions of 21 March 2017 - 1 VR 1.17 - (...) para. 18 and - 1 VR 2.17 - (...) para. 20).

25 The threat resulting from the foreign national does not, however, have to exceed already the threshold of a specific threat (*konkrete Gefahr*) within the meaning of police law on prevention of threats, which entails that if events are left unimpeded and take their course in line with what is to be objectively expected an violation of the protected legal interest must reasonably be expected. That follows not simply from the wording of the provision, which for the purposes of averting a particular threat demands simply an assessment based on facts. Also the spirit and purpose of the provision, having regard to the high-ranking protected interests and the emerging threats resulting from terrorism at issue, supports a lowered standard in terms of the threat, as following the attacks of 11 September 2001 it must be assumed that a terrorist attack injuring many people can be carried out anywhere and at any time using means that are widely available and without engaging in significant preparation. For that reason, a deportation order is already possible where in the light of specific factual indications a considerable risk exists that a terrorist threat and/or a comparable threat to the internal security of the Federal Republic may at any time materialise in the person of the foreign national unless action is taken (BVerwG, decisions of 21 March 2017 - 1 VR 1.17 - (...) para. 19 and - 1 VR 2.17 - (...) para. 21).

26 Notwithstanding the severity of measures ending a person's residence, this interpretation is in accordance with the Basic Law (GG, *Grundgesetz*). The legislature is not constitutionally limited from the outset to creating, in respect of each type of discharge of functions, requirements to interfere that reflect the usual model in security law of prevention of specific, imminent or present threats. Rather, it can set wider limits for particular fields of threat prevention, with a view to preventing criminal offences, by lowering the requirements of foreseeability for the causal chain. However, in that case, a sufficiently specified threat is required, in the sense that there are at least factual indications of the emergence of a specific threat. General experience does not suffice in this regard. Rather specific facts must substantiate the assessment in an individual case that an event leading to an attributable violation of weighty protected interests will occur. A sufficiently specified threat in this sense may already exist even where the causal chain leading to the damage is not yet foreseeable with sufficient probability, but certain facts already indicate that an individual threat to an exceptionally significant legal interest may occur. With regard to terrorist offences, often committed at unforeseeable locations and in very different ways by individuals who have no criminal record, this may already arise in the situation where, although an occurrence of a specific type and at a foreseeable time cannot be identified, the individual behaviour of a person substantiates the specific probability that the person will commit such offences in the near future. Given the severity of measures ending a person's residence, it is constitutionally unacceptable, however, to shift the threshold for interference to the preliminary stages if there are only relatively diffuse indications for potential threats, for example, the mere knowledge that a person is attracted to a fundamentalist understanding of religion (see BVerwG, decision of 31 May 2017 - 1 VR 4.17 - (...) para. 20 with reference to BVerfG, judgment of 20 April 2016 - 1 BvR 966/09 et al. - Rulings of the Federal Constitutional Court (BVerfGE, *Entscheidungen des Bundesverfassungsgerichts*) 141, 220 para. 112 et seq.).

27 For this "threat assessment" - as with every assessment - a sufficiently reliable factual basis is necessary. The reference to a fact-based assessment is intended to clarify that a mere suspicion (of a threat) or conjecture and/or speculation does not suffice. At the same time, this reference defines an independent probability standard. Whereas otherwise in the law on prevention of threats the standard of a sufficient probability of threat occurring applies, which differentiates according to the type and scope of damage that can be expected, for action to be taken under section 58a AufenthG a particular development does not have to be more probable than another. Rather, having regard to the particular threat situation, which section 58a AufenthG, by way of its independent legal regulation, is intended to counter, it suffices that the facts established give rise to a considerable risk that the threat situation posed by a foreign national may evolve at any time and become a specific terrorist threat and/or a comparable threat to the internal security of the Federal Republic (BVerwG, decisions of 21 March 2017 - 1 VR 1.17 - (...) para. 20 and - 1 VR 2.17 - (...) para. 22).

28 This considerable risk of a threat materialising may also result from circumstances that are not (yet) relevant in criminal law terms, for example, where a foreign national is firmly intent on carrying out a potentially serious attack in Germany requiring little preparation although that person has not yet taken any specific steps to prepare or execute the attack and details such as place, time, means and target of the attack are not yet determined. A situation that is sufficiently threatening may result, however, also from other circumstances. In every case, a comprehensive appraisal is required that considers the personality of the foreign national, his previous conduct, his inner convictions as are apparent or have been expressed to others, his connections to other persons and groups posing a terrorist threat and/or a threat to the internal security of the Federal Republic and other circumstances apt to leave or fortify the foreign national in his dangerous thoughts and actions. This may mean, depending on the circumstances of the individual case, and when viewed as a whole, that a considerable risk, capable of evolving into a specific threat at any time if no action is taken, is already deemed to exist on the basis that a foreign national, who is, in principle, prepared to resort to violence and searching for an identity, identifies strongly with radical-extremist Islamism in its various forms, going as far as jihadist Islamism which relies exclusively on violence, has close contacts with like-minded persons, who are possibly already willing to carry out an attack, and has regular conversations with them on "religious" issues (BVerwG, decisions of 21 March 2017 - 1 VR 1.17 - (...) para. 21 and - 1 VR 2.17 - (...) para. 23).

29 In carrying out the threat assessment necessary for a deportation order pursuant to section 58a AufenthG the supreme authority of a federal state is not entitled, however, to any assessment prerogative. As part of the executive, when issuing a deportation order, it is bound, like any other public body, by law, in particular by the basic rights (article 1 (3) and article 20 (3) GG) and in accordance with article 19 (4) first sentence GG its actions are subject to full judicial review. Neither the wording nor the spirit and purpose of the provision

support the existence of a margin of assessment for the public authority that is not amenable to judicial review. Even if the assessment required in the framework of section 58a AufenthG demands special knowledge and experience, the assessment is not so exceptional and dependent on a particular expertise that only supreme authorities (of the federal states) possess. Comparable difficulties in finding the facts arise also in other circumstances. The high rank of the protected legal interests and the urgency of the decision also do not require the authority to have an assessment prerogative in the matter (BVerwG, decisions of 21 March 2017 - 1 VR 1.17 - (...) para. 22 and - 1 VR 2.17 - (...) para. 24).

30 b) Applying these principles to the present case, at the (material) time of his deportation, on the basis of a fact-based assessment, the claimant posed not only a considerable risk - sufficient for the application of section 58a AufenthG - but also already a specific threat. As the Senate found in the proceedings for interim protection, before his detention in February 2017, the claimant belonged to the radical Islamist scene in Germany and, *inter alia*, had contacts with persons belonging to an Islamist-Salafist grouping with jihadist tendencies that had emerged from the scene surrounding the proscribed organisation "Caliphate State". He sympathised with the terrorist organisation "Islamic State" ("IS") and their ideology of martyrdom and had long been preoccupied with a plan to commit a serious act of violence in Germany using weapons that constitute a public danger. In that connection, the claimant was not simply "playing" with the thought of a terrorist attack. Rather, at the time of his arrest, he was firmly intent on committing such an attack in Germany and all that remained to be resolved was the question of "how" (BVerwG, decision of 21 March 2017 - 1 VR 2.17 - (...) para. 25 et seqq.).

31 The specific threat of an attack possible at any time derives primarily from the claimant's chat history for the period May 2016 to January 2017 with a certain "Abdullah. K", thought to be in Syria or a neighbouring country, and obtained through the surveillance of the claimant's telecommunication traffic and Telegram account. In those chats, the claimant expressed his wish on multiple occasions to leave the country to join combat operations. Advised that this was too dangerous and risky, he allowed himself to be persuaded by his chat counterpart to carry out an attack in Germany instead. In this connection, the claimant does not deny his contacts to the radical Islamist scene in Germany or the statements he made. To the extent that in his statements to the authorities he claimed, as a recent convert, to have entered extremist circles "without realising this", but to have never planned an attack in Germany and that his chat remarks to the opposite effect were not meant seriously, this is clearly a self-serving assertion. The credibility of this statement is undermined in particular by the intensity and persistence with which, over many months, the claimant actively pursued the notion of planning an attack in Germany and repeatedly sought the "advice" of his chat counterpart. In those chats he revealed his firm intent to carry out an attack in Germany and to give his life for this. For him, all that remained to be resolved was how he could implement that decision in the most effective manner. He had extensive discussions with his chat counterpart on the pros and cons of particular means of causing harm and targets for an attack (killing two police officers by stabbing, building a car bomb, student party or gay pride march, kitchen knife or car in a pedestrian zone, throwing stones from a motorway bridge, using a car or a lorry). In addition, the claimant had evidently already started saving money with which to buy "toys" (weapons) on the "darknet" (see BVerwG, decision of 21 March 2017 - 1 VR 2.17 - (...) para. 26 et seqq. and the references there to the relevant chat transcripts).

32 Thus, over a long period, the claimant expressed a firm intent to carry out a terrorist attack in Germany and to give his life for this. He also considered how he could hide his planning in his personal environment (pursue studies or vocational training as a professional or haulage driver) and as a result the family possibly did not recognise his radicalisation or, at any rate, did not recognise it to its full extent. (...) Further support for the existence of a firm intent on the part of the claimant is provided by the chat communication recovered from a mobile phone seized in the claimant's apartment on 9 February 2017, in which the claimant asked the other person, whose name is unknown, about obtaining illegal "toys" that "do a bit more damage" than "small knives" and tried to convince that other person of the appropriateness and effectiveness of a jihadist attack for "IS" in Germany. In addition, early in 2017, the claimant took active steps to obtain a category B driving licence after having had intensive chat discussions with "Abdullah K." on the possibility of using a vehicle to carry out an attack. His deep involvement in the ideas of jihadist Islamism also follows from the fact that he is evidently in possession of a book popular with jihadists concerning the jihad ("The Book of the Jihad") and sought via his chat counterpart to make contact with "jabhat fatih" (the former Syrian branch of al-Qaeda). In addition, when his apartment was searched numerous videos featuring brutal beheadings were found, which contradicts the written statement made by his brother and submitted in the proceedings for interim protection, according to which, the claimant is so sensitive he cannot bear to watch horror or violent videos. Nor is the characterisation of the claimant as dangerous undermined by the fact that prior to his arrest he had acquired a young cat, in particular, given the fact that the symbol of the cat is considered an Islamically legitimate expression of male tenderness and since 2014 has been instrumentalised, predominantly by Salafist combatants originating in the West, for the demonstration of jihadist masculinity (see BVerwG, decision of 21 March 2017 - 1 VR 2.17 - (...) para. 30 et seqq. with further references).

33 Against this background, at the time of the claimant's detention in February 2017, a terrorist attack using means posing public danger and involving an unforeseeable number of uninvolved victims had to be expected, in particular, given the fact that on 24 January 2017 in a chat conversation with "Abdullah K." the claimant commented, "A decision has to be taken - Better a bad decision than no decision" (see BVerwG, decision of 21 March 2017 - 1 VR 2.17 - (...) para. 30). It is not apparent that this threat situation could have in any way changed prior to the deportation of the claimant in ... 2017. The Senate considers the claimant's assertion that he never planned an attack and that his remarks to the contrary were not intended seriously to be a self-serving assertion. There are no indications of a serious and credible abandonment of his plan during his detention pending deportation. The claimant's verbal distancing of himself from an attack does not suffice in this regard. To the extent that the claimant now argues that in state N. he no longer has any contact to the "Islamic scene", he can no longer explain his earlier remarks and has changed as a result of the deportation, that argument is of no relevance in determining the lawfulness of the deportation orders, simply on legal grounds, given the Senate's findings on what constitutes the material time.

34 c) Even if one assumes that the deportation order constitutes a return decision that comes within the scope of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ L 348 p. 98), it is compatible with the EU law requirements that result from the Directive.

35 In particular there was no requirement to grant the claimant a period for voluntary departure, as on account of his planned attack he posed a risk to public and national security (article 7 (4) Directive 2008/115/EC). That conclusion is not precluded by the case-law of the Court of Justice of the European Union (CJEU), according to which it may not be refrained automatically, by legislative means or in practice, from granting a voluntary period for departure where the person concerned poses a risk to public policy (CJEU, judgment of 11 June 2015 - C-554/13 [ECLI:EU:C:2015:377] - para. 70). Namely, for cases coming within section 58a AufenthG the respective examination and determination of the constituent elements already include the assessment on a case-by-case basis required by the CJEU (CJEU, judgment of 11 June 2015 - C-554/13 - para. 50 and 57) in order to ascertain whether the personal conduct of the third-country national concerned poses a genuine and present risk to public policy that is so serious that no period whatsoever may be granted for voluntary departure (see BVerwG, decision of 13 July 2017 - 1 VR 3.17 - (...) para. 70).

36 (...)

37 d) The deportation order is also not (partially) unlawful on account of a deportation ban based on the state to which the individual is deported. According to the statutory construction of section 58a AufenthG, the existence of deportation bans based on the state to which the individual is to be deported under section 60 (1) to (8) AufenthG means that the individual concerned cannot be deported to that state but following notification (given in due time) may be deported to a different state (which is willing or obliged to accept the individual concerned). When issuing a deportation order, the competent authority must assess on its own responsibility whether deportation to the state intended is precluded by a deportation ban under section 60 (1) to (8) AufenthG. That includes both the question whether the requirements are satisfied for granting protection from deportation as a refugee (section 60 (1) AufenthG) or in connection with subsidiary protection (section 60 (2) AufenthG) and the assessment of national deportation bans under section 60 (5) and (7) AufenthG. If it is determined in court proceedings that a deportation ban based on the state to which the individual is to be deported exists, the lawfulness of the deportation order remains otherwise unaffected (section 58a (3) AufenthG in conjunction with section 59 (2) and (3) AufenthG applied *mutatis mutandis*).

38 In the present case, at the material time when the claimant was deported in ... 2017, no deportation ban based on the state to which he was to be deported in accordance with section 60 (1) to (8) AufenthG existed. To the extent that prior to his deportation the claimant argued that, on account of the accusations levelled against him in Germany, he was at risk of detention, torture and possibly even death in state N., there are, admittedly, indications that, having regard to the acute threat posed by Islamic terror organisations in the country, the security authorities in state N., in principle, also take an interest in their own nationals where it has come to their knowledge that these individuals became followers of the radical Islamist scene in a foreign country and planned a terrorist attack there. For that reason, these individuals must expect to be questioned by the police following their deportation. In that connection, in light of the findings in the present case, the risk that the security authorities in state N. could take measures of relevance to a deportation decision cannot be precluded (...). However, a real risk of torture or other inhuman or degrading treatment or punishment, within the meaning of article 3 of the European Convention on Human Rights (ECHR), presupposes that the authorities in state N. are at any rate aware of the specific reasons for deportation. An awareness of those circumstances could not be regarded to exist at the time of the claimant's deportation. The claimant did not appear publicly in the radical Islamist scene in Germany. He also maintained his radical Islamist Facebook profile using a pseudonym. To the extent that, following his arrest, the German press reported on his radicalisation and his plans for an attack, this was done without mentioning his name. Although, in principle, the authorities in state N. are likely to be interested in receiving notification from the deporting authority of the background to a deportation, disclosure of information was not to be anticipated in the present case as the Senate's rejection of the request for interim protection was subject to the direction that on carrying out the claimant's deportation the German authorities were not to communicate any details to the authorities in state N. (see BVerwG, decision of 21 March 2017 - 1 VR 2.17 - para. 40). The assessment that in these circumstances no deportation bans preclude the claimant's deportation is reinforced by the fact that, according to statements made by his counsel at the oral hearing, since the claimant's deportation, he has not been bothered by the authorities of state N. The fact that his passport was retained on his deportation and that it cannot be entirely excluded that the authorities in state N. could become aware one day through a different route of the allegations levelled against the claimant in Germany does not give rise to a real risk of a treatment contrary to human rights.

39 e) The issue of a deportation order by the supreme authority of a federal state was at the material time of the deportation neither vitiated by an error of discretion nor disproportionate. Protection of the public against terrorist attacks constitutes one of the most important public functions and can also justify very far-reaching interferences with the rights of individuals (see BVerfG, decision of 18 July 1973 - 1 BvR 23/73 and 1 BvR 155/73 - BVerfGE 35, 382 <402 et seq.>; judgment of 20 April 2016 - 1 BvR 966/09, 1 BvR 1140/09 - BVerfGE 141, 220 para. 96 and 132). If the constituent elements of section 58a AufenthG are satisfied, the supreme authority of a federal state must examine whether to issue a deportation order or whether, as the case may be, other measures which the foreigners authority may take - for example the issue of an immediately enforceable expulsion order coupled with a notice of intention to deport - or measures which may be taken on the basis of general police law suffice (discretion as to whether or not to take action); a discretion as to the choice of measures is conceivable only where there are several possible states to which an individual may be deported, which is not the case here.

40 In the present case, the supreme authority of a federal state correctly exercised its discretionary powers as to whether or not to take action in as much as it determined that other measures to terminate a person's residence provided for in the Residence Act or other measures under the law on prevention of threats do not suffice in order to counter effectively the particular threat posed by the claimant. That is not objectionable in the circumstances of the present case, given the willingness of the claimant - determined elsewhere - to commit a terrorist attack in Germany capable of being realised at any time using the simplest of means and the at best limited effectiveness of more elaborate control and surveillance measures (see BVerwG, decision of 21 March 2017 - 1 VR 2.17 - (...) para. 37). No different conclusion can be reached as regards the possibility, mentioned by the claimant's counsel at the oral hearing, of taking measures to deradicalise the claimant.

41 Given the threat of a terrorist attack, capable of being carried out at any time, that resulted from the claimant, the deportation order appears proportionate also for the remainder. (...) In its decision, the defendant took account of the private interests of the claimant who was born and raised in Germany and who as a *de facto* national had no, or at best very few, ties to his state of citizenship. Despite his roots in the local environment in Germany, the claimant, who is a person of full age and capable of work and, by reason of his knowledge of English, in a position, at any rate, to communicate in one of the official languages of his home country, has, even allowing for the initial difficulties involved, the capacity and can be reasonably expected to develop an existence in state N., in particular, given the fact that he has relatives there who can assist him in this connection. Consequently, it is not objectionable that, given the circumstances prevailing here, involving a terrorist attack, capable of being carried out at any time, the defendant did not give priority to the claimant's private and family interests. The termination of residence is also not disproportionate when viewed from the perspective of article 2 (1) and article 6 GG as well as article 8 ECHR (see BVerwG, decision of 21 March 2017 - 1 VR 2.17 - (...) para. 38).

42 (...)