Judgment of 4 July 2019 - BVerwG 1 C 31.18

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Risk upon return for a Syrian national who evaded reserve service by emigrating

Headnotes

1. In order for a well-founded fear of persecution as defined in section 3 (1) no. 1 AsylG to exist, a risk assessment based on the standard at the level of considerable probability of persecution is required; in this regard, the court responsible for finding the facts must also arrive at the conviction required under section 108 (1) VwGO even if the status of information is unclear.

2. A person seeking protection without having previously suffered persecution bears the burden of proof (or persuasion) for the considerable probability of the persecution with which the person is threatened upon return.

3. In the case of an act of persecution under section 3a (2) no. 5 AsylG, a connection with a reason for persecution is also required.

Sources of law

Asylum Act	AsylG, *Asylgesetz*	sections 3, 3a and 3b
Code of Administrative Court Procedure	VwGO, *Verwaltungsgerichtsordnung*	section 108 (1)
Directive 2011/95/EU		articles 4 (3) and (4), 9

Summary of the facts

The claimant, by his own account a Syrian national born in 1987, seeks to be granted refugee status.

The claimant entered the federal territory early in 2010 and applied for asylum. As grounds, he stated that he had been an adherent of the Yekiti Party in Syria, and had fled the country after a party meeting was raided by security forces. He had completed his military service from the end of March 2006 to the beginning of April 2008.

In a notice dated 24 February 2011, the Federal Office for Migration and Refugees (*Bundesamt für Migration und Flüchtlinge*, hereinafter Federal Office) refused, as manifestly unfounded, his application for asylum and for a grant of refugee status. At the same time, it found that there were no deportation bans under section 60 (2) through (7) of the Residence Act (AufenthG, *Aufenthaltsgesetz*), and warned the claimant of impending deportation to Syria. In a notice dated 23 March 2012, it found that there was a deportation ban pursuant to section 60 (2) AufenthG and repealed the deportation warning.

The claimant's action, directed to obtaining a grant of refugee status, did not meet with success before the Administrative Court (*Verwaltungsgericht*). However, the Higher Administrative Court (*Oberverwaltungsgericht*), in a judgment of 21 March 2018, ordered the defendant to grant the claimant refugee status. It founded its decision on the grounds that there was a considerable probability that the claimant, who had emigrated without having been persecuted, would be at risk of persecution upon returning to Syria because he had evaded reserve service. The Court ruled, pursuing further the jurisprudence developed on this standard, that full judicial conviction regarding a prognosis of a considerable probability of impending persecution could be gained even if, owing to the difficulty of obtaining information, an unambiguous factual situation could not be established and instead, an overview of information furnished sufficient reason for a prognosis in both one direction and the other; in other words, there was a situation comparable to a *non liquet*. The Court noted that higher administrative court jurisprudence had arrived at varying assessments as to whether there was a threat of persecution upon their return for Syrian nationals who, by fleeing to Europe, had evaded the duty of being available at all times to do reserve service in the Syrian Army. After an assessment of the available information, the Court ruled that the factual situation did not permit any clear conclusions or prognoses. Accordingly, upon a return, there was a threat of conscription for reserve service and a risk of abusive treatment on account of the associated investigations. The Court found that it also could not rule out that the security forces might lodge a charge of having connections with the opposition, or that failure to perform reserve service might be viewed as signalling sympathies with the opposition. To be sure, the Court noted, this suspicion is not asserted systematically, but rather depends on additional factors. In many cases, nothing more happens than a compulsory enforcement of reserve service, without any evidence that this is also an expression of persecution for imputed sympathies with the opposition. However, in view of the complete arbitrariness of the way in which the state security forces proceed, it could not be ruled out that conscription into reserve service, which did not constitute political persecution in and of itself, was not regularly associated with a suspicion of acting for the opposition, with the associated arrests, criminal penalties, abusive treatment and torture. Under these circumstances, the Court held, a prognosis could not be reached with certainty, but a threat of persecution could by no means be ruled out, and was instead left up to the arbitrariness of the state bodies. Thus, there was a factual risk of political persecution that made it unreasonable to expect the person to return.

In its appeal on points of law, the defendant complains of a violation of section 3 (1) no. 1 of the Asylum Act (AsylG, *Asylgesetz*) in the interpretation of the concept of a well-founded fear of persecution, and in the allocation of the burden of proof. The Court of Appeal, it argues, affirms a considerable probability of persecution even when no clear prognosis is possible and persecution cannot be ruled out. It argues that neither the aspect of the arbitrariness of acts of persecution, nor the fact that a reason for persecution cannot be ruled out, justifies the assumption of a considerable probability. Since a reason for persecution is a fact that establishes a claim, it argues, the burden of proof lies with the claimant.

The claimant defends the challenged decision.

The Representative of the Interests of the Federation at the Federal Administrative Court (*Vertreter des Bundesinteresses beim Bundesverwaltungsgericht*) has not submitted an opinion.

Reasons (abridged)

8 Although the claimant's representative was absent from the oral hearing, the Senate was able to hear and decide the appeal on points of law, because the representative had been notified of this possibility in the summons (section 102 (2) Code of Administrative Court Procedure (VwGO, *Verwaltungsgerichtsordnung*)).

9 The defendant's appeal on points of law is admissible and well-founded. The Court of Appeal affirmed that the claimant had a well-founded fear of persecution, and thus was entitled to be granted refugee status, on grounds violating federal law (section 137 (1) no. 1 VwGO). Admittedly, that Court correctly noted that the required prognosis of persecution depends on the standard at the level of considerable probability. From this, however, in the situation of an unclear status of information, it drew a conclusion that is incompatible both with the requirements for the judicial formation of conviction under section 108 (1) first sentence VwGO and with section 3 (1) no. 1 AsylG. For lack of an adequate overall assessment by the court responsible for finding the facts concerning the information about the risk for Syrian nationals upon their return, the Senate cannot arrive at a final decision. The case must therefore be referred back to the Court of Appeal for a further hearing and decision (section 144 (3) first sentence no. 2 VwGO).

10 1. The relevant legislation governing the legal assessment of the claimant's request is the Asylum Act, in its latest version (currently: the version promulgated on 2 September 2008 <Federal Law Gazette (BGBl., *Bundesgesetzblatt*) I p. 1798>, last amended by the Third Act Amending the Asylum Act (*Drittes Gesetz zur Änderung des Asylgesetzes*) of 4 December 2018, which entered into force on 12 December 2018 <BGBl. I p. 2250> - the Asylum Act). Changes in the law occurring after the last oral hearing or the decision of the court responsible for finding the facts must be taken into consideration in appeal proceedings on points of law if they had to be considered by the court responsible for finding the facts - if it were to decide instead of the court deciding on appeals on points of law (Federal Administrative Court (BVerwG, *Bundesverwaltungsgericht*), judgment of 11 September 2007 - 10 C 8.07 - Rulings of the Federal Administrative Court (BVerwGE, *Entscheidungen des Bundesverwaltungsgerichts*) 129, 251 para. 19). Since the present case concerns a dispute under asylum law where the court responsible for finding the facts regularly had to refer to the factual and legal situation at the time of the last oral hearing or the decision pursuant to section 77 (1) AsylG, it would have to base a decision on the latest version if it were to decide on the matter now, unless a derogation is required for reasons of substantive law (established jurisprudence, see BVerwG, judgment of 20 February 2013 - 10 C 23.12 - BVerwGE 146, 67 para. 12). However, the provisions relevant here have not changed since the proceedings on points of fact and law.

11 2. According to section 3 (4) AsylG, a foreign national who is a refugee under section 3 (1) AsylG is to be granted refugee status unless he or she meets the requirements of section 60 (8) first sentence AufenthG or the Federal Office has decided not to apply section 60 (1) AufenthG pursuant to section 60 (8) third sentence AufenthG. According to section 3 (1) AsylG, consistently with EU and international refugee law, a foreign national is a refugee as defined in the Convention relating to the Status of Refugees of 28 July 1951 (Geneva Convention) if he or she, owing to well-founded fear of persecution in his or her country of origin on account of his or her race, religion, nationality, political opinion or membership of a particular social group, resides outside the country (country of origin) whose nationality he or she possesses and the protection of which he or he cannot, or, owing to such fear does not want to, avail himself or herself of.

12 a) Persecution within the meaning of section 3 (1) AsylG, according to section 3a (1) AsylG, means acts that (1.) 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 (ECHR); or (2.) are an accumulation of various measures, including violations of human rights, which is sufficiently severe as to affect an individual in a similar manner. This legal definition of an act of persecution, which implements 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) - the Qualification Directive - undergoes a configuration in section 3a (2) AsylG, in conformity with article 9 (2) of Directive 2011/95/EU, with a non-exhaustive list of general examples. According to that list, the application of physical or mental violence (no. 1), as well as a disproportionate or discriminatory prosecution or punishment (no. 2), may suffice. The same applies to prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling under the exclusion clause as set out in section 3 (2) AsylG (no. 5). The presumption of an act of persecution presupposes a targeted interference with a legal interest protected under refugee law (BVerwG, judgment of 19 January 2009 - 10 C 52.07 - BVerwGE 133, 55 para. 22).

13 b) The reasons for persecution listed in section 3 (1) no. 1 AsylG (race, religion, nationality, political opinion or membership of a particular social group) are defined in further detail in section 3b (1) AsylG. The concept of political opinion - which was used by the Court of Appeal - in particular includes that a person holds an opinion, thought or belief on a matter related to the potential agents of persecution mentioned in section 3c AsylG and to their policies or methods (section 3b (1) no. 5 AsylG). According to section 3b (2) AsylG, in assessing the question of whether a foreign national's fear of persecution is well-founded, it is immaterial whether the person actually possesses the characteristics relevant in refugee law, provided these characteristics are attributed to him or her by his or her persecutor.

14 c) There must be a connection between the reasons for persecution mentioned in section 3 (1) no. 1 AsylG and further specified in section 3b AsylG, and the acts of persecution described in section 3a (1) and (2) AsylG, or the lack of protection against such acts (section 3a (3) AsylG, article 9 (3) Directive 2011/95/EU). The measure must be directed towards attacking the person concerned precisely in connection with one or more reasons for persecution. Whether the persecution in this sense occurs "on account of" a reason for persecution must be judged on the basis of the nature of its content, in accordance with the recognisable focus of the measure, but not according to the subjective reasons or motives that guide the persecutor in such acts (see Federal Constitutional Court (BVerfG, *Bundesverfassungsgericht*), decision of 1 July 1987 - 2 BvR 478/86, 2 BvR 962/86 - Rulings of the Federal Constitutional Court (BVerfGE, *Entscheidungen des Bundesverfassungsgerichts*) 76, 143 <157, 166 et seq.>). It must be possible to presume this focus not only with regard to the violation of rights brought about by the act of persecution, but also with reference to the reasons for persecution as defined in section 3b AsylG to which the act is connected (BVerwG, judgment of 19 January 2009 - 10 C 52.07 - BVerwGE 133, 55 para. 22 and decision of 21 November 2017 - 1 B 148.17 - para. 17). An association in the sense of a contributing cause is sufficient for such a "connection". A particular reason for persecution does not need to be the central motivation or sole cause of a measure of persecution; however, a merely remote, hypothetical connection with a reason for persecution does not meet the requirements of section 3a (3) AsylG (BVerwG, judgment of 19 April 2018 - 1 C 29.17 - (...)).

15 Sanctions connected with evasion of military service, even if they are imposed by totalitarian states, constitute persecution that is of significance in refugee law only when they are supposed to impact the person concerned above and beyond penalising non-performance of a citizen's duty, entirely or in part on account of the person's political opinion or some other characteristic relevant to refugee protection. Indications of such persecution might be a disproportionate scope of the sanctions, or their discriminatory character (established jurisprudence, see BVerwG, judgment of 19 April 2018 - 1 C 29.17 - (...) para. 22 with further references). In other case configurations as well, the Federal Administrative Court has denied the existence of persecution if a sanction serves (only) to enforce a duty that is incumbent on all citizens equally (see BVerwG, judgment of 24 October 1995 - 9 C 3.95 - (...) on the deprivation of the citizenship of a national who did not comply with an order to perform military service; judgment of 26 February 2009 - 10 C 50.07 - BVerwGE 133, 203 para. 24 on deprivation of citizenship because of failure to register). In such constellations, political opinion is significantly suppressed if a state, using the means of criminal law or otherwise, interferes with the life, physical integrity or personal freedom of the individual because the individual outwardly expresses his or her political opinion opposed to reasons of state, and thus necessarily exercises an intellectual influence on the environment and affects others' formation of their opinions. This can particularly be assumed if the individual suffers treatment that is harsher than is otherwise customary in the persecuting state when prosecuting other, non-political crimes of a comparably dangerous nature (politically motivated prosecution known as a "Politmalus", see BVerfG, 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 - (...); BVerwG, judgment of 19 April 2018 - 1 C 29.17 - (...)).

16 d) A fear of persecution is well-founded if, in the event of a hypothetical return, there is a considerable probability that the foreign national would be threatened with the aforementioned risks because of the circumstances prevailing in his country of origin, in view of his individual situation. This probability standard is oriented to the case law of the European Court of Human Rights (ECtHR), which focuses on "real risk" in its examination of article 3 ECHR; this corresponds to the German standard at the level of considerable probability (established jurisprudence, see BVerwG, judgments of 1 June 2011 - 10 C 25.10 - BVerwGE 140, 22 para. 22 with further references and of 20 February 2013 - 10 C 23.12 - BVerwGE 146, 67 para. 32; decision of 15 August 2017 - 1 B 120.17 - para. 8). For this purpose, it is necessary that in a summarising assessment of the real-world fact situation submitted for examination, the circumstances arguing for the existence of an individual persecution must hold greater weight, and therefore prevail over the facts that argue to the contrary. This assessment is to be performed on the basis of a "qualifying" approach, in the sense of a weighting and weighing of all established circumstances and their significance. In that process, under article 4 (3) of Directive 2011/95/EU, account is to be taken not only of the information provided by the applicant and his or her individual situation, but also all facts relevant to refugee protection as they relate to the country of origin. The deciding factor is whether, in light of the overall circumstances, a reasonable, prudent person in the same situation as the individual concerned can be induced to feel a fear of persecution (BVerwG, judgment of 20 February 2013 - 10 C 23.12 - BVerwGE 146, 67 para. 32 with further references). A well-founded fear of an event in this sense may still exist if, in a "quantitative" or mathematical approach, the probability of its occurrence is less than 50%. In such a case, to be sure, the mere theoretical possibility of persecution is not sufficient; a reasonable person will dismiss that from consideration. But if the overall circumstances of the case show a "real possibility" of persecution, a reasonable person will also not take on the risk of a return to the home country. When weighing all circumstances, the particular severity of the feared interference must be included under consideration to a certain extent. If, in a quantitative approach, there is only a slight mathematical probability of persecution, even from the viewpoint of a prudent, reasonable person who is deciding whether he or she can return to the home country, it still makes a considerable difference whether, for example, the person will be risking merely a month's imprisonment, or the death penalty. Ultimately, the aspect of reasonableness is therefore decisive here; it represents the primary qualitative criterion to be applied in assessing whether the probability of risk is "considerable" (established jurisprudence, see BVerwG, decision of 7 February 2008 - 10 C 33.07 - (...)).

17 This standard of probability inherent in the constituent element of a "well-founded fear of persecution" applies irrespective of whether the applicant had or had not already been subject to persecution before leaving the country. Persons who have already been subject to persecution - a category to which the claimant does not belong, according to the findings of the Court of Appeal - are privileged under the rules of EU law not by way of a graduated standard of probability, but by way of the facilitated burden of proof under article 4 (4) of Directive 2011/95/EU. According to that standard, such persons are *de facto* presumed to have a well-founded fear of persecution. That presumption may be rebutted. For that purpose, there must be good reasons to consider that they will not be threatened again with such persecution (BVerwG, judgment of 1 June 2011 - 10 C 25.10 - BVerwGE 140, 22 para. 22 on article 4 (4) of Directive 2004/83/EC having the same content).

18 3. Concerning the constituent element of a well-founded fear of persecution, the approach taken by the Court of Appeal does follow the one of the supreme court jurisprudence to some extent. In particular, the Court recognises that the required prognosis of persecution must be based on the standard at the level of considerable probability of persecution; that this is not a degree of probability determinable with the precision of scientific methods, but rather an act of acquiring knowledge by assessment; that the presumption of a considerable probability of persecution on account of an ascribed political opinion requires a qualifying overall consideration and assessment of findings; and that here the aspect of whether the person can reasonably be expected to return must be applied as the primary qualitative criterion. Nor is there any reason to object within the scope of the appeal on points of law to the assessment of facts and evidence by the Court for finding that the evaluation of the available factual situation referring to the current situation in Syria does not permit a clear prognosis. However, the Court violates federal law in its considerations of what legal conclusions should be drawn from a factual situation that cannot be clearly determined. In the opinion of the Court of Appeal, it should in this case be sufficient for judicial conviction that there is a considerable probability of a threat of persecution in the event of a return, if in the overall examination of the findings, there is sufficient reasons for a prognosis in both one direction and the other; in other words, there is a situation comparable to a *non liquet*.

19 a) In so doing, the Court of Appeal evidently presumes that in case of doubt, an unclear factual situation when forming a conviction tells to the benefit of the person seeking protection ("benefit of doubt"). With this legal proposition, not only does it fall short of the level of conviction prescribed under section 108 (1) first sentence VwGO; but also, a prognosis of persecution established on that basis constitutes a violation of substantive law. In view of the constituent elements, a grant of refugee status presupposes a well-founded fear of persecution. For that purpose, a risk assessment is required on the basis of the standard at the level of considerable probability of persecution, and the court responsible for finding the facts must arrive at the conviction required under section 108 (1) VwGO, even given the problems of establishing and assessing the facts that are "typical of asylum". If, in arriving at the prognosis of persecution, it falls short of the required level of conviction, its decision is not consistent with the objectives of refugee law (see BVerwG, judgments of 29 November 1977 - 1 C 33.71 - BVerwGE 55, 82 <83> and of 11 November 1986 - 9 C 316.85 - para. 11 on the requirements to proof facts establishing a basis for asylum).

20 aa) In the administrative court proceedings governed by the principle of investigation, it is the task of the court responsible for finding the facts to determine the decisive factual basis, for that purpose to pursue the necessary inquiry into the facts *ex officio*, and to form its own conviction (sections 86 (1) first sentence, 108 (1) first sentence VwGO). Nor do the obligations to cooperate that are heightened in asylum procedures (sections 15 and 25 AsylG) relieve the court of its duty to investigate in order to arrive at the conviction necessary for its decision. For this purpose, the court must investigate the facts for the prognosis, assess them in an overall view, and form a conviction on this basis.

21 (1) A conviction applies not only with regard to the information adduced by the person seeking protection concerning the events attributable to his or her personal sphere, but also with regard to the general findings to be incorporated into the risk assessment. These proceed primarily from the sources of information available from the country of origin. The regular standard of proof under section 108 (1) first sentence VwGO applies for these connecting facts as well. Here, the court responsible for finding the facts cannot set any unattainable requirements of proof, or demand incontrovertible certainty, but in cases of doubt about the facts may be content with a degree of certainty that is usable for practical life, which compels doubts to be silent even if they cannot be ruled out entirely (see BVerwG, decision of 8 February 2011 - 10 B 1.11 - (...)).

22 (2) On the basis of the foundation for a prognosis thus obtained, the court responsible for finding the facts must, in making a risk assessment, arrive at findings concerning the probability of future occurrences in the event of a hypothetical return of the person seeking protection. In contrast to statements about the past and present, this projection directed to the future, as an anticipation of future events, is typically encumbered with uncertainties. By its very nature, only a statement of probability is ever possible about a future event, based here on the standard at the level of considerable probability. Even if the prognosis therefore does not require "full proof", this does not change the fact that in accordance with section 108 (1) first sentence

VwGO, the court responsible for finding the facts must also arrive at a full conviction, in a reasonable assessment of (all) circumstances of the individual case, that the court's prognosis of a considerable probability of the threat of persecution, obtained without procedural error, is correct (established jurisprudence, see BVerwG, judgment of 16 April 1985 - 9 C 109.84 - BVerwGE 71, 180 <182>; see also BVerwG, decision of 8 February 2011 - 10 B 1.11 - (...)). In that case, the presumption of the considerable probability of a threat of persecution requires neither an unambiguous factual situation nor a minimum 50% probability. Rather, as is already evident from the concept of risk, it is sufficient if in a summarising assessment, the circumstances that argue in favour of the existence of persecution hold greater weight, and therefore prevail over the facts that argue to the contrary. The regular standard of proof of the full judicial conviction applies, even where - as is the case here - there is an uncertain basis of fact (BVerwG, decision of 28 April 2017 - 1 B 73.17 - para. 10). In these cases there is a particularly great need for a comprehensive assessment of all sources of information about the general situation in the country of origin; on that basis, when a factual situation is unclear and information from a region in crisis is only fragmentary, the court must perform a summarising assessment of a large number of individual items of information (BVerwG, judgment of 21 April 2009 - 10 C 11.08 - (...)). In that event, certain prognostic uncertainties must be accepted as inevitable, and do not in principle oppose the formation of a conviction, if a further inquiry into the facts offers no promise of success. The presumption of a considerable probability, however, cannot be founded on mere hypotheses and unconfirmed assumptions, dispensing with the establishment of objectifiable prognostic facts.

23 (3) If the court cannot arrive at a conviction in one direction or the other on the basis of a foundation for a prognosis that has been established to the court's conviction concerning the considerable probability of a persecution with which a claimant is individually threatened, and if the court finds no good reasons to further pursue the inquiry into the facts, it must rule that the asserted future persecution is unconfirmable, and must take a decision on the basis of the burden of proof. Prior to this step, however, there must always be a thorough analysis of the sources of information and the resulting findings. In this process, because of the evaluative nature of the prognostic standard at the level of considerable probability, the court must also take into account the reasons behind any uncertainties and unclarities, and whether, at least in an overall view of the individual items of information before the court, there are sufficient indications which, in a summarising assessment, make it possible for the court to reach its own prognosis-based decision on the risk in the event of a return. Only if it is not possible for the court responsible for finding the facts to reach a prognosis-based decision of its own, founded on the prognostic basis that has been established to the court's conviction, may the court arrive at a decision that the matter is unconfirmable, to be directed to the burden of persuasion.

24 bb) The appeal judgment does not meet these requirements. The Court of Appeal fails to recognise the requirements for the full judicial conviction as to the prognosis of a considerable probability, when in the presence of an unresolved status of information it affirms a risk in the event of a return solely because of the difficulty of obtaining information. Instead, it finds it sufficient for a grant of refugee status that a reliable prognosis of risk in the event of a return is not possible for persons who have not met their obligation to perform military service or, like the claimant, reserve service. The Court ruled that a persecution with which such persons are threatened could by no means be ruled out, but rather their fate was left to the arbitrariness of the state bodies, who had a free hand in how to deal with these returnees. In these reasons, the Court of Appeal falls short of the standard of proof of the full judicial conviction that applies for its prognosis. That shortfall, at the same time, constitutes a violation of substantive law, as the Court of Appeal did not arrive at a proper prognosis because of its deficient approach.

25 b) If, contrary to the above interpretation, the considerations of the Court of Appeal as to what conclusions should be drawn from an ambiguous status of information should be viewed as a decision on unconfirmability, that too would be a violation of federal law. To that extent, the appeal on points of law rightfully complains that the burden of persuasion for a considerable probability of a threat of persecution lies with the claimant, and not with the defendant.

26 aa) The party who bears the burden of proof (or persuasion) is determined by substantive law, and is to be determined by interpretation of the provisions relevant to the individual case; if those provisions contain no particular rules, the general legal principle applies that if a party derives legal consequences that are advantageous to the party from certain facts, and those facts cannot be confirmed, that unconfirmability must tell against the party (BVerwG, judgment of 13 October 1988 - 5 C 35.85 - BVerwGE 80, 290 <296 et seq.>). According to this principle of favourability, someone who lays claim to a right must accept that the unconfirmability of facts establishing that right will tell against the claimant, while conversely, the unconfirmability of circumstances that impede, extinguish or suspend a right will tell against the party that invokes those circumstances (...).

27 bb) In application of these principles, as a general rule, the person seeking protection bears the burden of proof (or persuasion) for the existence of the (positive) requirements for a grant of refugee status, and to that extent, a *non liquet* will tell against that person. This is, at any rate, the case for an applicant who, as is the case here, had left the country without having already been subject to persecution, with regard to the question of whether there is a considerable probability that he or she will be threatened with persecution upon his or her return (BVerwG, judgment of 21 November 1989 - 9 C 44.89 - (...); decision of 15 August 2017 - 1 B 120.17 - para. 8).

28 With regard to the return prognosis, substantive law offers an evidentiary approach that diverges from the principle of favourability only for special situations, such as for those that have already been subject to persecution (article 4 (4) Directive 2011/95/EU; see Court of Justice of the European Union (CJEU), judgment of 2 March 2010 - C-175/08 et al. [ECLI:EU:C:2010:105], Abdullah et al. - para. 94; BVerwG, judgment of 19 April 2018 - 1 C 29.17 - (...)) and in cases of revocation (article 14 (2) Directive 2011/95/EU). Conversely, from the same principle it must be concluded that otherwise, unless something else proceeds from the nature of the matter, an unconfirmability must normally tell against the person seeking protection. Contrary to the claimant's interpretation, this applies not only to facts within the claimant's own sphere, but for all circumstances in general that are material to the risk assessment. Consequently, in case of doubt, uncertainties and unclarities that result from the sources of information about general conditions in the person's country of origin also tell against the person seeking protection. The same applies for the connection between measures threatened upon the person's return and a reason for persecution. The mere fact that Syrian criminal law provides for punishment of those evading military service does not, contrary to the claimant's interpretation, justify a reversal of the burden of proof in assessing whether measures threatened upon his return have a connection with a characteristic relevant to refugee protection.

29 4. Thus, the claimant was not to be granted refugee status solely on account of an unclear status of information. A decision on the matter itself (section 144 (3) first sentence no. 1 VwGO) is not possible for the Senate in its function as a court that hears appeals on points of law, because it cannot conclusively decide either against or for the claimant as for lack of adequate factual findings and an assessment based thereon by the court responsible for finding the facts.

30 For lack of a proper prognosis, the findings of the Court of Appeal do not support either that Court's own presumption that there is a considerable probability that the claimant is threatened with persecution connected with his (presumed) political opinion, nor do they enable the Senate to decide itself on the

claimant's risk in the event of a return. In court proceedings, it is fundamentally the task of the court responsible for finding the facts to assess the conditions in the country of origin on the basis of an overall view, and to prepare a risk assessment referred to the individual case in light of the individual situation of the person seeking protection (BVerwG, judgment of 1 March 2012 - 10 C 7.11 - (...)). In that regard, the assessment of whether a (potentially) threatened act of persecution is connected with a reason for persecution is also part of the assessment of facts and evidence reserved for the court responsible for finding the facts (BVerwG, decision of 2 July 2018 - 1 B 37.18 - para. 7 et seqq.). The findings of the Court of Appeal, as the court responsible for finding the facts, also do not show, even by exception, that the conditions in Syria concerning persecution of those subject to reserve service clearly yield a particular result.

31 By themselves, the findings whose content is reproduced by the Court of Appeal do not suffice, without the required overall assessment by the court responsible for finding the facts, for a conclusive review of the risk upon return under the standard at the level of considerable probability. This applies in particular to the question of whether the measures threatening Syrian nationals because of evasion of reserve service are connected to a reason for persecution. In this regard, the Court of Appeal finds merely that it is not ruled out that such persons would be charged by the Syrian security forces with having ties to the opposition, or that non-performance of reserve service would be viewed as sympathising with the opposition. This suspicion, the Court found, is not systematically asserted, but depends on additional factors such as place of origin or residence, family or tribal membership, and membership of a particular religious group. In many cases, nothing more happens than a compulsory enforcement of reserve service, without any evidence that this is also an expression of persecution for imputed sympathies with the opposition. However, in view of the complete arbitrariness of the way in which the state security forces proceed, it could not be ruled out that conscription into reserve service, which did not constitute political persecution in and of itself, was not regularly associated with a suspicion of acting for the opposition, with the associated arrests, criminal penalties, abusive treatment and torture.

32 This does not justify the presumption of a considerable probability of persecution. The reference to the complete arbitrariness of approach and the suspicion of sympathies or contacts with the opposition, which is not systematically applied, but also cannot be ruled out, is more likely to argue against a persecution connected with political opinions, rather than for it. Arbitrarily applied measures of persecution need not be based on a reason for persecution (here: in the form of an ascribed position of opposition). The mere assessment that a persecution "cannot be ruled out" does not justify the presumption of a considerable probability of persecution (BVerwG, decision of 4 December 1995 - 9 B 70.95 - para. 3). Conversely, however, on the basis of the findings by the court responsible for finding the facts, a considerable probability of persecution also cannot be denied, especially because the Court of Appeal holds that the suspicion of sympathies with the opposition depends on additional factors, without pursuing the question of whether and to what degree the claimant might accordingly be subject to increased risk.

33 Contrary to the claimant's opinion, a grant of refugee status is also not justified solely on the basis of the existence of an act of persecution under section 3a (2) no. 5 AsylG. According to that provision, prosecution or punishment for refusal to perform military service in a conflict may constitute an act of persecution if performing military service would include crimes or acts falling under the exclusion clauses as set out in section 3 (2) AsylG. It is not relevant for the decision here whether this means that refusing to participate in war crimes, and the associated punishment, should always be categorised as relevant in refugee law (...), if only because the Court of Appeal's judgment offers no factual findings to the effect that the reserve service with which the claimant is threatened in Syria would include crimes or acts falling under the exclusion clauses of section 3 (2) AsylG.

34 Irrespective of that point, if the requirements of section 3a (2) no. 5 AsylG are met, one should indeed presume an act of persecution; but this still does not establish a connection with a reason for persecution. It proceeds from the legal provision of section 3a (3) AsylG, which to that extent implements article 9 (3) of Directive 2011/95/EU, that qualifying an act as persecution within the meaning of section 3a (2) no. 1 to 6 AsylG is not sufficient to establish a measure of persecution relevant in refugee law. Rather, there must also be a "connection" between the act and the reason for persecution, i.e. the persecution must be threatened "on account of" certain reasons for persecution (BVerwG, decision of 5 December 2017 - 1 B 131.17 - (...)). In the same sense, the CJEU also holds that article 9 (2) (e) of Directive 2011/95/EU concerns the categorisation of a prosecution or punishment as an "act of persecution", and separates this from the reasons for persecution listed in article 10 of Directive 2011/95/EU (see CJEU, judgment of 26 February 2015 - C-472/13 [ECLI:EU:C:2015:117], Shepherd - para. 31 on the previous Directive 2004/83/EC; see also the opinion of Advocate General Sharpston of 11 November 2014 in case C-472/13, para. 48). Consequently, the Senate also does not share the opinion argued by the Hannover Administrative Court in its decision requesting a preliminary ruling of 7 March 2019 that in this regard, there is a need for a (further) clarification by the CJEU.

35 5. The Court of Appeal will now have to assess conclusively whether, in the event of a return to Syria, there is a considerable probability that the claimant will be threatened with treatment relevant in refugee law precisely in connection with (ascribed) sympathies with the opposition or some other reason for persecution. In particular, it will have to pursue the question of whether at the time of entering the country, Syrian security forces arbitrarily impose measures on persons who, like the claimant, have *de facto* evaded conscription into reserve service in the Syrian Army by fleeing to Europe, doing so without discrimination or solely for non-fulfilment of a citizen's duty that is equally incumbent on all men eligible for military service; or whether they regularly, or at least when circumstances that increase a threat are added, ascribe a disloyal attitude of political opposition to such persons. At present, jurisprudence adopts varying assessments of the factual aspects of the risk of persecution threatening Syrian nationals in the event of evasion of military service (...), and therefore the Court of Appeal will also have to give due attention to the assessments by other courts of appeal. It will furthermore have to examine whether the claimant might be threatened with persecution for other reasons, such as (illegally) leaving the country, lodging an application for asylum, and his extended residence abroad in Europe (...), as well as the political involvement he claims as an adherent of the Yekiti Party, or on account of the possible existence of (other) circumstances that increase a threat.

36 (...)