Private office translation

19 B 372/23
9 L 99/23 Aachen

Certified copy

D e c i s i o n

In the administrative court proceedings

of Dr Ingve Björn S t j e r n a , Graf-Adolf-Platz 15, 40213 Düsseldorf,
Az.: 230131.KSDN.IBS,

applicant,

v e r s u s

the District of Düren, represented by the District Administrator, Public Order office, Bismarckstraße 16, 52351 Düren, Az.: 30/1 - 18/1,

respondent,

as regards Removal of grave decorations from war gravesites;
here: Appeal against the rejection of a temporary injunction pursuant to sec. 123 (1) VwGO [German Administrative Court Act]

the 19th Senate of the

HIGHER ADMINISTRATIVE COURT FOR THE STATE OF NORTH RHINE-WESTPHALIA

on 23 June 2023

by

Judge at the Higher Administrative Court Dr. W e b e r ,
Judge at the Higher Administrative Court Dr. W e b e r ,
Judge at the Higher Administrative Court K o s m i d e r

on the appeal of the applicant against the order of the Aachen Administrative Court of 22 March 2023, has

decided as follows:

The appeal is dismissed.

The applicant shall bear the costs of the appeal proceedings.

The amount in dispute for the appeal proceedings is set at EUR 2,500.00.

R e a s o n s :

The appeal is admissible pursuant to sec. 146 (1) and (4) VwGO, but unfounded. Pursuant to sec. 146 (4) sentences 1 and 6 VwGO, the Senate shall examine only the grounds specified. These grounds do not justify allowing the applicant's application for a temporary injunction pursuant to sec. 123 VwGO amending the contested order and provisionally prohibiting the respondent from removing or having removed “signs of mourning”, in particular plants and/or grave lights, laid down by the applicant at the war gravesites Hürtgen and/or Vossenack, in particular if the laying down takes place at the respective high cross, the respective gravestones or memorial stones or the sarcophagus in Vossenack.

The Administrative Court refused to issue the requested temporary injunction because it considered there to be no need for legal protection [“Rechtsschutzbedürfnis”] for the requested preventive legal protection, which is fundamentally alien to administrative court proceedings. In addition, the court did not recognize any particular urgency and thus no reason for issuing an injunction [“Anordnungsgrund”].

The Senate leaves open whether the applicant can successfully plead in his grounds of appeal that, contrary to the first-instance finding, there is a need for legal protection. At any rate, he correctly asserts, at the outset, that in the case of impending factual acts by public authorities – in contrast to legal protection in administrative law otherwise being, in principle, subsequent in nature –, the qualified interest in legal protection required for a preventive action for injunctive relief is likely to exist on a regular basis.

Where the violation of legal positions protected by fundamental rights by factual administrative action is impending, preventive injunctive action is permissible if the feared action leads to an impairment of relevant weight and further waiting would be associated with unreasonable disadvantages.

> BVerwG [Federal Administrative Court], judgment of 25 September 2008 - BVerwG 3 C 35.07 -, BVerwGE 132, 64, juris, para. 26 f. w. f. r;
> Sächs. OVG [Saxonian Higher Administrative Court], judgment of 24 February 2010 - F 7 D 23/07 -, juris, para. 21; Bay. VGH [Bavarian Higher Administrative Court], decision of 3 April 2006 - 24 ZB 06.50 -, juris, para. 25 f. w. f. r.; Wöckel, in Eyermann, VwGO, 16th ed. 2022, vor § 40, para. 25 w. f. r.

Whether these qualified requirements for the interest in legal protection are met here, however, does not require a final decision. Even taking into account the submissions of the applicant on appeal, he has not substantiated the factual requirements for the existence of a reason for issuing an injunction in a manner justifying the anticipation of the action on the merits (sec. 123 (3) in conjunction with sec. 920 (2), sec. 294 ZPO [German Code of Civil Procedure]). He has not shown to the satisfaction of the court that without the issuance of the requested temporary injunction he would be threatened with unreasonable disadvantages.

Such disadvantages are not constituted by the threatened removal and destruction of “signs of mourning” deposited by the applicant on the Hürtgen and Vossenack war gravesites, including any possible sanctions under the law on administrative offenses. There is already no particular temporal urgency with regard to the laying of flowers, plants, wreaths, grave lights or other grave ornaments, in terms of the removal of which the applicant is seeking a preventive injunction. The applicant does not name any specific circumstances why a timely deposition should be of such outstanding importance for him that waiting for proceedings on the merits would be unreasonable. The sometimes considerable duration of administrative court action proceedings cited by him alone is not sufficient in this respect. Nor is there any special individual connection to the war gravesites that are the subject of the proceedings – for example, because of relatives buried there or other persons personally close to him – that could possibly make the applicant’s request to commemorate the deceased by laying grave decorations there appear to be temporally urgent.

The applicant himself states that he first became aware of the Vossenack war gravesite through the reappraisal of his family's history and its connections to the Second World War, when he came across the story of Julius Erasmus and his nationwide recognition as the first warden of this war gravesite. The applicant does not assert any kinship or other individual connection to the deceased buried there, nor is this evident. On the contrary, according to his own submission, he regularly visits the graves (located in other places) of his deceased family members and commemorates them by laying flowers at their gravesites and lighting candles there and in the church. This way of commemoration is not restricted in any way.

Waiting for proceedings on the merits is also reasonable because the applicant has the possibility under sec. 4 No. 5 of the cemetery rules for the war gravesites Hürtgen and Vossenack of 13 September 2022 (FO) to apply for an exemption from the prohibition of laying down grave decorations and other signs of mourning according to sec. 4 No. 4 a) FO. The respondent already pointed this out to him in the administrative proceedings on 3 February 2023, re-emphasizing this in the judicial proceedings in the written statement of 6 March 2023, and promising a short-term decision in the event of an application being filed. There are no indications that the respondent would refuse to allow an exception, provided that the exception is compatible with the purpose of the war gravesites and the order on them. The applicant can also be expected to make such an application without further ado, especially since, according to his own submission, he only visits the war gravesites at Hürtgen and Vossenack once a quarter in order to lay flowers and/or grave candles there. The fact that he considers the permit requirement to be unlawful does not lead to unreasonableness and is irrelevant to the existence of a reason for an injunction.

The impairments of fundamental rights asserted by the applicant – he invokes the freedom of belief and confession (Art. 4 (1) and (2) GG [German Grundgesetz]), the fundamental right to property (Art. 14 (1) GG), the freedom of opinion (Art. 5 (1) GG) and the general freedom of action (Art. 2 (1) GG) – do not require a different assessment.

Insofar as the scope of protection of the aforementioned fundamental rights is affected at all, the intensity of the encroachment is only slight and can be reasonably accepted for the duration of proceedings on the merits. A religious conviction only enjoys the protection of Art. 4 GG if the person concerned substantiates and comprehensibly demonstrates that he or she considers the conduct in question (here the laying of flowers and/or grave candles at memorial stones or war graves without any particular individual attachment to the deceased) to be obligatory for him or her according to the common religious conviction of the specific religious community.

> BVerfG, decision of 9 May 2016 - 1 BvR 2202/13 -, NVwZ 2016, 1804, juris, para. 73 (Hauskirchenbestattung);
> cf. also OVG NRW [Higher Administrative Court NRW], decisions of 1 June 2023 - 19 B 541/23 -, juris, para. 10, and of 22 February 2023 - 19 E 843/22 -, juris, para. 4, each w. f. r.

Such a substantiation is missing here. The “universal custom of commemorating the dead” referred to by the applicant is not sufficient in this respect. The removal of flowers or grave candles, which the applicant only wants to lay down occasionally (four times a year) and, moreover, in the knowledge of a threatened removal by the respondent, also leads to an intensity of the encroachments on the freedom of property and the general freedom of action – which are also justified – that is at most low. Irrespective of whether the removal of the grave decoration has an expressive character, freedom of expression is restricted only in its form, not in its content, and also finds its limits in the provisions of the general laws and the property protection provisions.

The decision on costs is based on sec. 154 (2) VwGO.

The amount in dispute is determined in accordance with sec. 47 (1), sec. 52 (1) and (2), sec. 53 (2) GKG [German Act on Court Costs]).

This decision is final (sec. 152 (1) VwGO, sec. 66 (3) sentence 3, sec. 68 (1) sentence 5 GKG).

Dr. Weber Dr. Weber Kosmider