



## Reports of Cases

OPINION OF ADVOCATE GENERAL  
BOT  
delivered on 17 July 2014<sup>1</sup>

**Case C-542/13**

**Mohamed M'Bodj**  
v  
**État belge**

(Request for a preliminary ruling from the Cour constitutionnelle (Belgium))

(Common European Asylum System — Directive 2004/83/EC — Minimum standards for determining whether third country nationals or stateless persons are eligible for subsidiary protection status — Third country national with a disability authorised by a Member State to reside in its territory on medical grounds — Inclusion within the scope of Directive 2004/83 — Article 2(e) — Definition of ‘person eligible for subsidiary protection’ — Article 15(b) — Definition of ‘serious harm’ — Real risk of inhuman or degrading treatment if returned to the country of origin — Content of international protection — Articles 28 and 29 — Welfare and healthcare benefits — Equal treatment)

1. May a third country national suffering from a serious illness who, if returned to his or her country of origin, would face a real risk of being subjected to inhuman or degrading treatment because of the lack of appropriate medical treatment in that country be regarded as a ‘person eligible for subsidiary protection’ within the meaning of Article 2(e) of Directive 2004/83/EC?<sup>2</sup> If so, are Member States required to provide the person concerned with the same welfare and healthcare benefits as those granted to nationals and refugees?
2. Those are, in essence, the questions which have been asked by the Cour constitutionnelle (Belgium).
3. Those questions arose in the course of proceedings relating to the payment by the Belgian State of a disability allowance to Mr M'Bodj, a Mauritanian national. Having granted the applicant leave to reside in Belgian territory on medical grounds, the Belgian State then refused to pay him that allowance on the ground that, under the applicable national legislation, only Belgian nationals, EU citizens, Algerian, Moroccan and Tunisian nationals, stateless persons and refugees are eligible to receive it.
4. In the present case, the referring court has expressed uncertainty concerning the different treatment under national law of third country nationals suffering from a serious illness, depending on whether those third country nationals have been granted refugee status under Directive 2004/83 or have been granted leave to reside on medical grounds by the Belgian State.

1 — Original language: French.

2 — Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ 2004 L 304, p. 12, and corrigendum OJ 2005 L 204, p. 24).

5. It asks, in particular, whether, having regard to the terms of that directive and to the case-law of the European Court of Human Rights<sup>3</sup> relating to the removal of persons who are seriously ill, the granting of such leave to reside might, in fact, constitute a subsidiary form of international protection, which therefore confers entitlement to the economic and social benefits provided for by Directive 2004/83.

6. This case will enable the Court to clarify the scope of Directive 2004/83 in relation to a person suffering from a serious illness and, in particular, the conditions laid down by the EU legislature for eligibility for subsidiary protection.

7. In this Opinion I shall argue that a third country national who, if returned to his country of origin, would face a real risk of being subjected to inhuman or degrading treatment because of the state of his health and the lack of appropriate medical treatment in that country, falls outside the scope of Article 2(e) of that directive.

8. Indeed, I shall point out that, in such a situation, the need for international protection, which forms the basis of the Common European Asylum System, is absent, given that the inhuman treatment arising from the individual's state of health and the lack of sufficient medical resources in the country of origin does not stem from an intentional act or omission on the part of the authorities or independent bodies of that country. I shall explain that in such a situation, however, the Member State may be required to provide national protection for compelling humanitarian reasons, on the basis of Articles 4 and 19(2) of the Charter of Fundamental Rights of the European Union<sup>4</sup> and Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950.<sup>5</sup>

## I – Legal context

### A – EU law

#### 1. Directive 2004/83

9. The purpose of Directive 2004/83 is to lay down criteria common to all the Member States as regards the substantive conditions to be met by third country nationals in order to qualify for international protection<sup>6</sup> and the substance of that protection.<sup>7</sup> It is against that background that Directive 2004/83 determines, in Article 2(c) and (e), the persons eligible for refugee status and subsidiary protection status, establishes, in Chapters II, III and V, the substantive conditions to be met by the latter and determines, in Chapter VII, the rights attaching to each of those statuses.

10. Under the Common European Asylum System, subsidiary protection supplements the rules governing refugee status laid down by the Convention relating to the Status of Refugees.<sup>8</sup>

3 — 'The European Court of Human Rights'.

4 — 'The Charter.'

5 — 'The ECHR.'

6 — See Article 1 of that directive.

7 — See my Opinion in *M.*, C-277/11, EU:C:2012:253, point 19, which gave rise to the judgment in *M.*, C-277/11, EU:C:2012:744, paragraph 72.

8 — That convention, signed in Geneva on 28 July 1951 (*United Nations Treaty Series*, Vol. 189, p. 150, No 2545 (1954)), entered into force on 22 April 1954. It was supplemented by the Protocol relating to the Status of Refugees of 31 January 1967, which entered into force on 4 October 1967.

11. Subsidiary protection is international protection which, as defined by Article 2(e) of Directive 2004/83, concerns 'a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin ..., would face a real risk of suffering serious harm as defined in Article 15, ... and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country'.

12. Under Article 18 of that directive, 'Member States shall grant subsidiary protection status to a third country national ... eligible for subsidiary protection in accordance with Chapters II and V'.

13. Chapter II of Directive 2004/83 concerns the '[a]ssessment of applications for international protection'. Article 6, in Chapter II, is entitled 'Actors of persecution or serious harm' and provides as follows:

'Actors of persecution or serious harm include:

- (a) the State;
- (b) parties or organisations controlling the State or a substantial part of the territory of the State;
- (c) non-State actors, if it can be demonstrated that the actors mentioned in (a) and (b), including international organisations, are unable or unwilling to provide protection against persecution or serious harm as defined in Article 7.'

14. Chapter V of Directive 2004/83 relates to '[q]ualification for subsidiary protection'. Article 15, in Chapter V, defines 'serious harm' as follows:

'Serious harm consists of:

- (a) death penalty or execution; or
- (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or
- (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.'

15. Furthermore, in Chapter VII of that directive, relating to the '[c]ontent of international protection', the EU legislature specifies, in Articles 28 and 29, that where Member States have granted international protection, they must ensure that the beneficiaries, whether they have been granted refugee or subsidiary protection status, receive the same social assistance and access to healthcare under the same eligibility conditions as nationals of the Member States in question. The Member States may none the less draw a distinction between those two statuses since, under the above provisions, they are permitted to limit social assistance granted to beneficiaries of subsidiary protection status to core benefits.<sup>9</sup>

<sup>9</sup> — In *M.*, EU:C:2012:744, the Court pointed out that the nature of the rights attaching to refugee status and that of the rights attaching to subsidiary protection status are different (paragraph 92). Nevertheless, it should be noted that 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 (OJ 2011 L 337, p. 9), which recast Directive 2004/83, removes the differences in the level of rights granted to refugees and beneficiaries of subsidiary protection as regards access to healthcare (Article 30). Such differences have not, however, been removed as regards social protection (Article 29).

16. Finally, it should be noted that the objective of the Directive 2004/83 is to establish minimum standards. In accordance with recital 8 and Article 3 thereof, Member States remain, therefore, at liberty to introduce or retain more favourable standards for determining who qualifies as a refugee or as a person eligible for subsidiary protection, in so far as those standards are compatible with the directive.

17. None the less, the EU legislature stated, in recital 9 in the preamble to Directive 2004/83, that '[t]hose third country nationals or stateless persons, who are allowed to remain in the territories of the Member States for reasons not due to a need for international protection but on a discretionary basis on compassionate or humanitarian grounds, fall outside the scope of this Directive'.

## 2. The Charter

18. Under Article 4 of the Charter, '[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment'.

19. Furthermore, in accordance with Article 19(2) of the Charter '[n]o one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment'.

## B – *Belgian law*

1. The Law of 15 December 1980 on entry to Belgian territory, residence, establishment and removal of foreign nationals.

20. The purpose of the Law of 15 December 1980 on entry to Belgian territory, residence, establishment and removal of foreign nationals<sup>10</sup> is to transpose Directive 2004/83 into Belgian law.

21. Article 9b of that law lays down the conditions under which leave may be granted to reside on medical grounds. Paragraph 1 of that article is worded as follows:

'A foreign national residing in Belgium who can prove his identity in accordance with paragraph 2 and who suffers from an illness occasioning a real risk to his life or physical integrity or a real risk of inhuman or degrading treatment where there is no appropriate treatment in his country of origin or in the country in which he resides may apply to the Minister or his representative for leave to reside in the Kingdom of Belgium.

The application shall be made by registered post to the Minister or his representative and shall contain the address of the actual place of residence of the foreign national in Belgium.

The foreign national shall submit with his application all relevant and up-to-date information regarding his illness and the options for and availability of appropriate treatment in his country of origin or in the country in which he is resident.

The foreign national shall submit a standard-form medical certificate, as established by the King by decree deliberated in the Council of Ministers. The medical certificate must be dated less than three months prior to the date of the application and indicate the illness, its degree of severity and the treatment considered necessary.

<sup>10</sup> — As amended by the Law of 15 September 2006 ('the Law of 15 December 1980').

The assessment of the risk referred to [in the first subparagraph], of the treatment options, the availability thereof in the person's country of origin or in the country in which he is resident and of the illness, its degree of severity and the treatment considered necessary, as stated on the medical certificate, shall be carried out by a medical official or by a doctor appointed by the Minister or his representative, who shall issue an opinion on that matter. That doctor may, if he considers it necessary, examine the foreign national and seek an additional expert opinion.

...'

22. Article 48/4 of that law lays down the conditions to be met in order to be eligible for subsidiary protection status.<sup>11</sup> It transposes Articles 2(e), 15 and 17 of Directive 2004/83 and provides as follows:

'(1) Subsidiary protection status shall be granted to a foreign national who does not qualify as a refugee and to whom Article 9b is not applicable, and with regard to whom there are substantial grounds for believing that, if returned to his country of origin or, in the case of a stateless person, to his country of former habitual residence, he would face a real risk of serious harm as referred to in paragraph 2, and who is unable, or, owing to such risk, unwilling to avail himself of the protection of that country, insofar as that person is not covered by the exclusion clauses set out in Article 55/4.

(2) The following are considered to constitute serious harm:

- (a) death penalty or execution; or
- (b) torture or inhuman or degrading treatment or punishment of an applicant in his country of origin; or
- (c) serious threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.'

2. The Law of 27 February 1987 concerning disability allowances

23. In accordance with Articles 1 and 2 of the Law of 27 February 1987 concerning disability allowances ('the Law of 27 February 1987'), disabled people are eligible for income replacement allowance or integration allowance or for an allowance for assistance to elderly persons.

24. Article 4(1) of the above Law provides as follows:

'The allowances referred to in Article 1 may be granted only to a person who is actually residing in Belgium and is:

1. Belgian;
2. a national of a Member State of the European Union;
3. a Moroccan, Algerian, or Tunisian national who meets the requirements of Regulation (EEC) No 1408/71; (<sup>12</sup>)

11 — Beneficiaries of subsidiary protection status may be granted a residence permit which is valid for one year and renewable for five years. After that five-year period, the person concerned may be granted indefinite leave to reside on the basis of Article 49/2(2) and (3) of the Law of 15 December 1980.

12 — Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1).

4. a stateless person to whom the Convention relating to the Status of Stateless Persons, signed in New York on 28 September 1954 and approved by the Law of 12 May 1960, applies;
5. a refugee within the meaning of Article 49 of the (Law of 15 December 1980);

...'

25. By Royal Decree of 9 February 2009, the King extended the scope of that provision, with effect from 12 December 2007, to foreign nationals who are registered in the Population Register.

## II – The facts in the main proceedings

### *A – Procedure for granting leave to reside on medical grounds on the basis of Article 9b of the Law of 15 December 1980*

26. On 4 January 2006, Mr M'Bodj lodged an application for asylum with the Office des étrangers (Aliens' Office), which rejected the application as inadmissible on the basis that it was manifestly unfounded.

27. On 24 August 2007, Mr M'Bodj lodged an application for leave to reside on medical grounds under Article 9b of the Law of 15 December 1980. Mr M'Bodj stated that he had been left with a severe visual impairment as a result of an assault of which he was the victim at the Red Cross centre for asylum seekers where he had been staying. The Office des étrangers initially rejected his application as inadmissible but, following legal proceedings, leave was granted on 19 September 2008 and Mr M'Bodj was then registered in the Register of Foreign Nationals.

28. On 17 May 2010, Mr M'Bodj was granted indefinite leave to remain in Belgian territory pursuant to Articles 9 and 13 of the Law of 15 December 1980.

### *B – Procedure for granting disability allowances on the basis of Article 4 of the Law of 27 February 1987*

29. On 19 February 2009, the competent authorities granted Mr M'Bodj's application for medical recognition of a disability, which makes him eligible for social and tax benefits.

30. On 21 April 2009, while the proceedings brought by Mr M'Bodj in order to obtain leave to reside under Article 9b of the Law of 15 December 1980 were still pending, he submitted an application for a loss of income allowance and income support. The application was rejected on 5 October 2009 on the ground that Mr M'Bodj did not meet the requirements set out in Article 4(1) of the Law of 27 February 1987, which provides that only Belgian nationals, nationals of Member States of the European Union, Algerian, Moroccan and Tunisian nationals, stateless persons and refugees are eligible for those allowances.

31. Mr M'Bodj brought an appeal against that decision before the Tribunal de travail de Liège (Labour Court, Liège) on 31 December 2009. When examining the appeal, that court took the view, first of all, that third country nationals with a disability, whether they are refugees or have been granted leave to reside on medical grounds, are entitled to international protection as provided for in Directive 2004/83, which requires Member States to provide such individuals with the same social assistance as that granted to Member State nationals.

32. The Tribunal du travail de Liège therefore went on to question whether Article 4 of the Law of 27 February 1987 is compatible with, in particular, the principles of equality and non-discrimination guaranteed by the Belgian Constitution and, hence, referred a question to the Cour constitutionnelle (Constitutional Court) for a preliminary ruling.

33. In its examination of the question referred, the Cour constitutionnelle is, in turn, uncertain whether it is necessary to ensure equal treatment as between disabled third country nationals who have refugee status and those who have been granted a leave to reside on medical grounds. Consequently, the Cour constitutionnelle questions whether such leave to reside, which is based on the risk of inhuman or degrading treatment as a result of the applicant's state of health and the lack of appropriate treatment in his country of origin, is covered by the subsidiary protection guaranteed by Directive 2004/83.

34. It is clear from the documents before the Court, and from the exchange of arguments and evidence at the hearing, that the national authorities disagree on this point.

35. As regards the judicial authorities, it is clear from the wording of the question referred for a preliminary ruling from the Tribunal du travail de Liège that a third country national residing legally in Belgium on the basis of leave granted pursuant to Article 9b of the Law of 15 December 1980 is eligible for subsidiary protection status. That court refers to a judgment delivered by the Cour constitutionnelle, in which the latter confirmed that 'Articles 9b and 48/4 of the Law of 15 December 1980, together, transpose Article 15 of [the aforementioned directive] into Belgian law'.<sup>13</sup>

36. It is apparent from the order for reference that, in the *travaux préparatoires* for the legislation intended to transpose Directive 2004/83 into Belgian law,<sup>14</sup> the national legislature stated as follows:

'Foreign nationals who suffer from an illness which represents a real risk to their life or to their physical integrity or which represents a real risk of inhuman or degrading treatment where no appropriate treatment is available in their country of origin or in the country in which they are entitled to reside are covered by Article 15(b) of Directive [2004/83] as a result of the case-law of the European Court of Human Rights (inhuman and degrading treatment).'

37. In the proceedings before the Cour constitutionnelle, the Conseil des ministres maintains that 'subsidiary protection cannot' confer a legal right to residence on medical grounds, as such a right is governed by Article 9b of the Law of 15 December 1980, which constitutes a specific provision. According to the Conseil des ministres, such a right of residence is granted on the basis of Article 3 of the ECHR. It also points out that the procedure for obtaining such a right is different from that before the Commissariat général aux réfugiés et aux apatrides (Commissioner General for Refugees and Stateless Persons), since it remains within the competence of the Ministre de l'Intérieur and the Office des étrangers.

38. Consequently, the Cour constitutionnelle decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Must Articles 2(e) and (f), 15, 18, 28 and 29 of ... Directive 2004/83 ... be interpreted as meaning that not only a person who has been granted, at his request, subsidiary protection status by an independent authority of the Member State must be eligible for the social welfare and health care referred to in Articles 28 and 29 of that directive, but also a foreign national who has been granted leave by an administrative authority of a Member State to reside in the territory of that

13 — See judgment No 193/2009 of 26 November 2009, paragraph B.3.1, and judgment No 43/2013 of 21 March 2013, paragraph B.4.1.

14 — Parliamentary document, Chamber of Representatives, 2005-2006, DOC 51-2478/001, p. 9.

Member State and who suffers from an illness occasioning a real risk to his life or physical integrity or a real risk of inhuman or degrading treatment where there is no appropriate treatment in his country of origin or in the country in which he resides?

- (2) If the answer to the first question referred for a preliminary ruling is that the two categories of persons who are there described must be eligible for the social welfare and health care referred to therein, must Articles 20(3), 28(2) and 29(2) of Directive 2004/83 be interpreted as meaning that the obligation imposed on Member States to take into account the specific situation of vulnerable persons such as the disabled implies that the latter must be granted the allowances provided for by the Law of 27 February 1987 ... in view of the fact that social assistance which takes account of the disability may be granted pursuant to the Basic Law of 8 July 1976 on public social welfare centres?

39. The parties to the main proceedings, the Belgian, German, Greek and French Governments and the European Commission have submitted observations.

### III – Analysis

40. By its first question, the referring court is asking, in essence, whether a third country national who suffers from a serious illness and who, if returned to his country of origin, would face a real risk of being subjected to inhuman or degrading treatment due to the lack of appropriate medical treatment in his or her country should be regarded as a 'person eligible for subsidiary protection' within the meaning of Article 2(e) of Directive 2004/83.

41. It should be recalled that, in accordance with that provision, a 'person eligible for subsidiary protection' is a person in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, would face a real risk of suffering serious harm as defined in Article 15 of that directive, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country.

42. Article 15 of Directive 2004/83 defines three types of serious harm, including, under Article 15(b), inhuman or degrading treatment of an applicant in the country of origin.

43. The question put by the referring court arises because, as pointed out by the Court in *Elgafaji*<sup>15</sup> and as is apparent from the *travaux préparatoires* for Directive 2004/83,<sup>16</sup> that provision 'corresponds, in essence, to Article 3 of the ECHR'.

44. It is apparent from the case-law of the European Court of Human Rights that suffering which is caused by a naturally occurring physical or mental illness may constitute inhuman or degrading treatment within the meaning of Article 3 of the ECHR if it is exacerbated or may be exacerbated by an act or treatment arising, inter alia, from detention conditions, removal or other measures for which the authorities concerned may be held responsible.<sup>17</sup>

15 — C-465/07, EU:C:2009:94, paragraph 28.

16 — See the note from the Presidency of the Council of the European Union to the Strategic Committee on Immigration, Frontiers and Asylum of 25 September 2002, 12148/02, p. 5.

17 — European Court of Human Rights, *S.J. v. Belgium*, no. 70055/10, § 118, 27 February 2014. The European Court of Human Rights points out, however, that according to its case-law, third country nationals who are subject to a removal order cannot, in principle, claim the right to remain in the territory of a Contracting State in order to continue to receive social, medical or other types of assistance and services provided by the State from which they are being removed. The fact that, on removal from the Contracting State, the applicant's situation may deteriorate significantly and, in particular, his life expectancy may be considerably reduced, is not in itself sufficient to give rise to a violation of Article 3 of the ECHR.



45. Accordingly, in certain very exceptional circumstances such as those referred to in *D. v. United Kingdom*,<sup>18</sup> the European Court of Human Rights has held that the implementation of the decision to remove an individual suffering from AIDS would constitute a breach of Article 3 of the ECHR if that person were returned to his country of origin, in so far as his removal would expose him to a real risk of dying under most distressing circumstances. In its judgment, the European Court of Human Rights took account of the fact that the applicant was in the advanced stages of the illness and that the abrupt withdrawal of the medical treatment he was receiving in the host State, in conjunction with the lack of adequate treatment in his country of origin and the absence of any form of moral support or social assistance, would hasten his death and subject him to acute mental and physical suffering.<sup>19</sup>

46. The European Court of Human Rights stated that it must therefore reserve to itself sufficient flexibility to address the application of Article 3 of the ECHR in contexts in which the risk to the person concerned of being subjected to proscribed treatment in the receiving country stems from factors which cannot engage, either directly or indirectly, the responsibility of the public authorities of that country or which, taken alone, do not in themselves infringe the standards of that provision.<sup>20</sup> In such a case, in view of the compelling humanitarian considerations at stake, the Contracting States cannot implement a decision to remove the person concerned without running the risk of engaging their responsibility under Article 3 of the ECHR.<sup>21</sup>

47. The question being asked by the referring court is, in essence, whether similar circumstances may fall within the definition of 'serious harm' under Article 15 of Directive 2004/83, and may, therefore, justify the granting of subsidiary protection status.

48. I do not think that a person suffering from a serious illness may fall within the scope of that directive on that basis.

49. Although, in certain specific circumstances, the suffering caused by an illness might constitute inhuman or degrading treatment, the fact remains that one of the key criteria for eligibility for subsidiary protection, namely the identification of those responsible for inflicting harm against whom protection is needed, is not fulfilled.

50. Indeed, the Common European Asylum System is based on the need to provide those who fear being persecuted for reasons of race, religion, nationality, political opinion, or membership of a particular social group or being faced with a risk of serious harm in their country of origin with protection which their country is unable, or is no longer able, to provide, either because it is intentionally committing those acts or because it is failing to prevent them.

51. The system by which Member States may grant international protection, either in the form of refugee status or subsidiary protection status, therefore pursues a specific aim and establishes a specific protection mechanism,<sup>22</sup> which requires two key criteria to be fulfilled. First, there must be a risk of persecution or serious harm that the applicant would face if returned to his country of origin. Secondly, that country must be directly or indirectly responsible for there being such a risk. Refugee

18 — European Court of Human Rights, *D. v. United Kingdom*, no. 30240/96, ECHR 1997-III.

19 — *Ibid.*, paragraphs 51 to 54.

20 — *Ibid.*, paragraph 49.

21 — In its judgment in *S.J. v. Belgium*, the European Court of Human Rights none the less stated that such a situation would arise only where there are compelling humanitarian considerations, and referred in that connection to the cases which gave rise to its judgments in *N. v. the United Kingdom* [GC], no. 26565/05, ECHR 2008 and *Yoh-Ekale Mwanje v. Belgium*, no. 10486/10, 20 December 2011. In both those cases, the applicants were also suffering from AIDS. However, the European Court of Human Rights held that their removal did not raise an issue under Article 3 of the ECHR inasmuch as, at the time of their removal, they were in a stable condition, the illness had not reached a 'critical stage' and they were fit to travel.

22 — See, in that regard, judgment in *Diakité*, C-285/12, EU:C:2014:39, paragraph 24.

or subsidiary protection status may be granted, therefore, only in cases where the public authorities in the country of origin have not taken any steps to provide such protection, either because they are responsible for the persecution, or because they encourage or tolerate persecution by militia or other private groups.

52. It is essential, in order for international protection to be granted, for those two criteria to be fulfilled, as they form the basis of the fear of the person concerned and justify his inability or unwillingness to avail himself of the protection of his country of origin.

53. As regards subsidiary protection, those two criteria are clear from the wording of Article 2(e) of Directive 2004/83. Indeed, the EU legislature states unequivocally that a 'person eligible for subsidiary protection' is a person who would not only face a real risk of suffering serious harm as defined in Article 15 of that directive if returned to his country of origin, but who is also unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country.

54. Furthermore, that article defines 'serious harm' in terms of acts or circumstances for which the public authorities in the country of origin are directly or indirectly responsible.

55. Thus, Article 15 of Directive 2004/83 must be read in conjunction with Article 6 thereof.

56. In Article 15 of Directive 2004/83, as has been seen, the legislature defines the substantive element of 'serious harm'. It consists of the death penalty or execution, torture or inhuman or degrading treatment or punishment of an applicant in the country of origin, or serious threat to the applicant's life or person by reason of indiscriminate violence in situations of international or internal armed conflict. Inherent in those acts is a deliberate intention on the part of the perpetrator to inflict particularly intense physical or mental suffering.

57. In Article 6 of Directive 2004/83, on the other hand, the legislature defines the personal element, since it defines the 'actors of serious harm'. The EU legislature therefore expressly limits the scope of the harm referred to in Article 15 of that directive to the harm caused by the State, by parties or organisations controlling the State or a substantial part of the territory of the State, or by non-State actors, if it can be demonstrated that the State or the parties or organisations controlling the State are unable or unwilling to provide protection against persecution or serious harm.

58. Therefore, in order for a person to be eligible for subsidiary protection, it is not sufficient to prove that that person would face a risk of being subjected to inhuman or degrading treatment if he were returned to his country of origin. It must also be demonstrated that the risk arises from factors which are attributable, directly or indirectly, to the public authorities of that country, either because the threats to the person concerned are being made or tolerated by the authorities in the country of which that person is a national, or because those threats are being made by independent groups against which the authorities of that country are unable to provide effective protection to their citizens.

59. As the French Government notes in its observations, where an individual's state of health is such that he requires medical treatment and no appropriate treatment is available in his country of origin, the inhuman or degrading treatment to which he risks being subjected if he is returned to that country does not arise from any intentional act or omission on the part of the public authorities of that State or bodies acting independently of the State. In other words, in such a case, one of the key criteria for eligibility for subsidiary protection laid down in Article 6 of Directive 2004/83, namely that the public authorities in the country of origin should be directly or indirectly responsible for inflicting the serious harm against which protection is needed, would obviously not be met.

60. In such circumstances, the protection provided by the Member State does not meet any need for international protection within the meaning of Article 2(a) of that directive and does not, therefore, form part of the Common European Asylum System.

61. In accordance with the closing words of Article 2(g) of Directive 2004/83,<sup>23</sup> international protection is 'another kind of protection' which falls outside the scope of the directive. That protection is provided for other reasons, on a discretionary basis on compassionate or humanitarian grounds, based on compliance with Article 3 of the ECHR and Articles 4 and 19(2) of the Charter. If protection is provided on that basis, it is the implementation of the decision by the host Member State to remove the person concerned, in conjunction with the lack of appropriate medical resources in the country of origin, which may constitute inhuman treatment.

62. However, the EU legislature clearly wished to exclude cases based on humanitarian grounds from the scope of Directive 2004/83.

63. Indeed, the legislature expressly states in recital 9 in the preamble to Directive 2004/83 that '[t]hose third country nationals or stateless persons, who are allowed to remain in the territories of the Member States for reasons not due to a need for international protection but on a discretionary basis on compassionate or humanitarian grounds, fall outside the scope of [that] Directive'.<sup>24</sup>

64. Furthermore, it is interesting to refer to the *travaux préparatoires* for Directive 2004/83 in relation to the wording of Article 15(b),<sup>25</sup> in which the EU legislature states the following:

'However, if paragraph (b) were to incorporate all the case-law of the [European Court of Human Rights] relating to Article 3 of the ECHR, then account would have to be taken of cases based solely on humanitarian grounds, such as *D. v. United Kingdom* (1997), also known as the Saint-Kitts case.

In the Saint-Kitts case, although the lack of access to a well developed healthcare system and the absence of a support network were not, in themselves, regarded as torture or inhuman or degrading treatment, removal to that country, which would constitute a threat to the life of the person concerned, was described as such.

Consequently, in order to exclude cases which are based on humanitarian grounds from the subsidiary protection regime, as [Directive 2004/83] was never intended to cover those cases, the Presidency proposes to limit the scope of paragraph (b) by stating that a real risk of torture or inhuman or degrading treatment or punishment *must exist in the country of origin*.<sup>26</sup>

23 — As observed by the Court in *B and D*, C-57/09 and C-101/09, EU:C:2010:661, it is clear from the closing words of Article 2(g) of Directive 2004/83 that the directive does not preclude a person from applying for 'another kind of protection' outside the scope of Directive 2004/83 (paragraph 116).

24 — Directive 2004/83, like the Convention Relating to the Status of Refugees, signed in Geneva on 28 July 1951, is based on the principle that host Member States may, in accordance with their national law, grant national protection which includes rights enabling persons excluded from refugee status under Article 12(2) of the directive to remain in the territory of the Member State concerned.

25 — See note from the Presidency of the Council of the European Union to the Strategic Committee on Immigration, Frontiers and Asylum of 25 September 2002, 12148/02, p. 6.

26 — Emphasis added.

65. Although, as the Court pointed out in *Elgafaji*,<sup>27</sup> Article 15(b) of Directive 2004/83 'corresponds, in essence, to Article 3 of the ECHR'<sup>28</sup>, the EU legislature nevertheless limited its scope to the treatment 'of an applicant in *the country of origin*',<sup>29</sup> which presupposes that the public authorities of that country are, directly or indirectly, responsible. The international protection regime, in particular subsidiary protection status, does indeed establish, therefore, its own specific protection mechanism,<sup>30</sup> which is distinct from the obligations incumbent on the Contracting States under Article 3 of the ECHR.

66. In light of the foregoing, I therefore consider that Article 2(e) of Directive 2004/83 must be interpreted as precluding a Member State from regarding as a 'person eligible for subsidiary protection' a third country national suffering from a serious illness who, if returned to his country of origin, would face a real risk of being subjected to inhuman or degrading treatment because of the lack of appropriate medical treatment in his country.

67. Leave to reside such as that granted to Mr M'Bodj, on the basis of Article 9b of the Law of 15 December 1980, is, therefore, not capable of constituting a subsidiary form of international protection for the purpose of Article 2(e) of Directive 2004/83.

68. Nor is it capable of constituting a 'more favourable standard', within the meaning of Article 3 of that directive.

69. Indeed, although, under the above provision, Member States may introduce or retain more favourable standards for determining, inter alia, who qualifies as a refugee or as a person eligible for subsidiary protection, those standards must none the less be compatible with Directive 2004/83.<sup>31</sup>

70. For the reasons set out above, the granting of subsidiary protection status by a Member State to an individual in a situation such as that of Mr M'Bodj would not be compatible with the provisions or objectives of the directive.

71. Given my proposed answer to the first question, it is not necessary to answer the second.

#### IV – Conclusion

72. In the light of the foregoing considerations, I propose that the Court should reply as follows to the questions submitted by the Cour constitutionnelle:

Article 2(e) of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted must be interpreted as precluding a Member State from regarding as a 'person eligible for subsidiary protection' a third country national suffering from a serious illness who, if returned to his country of origin, would face a real risk of being subjected to inhuman or degrading treatment because of the lack of appropriate medical treatment in his country.

27 — EU:C:2009:94.

28 — *Ibid.*, paragraph 28.

29 — McAdam, J., 'The Qualification Directive: An Overview', *The Qualification Directive: Central Themes, Problem Issues, and Implementation in Selected Member States*, Wolf Legal Publishers, Nimègue, 2007, p. 19.

30 — See, in that regard, judgment in *Diakité*, EU:C:2014:39, paragraph 24.

31 — See, in that regard, the reasoning of the Court in the judgment in *B and D*, EU:C:2010:661, paragraphs 114 to 120.