

JUDGMENT OF THE COURT (Grand Chamber)

17 February 2009 *

In Case C-465/07,

REFERENCE for a preliminary ruling under Articles 68 EC and 234 EC from the Raad van State (Netherlands), made by decision of 12 October 2007, received at the Court on 17 October 2007, in the proceedings

Meki Elgafaji,

Noor Elgafaji

v

Staatssecretaris van Justitie,

* Language of the case: Dutch.

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas, K. Lenaerts and M. Ilešič, Presidents of Chambers, G. Arestis, A. Borg Barthet, J. Malenovský, U. Lohmus and L. Bay Larsen (Rapporteur), Judges,

Advocate General: M. Poiares Maduro,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 8 July 2008,

after considering the observations submitted on behalf of:

— Mr and Mrs Elgafaji, by A. Hekman, advocaat,

— the Netherlands Government, by C. Wissels and C. ten Dam, acting as Agents,

- the Belgian Government, by C. Pochet and L. Van den Broeck, acting as Agents,
- the Greek Government, by M. Michelogiannaki, T. Papadopoulou and G. Papagianni, acting as Agents,
- the French Government, by J-C. Niollet, acting as Agent,
- the Italian Government, by R. Adam, acting as Agent, and P. Gentili, avvocato dello Stato,
- the Finnish Government, by J. Heliskoski, acting as Agent,
- the Swedish Government, by S. Johannesson and C. Meyer-Seitz, acting as Agents,
- the United Kingdom Government, by V. Jackson, acting as Agent, and S. Wordsworth, Barrister,

- the Commission of the European Communities, by M. Condou-Durande and R. Troosters, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 9 September 2008,

gives the following

Judgment

- ¹ This reference for a preliminary ruling concerns the interpretation of Article 15(c) 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 (OJ 2004 L 304, p. 12; ‘the Directive’), in conjunction with Article 2(e) of that directive.
- ² The reference was made in the course of proceedings between Mr and Mrs Elgafaji, both Iraqi nationals, and the Staatssecretaris van Justitie (State Secretary for Justice) relating to his refusal of their applications for temporary residence permits in the Netherlands.

Legal context

The European Convention for the Protection of Human Rights and Fundamental Freedoms

- ³ Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 ('the ECHR'), is entitled 'Prohibition of torture', and provides:

'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'

Community legislation

- ⁴ Recital 1 in the preamble to the Directive states:

'A common policy on asylum, including a Common European Asylum System, is a constituent part of the European Union's objective of progressively establishing an area of freedom, security and justice open to those who, forced by circumstances, legitimately seek protection in the Community.'

5 Recital 6 in the preamble to the Directive states:

‘The main objective of this Directive is, on the one hand, to ensure that Member States apply common criteria for the identification of persons genuinely in need of international protection, and, on the other hand, to ensure that a minimum level of benefits is available for these persons in all Member States.’

6 Recital 10 in the preamble to the Directive states:

‘This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union [proclaimed at Nice on 7 December 2000 (OJ 2000 C 364, p. 1)]. In particular this Directive seeks to ensure full respect for human dignity and the right to asylum of applicants for asylum and their accompanying family members.’

7 Recitals 24 to 26 in the preamble to the Directive state:

‘(24) Minimum standards for the definition and content of subsidiary protection status should also be laid down. Subsidiary protection should be complementary and additional to the refugee protection enshrined in the [Convention relating to the Status of Refugees, signed at Geneva on 28 July 1951].

- (25) It is necessary to introduce criteria on the basis of which applicants for international protection are to be recognised as eligible for subsidiary protection. Those criteria should be drawn from international obligations under human rights instruments and practices existing in Member States.
- (26) Risks to which a population of a country or a section of the population is generally exposed do normally not create in themselves an individual threat which would qualify as serious harm.'

8 Article 1 of the Directive provides:

'The purpose of this Directive is to lay down minimum standards for the qualification of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.'

9 Under Article 2(c), (e) and (g) of the Directive:

' ...

- (c) "refugee" means a third country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country ...

...

- (e) “person eligible for subsidiary protection” means 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, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15 ... and [who] is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country;

...

- (g) “application for international protection” means a request made by a third country national or a stateless person for protection from a Member State, who can be understood to seek refugee status or subsidiary protection status ...’

¹⁰ Under Article 4(1), (3) and (4) in Chapter II of the Directive, entitled ‘Assessment of applications for international protection’:

- Member States may consider it the duty of the applicant to submit all elements needed to substantiate the application for international protection;

- the assessment of an application for international protection is to be carried out on an individual basis taking into account a number of factors as they relate to the country of origin at the time of taking a decision on the application and the personal circumstances of the applicant;
- the fact that an applicant has already been subject to serious harm or to direct threats of such harm, is a serious indication of a real risk of suffering serious harm, unless there are good reasons to consider that such serious harm will not be repeated.

¹¹ Article 8(1) in Chapter II, provides:

‘As part of the assessment of the application for international protection, Member States may determine that an applicant is not in need of international protection if in a part of the country of origin there is no well-founded fear of being persecuted or no real risk of suffering serious harm and the applicant can reasonably be expected to stay in that part of the country.’

¹² Under the heading ‘Serious harm’, Article 15 in Chapter V of the Directive, entitled ‘Qualification for subsidiary protection’, provides:

‘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.'

- ¹³ Article 18 of the Directive provides that Member States are to grant subsidiary protection status to a third country national eligible for subsidiary protection in accordance with Chapters II and V of that directive.

National legislation

- ¹⁴ Article 29(1)(b) and (d) of the Law on Aliens 2000 (Vreemdelingenwet 2000, 'the Vw 2000') provides:

'A temporary residence permit, as referred to in Article 28, may be issued to an alien:

...

- (b) who has proved that he has good grounds for believing that if he is expelled he will run a real risk of being subjected to torture or to inhuman or degrading treatment or punishment;

...

- (d) for whom return to his country of origin would, in the opinion of the Minister, constitute an exceptional hardship in the context of the overall situation there.'

¹⁵ The Circular on Aliens of 2000 (Vreemdelingencirculaire 2000), in the version in force on 20 December 2006, states in paragraph C 1/4.3.1:

'Article 29(1)(b) of the [Vw 2000] allows the grant of a residence permit where the alien has proved satisfactorily that he has good grounds for believing that if he is expelled he will run a real risk of being subjected to torture or to inhuman or degrading treatment or punishment.

That provision is derived from Article 3 of [the ECHR]. The removal of a person to a country in which he runs a real risk of being subjected to such treatment constitutes an infringement of that article. If that real risk has been or is established, a temporary (asylum) residence permit is in principle issued.

...

- ¹⁶ A new Article 3.105(d) was inserted into the Decree on Aliens of 2000 (Vreemdelingenbesluit 2000) in order expressly to transpose, with effect from 25 April 2008, Article 15(c) of the Directive.

The dispute in the main proceedings and the questions referred for a preliminary ruling

- ¹⁷ On 13 December 2006 Mr and Mrs Elgafaji submitted applications for temporary residence permits in the Netherlands, together with evidence seeking to prove the real risk to which they would be exposed if they were expelled to their country of origin, in this case, Iraq. In support of their arguments, they relied, in particular, on facts relating to their personal circumstances.
- ¹⁸ They pointed out, inter alia, that Mr Elgafaji, who is a Shiite Muslim, had worked from August 2004 until September 2006 for a British firm providing security for personnel transport between the airport and the 'green' zone. They stated that Mr Elgafaji's uncle, employed by the same firm, had been killed by militia, his death certificate stating that his death followed a terrorist act. A short time later, a letter threatening 'death to collaborators' was fixed to the door of the residence which Mr Elgafaji shared with his wife, a Sunni Muslim.

- 19 By orders of 20 December 2006, the Minister voor Vreemdelingenzaken en Integratie (Minister for Immigration and Integration; ‘the Minister’) — the competent authority until 22 February 2007, the date on which the Staatssecretaris van Justitie became responsible for immigration matters — refused to grant temporary residence permits to Mr and Mrs Elgafaji. He found, *inter alia*, that they had not proved satisfactorily the circumstances on which they were relying and, therefore, had not established the real risk of serious and individual threat to which they claimed to be exposed in their country of origin. He thus concluded that their situation did not come within the scope of Article 29(1)(b) of the Vw 2000.
- 20 According to the Minister, the standard of proof required for the protection granted under Article 15(b) of the Directive is identical to that required for the protection granted under Article 15(c). Those two provisions, like Article 29(1)(b) of the Vw 2000, require applicants to show satisfactorily, in their individual circumstances, the risk of serious and individual threat to which they would be exposed were they to be returned to their country of origin. As Mr and Mrs Elgafaji failed to produce such evidence under Article 29(1)(b) of the Vw 2000, they could not effectively rely on Article 15(c) of the Directive.
- 21 Following the refusal of their applications for temporary residence permits, Mr and Mrs Elgafaji brought actions before the Rechtbank te’s-Gravenhage (District Court, The Hague). Their actions before that court were successful.
- 22 That court held, *inter alia*, that Article 15(c) of the Directive, which takes account of the existence of armed conflict in the country of origin of the applicant seeking protection, does not require the high degree of individualisation of the threat required by Article 15 (b) of the Directive and by Article 29(1)(b) of the Vw 2000. Thus, the existence of a serious and individual threat to the persons seeking protection can be proved more easily under Article 15(c) of the Directive than under Article 15(b).

- 23 Consequently, the Rechtbank te 's-Gravenhage annulled the orders of 20 December 2006 refusing to grant temporary residence permits to Mr and Mrs Elgafaji, since the proof required under Article 15(c) of the Directive had been aligned with that required in the application of Article 15(b) of the Directive, as reproduced in Article 29(1)(b) of the Vw 2000.
- 24 According to that court, the Minister ought to have examined whether there were grounds for issuing temporary residence permits to Mr and Mrs Elgafaji under Article 29(1)(d) of the Vw 2000 on account of the existence of serious harm within the meaning of Article 15(c) of the Directive.
- 25 Seised on appeal, the Raad van State (Council of State) held that there were difficulties in interpreting the relevant provisions of the Directive. It held, furthermore, that Article 15(c) of the Directive had not been transposed into Netherlands law by 20 December 2006, the date on which the Minister's contested orders were made.
- 26 In those circumstances, the Raad van State decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:
- '(1) Is Article 15(c) of [the Directive] to be interpreted as offering protection only in a situation in which Article 3 of the [ECHR], as interpreted in the case-law of the European Court of Human Rights, also has a bearing, or does Article 15(c), in comparison with Article 3 of the [ECHR], offer supplementary or other protection?

- (2) If Article 15(c) of the Directive, in comparison with Article 3 of the [ECHR], offers supplementary or other protection, what are the criteria in that case for determining whether a person who claims to be eligible for subsidiary protection status runs a real risk of serious and individual threat by reason of indiscriminate violence within the terms of Article 15(c) of the Directive, read in conjunction with Article 2(e) thereof?’

The questions referred for a preliminary ruling

²⁷ At the outset, it should be noted that the referring court seeks guidance on the protection guaranteed under Article 15(c) of the Directive, in comparison with that under Article 3 of the ECHR as interpreted in the case-law of the European Court of Human Rights (see, *inter alia*, Eur. Court H.R. *N.A. v. the United Kingdom*, judgment of 17 July 2008, not yet published in the *Reports of Judgments and Decisions*, § 115 to 117, and the case-law cited).

²⁸ In that regard, while the fundamental right guaranteed under Article 3 of the ECHR forms part of the general principles of Community law, observance of which is ensured by the Court, and while the case-law of the European Court of Human Rights is taken into consideration in interpreting the scope of that right in the Community legal order, it is, however, Article 15(b) of the Directive which corresponds, in essence, to Article 3 of the ECHR. By contrast, Article 15(c) of the Directive is a provision, the content of which is different from that of Article 3 of the ECHR, and the interpretation of which must, therefore, be carried out independently, although with due regard for fundamental rights, as they are guaranteed under the ECHR.

29 The questions referred, which it is appropriate to examine together, thus concern the interpretation of Article 15(c) of the Directive, in conjunction with Article 2(e) thereof.

30 Having regard to those preliminary observations, and in the light of the circumstances of the case in the main proceedings, the referring court asks, in essence, whether Article 15(c) of the Directive, in conjunction with Article 2(e) thereof, must be interpreted as meaning that the existence of a serious and individual threat to the life or person of the applicant for subsidiary protection is subject to the condition that that applicant adduce evidence that he is specifically targeted by reason of factors particular to his circumstances. If not, the referring court wishes to know the criterion on the basis of which the existence of such a threat can be considered to be established.

31 In order to reply to those questions, it is appropriate to compare the three types of 'serious harm' defined in Article 15 of the Directive, which constitute the qualification for subsidiary protection, where, in accordance with Article 2(e) of the Directive, substantial grounds have been shown for believing that the applicant faces 'a real risk of [such] harm' if returned to the relevant country.

32 In that regard, it must be noted that the terms 'death penalty', 'execution' and 'torture or inhuman or degrading treatment or punishment of an applicant in the country of origin', used in Article 15(a) and (b) of the Directive, cover situations in which the applicant for subsidiary protection is specifically exposed to the risk of a particular type of harm.

- 33 By contrast, the harm defined in Article 15(c) of the Directive as consisting of a ‘serious and individual threat to [the applicant’s] life or person’ covers a more general risk of harm.
- 34 Reference is made, more generally, to a ‘threat ... to a civilian’s life or person’ rather than to specific acts of violence. Furthermore, that threat is inherent in a general situation of ‘international or internal armed conflict’. Lastly, the violence in question which gives rise to that threat is described as ‘indiscriminate’, a term which implies that it may extend to people irrespective of their personal circumstances.
- 35 In that context, the word ‘individual’ must be understood as covering harm to civilians irrespective of their identity, where the degree of indiscriminate violence characterising the armed conflict taking place — assessed by the competent national authorities before which an application for subsidiary protection is made, or by the courts of a Member State to which a decision refusing such an application is referred — reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to the serious threat referred in Article 15(c) of the Directive.
- 36 That interpretation, which is likely to ensure that Article 15(c) of the Directive has its own field of application, is not invalidated by the wording of recital 26 in the preamble to the Directive, according to which ‘[r]isks to which a population of a country or a section of the population is generally exposed do normally not create in themselves an individual threat which would qualify as serious harm’.

- 37 While that recital implies that the objective finding alone of a risk linked to the general situation in a country is not, as a rule, sufficient to establish that the conditions set out in Article 15(c) of the Directive have been met in respect of a specific person, its wording nevertheless allows — by the use of the word ‘normally’ — for the possibility of an exceptional situation which would be characterised by such a high degree of risk that substantial grounds would be shown for believing that that person would be subject individually to the risk in question.
- 38 The exceptional nature of that situation is also confirmed by the fact that the relevant protection is subsidiary, and by the broad logic of Article 15 of the Directive, as the harm defined in paragraphs (a) and (b) of that article requires a clear degree of individualisation. While it is admittedly true that collective factors play a significant role in the application of Article 15(c) of the Directive, in that the person concerned belongs, like other people, to a circle of potential victims of indiscriminate violence in situations of international or internal armed conflict, it is nevertheless the case that that provision must be subject to a coherent interpretation in relation to the other two situations referred to in Article 15 of the Directive and must, therefore, be interpreted by close reference to that individualisation.
- 39 In that regard, the more the applicant is able to show that he is specifically affected by reason of factors particular to his personal circumstances, the lower the level of indiscriminate violence required for him to be eligible for subsidiary protection.
- 40 Moreover, it should be added that, in the individual assessment of an application for subsidiary protection, under Article 4(3) of the Directive, the following may be taken into account:
- the geographical scope of the situation of indiscriminate violence and the actual destination of the applicant in the event that he is returned to the relevant country, as is clear from Article 8(1) of the Directive, and

- the existence, if any, of a serious indication of real risk, such as that referred to in Article 4(4) of the Directive, an indication in the light of which the level of indiscriminate violence required for eligibility for subsidiary protection may be lower.

⁴¹ Lastly, in the case in the main proceedings, it should be borne in mind that, although Article 15(c) of the Directive was expressly transposed into Netherlands law only after the facts giving rise to the dispute before the referring court, it is for that court to seek to carry out an interpretation of national law, in particular of Article 29(1)(b) and (d) of the Vw 2000, which is consistent with the Directive.

⁴² According to settled case-law, in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 249 EC (see, *inter alia*, Case C-106/89 *Marleasing* [1990] ECR I-4135, paragraph 8, and Case C-188/07 *Commune de Mesquer* [2008] ECR I-4501, paragraph 84).

⁴³ Having regard to all of the foregoing considerations, the answer to the questions referred is that Article 15(c) of the Directive, in conjunction with Article 2(e) thereof, must be interpreted as meaning that:

- the existence of a serious and individual threat to the life or person of an applicant for subsidiary protection is not subject to the condition that that applicant adduce evidence that he is specifically targeted by reason of factors particular to his personal circumstances;

- the existence of such a threat can exceptionally be considered to be established where the degree of indiscriminate violence characterising the armed conflict taking place — assessed by the competent national authorities before which an application for subsidiary protection is made, or by the courts of a Member State to which a decision refusing such an application is referred — reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to that threat.

⁴⁴ It should also, lastly, be added that the interpretation of Article 15(c) of the Directive, in conjunction with Article 2(e) thereof, arising from the foregoing paragraphs is fully compatible with the ECHR, including the case-law of the European Court of Human Rights relating to Article 3 of the ECHR (see, inter alia, *N.A. v. the United Kingdom*, § 115 to 117 and the case-law cited).

Costs

⁴⁵ Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

Article 15(c) 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, in conjunction with Article 2(e) thereof, must be interpreted as meaning that:

- **the existence of a serious and individual threat to the life or person of an applicant for subsidiary protection is not subject to the condition that that applicant adduce evidence that he is specifically targeted by reason of factors particular to his personal circumstances;**

- **the existence of such a threat can exceptionally be considered to be established where the degree of indiscriminate violence characterising the armed conflict taking place — assessed by the competent national authorities before which an application for subsidiary protection is made, or by the courts of a Member State to which a decision refusing such an application is referred — reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to that threat.**

[Signatures]