Reports of Cases

OPINION OF ADVOCATE GENERAL
PIKAMÄE
delivered on 11 February 2021 [1]

Case C-901/19

CF,
DN
v
Bundesrepublik Deutschland

(Request for a preliminary ruling from the Verwaltungsgerichtshof Baden-Württemberg (Higher Administrative Court, Baden-Württemberg, Germany))

(Directive 2011/95/EU – Minimum standards for granting refugee status or subsidiary protection status – Person eligible for subsidiary protection – Article 2(f) – Real risk of suffering serious harm – Article 15(c) – Serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of internal or international armed conflict – Assessment of the degree of indiscriminate violence)

1. How is the degree of indiscriminate violence of an armed conflict to be measured for the purposes of assessing an application for subsidiary protection based on Article 15(c) of Directive 2011/95/EU? [2] Can the grant of such protection be made subject to a quantitative precondition requiring a minimum number of casualties – injured or killed – in the combat zone, in relation to the population of the area, or does it require, *ab initio*, a comprehensive assessment, both quantitative and qualitative, of all the characteristics of that armed conflict?

2. Those are the questions arising in the present case, which provides the Court with an opportunity to clarify the case-law which it delivered when Directive 2004/83/EC [3] was in force.

1 Original language: French.

2 Directive 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).

3 Council Directive 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).

I. Legal context

A. EU law

3. Article 2 of Directive 2011/95, entitled 'Definitions', provides:

'For the purposes of this Directive the following definitions shall apply:

(a) "international protection" means refugee status and subsidiary protection status as defined in points (e) and (g);

(b) "beneficiary of international protection" means a person who has been granted refugee status or subsidiary protection status as defined in points (e) and (g);

…

(f) "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 to whom Article 17(1) and (2) does not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country;

…'

4. Article 4 of that directive, entitled 'Assessment of facts and circumstances', provides inter alia that:

'1. Member States may consider it the duty of the applicant to submit as soon as possible all the elements needed to substantiate the application for international protection. In cooperation with the applicant, it is the duty of the Member State to assess the relevant elements of the application.

…

3. The assessment of an application for international protection is to be carried out on an individual basis and includes taking into account:

(a) all relevant facts as they relate to the country of origin at the time of taking a decision on the application …;

(b) the relevant statements and documentation presented by the applicant including information on whether the applicant has been or may be subject to persecution or serious harm;

(c) the individual position and personal circumstances of the applicant, including factors such as background, gender and age, so as to assess whether, on the basis of the applicant's personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm;

…

4. The fact that an applicant has already been subject to persecution or serious harm, or to direct threats of such persecution or such harm, is a serious indication of the applicant's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated.

…'

5. Article 15 of Directive 2011/95 is worded as follows:

'Serious harm consists of:

(a) the 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.'

B. German law

6. Directive 2011/95 was transposed into German Law by the Asylgesetz (Law on Asylum) (BGBl. I p. 1798; 'the AsylG').

7. Paragraph 4(1) of the AsylG, transposing Articles 2 and 15 of Directive 2011/95, lays down the conditions for the granting of subsidiary protection. That provision reads as follows:

'(1) A foreign national shall be eligible for subsidiary protection where there are serious and substantial grounds for believing that he or she is at risk of suffering serious harm in his or her country of origin. The following are considered to constitute serious harm:

1. the death penalty or execution;

2. torture or inhuman or degrading treatment or punishment; or

3. serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

…'

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

8. It is apparent from the decision to refer that the applicants in the main proceedings are two Afghan civilians from the province of Nangarhar (Afghanistan), whose applications for asylum in Germany were rejected by the Bundesamt für Migration und Flüchtlinge (Federal Office for Migration and Refugees). Actions brought before the administrative courts of Karlsruhe and Freiburg were unsuccessful. On appeal, the applicants have asked the Verwaltungsgerichtshof Baden-Württemberg (Higher Administrative Court of Baden-Württemberg, Germany) to grant them subsidiary protection, pursuant to Paragraph 4 of the AsylG, in the event that they should not secure refugee status.

9. In those circumstances, that court is seeking further clarification as to the criteria applicable in EU law as regards the granting of subsidiary protection in the case of indiscriminate violence against the civilian population arising from a conflict, as referred to in Article 15(c) of Directive 2011/95, read in conjunction with Article 2(f) thereof. It states that the Court has not yet ruled on that question and that the case-law handed down by other courts in this area is inconsistent. Whereas some have conducted a comprehensive assessment based on all the circumstances of the case, others have predicated their approach primarily on an analysis based on the number of civilian casualties.

10. In particular, the referring court observes that, in order to find that a person who is not specifically targeted, by reason of factors particular to his or her personal circumstances, faces a serious and individual threat, the case-law of the Bundesverwaltungsgericht (Federal Administrative Court, Germany) on the first sentence of Paragraph 4(1) and point 3 of the second sentence of Paragraph 4(1) of the AsylG, which transposes Article 15(c) of Directive 2011/95, read in conjunction with Article 2(f) of that directive, diverges significantly from the case-law based on a comprehensive assessment of the particular circumstances of each individual case, as conducted by other courts, particularly the European Court of Human Rights.

11. According to the Bundesverwaltungsgericht (Federal Administrative Court), before any finding of serious and individual threats can be made (in relation to persons who are not exposed to a specific risk by reason of their personal circumstances), it is necessary to conduct a quantitative assessment of the 'risk of death and injury', expressed by the ratio between the number of victims in the relevant area and the total number of individuals comprising the population of that area, which must reach a certain minimum threshold. To date, however, the Bundesverwaltungsgericht (Federal Administrative Court) has not specified that minimum threshold, but has nevertheless held, according to the referring court, that a probability of death or injury of about 0.12% (or 1 in 800) per annum is insufficient, being significantly below the minimum threshold. According to that case-law, if the probability does not exceed that threshold, there is no need for any further assessment of the level of risk, and a serious and individual threat cannot be found to exist even on the basis of a comprehensive assessment of the particular circumstances of the case.

12. Thus, according to the referring court, if the issue of whether a serious and individual threat exists depends mainly on the number of civilian casualties, the applicants' applications for subsidiary protection would have to be rejected. By contrast, on the basis of a comprehensive assessment that included other risk-substantiating circumstances, the current level of violence prevailing in Nangarhar province would appear to be so high that the applicants, to whom no internal protection is available, would, solely by reason of their presence, face a serious threat.

13. In that regard, the referring court acknowledges that the Court has held, in its judgment of 17 February 2009, *Elgafaji* (C-465/07, EU:C:2009:94; 'the judgment in *Elgafaji*'), that, where the person concerned is not specifically affected by reason of factors particular to his or her personal circumstances, the existence of a serious and individual threat arising from indiscriminate violence in a situation of armed conflict, within the meaning of Article 15 of Directive 2011/95, can exceptionally be considered to be established where the degree of indiscriminate violence characterising the armed conflict reaches such a high level that serious and substantial grounds are shown for believing that that person would, solely on account of his or her presence on the territory in question, face a real risk of being subject to such a threat. Nonetheless, it states, the Court has not ruled on the criteria to be applied in determining the necessary level of violence.

14. Against that background, the Verwaltungsgerichtshof Baden-Württemberg (Higher Administrative Court, Baden-Württemberg) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Do Article 15(c) and Article 2(f) of Directive [2011/95] preclude the interpretation and application of a provision of national law whereby a serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of armed conflict (in the sense that a civilian would, solely on account of his or her presence in the relevant region, face a real risk of being subject to such a threat), in cases in which that person is not specifically targeted by reason of factors particular to his or her personal circumstances, can only exist where a minimum number of civilian casualties (killed and injured) has already been established?

(2) If the answer to Question 1 is in the affirmative: must the assessment as to whether a threat exists in that sense be conducted on the basis of a comprehensive appraisal of all the circumstances of the individual case? If not: which other requirements of EU law apply to that assessment?'

III. Procedure before the Court

15. The German, French and Netherlands Governments, as well as the European Commission, presented written and oral observations at the hearing held on 19 November 2020, at which the applicants in the main proceedings were also heard.

IV. Analysis

A. Preliminary observations

16. The referring court is asking the Court about the interpretation of Article 15(c) of Directive 2011/95, which repealed and replaced Directive 2004/83 with effect from 21 December 2013. It is common ground that that change of directive did not result in any change in the legal rules for granting subsidiary protection, or even the numbering of the relevant provisions. Thus, the wording of Article 15(c) of Directive 2011/95 is strictly identical to that of Article 15(c) of Directive 2004/83.

17. In that regard, it is interesting to note that Article 15 of Directive 2004/83 was, however, one of the three provisions referred to in Article 37 of that directive, which required the Commission to report to the European Parliament and the Council on the application of that directive and to propose any amendments that were necessary.[4] In that context, the Commission stated, in a communication of 17 June 2008 entitled 'Policy plan on asylum: an integrated approach to protection across the EU',[5] that it 'may be necessary *inter alia* to clarify further the eligibility conditions for subsidiary protection, since the wording of the current relevant provisions allows for substantial divergences in the interpretation and the application of the concept across Member States'.

18. In spite of that finding, and of a renewed request for clarification of Article 15(c) of Directive 2004/83 from the entities consulted, the proposal of 21 October 2009 for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third-country nationals or stateless persons as beneficiaries of international protection[6] ultimately stated that it was

4 Article 37 of Directive 2004/83 was considered to reflect a recognition on the part of the EU legislature of the potential difficulties surrounding the interpretation of Article 15 of that directive, which is ambiguously worded and reflects a compromise between the Member States (J. Périlleux, *L'interprétation de la notion de 'conflit armé interne' et de 'violence aveugle' de la protection subsidiaire : le droit international humanitaire est-il une référence obligatoire* ?, Revue belge de droit international 2009/1, Éditions Bruylant, p. 113, at p 143).

5 COM(2008) 360 final.

6 COM(2009) 551 final.

unnecessary to amend that provision, in the light of the guidance provided by the Court in the judgment in *Elgafaji*. The EU legislature in 2011 accepted that proposal, and thus opted for the legislative status quo on the basis of case-law which supposedly provided the necessary clarification, but which – as can be seen from the request for a preliminary ruling – the referring court considers to be manifestly insufficient. The fact that the case was very vigorously argued at the hearing demonstrates, furthermore, that that court is not alone in its uncertainty as to the meaning of the judgment in *Elgafaji*.

B. The scope of the questions referred

19. There was indeed extensive discussion at the hearing, instigated by the Netherlands Government and relating to the answer to be given to the second question referred, as to the precise meaning of a particular paragraph of the judgment in *Elgafaji*. It should be stressed that, in that judgment, the Court sought to clarify the scope of Article 15(c) of Directive 2011/95, which defines one of the three forms of serious harm which, when substantiated, entitle the person subject to them to the grant of subsidiary protection.

20. The Court thus indicated that the situation referred to in Article 15(c) of Directive 2011/95, consisting of a 'serious and individual threat to [an applicant's] life or person' 'covers a more general risk of harm' than the situations referred to in Article 15(a) and (b) of that directive. In that sense, Article 15(c) of Directive 2011/95 refers, more generally, to a 'threat … to a civilian's life or person rather than to specific acts of violence'. That threat is inherent in a general situation of armed internal or international conflict giving rise to violence described as 'indiscriminate', a term which implies that it may extend to people 'irrespective of their personal circumstances'.[7] It follows that the establishment of a serious and individual threat is not conditional on the applicant for subsidiary protection proving that he or she is specifically targeted by reason of factors particular to his or her personal circumstances.

21. Nevertheless, 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 Directive 2011/95 have been met. The Court indicated that 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 … 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'.[8]

22. It thus follows from the Court's case-law that the application of Article 15(c) of Directive 2011/95 does not necessitate an examination of the applicant's personal circumstances, at least not initially. Having regard to the need for that provision to be subject to a coherent interpretation in relation to the other two situations referred to in Article 15(a) and (b) of Directive 2011/95, the Court added, in paragraph 39 of the judgment in *Elgafaji*, that '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'.

23. Both in its written observations and at the hearing, the Netherlands Government maintained that the aforementioned paragraph is contradicted by the operative part of the judgment, which states that the application of Article 15(c) of Directive 2011/95 is not subject to the condition that that applicant adduce evidence that he or she is specifically targeted by reason of factors particular to his or her personal circumstances. If that section of the operative part is to have any meaningful effect, the

7 The judgment in *Elgafaji*, paragraphs 33 and 34.

8 The judgment in *Elgafaji*, paragraph 43.

Netherlands Government argues, it can relate only to an assessment of the risk made solely on the basis of concrete, objective circumstances of a general nature, with no consideration given to matters which are personal to the applicant for protection. That analysis is disputed by the Commission, which construes paragraph 39 of the judgment in *Elgafaji* as invoking the concept of a 'sliding' or 'tapering scale'[9] capable of encompassing, in addition to circumstances of that kind, individual matters which are specific to the person concerned.

24. For my part, I consider that the wording of paragraph 39 of the judgment in *Elgafaji* is intrinsically clear, and that paragraph 40 confirms that the Commission's reading is correct.[10] In that paragraph, the Court indicates that, in the assessment of the application for subsidiary protection, account could be taken of the fact that the applicant had already been subject to persecution or serious harm, or to direct threats of such persecution or such harm. It holds that a history of such treatment is a serious indication of a real risk of suffering serious harm, as referred to in Article 4(4) of Directive 2011/95, 'in the light of which the level of indiscriminate violence required for eligibility for subsidiary protection may be lower'. It is thus apparent that Article 15(c) of Directive 2011/95 must be read in conjunction with Article 4 of that directive, as will be seen below, and that matters of a personal nature may, where relevant, be taken into account in determining whether there is a serious and individual threat within the meaning of the former provision.

25. In any event, I do not consider this discussion to be relevant to the answer to be given to the referring court, with regard to its utility in resolving the dispute in the main proceedings. It should be noted that, after indicating that subsidiary protection could not be granted to the applicants under the national provisions transposing Article 15(a) and (b) of Directive 2011/95, the referring court first explains that, equally, the applicants are not specifically affected, *by reason of their personal circumstances*, by the indiscriminate violence prevailing in the province, within the meaning of the judgment in *Elgafaji*, referring expressly to paragraph 39 of that judgment.[11]

26. It goes on to state that it considers, on the basis of a comprehensive assessment of the general security situation in Afghanistan, and thus of matters which are not personal to the applicants, that, if they were returned to Nangarhar province, they would, *solely on account of their presence*, face a real risk of serious and individual harm as a result of indiscriminate, conflict-related violence,[12] and that they therefore come within the situation described in paragraph 35 of the judgment in *Elgafaji*. The scope of the questions referred is thus limited to the determination of entirely impersonal criteria for assessing the level of indiscriminate violence characterising an armed conflict. In those circumstances, I do not consider that the answer to be expected from the Court, as regards the interpretation of Article 15(c) of Directive 2011/95, involves any discussion of the meaning of paragraph 39 of the judgment in *Elgafaji*.[13]

9 The same approach is taken by the European Asylum Support Office (EASO), in its report of December 2014, entitled 'Article 15(c) Qualification Directive (2011/95/EU) – a judicial analysis' (pp. 23 and 24), and in that of April 2018, entitled 'Qualification for international protection' (p. 32). The sliding scale concept operates as follows: either the territory in question is one in which the level of indiscriminate violence is so high that there are substantial grounds for believing that a civilian returned to the relevant country (or, as the case may be, the relevant region) would, *solely on account of his or her presence* in that country or region, face a real risk of being subject to a serious threat of the kind referred to in Article 15(c) of Directive 2011/95, or it is one in which, while there is indiscriminate violence, that violence does not reach such a high level, and *supplementary individual evidence must be presented in relation to it*. This distinction is applied, inter alia, in France, by the Cour nationale du droit d'asile (National Court of Asylum, France; 'the CNDA') (decision of the CNDA, sitting in enlarged composition, of 19 November 2020, M.N., No 19009476, paragraph 10).

10 Moreover, the Court unequivocally reaffirmed its position in the judgment of 30 January 2014, *Diakité* (C-285/12, EU:C:2014:39, paragraph 31).

11 See paragraph 13 of the decision to refer.

12 See paragraphs 14 to 20 of the decision to refer.

13 The referring court's question relates to the scope of Article 15(c) of Directive 2011/95; this is entirely accepted by the Netherlands Government, which considers it to be the only possible scope.

27. Lastly, it should be stated that it is apparent from the request for a preliminary ruling that the referring court is in doubt as to the interpretation of Article 15(c) of Directive 2011/95 and is seeking, very precisely, further clarification of the criteria applicable in EU law, as regards qualification for subsidiary protection in cases of indiscriminate violence against civilians arising from an armed conflict. It considers that there is no obvious answer to those questions to be found in the existing case-law of the Court, which did not rule on those criteria in its judgment in *Elgafaji*. Those explanatory remarks must be borne in mind in reading the questions referred; due to the ambiguous wording of the second question, the interrelationship between them is a potential source of difficulty.

28. By its first question, the referring court is essentially asking whether Article 15(c) Directive 2011/95, read in conjunction with Article 2(f) thereof, is to be interpreted as precluding the interpretation of a national practice under which a finding of serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of armed conflict, within the meaning of that provision, can be made, in cases where that civilian is not specifically targeted by reason of factors particular to his or her circumstances, only where the ratio between the number of casualties (killed and injured) in the area in question and the total number of individuals making up the population of that area reaches a fixed threshold.[14]

29. In the event that the first question is answered in the affirmative, necessitating a comprehensive assessment of the various characteristics of the situation in question, the referring court enquires of the Court, in essence, by its second question, as to the nature of the circumstances which may be regarded as relevant for the purposes of establishing a threat of the kind referred to above.

C. The first question referred

30. It is apparent from Article 18 of Directive 2011/95, read in conjunction with the definition of 'person eligible for subsidiary protection' in Article 2(f) thereof, and that of 'subsidiary protection status' in Article 2(g) thereof, that the subsidiary-protection status referred to in that directive must, in principle, be granted to a third-country national or stateless person who faces a real risk of suffering serious harm, within the meaning of Article 15 of that directive, if returned to his or her country of origin or to the country of his or her former habitual residence.[15] Among the three types of serious harm defined in Article 15 of Directive 2011/95, the type specified in Article 15(c) consists in a serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

31. According to settled case-law, in interpreting a provision of EU law, it is necessary to consider not only the wording of that provision but also the context in which it occurs and the objectives pursued by the rules of which it is part.[16] It is therefore necessary to carry out a literal, systematic and purposive interpretation of Article 15(c) of Directive 2011/95, read in conjunction with Article 2(f) thereof, taking the existing case-law into consideration so far as it is relevant to the resolution of the dispute in the main proceedings. It seems to me that such an analysis must lead to the conclusion that the grant of subsidiary protection does not require a finding that a minimum threshold of

14 At the hearing, the German Government's representative indicated, essentially, that the referring court had misinterpreted the case-law of the Bundesverwaltungsgericht (Federal Administrative Court) referred to in its order, and cited a decision of that court of 20 May 2020 providing clarification in terms which rule out the systematic application of a quantitative precondition as a basis for refusing subsidiary protection. It should be stated, in this regard, that the Court is empowered to rule solely on the interpretation or validity of EU law in the light of the factual and legal situation as described by the referring court, in order to provide that court with such guidance as will assist it in resolving the dispute before it (judgment of 28 July 2016, *Kratzer*, C-423/15, EU:C:2016:604, paragraph 27), any assessment of the facts and of national law being a matter for the national court or tribunal (judgment of 19 September 2019, *Lovasné Tóth*, C-34/18, EU:C:2019:764, paragraph 42). There is, moreover, no doubt that the dispute in the main proceedings remains live, the referring court having being called on to make a decision which is liable to involve consideration of the Court's preliminary ruling.

15 Judgment of 23 May 2019, *Bilali* (C-720/17, EU:C:2019:448, paragraph 36).

16 Judgment of 10 September 2014, *Ben Alaya* (C-491/13, EU:C:2014:2187, paragraph 22 and the case-law cited).

casualties has been reached, a conclusion which is supported by an examination of the case-law of the European Court of Human Rights on Article 3 of the Convention on the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR') and by the recommendations of EASO.

1. Literal interpretation

32. I think it is appropriate to point out that the relevant provisions of Directive 2011/95 concern the existence of a 'real risk' that the applicant for international protection may suffer serious harm, defined as a serious threat to a civilian's 'life or person'. The concept of a 'real risk' relates to the standard of proof applicable to the assessment of the risks, which is a factual assessment, and represents a probability criterion that cannot be reduced to a mere possibility. In that regard, a count of the number of civilian casualties in a given territory does not appear to be a speculative consideration but, on the contrary, one grounded in reality and thus capable of establishing the required risk. As to the reference to a threat to a civilian's 'life or person', it can be inferred that the number of civilians killed is not the only relevant consideration, as that expression extends to other bodily harm, and even psychological harm. [17]

33. While these considerations are of genuine interest, it appears that a literal interpretation of Article 15(c) of Directive 2011/95, read in conjunction with Article 2(f) thereof, cannot provide a sufficient, unequivocal answer to the referring court's question.

2. Systematic interpretation

34. It is settled case-law that any decision on the granting of refugee status or the status conferred by subsidiary protection must be based on an individual assessment intended to determine whether, having regard to the personal circumstances of the applicant, the conditions for granting such status are satisfied. It thus follows from the system established by the EU legislature for granting the uniform asylum or subsidiary protection status that the assessment of an application for international protection, prescribed by Article 4 of Directive 2011/95, is intended to determine whether the applicant – or, where relevant, the person on whose behalf the applicant has lodged an application – has a well-founded fear of being personally persecuted or personally faces a real risk of suffering serious harm. [18]

35. Article 4(3) of Directive 2011/95 lists the factors which the competent authorities must take into account during the individual assessment of an application for international protection, which factors include '*all relevant facts as they relate to the country of origin*'. [19] It was by reference to that very provision that the Court, in the judgment in *Elgafaji*, held that, in the individual assessment of an application for subsidiary protection, account could be taken '*inter alia*' of the geographical scope of the situation of indiscriminate violence and the actual destination of the applicant in the event that he or she was returned to the relevant country, as was clear from Article 8(1) of the directive.

36. In this regard, it is important to observe that if protection is not available in the area of the country of origin where the applicant resides, the competent national authority must examine, under Article 8(1) of Directive 2011/95, whether there is another part of that country which is safe. The competent national authority may decide that an applicant is not in need of international protection if there is a part of his or her country of origin in which he or she has no well-founded fear of being persecuted or is not at real risk of suffering serious harm, or has access to protection against

17 This last assertion is not confirmed in all the language versions of Article 15(c) of Directive 2011/95. Thus, the Spanish version refers to: 'las amenazas graves e individuales contra la vida o la integridad física de un civil …'.

18 Judgment of 4 October 2018, *Ahmedbekova* (C-652/16, EU:C:2018:801, paragraphs 48 and 49).

19 See, to that effect, judgment of 25 January 2018, *F* (C-473/16, EU:C:2018:36, paragraph 33).

persecution or serious harm. In relation to that assessment, Article 8(2) of Directive 2011/95 provides that the Member States are to have regard, at the time of taking the decision on the application, to the '*general circumstances prevailing in that part of the country*' and to the personal circumstances of the applicant in accordance with Article 4 of that directive.

37. It thus seems to me that Articles 4, 8 and 15(c) of Directive 2011/95, read together, support the proposition that a comprehensive approach must be taken to the situation of conflict in question, with a multiplicity of factors being taken into account on equal terms – a proposition which, it strikes me, was confirmed by the Court, without express reference to the first two of those provisions, in the judgment of 30 January 2014, *Diakité* (C-285/12, EU:C:2014:39).

38. After determining the meaning and scope of the expression 'armed conflict' referred to in Article 15(c) of Directive 2004/83, the Court indicated that such a conflict could lead to the granting of subsidiary protection only where the degree of indiscriminate violence characterising it reached the level required in the judgment in *Elgafaji*. It also held that it was not necessary, in order to establish the existence of an armed conflict, to carry out a specific assessment of the intensity of the confrontations, as a separate matter from the appraisal of the degree of violence. To illustrate and clarify its approach, the Court listed a number of factual considerations which were useful in appraising the degree of violence in a given territory, making clear that there was no need to assess them separately in order to establish whether there was a conflict. Those considerations were the intensity of the armed confrontations, the level of organisation of the armed forces involved and the duration of the conflict. It follows indirectly and by implication from the judgment in *Diakité* that the assessment of the degree of indiscriminate violence cannot be limited to the single quantitative precondition of the ratio borne by the number of casualties to the population of a given territory. [20]

3. Purposive interpretation

39. First, it is apparent from recital 12 of Directive 2011/95 that one of the main objectives of that directive is to ensure that all Member States apply common criteria for the identification of persons genuinely in need of international protection. [21]

40. Given that objective, it appears essential to ensure that Article 15(c) of Directive 2011/95 is interpreted in the same way in all Member States. More specifically, as stated in recital 13 of that directive, 'the approximation of rules on the recognition and content of refugee and subsidiary protection status should help to limit the secondary movement of applicants for international protection between Member States, where such movement is purely caused by differences in legal frameworks'. Making the grant of subsidiary protection subject to a precondition reflecting a minimum casualty threshold, determined unilaterally and arbitrarily by the competent national authorities, is such as to undermine that objective.

41. As the French Government rightly observes, this might prompt applicants for international protection to leave their country of initial arrival and to travel to other Member States where no such minimum threshold applies, or where the threshold is lower, thus giving rise to the secondary movement that Directive 2011/95 seeks to prevent by approximating the rules concerning the recognition of persons as beneficiaries of subsidiary protection and the content of such protection. It seems to me that such an outcome, originating as it would in a difference between the legal frameworks of the Member States, would be directly contrary to the objective set out in recital 13 of the directive, and would, to a great extent, deprive the relevant provisions of Directive 2011/95 of their utility.

20 Judgment of 30 January 2014, *Diakité* (C-285/12, EU:C:2014:39, paragraphs 30, 32 and 35).

21 Judgment of 23 May 2019, *Bilali* (C-720/17, EU:C:2019:448, paragraph 35).

42. Secondly, it is clear from recitals 5, 6 and 24 of Directive 2011/95 that the minimum requirements for granting subsidiary protection must help to complement and add to the protection of refugees enshrined in the Convention relating to the Status of Refugees, signed in Geneva on 28 July 1951, through the identification of persons genuinely in need of international protection and through such persons being offered an appropriate status.[22] Article 15(c) of Directive 2011/95, and hence the scope of the subsidiary protection mechanism, must therefore be interpreted with regard to that directive's express objective of ensuring international protection for those genuinely in need of it.

43. It seems to me, in this regard, that there are serious difficulties with an interpretation of Article 15(c) of Directive 2011/95 that can be reduced to the application of a quantitative test requiring a preliminary finding that a casualty threshold has been reached. I note that, while it refers in its written observations to an objective, appropriate and verifiable criterion, the German Government cited a passage from a decision of the Bundesverwaltungsgericht (Federal Administrative Court) which illustrates these difficulties, stating that it is necessary to 'determine quantitatively, at least *approximately*, the total number of civilians living in the region in question, and the acts of indiscriminate violence perpetrated by the parties to the conflict against the lives or persons of the civilians in that region'.

44. This passage brings a twin difficulty to light concerning the statistics, namely that of gathering reliable and precise data in relation both to the number of civilian casualties and to the number of persons present in the country or territory concerned and facing violent confrontations, which lead unfailingly to panic movements of population. In those circumstances the question arises as to whether there are objective and independent sources of information, located as close as possible to the fighting, from which the relevant data can be reliably obtained.[23] Clearly, obtaining objective, reliable and properly updated information about the local situation characterising an armed conflict, beyond the number of casualties and the population of the area, is just as delicate a matter. In my view, however, it is undeniable that making the grant of subsidiary protection subject to prior satisfaction of a single quantitative precondition, and one of questionable reliability, is not the most appropriate way of identifying persons genuinely in need of international protection.

45. Lastly, it should be pointed out that the method described in the decision to refer is to determine a ratio: that borne by the number of casualties in the area in question to the total number of individuals making up the population of that area. That ratio is treated as sufficient or insufficient depending on whether it is above or below a threshold which is determined unilaterally, on a discretionary basis, by the competent national authority, and is not even stated as such. In my view, this is far from the objective criterion that it is claimed to be.[24] This method must be differentiated from that seeking simply to quantify the total number of casualties, which (provided it is sufficiently reliable) is one of the objective indicators of the degree of indiscriminate violence in an armed conflict.

22 Judgment of 30 January 2014, *Diakité* (C-285/12, EU:C:2014:39, paragraph 33).

23 In that regard, Article 8(2) of Directive 2011/95 states that Member States must ensure that precise and up-to-date information is obtained from relevant sources, such as the United Nations High Commissioner for Refugees and EASO.

24 The decision to refer cites a decision of the Bundesveraltungsgericht (German Federal Administrative Court) of 17 November 2011, in which that court took the view that a probability of death or injury of about 0.12% (or 1 in 800) per annum was significantly below the minimum threshold required, or indicated merely a risk so far removed from the relevant probability threshold that not taking other circumstances into account could not affect the outcome. It is common ground that neither the relevant probability threshold nor, inevitably, the grounds on which it was adopted have been specified. It can therefore be legitimately asked how an annual ratio of 1 in 800 can be regarded as insufficient to establish indiscriminate violence of a particular intensity.

46. Thirdly, in accordance with Article 2(f) of Directive 2011/95, the subsidiary protection regime seeks to protect the individual against a real risk of serious harm if returned to his or her country of origin, which implies that substantial grounds must be shown for believing that the person concerned, if returned to that country, would face such a risk. [25] It thus appears that the analysis to be carried out by the competent national authority consists in an assessment of a hypothetical future situation, which necessarily involves a kind of projection.

47. This necessarily dynamic analysis cannot, in my view, be reduced to a quantitative evaluation of a number of casualties in relation to a given population at a given moment, removed to a greater or lesser extent from the moment at which the national authority or court is required to take its decision. [26] The assessment of the need for international protection must be capable of extending to unquantifiable considerations such as recent developments in an armed conflict which, while they may not yet be reflected in an increase in casualties, are significant enough to establish a real risk of serious harm to the civilian population. [27]

4. The interpretation of Directive 2011/95 from the perspective of protection of fundamental rights

48. As is apparent from recital 16 of Directive 2011/95, that directive must be interpreted in a manner consistent with the rights recognised by the Charter of Fundamental Rights of the European Union ('the Charter'). [28] In that regard, the referring court cites Article 4 of the Charter in its request for a preliminary ruling.

49. The explanations relating to the Charter as regards Article 4 – which, in accordance with the third subparagraph of Article 6(1) TEU and Article 52(7) of the Charter, were drawn up in order to provide guidance in the interpretation of the Charter and must be duly taken into consideration both by the Courts of the European Union and by the courts of the Member States – state expressly that the right in Article 4 corresponds to the right guaranteed by Article 3 of the ECHR, which has the same wording: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'. By virtue of Article 52(3) of the Charter, it therefore has the same meaning and scope as the ECHR article. [29]

50. It must, however, be borne in mind that, in answering the referring court, which had asked about the relationship between the protection provided for in Article 15(c) of Directive 2004/83 and that guaranteed by Article 3 of the ECHR, the Court held, in the judgment in *Elgafaji*, that Article 15(c) of the directive provides for subsidiary protection in circumstances other than those engaging the prohibition of torture and inhuman or degrading treatment under Article 3 of the ECHR, and is therefore to be interpreted independently, although with due regard for fundamental rights, as they are guaranteed under the ECHR. [30]

25 See, by analogy, judgment of 24 April 2018, *MP (Subsidiary protection of a person who has previously suffered acts of torture)* (C-353/16, EU:C:2018:276, paragraph 31).

26 It should be noted that Article 46(3) of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (OJ 2013 L 180, p. 60) defines the scope of the effective remedy to which applicants for protection are entitled, stipulating that Member States bound by that directive must ensure that the court or tribunal hearing a challenge to a decision on an application for international protection carries out 'a full and *ex nunc* examination of both facts and points of law, including, where applicable, an examination of the international protection needs'. The expression '*ex nunc*' points to the court or tribunal's obligation to make an assessment that takes account, should the need arise, of new evidence which has come to light after adoption of the decision being challenged. As for the word 'full', that adjective confirms that the court or tribunal is required to examine both the evidence which the determining authority took into account or could have taken into account and that which has arisen following the adoption of the decision by that authority (judgment of 12 December 2019, *Bevándorlási és Menekültügyi Hivatal (Family reunification – Sister of a refugee)*, C-519/18, EU:C:2019:1070, paragraph 52).

27 An example would be a recent breach of a ceasefire agreement followed by the penetration of a given territory by armed troops, leading to a mass displacement of the civilian population.

28 Judgment of 1 March 2016, *Alo and Osso* (C-443/14 and C-444/14, EU:C:2016:127, paragraph 29).

29 See, to that effect, judgment of 27 May 2014, *Spasic* (C-129/14 PPU, EU:C:2014:586, paragraph 54).

30 The judgment in *Elgafaji*, paragraphs 28 and 44.

51. In that regard, it is interesting to observe that the European Court of Human Rights has stated clearly that it was 'not persuaded' that Article 3 of the ECHR did not offer comparable protection to that afforded under Article 15(c) of Directive 2004/83. It noted that the threshold set by both provisions could, in exceptional circumstances, be attained in consequence of a situation of general violence of such intensity that any person being returned to the region in question would be at risk simply on account of his or her presence there.[31] Given that similarity of analysis, it appears that the case-law of the European Court of Human Rights on the assessment of the degree of general violence may assist in answering the questions referred for a preliminary ruling in the present case. It is not disputed that the method used by that court is based on a comprehensive assessment of all the relevant information, which may vary from one case to another and cannot be reduced to a quantitative measure.[32]

52. It follows from the foregoing considerations that, in order to determine whether there is serious harm for the purposes of Article 15(c) of Directive 2011/95, it is necessary to conduct a comprehensive cross-analysis of all relevant facts capable of establishing that there is or is not indiscriminate violence of such a high level that civilians are at real risk of suffering serious harm, solely on account of their presence on the territory in question. The grant of subsidiary protection is not subject to a precondition requiring a minimum number of casualties in relation to a given population.

53. That interpretation is supported by EASO reports[33] recommending, in relation to the assessment of the level of violence, that courts adopt a comprehensive and inclusive approach, both quantitative and qualitative, and take account of a wide range of relevant variables, not restricting themselves to a purely quantitative examination of the number of civilians killed and injured.[34] EASO refers in that regard to decisions of the European Court of Human Rights and of national courts, stating with obvious regret that the case-law of the Court 'does not assist the national courts or tribunals in answering the question as to how they should [proceed]'. This brings us to the second question referred.

D. The second question referred

54. As stated above, the referring court is uncertain as to the interpretation of Article 15(c) of Directive 2011/95 and is seeking further clarification as to the circumstances in which that provision applies, as it considers that the reasoning in the judgment in *Elgafaji* is insufficient in that regard. The same sentiment of regret, or of criticism, is found in some academic commentaries and in EASO's analysis that 'there is no guidance … from the [Court] on the criteria for assessing the level of violence in an armed conflict'.[35]

55. At this point we run into the especially delicate issue of the distinction between the *interpretative function* performed by the Court, in relation to EU law, in preliminary-ruling proceedings, and the *application* of that law, which, in principle, is a matter for the national courts and tribunals – a distinction which is sometimes elusive and can be put into effect only through close analysis of the referred matter and its legal context.

31 ECtHR, 28 June 2011, *Sufi and Elmi v. United Kingdom* (CE:ECHR:2011:0628JUD000831907, § 226).

32 ECtHR, 28 June 2011, *Sufi and Elmi v. United Kingdom* (CE:ECHR:2011:0628JUD000831907, § 241).

33 Judgment of 13 September 2018, *Ahmed* (C-369/17, EU:C:2018:713, paragraph 56).

34 EASO reports of December 2014, entitled 'Article 15(c) Qualification Directive – a judicial analysis' (see, in particular, pp. 29-32), and of April 2018, entitled 'Qualification for international protection' (see, in particular, p. 32).

35 See, in particular, Boutruche-Zarevac, *The Court of Justice of the EU and the Common European Asylum System: Entering the Third Phase of Harmonisation*? (2009-2010) 12 CYELS 53, 63, and EASO report of December 2014, entitled 'Article 15(c) Qualification Directive – a judicial analysis' (see, in particular, pp. 29-32).

56. The present reference for a preliminary ruling relates to the interpretation of Article 15(c) of Directive 2011/95, which contains a legal concept of a very general nature, bearing in mind that that text reflects a compromise between the Member States, which manifestly chose to leave it to the courts to identify its precise contours. In that regard, in the judgment in *Elgafaji*, the Court provided an interpretation of that concept which can itself be described as broad, having regard to the wording of the operative part of the decision. This, incidentally, includes the phrase 'assessed by the competent national authorities … or by the courts of a Member State', relating to the degree of indiscriminate violence characteristic of the conflict, a form of words which generally signifies that the Court is leaving it to the referring court to assess the factual matters which will dictate the outcome of applying that interpretative judgment. That interpretation was supplemented, at least implicitly, in the judgment in *Diakité*,[36] in which the Court referred to the intensity of the armed confrontations, the level of organisation of the armed forces involved, and the duration of the conflict, as elements to be taken into account in assessing whether there is a real risk of serious harm within the meaning of Article 15(c) of Directive 2011/95.

57. Nevertheless, it is apparent from the present request for a preliminary ruling[37] and from the observations made by academics and EASO that the clarification provided by the Court is perceived to be insufficient, or has not even been recognised as such, which may reflect a lack of clarity in the judgments concerned. For my part, I think that it is indeed difficult to maintain that the case-law is sufficiently developed as regards the interpretation of the concept of a 'real risk' of serious harm pursuant to the above provision. Given that that concept determines the scope of one of the situations in which subsidiary protection is granted in EU law, it may be appropriate to clarify its interpretation. In providing further guidance as to the matters which can be taken into consideration in applying Article 15(c) of Directive 2011/95, the Court would be promoting a consistent application of that text within the European Union, and would thus be furthering the objective, set out in recital 12 of that directive, of identifying criteria which are common to the Member States.

58. With that in mind, if the Court wished to clarify its case-law, it might find assistance in the decisions of the European Court of Human Rights, which has held that a situation of general violence could be evaluated with regard to whether the parties to the conflict were either employing methods and tactics of warfare which increased the risk of civilian casualties or directly targeting civilians, whether the use of such methods was widespread among the parties to the conflict, whether the fighting was localised or widespread, and the number of civilians killed, injured and displaced as a result of the fighting. The European Court of Human Rights indicated that those criteria were not to be seen as an exhaustive list to be applied in all cases.[38] Moreover, while they do, a priori, provide a range of relevant indicators, they must only be taken into consideration to the extent that they are based on reliable and up-to-date information obtained from independent and objective sources of all kinds.[39]

36 Judgment of 30 January 2014 (C-285/12, EU:C:2014:39).

37 It is apparent from the decision to refer that the uncertainty expressed in that document is interpretative in nature, in the sense that the reference for a preliminary ruling is not intended to lead to a determination as to the proper application of the concept of a 'real risk' of serious harm, within the meaning of Article 15(c) of Directive 2011/95, in the very specific factual circumstances of the main proceedings, but is seeking clarification of the criteria governing the interpretation of that concept, by reason of the overly general nature of the initial interpretation. We are therefore dealing with a reference for a preliminary ruling seeking an interpretation of the interpretation provided by the Court in the judgment in *Elgafaji*.

38 ECtHR, 28 June 2011, *Sufi and Elmi v. United Kingdom* (CE:ECHR:2011:0628JUD000831907, § 241).

39 This requirement is frequently referred to by the European Court of Human Rights. In its judgment of 23 August 2016, *J.K. and Others v. Sweden* (CE:ECHR:2016:0823JUD005916612), it thus stated that 'in assessing the weight to be attached to country material, the Court has found in its case-law that consideration must be given to the source of such material, in particular its independence, reliability and objectivity. In respect of reports, the authority and reputation of the author, the seriousness of the investigations by means of which they were compiled, the consistency of their conclusions and their corroboration by other sources are all relevant considerations'.

59. In identifying those criteria, the European Court of Human Rights referred directly to a decision of the Asylum and Immigration Tribunal of the United Kingdom.[40] On this point, national courts and tribunals take a range of factors into account in assessing the degree of violence affecting the country or region concerned. On examination of the case-law of several Member States,[41] other factors taken into account are the number of civilians killed and injured in the relevant geographical areas, the extent of displacement resulting from the armed conflict, the methods and tactics of warfare employed and their consequences for civilians, human rights infringements, the capacity of the State or organisations controlling the territory in question to protect civilians and assistance provided by international organisations. The wide variety of the criteria considered by national authorities demonstrates that most take the comprehensive assessment approach to applications for subsidiary protection corresponding to the situation referred to in Article 15(c) of Directive 2011/95. This comprehensive, dynamic approach requires a cross-analysis of all the relevant data gathered by the national authorities. In other words, for the purposes of determining whether there is a serious and individual threat within the meaning of Article 15(c) of Directive 2011/95, the circumstances identified at the time of the application for subsidiary protection must not be taken in isolation but in conjunction with one another.

60. In conclusion, the final question arising is whether the clarification that can legitimately be expected of the Court, as regards the assessment of the requisite degree of violence, must take the form of interpretative guidance which is more explicit but still general in nature, or that of a list of concrete indicators of the intensity of the conflict, such as those mentioned in the present Opinion, which remains somewhat general in nature. While I am not certain that either of these possibilities would prevent further questions being referred for a preliminary ruling in relation to the concept of a 'real risk' of suffering serious harm within the meaning of Article 15(c) of Directive 2011/95, my preference is for the second approach, which is simply a matter of reiterating and supplementing indicators which have already been identified by the Court.[42] Clearly, the resulting list will not be exhaustive.

V. Conclusion

61. In the light of the foregoing considerations, I propose that the Court should answer the first and second questions referred for a preliminary ruling by the Verwaltungsgerichtshof Baden-Württemberg (Higher Administrative Court, Baden-Württemberg, Germany) as follows:

(1) Article 15(c), read in conjunction with Article 2(f), 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, must be interpreted as precluding a national practice whereby a finding of serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of armed conflict, within the meaning of that provision, can be made, in a case where that civilian is not specifically targeted by reason of factors particular to his or her circumstances, only if the ratio between the number of casualties in the area in question and the total number of individuals making up the population of that area reaches a fixed threshold.

40 Asylum and Immigration Tribunal, 25 November 2011, *AMM and Others*, UKUT 445.

41 An examination of the case-law in various Member States appears as an annex to the report entitled 'Article 15(c) Qualification Directive – a judicial analysis', produced by EASO (December 2014).

42 It is important to stress that these are indeed interpretative criteria which serve to guide the national courts and tribunals in assessing the factual circumstances of each case with a view to resolving the disputes brought before them.

(2) In order to verify the level of the degree of indiscriminate violence of the armed conflict, for the purposes of determining whether there is a real risk of serious harm within the meaning of Article 15(c) of Directive 2011/95, it is necessary to carry out a comprehensive assessment, both quantitative and qualitative in nature, of all relevant facts characterising that conflict, based on the collection of objective, reliable and up-to-date information including, in particular, the geographical scope of the situation of indiscriminate violence, the actual destination of the applicant in the event that he or she is returned to the relevant country or region, the intensity of the armed confrontations, the duration of the conflict, the level of organisation of the armed forces involved, the number of civilians killed, injured or displaced as a result of the fighting, and the nature of the methods or tactics of warfare employed by the parties to the conflict.