

THE EUROPEAN DEFINITION OF REFUGEE AND SUBSIDIARY PROTECTION STATUS

Presented by Boldizsár Nagy,
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QUALIFICATION DIRECTIVE, 2011 DECEMBER

**DIRECTIVE 2011/95/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
of 13 December 2011**

**on standards for the qualification of third-country nationals or stateless persons as
beneficiaries of international protection, for a uniform status for refugees or for persons
eligible for subsidiary protection, and for the content of the protection granted
(recast)**

Replaced

**EC 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 L 304/12 of 30.9.2004)**

Qualification directive

Purpose

- Guaranteeing (a minimum) of protection
- Closing the protection gap concerning persons not threatened with Geneva Convention type persecution
- Prevention of asylum shopping and abuse of the asylum system

Scope of application

- 25 Member states of the EU. The UK and Ireland who opted out (Denmark is not bound)
 - UK and Ireland participated in the earlier (2004) version and are bound by it

Minimum standards

- According to Art 3. states may introduce or retain more favourable standards. The directive represents the (bare) minimum

Major features of the QDs compared to earlier state practice and doctrine

- Introduction of „**subsidiary protection**” and identification of rights accompanying it.
- **Non-state actors** may qualify as persecutors in a Geneva Convention sense
- „**Protection**” is defined
- **Internal relocation alternative** is an exclusion ground.
- More emphasis on groups with **special needs**

Relationship to the 1951 Geneva Convention

CJEU, Grand Chamber Judgment in the Bundesrepublik Deutschland v Y (C-71/11), Z (C-99/11) cases (the Ahmadi case)

Para 47: „the **Geneva Convention** constitutes the **cornerstone of the international legal regime** for the protection of refugees and ... the provisions of **the Directive** ... were adopted **to guide** the competent authorities of the Member States **in the application of that convention** on the basis of common concepts and criteria

Para 48 „**The Directive must**, for that reason, **be interpreted** in the light of its general scheme and purpose, and in a manner **consistent with the Geneva Convention** and **the other relevant treaties** referred to in Article 78(1) TFEU. As is apparent from recital 10 in the preamble thereto, the Directive must also be interpreted in a manner consistent with the rights recognised by the **Charter**”.

Qualification directive (cont'd)

2 § Definitions:

Application = seeking refugee **or** subsidiary protection status

Refugee = GC definition applied to third country nationals

„‘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 ...”

+ to whom exclusion grounds do not apply

Person eligible for subsidiary protection

See next slide

Qualification directive (cont'd)

Art 2 (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) do not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country”

Qualification directive (cont'd)

Article 15: Serious harm

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.

Conceptual scheme

International protection

Refugee status

Added
by the
recast

Subsidiary protection status

means the recognition of a third country national or stateless person
(Not EU citizen!)

As a „refugee“

as a „person eligible
for subsidiary protection“

Qualification directive

Definitions: **Family** (in so far as it already existed in the country of origin)

Spouse

+ **unmarried partner**, if stable relationship + territorial states recognizes such partnerships

Children (of the couple or of one of them):

unmarried minor child

Recast no longer „dependent“

Father, mother or another adult responsible for the unmarried, minor beneficiary of international protection

Added by
the recast

Qualification directive

Major themes

Convention refugee status

Well founded fear

Evidence, credibility, sur place,
manufactured cases

Persecution

Actors, protection,
Internal relocation alternative,
Acts of persecution

The five grounds (reasons)

Cessation, exclusion

Procedure, including revocation of status

Subsidiary protection

Real risk

Serious harm

Cessation, exclusion

Procedure, including
revocation of status

Content of protection

Non refoulement, information,
family unity, residence permits, travel document, employment,
education, social welfare, health care, unaccompanied minors,
accommodation, freedom of movement, integration, repatriation

Qualification directive

➤ Well founded fear

= Assessment of applications for international protection
(Chapter II) = objective theory

- **burden of proof: shared** between applicant and assessing state;
- **assessment: individual**, based on the statement of the applicant + his documents
- country of origin: **law and reality** should be assessed
- opening for subjectivization (4§ (3. (c)) (Taking into account the „**individual position and personal circumstances**” of the applicant ...to assess whether the acts to which (s)he could be exposed amount to persecution or serious harm)
- **Past persecution /serious harm** = serious indication of well-founded fear unless „good reasons to consider” that they „will not be repeated”.
- Credibility issues - see next slide

Qualification directive Well-founded fear (cont'd)

Credibility /benefit of doubt

„where aspects of the applicant’s statements are not supported by... evidence” these need no confirmation if:

- applicant made **genuine effort** to substantiate
- **submitted relevant** evidence and **explained the lack** of others
- the statement is **coherent and plausible** and does not contradict available information
- the a.s. has **applied „at the earliest possible time” unless** good reason for not having done so
- „the **general credibility** of the applicant has been established” (4§ 5. (e))

CJEU C-148/13, *A., B., C.*,
Netherlands – how *not* to
prove homosexuality

Qualification directive

Well-founded fear (cont'd)

Sur place refugees and manufactured cases

- Genuine sur place = changes at home
- „sincere” sur place = activities abroad which „constitute the expression and continuation of convictions or orientations held in the country of origin” (5 § 2.)
- Manufactured case:
 - Subsequent application
 - based on circumstances the asylum seeker has created by his own decision → may be denied refugee status

QUALIFICATION DIRECTIVE PERSECUTION (CONT'D)

Persecutor / serious harm doer	Protector
<p>the State;</p> <p>parties or organisations controlling the State or a substantial part of the territory of the State;</p> <p>non-State actors, if the state or other agents are unable or unwilling to provide protection</p>	<p>the State; or</p> <p>parties or organisations, including international organisations, controlling the State or a substantial part of the territory of the State.</p> <p>Protection means at least that</p> <ul style="list-style-type: none">- an effective legal system for the detection, prosecution and punishment of persecution or serious harm is operated- the applicant has access to such protection. <hr/> <p>Protection must be effective and non-temporary and can only be provided by the above mentioned actors if they are willing and able to enforce the rule of law.</p>

Added by the recast

Qualification directive Persecution (cont'd)

Internal relocation alternative (8§)

- Optional! (MS „may” determine)
- In a **part of the country** of origin
 - there is **no well-founded fear** of being persecuted / **no real risk** of suffering serious harm
 - The applicant **has** (actual) **access** to protection
- the applicant can **„safely and legally” travel there and gain admittance** and **„reasonably be expected to settle** in that part of the country”
- „Have regard” to – general circumstances + personal circumstances of the applicant
- Authorities must have up-to-date info

Added by the recast incorporating the Salah Sheek judgment of the ECtHR, 2007

Added by
the recast

Qualification directive Persecution (cont'd)

Acts of persecution

(a) [„must be”] sufficiently **serious**

by their nature or repetition

as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms;

or

(b) be an **accumulation** of various measures,

including violations of human rights which is

sufficiently severe as to affect an individual in a similar manner as mentioned in (a).

Acts: violence (physical, mental, sexual), discriminatory measures and punishment, **prosecution for denial of military service in a conflict entailing crimes or acts justifying exclusion, gender specific or child-specific acts**

Nexus (for reasons of) need not be with persecution

It **may be with absence of protection.**

Added by
the recast

Qualification directive

The reasons for persecution

Immaterial whether applicant possesses the characteristic or only the persecutor attributes to her/him.

Race: includes colour, descent, or membership of a particular ethnic group;

Religion: theistic, non-theistic and atheistic beliefs, the participation in, or abstention from, formal worship in private or in public

Nationality: citizenship or lack thereof + membership of a group determined by its cultural, ethnic, or linguistic identity, common geographical or political origins or its relationship with the population of another State;

Political opinion: opinion, thought or belief on a matter related to the potential actors of persecution and to their policies or methods, whether or not reflected in acts of the applicant.

Particular social group:

members of that group share an **innate characteristic, or a common background that cannot be changed**, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it,

and

that group has a distinct identity in the relevant country, because it is **perceived as being different** by the surrounding society.

X, Y and Z v Minister voor Immigratie en Asiel CJEU, C-199/12, C-200/12, C-201/12, Judgment of 7 November 2013

Facts: three men, all claim refugee status (between 2009 and 2011) for being persecuted for **homosexuality in Sierra Leone, Uganda and Senegal**. In each country homosexuality is a crime
Their **homosexuality and credibility not in dispute** in front of the Raad van Staade

Preliminary questions addressed to CJEU:

1. Do persons with a homosexual orientation form a **particular social group**?

If they do:

2. **Which homosexual activities fall within the scope of the Directive** and (in case of persecution) can that lead to of refugee status? Subquestions:

X, Y and Z v Minister voor Immigratie en Asiel CJEU, C-199/12, C-200/12, C-201/12, Judgment of 7 November 2013

(a) Can homosexuals be expected to conceal their orientation from everyone in their [respective] country of origin in order to avoid persecution?

(b) If not, can they be expected to exercise restraint, and if so, to what extent, when giving expression to that orientation in their country of origin, in order to avoid persecution? Moreover, can greater restraint be expected of homosexuals than of heterosexuals?

(c) If a distinction can be made between forms of expression which relate to the core area of the orientation and forms of expression which do not, what should be understood to constitute the core area of the orientation and in what way can it be determined?

3. Do the criminalisation of homosexual activities and the threat of imprisonment in relation thereto, constitute an act of persecution? If not, under what circumstances would that be the case?'

X, Y and Z v Minister voor Immigratie en Asiel, 2013

CJEU

- Interpretation of the QD should be **in conformity with G51** and with **the Charter** of F.R.
- Well founded fear of „**personally**” being subject to **persecution** (§ 43)
- Ad Q 1 (**Do homosexuals constitute a p.s.g.?**) **Yes!**
 - Homosexuality: **protected characteristics**, not to be renounced as it is „**fundamental to ... identity**” (§ 46)
 - **Criminal punishment** makes them **perceived as a separate group**
- Ad Q 3 (!) (Is criminalisation persecution?)
 - Persecution = serious interference with human right
 - Homosexual acts = family and private life = **may be subject to derogation**
 - **Mere criminalisation** does **not violate** QD, but
 - Long term imprisonment may be „**disproportionate or discriminatory**” (58)
 - If such, it must be shown that **applied in practice**

Yes!

- **If actually applied**
- **So severe as to be discriminatory or disproportionate**

X, Y and Z v Minister voor Immigratie en Asiel, 2013

- Ad Q 2: (Should homosexuality be concealed or restraint exercised if no persecution before departure occurred? What is core area?)

No concealment or restraint may be required!

- „sexual orientation can **not** be understood **to include** acts considered to be **criminal** in accordance with national **law of the Member States**”
(*Universalist – relativist debate! - BN*)
- No *a contrario* argument: „in public” mentioned in connection with religion but not with sexual orientation
- If a person can not be expected to renounce homosexuality then he **can not be required to conceal** it as that would be **„incompatible” with the non-renunciation entitlement**
- Assessment of risk of persecution is independent from restraint i.e. abstention from certain behaviour.
- No need to answer what is core. **Anything should be allowed what is not prohibited in the EU Member States.**

Bundesrepublik Deutschland v Y (C-71/11), Z (C-99/11) – the Ahmadi (religion) case –Grand Chamber judgment of 5 September 2012

Facts: Y and Z Pakistani nationals members of the Muslim Ahmadiyya community. Arrive in Germany in 2004 and 2003

Claimed persecution:

Y: beaten up in his village by non-state actors, stones thrown at place of prayer, death threats (and threat of reporting to the police) Z: mistreatment and imprisonment for his religious beliefs

+ Pakistani Criminal Code criminalises if Ahmadi people claim to be Muslim, describe their faith as Islam, preach or propagate their faith or invite others to accept it. Defiling the name of Prophet Mohamed entails serious punishment, even death penalty.

Issues:

1. Is **any interference** with religious practices persecution?
2. Can „**core areas**” and „**external aspects**” of religious freedom be **separated** (and only give protection to the core areas)?
3. Are the **nature of the repression inflicted** on the individual and its consequences determinative of persecution?
4. **Should persons abstain** from religious practices in public in order to avoid persecution?

Court's answers

1. No
2. No
3. Yes
4. No

Qualification directive

Cessation, exclusion

Cessation

Usual GC grounds (re-availment of protection, re-acquiring nationality, acquiring new nationality, re-establishment in country of origin, circumstances justifying ref. status cease to exist)

The change of circumstances must be of such a **significant and non-temporary nature** that the refugee's fear of persecution can no longer be regarded as well-founded.

Questions:

Durability

Justified grounds to resist return solely for memories of past persecution

Exception to ceased circumstances if „a refugee who is able to invoke **compelling reasons arising out of previous persecution for refusing to avail** himself of the protection of the country of nationality”

Added by
the recast

Shepherd case C-472/13, Judgment of 26 February 2015

Shepherd – US soldier (Volunteely enlisted for military service). After one term of serving in **Iraq** he **deserts the US army** and applies for refugee status in Germany.

Claims that **US is likely to commit war crimes** in Iraq, so he is entitled to ref. status under **article 9 (2) of the QD** („prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling under the exclusion clauses” constitutes persecution.

He also claims that punishment for desertion is disproportionately severe, and therefore constitutes persecution

Judgment:

If indeed the commission of war crimes was **highly likely**, in an **existing**, concrete **conflict**, **any personnel** (even logistical) is entitled to ref status „if it is reasonably likely that, by the performance of his tasks, he would provide **indispensable support** to the preparation or execution of those crimes.”

Shepherd case C-472/13, Judgment of 26 February 2015

If the armed intervention is based on a resolution adopted by that **Security Council** or on „a consensus on the part of the international community” that „offers, in principle, every guarantee that no war crimes will be committed”. Also **if a state condemns and punishes war crimes**, it is unlikely that it forces its forces to commit such acts. → Burden of proof shifts to the applicant

The refusal of service must be the only means to avoid committing the prohibited acts. (If voluntary enlisted that may not be the case).

If a procedure for **obtaining conscientious objector status** exists, it excludes any protection under Article 9(2)(e)

If there was no right to refuse service then the next question relates to the consequences of unjustified refusal of service.

Do the imposition of a **prison sentence, dishonourable discharge** from the army, and the **ostracism and disadvantages** associated therewith **constitute** acts of **persecution**?

State have A legitimate right to maintain an armed force. Inprisonment for a maximum of **5 years is not disproportional**.

Ostracism is the consequence of the legitimate prosecution – therefore it is not persecution

Qualification directive

Cessation, exclusion

GC grounds:

- protection by other UN organ (UNRWA)
- enjoying rights equivalent to those of nationals
- crime against peace, war crime, crime against humanity
- a serious non-political crime outside the country of refuge **prior to the issuing of residence permit** based on refugee status; **particularly cruel actions**, - even if committed with political objective - may be classified as serious non-political crimes;
- Acts contrary to the purposes and principles of the UN

Exclusion ≠ return: non refoulement may apply!

Qualification directive

Procedure, including revocation of refugee status

MS **must** „grant” (i.e.: recognise) refugee status to those who qualify! (13 §)

MS **must** „revoke, end or refuse to renew” refugee status if **cessation grounds** apply or „he or she **should have been or is excluded** from being a refugee” (14 § 3. (a)) or his or her **misrepresentation or omission of facts**, including the use of false documents, were decisive for the granting of refugee status.

MS **may** „revoke, end or refuse to renew” status **when GC exceptions to non-refoulement** (33§ (2)) apply, i.e. national security or danger to the community

Burden of proof:

cessation: MS „demonstrate” on an individual basis

Exclusion: „establish”

Confusion of cessation, cancellation and revocation

Cessation – normal end of status – changed circumstances

Cancellation – should not have been recognized

Revocation – after recognition engages in 1 F (a) and (c) activities

Ending status = in fact ending asylum, not refugee quality in the Geneva 33(2) cases

**CJEU - C-57/09 and C-101/09 Bundesrepublik
Deutschland v B and D – Grand Chamber judgment of 9
November 2010**

Facts: Kurdish former PKK members, threatened with persecution upon return.

Can they be excluded for non-political crimes or acts contrary to UN principles

Is it a precondition of the exclusion that they present a danger to the host society?

Should the threat of persecution be measured to the acts committed (Proportionality test)

CJEU - C-57/09 and C-101/09 Bundesrepublik Deutschland v B and D – Grand Chamber judgment of 9 November 2010

Judgment

1. Article 12(2)(b) and (c) of QD must be interpreted as meaning that:
 - the fact that a person has been a member of an organisation which, because of its involvement in terrorist acts, is on the list forming the Annex to Common Position 2001/931/CFSP on the application of specific measures to combat terrorism and that that person has actively supported the armed struggle waged by that organisation does not automatically constitute a serious reason for considering that that person has committed ‘a serious non-political crime’ or ‘acts contrary to the purposes and principles of the United Nations’;
 - the finding, in such a context, that there are serious reasons for considering that a person has committed such a crime or has been guilty of such acts is conditional on an assessment on a case-by-case basis of the specific facts, with a view to determining whether the acts committed by the organisation concerned meet the conditions laid down in those provisions and whether individual responsibility for carrying out those acts can be attributed to the person concerned, regard being had to the standard of proof required under Article 12(2) of the directive.
2. Exclusion is not conditional on the person concerned representing a present danger to the host Member State.
3. The exclusion is not conditional on an assessment of proportionality in relation to the particular case.
4. A Member States may grant a right of asylum under their national law to a person who is excluded from refugee status pursuant to Article 12(2) of the directive, provided that that other kind of protection does not entail a risk of confusion with refugee status within the meaning of the directive.

SUBSIDIARY PROTECTION

Qualification directive Subsidiary protection

See definition (2§ and 15§) above

(death penalty, execution; torture, inhuman, degrading treatment, punishment; serious individual threat to life or person by reason of indiscriminate violence in armed conflict)

Applies to anyone, not only to those who are threatened with the harm for the five grounds

Should **not be used to replace** GC ref. status

Individual threat in generalized violence?

See **Elgafaji judgment**, Case C-465/07, judgment of 17 February 2009

What about non armed conflict situations?

Issues raised

The moral dilemma – **is subsidiary protection of less moral value?**

Complementary or subsidiary

Preamble (24) :

„Subsidiary protection should be complementary and additional to the refugee protection enshrined in the Geneva Convention”

Is subsidiary protection of a lesser standing, do beneficiaries deserve less rights/protection?

Qualification Directive (QD) (Original: yes, Recast: not really) Jane Mc Adam, UNHCR: no

The moral dilemma – what is the basis of subsidiary protection?

Compassion

Differentiation between Convention status and complementary protection is conceivable

State discretion in granting or withholding it

Integrity, dignity and human rights of the human being

Differentiation is unjustified

The state only recognises the necessity of protection

"There is no legal justification for differentiating between convention refugees and the status of beneficiaries of complementary protection,"

(McAdam, 2007, p.1.)

The Elgafaji case – C-465/07 ECJ – Judgment, 17 February 2009

The case:

Case C-465/07, Reference for a preliminary ruling under Articles 68 EC and 234 EC from the Raad van State (Netherlands), in the proceedings **Meki Elgafaji, Noor Elgafaji v Staatssecretaris van Justitie** . The Grand Chamber deciding, Netherlands and seven other MS (+ the Commission) making observations

Importance: clarifying what „individual” means in 15 § c; settling the relationship among a, b, and c by stating that c goes beyond a and b.

Facts:

Mr Elgafaji, is a Shiite Muslim his wife is Sunni. He had worked from August 2004 until September 2006 for a British firm providing security for personnel transport between the airport and the ‘green’ zone. His uncle, employed by the same firm, had been killed by a terrorist act of the militia.

Claimants’ reasons for believing that there was a serious and individual threat

- The killing of the uncle
- A short time later, a letter threatening ‘death to collaborators’ fixed to the door of their residence

The Elgafaji case - Judgment, 17 February 2009

The question: do Article 15 § b and 15 § c require the same level of individualisation?

Dutch first level decision: yes; second level: no → Raad van State (Council of State) request to ECJ for preliminary ruling:

1. Does Article 15(c), in comparison with Article 3 of the [ECHR], offer **supplementary or other** protection?
2. If the answer is affirmative, **when** does a person run „**a real risk of serious and individual threat** by reason of indiscriminate violence”

The Elgafaji case - Judgment, 17 February 2009

ECJ: Article 15 b corresponds to Art 3 of the ECHR,
however

Article 15 c differs from it and needs to be interpreted
independently (28. §)

§ 15 b (and 15 a)

„cover situations in which the applicant for subsidiary protection is specifically exposed to the risk of a particular type of harm.“

but

See. NA v. UK, ECtHR, judgment of 17 July 2008, § 116
(stating that in exceptional cases no individualisation is
needed)

The Elgafaji case - Judgment, 17 February 2009

„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” (33. §)

It does not refer to specific acts of violence, but to the **threat** of the applicant’s life and person.

That threat is **triggered by violence**, which is indiscriminate (34. §)

Indiscriminate: it extends to the person **„irrespective of her/his personal circumstances”** (34 §)

The Elgafaji case - Judgment, 17 February 2009

The key sentence

...[T]he 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 ... **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

Epilogue to Elgafaji

On 25 May 2009, the Dutch Council of State, the Netherland's highest administrative court, gave an important judgment applying the recent European Court of Justice's interpretation of the Qualification directive.

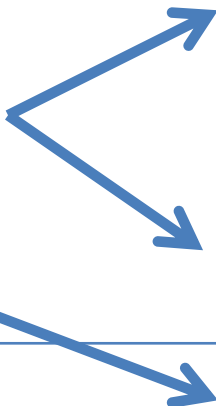
....

The Dutch Council of State, taking into account the above ECJ interpretation, denied the request of the Elgafaji couple to remain in the Netherlands on the ground that there is no exceptional situation taking place in Iraq whereby any civilian is at risk through random acts of violence.

(Source: ECRE Weekly Bulletin, xxx 2009)

The logic behind the different provisions of Article 15 and the preamble of the QD

Provision	Level of individualisation
<p>Preamble</p> <p>Para 24. Subsidiary protection should be complementary and additional to the refugee protection enshrined in the Geneva Convention.</p>	<p>Article 15.</p> <p>Serious harm consists of</p>
<p>Para 25. The criteria should be drawn from international obligations under human rights instruments and existing practices in Member States.</p>	<p>(a) death penalty or execution;</p> <p>(b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin;</p> <p>„the applicant for subsidiary protection is specifically exposed to the risk of a particular type of harm.” (Elgafaji, § 32.)</p>
<p>Para 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</p>	<p>(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.</p> <p>Not specifically targeted by reason of factors particular to the personal circumstances— a mere presence on the territory entails a threat to life and person of civilians irrespective of their identity (Elgafaji, 35 és 43.pont)</p>



(b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin;



Problems related to Article 15

Problem	Possible answer	Example
<p>Multiplication of contingencies: real risk of suffering serious harm; serious harm = serious and individual threat. Art 2 and 15 read together (real risk of → a serious threat)</p>	<p>QD and AH v SSHD: No double contingencies “Risk” in article 2(e) overlaps with “threat” in article 15(c)</p> <p>The latter reiterates but does not qualify or dilute the former.</p>	<p>the placing of car bombs in market places; snipers firing methodically at people in the streets (QD and AH v. SSHD, § 27.)</p>
<p>Contradiction: Indiscriminate violence -- individual threat</p>	<p>Elgafaji: the existence of such a threat can exceptionally be considered to be established where the degree of indiscriminate violence reaches such a high level ...that a civilian, 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. See also NA v. United Kingdom, ECtHR Case No. 25904/07 § 115.</p>	
<p>Armed conflict – what does it mean? = two or more warring factions or = one actor using armed violence</p>	<p>Czech Administrative High Court: Geneva II. protocol + „Tadic”</p> <p style="text-align: center;">↓</p> <p>QD and AH v SSHD, Diakité (CJEU): Not humanitarian law. Independent meaning</p>	

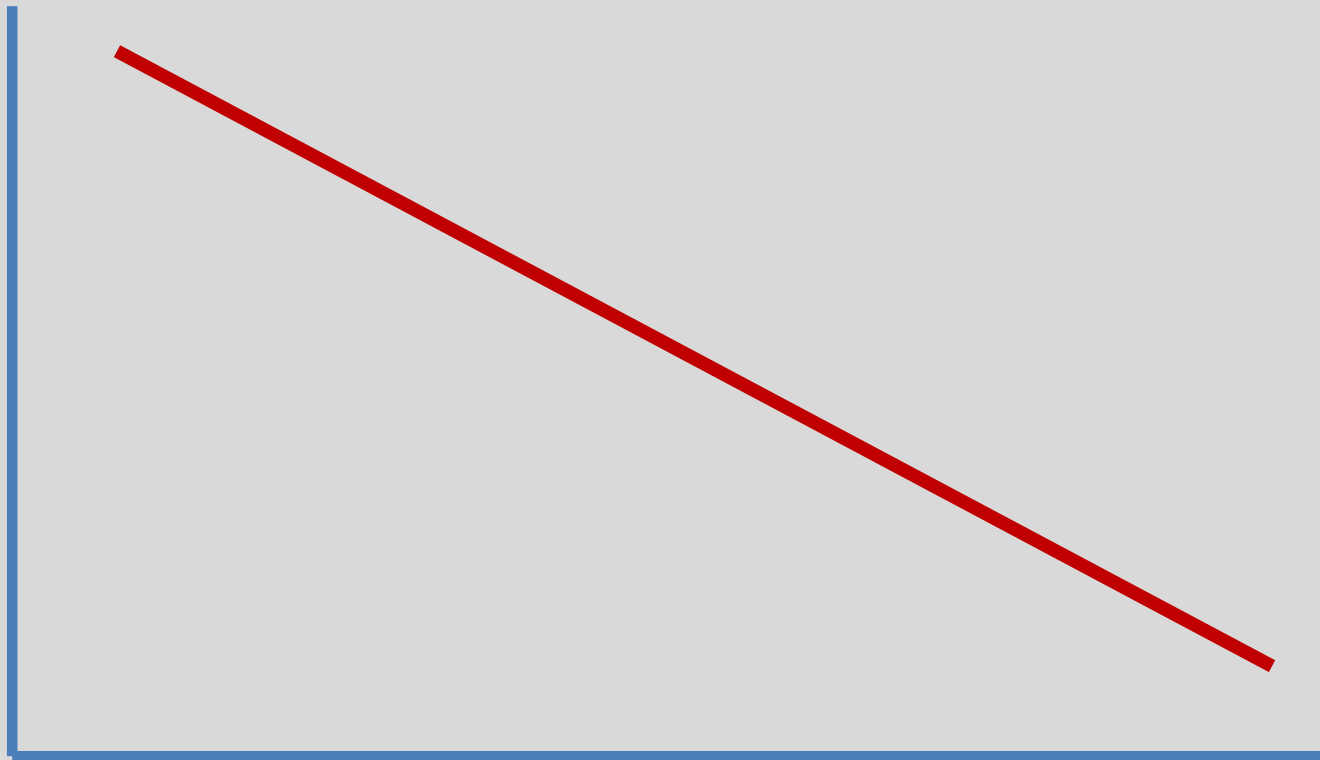
The measure of individualisation and the level of violence

Elgafaji, para 39.

Individualisation

High

Low



The level of indiscriminate violence

Low

High

Interpretation of the term „armed conflict”

Humanitarian law

Geneva II. protocol, Art. 1.
(1)

- Between forces of the state and „dissident armed forces” or other organised armed groups
- Under responsible command
- Control over at least part of the country
- Sustained and concerted military operations



Geneva II. protocol, Art. 1. (2)

shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts

Tadić criteria

- The existence of organised armed groups
- Protracted armed conflict



Wider meaning

„[T]he phrase ‘situations of international or internal armed conflict’ in article 15(c) has an autonomous meaning broad enough to capture any situation of indiscriminate violence, whether caused by one or more armed factions or by a state, which reaches the level described by the ECJ in *Elgafaji*.”

QD and AH v SSHD, § 35

On the notion of internal armed conflict: key question is it the same as in international humanitarian law the notion of armed conflict not of an international character.

Answer: no. It has an independent meaning derived from the directive's context.

„ On a proper construction of Art. 15(c) and the content of the protection granted, it must be acknowledged that an internal armed conflict exists, for the purposes of applying that provision, if a State's armed forces confront one or more armed groups or if two or more armed groups confront each other.

It is not necessary for that conflict to be categorised as 'armed conflict not of an international character' under international humanitarian law; nor is it necessary to carry out, in addition to an appraisal of the level of violence present in the territory concerned, a separate assessment of the intensity of the armed confrontations, the level of organisation of the armed forces involved or the duration of the conflict.”

Summary

Arguments against the requirement of singling out or high level of individualisation

Refugee Convention and QD § 15 (b) and (c)

RC: Persecution of the group (a violation of basic /human/ rights) and membership in the group should amount to persecution

Hathaway

QD 15 § (b) = ECHR Art 3. torture, inhuman or degrading treatment or punishment: In exceptional cases membership in a group suffering such treatment establishes protection need (prohibition of refoulement) if requiring individual distinguishing factors would render the protection illusory. (NA v UK, ECtHR and approvingly QD and AH v SSHD, Court of Appeal judgment)

15 c: Serious and individual threat is present if the level of indiscriminate violence is so high, that the life or person of a human being is at real risk solely because of being present on the territory. (Elgafaji and QD and AH v SSHD, Court of Appeal judgment)

Summary

The wider meaning of the term „armed conflict”

Subsidiary protection does not require that in the whole or material part of the country of origin an armed conflict – as understood in international humanitarian law - take place. There is not even a requirement that two or more parties in conflict be identifiable. One actor (the state or a faction challenging it) may alone create the situation amounting to armed conflict. (AH v SSHD, Court of Appeal judgment, Diakité, CJEU)

The term „armed conflict” in Article 15 is to be interpreted as to mean indiscriminate violence caused by one or more armed parties where the level of violence reaches the intensity identified in Elgafaji. (ibid)

Qualification directive

Subsidiary protection: procedure, including revocation of status

MS **must** „grant” (i.e.: recognize) subsidiary protection status to those who qualify! (18 §)

Cessation: A person shall cease to be eligible for subsidiary protection when the **circumstances** which led recognition **have ceased to exist** or **have changed to such a degree** that protection is no longer required.

the change must be **significant and of a non-temporary nature**, therefore the person no longer faces a **real risk of serious harm**.

If **compelling reasons** to refuse protection, **arising out of previous harm**

Added by
the recast

Qualification directive: Subsidiary protection: procedure, including revocation of status (Cont'd)

Exclusion

A person „**is excluded** from being eligible for s.p. if there are serious reasons for considering that:”

- (a) he or she has committed a crime against peace, a war crime, or a crime against humanity,
- (b) he or she **has committed a serious crime**;
- (c) he or she has been guilty of acts contrary to the purposes and principles of the United Nations
- (d) he or she **constitutes a danger to the community or to the security of the Member State** in which he or she is present.

Member States **may** exclude a person from being eligible for subsidiary protection, if prior to admission the person has committed **one or more (non-serious) crime**, punishable by imprisonment in the Member State concerned, **and** if the person **left** his or her country of origin **solely in order to avoid sanctions resulting from these crimes**.

Qualification directive: Subsidiary protection: procedure, including revocation of status (Cont'd)

Compulsory

Optional

revocation

Cessation clauses

- Fleeing prosecution

Exclusion clauses:

for smaller crime

Peace, war, humanity

serious common crime

UN principles,

Misrepresentation

of decisive facts

Proof: **MS must „demonstrate” „on an individual basis” that revocation, ending or non-renewal is applicable**

**SUBSTANTIVE RIGHTS OF THE
INTERNATIONALLY PROTECTED**

Qualification directive: substantive rights

Without prejudice to GC

Same rights to refugees and beneficiaries of subsid. prot - **unless otherwise** indicated!

Specific attention to **vulnerable groups** + best interest of the child

21 § **confirms non-refoulement** both for asylum seekers and recognized refugees

Qualification directive: substantive rights

Recast removed
difference b/w
family members of
refugees and of b. of
s.p.

MS **shall** ensure **family unity** (23 §)

(definition – see there, unity and benefits according to national law)

national security or public order: grounds for refusal, reduction or withdrawal of benefits from fam. members

MS **may** extend to other close relatives, who lived together and were dependent on the beneficiary of ref or subsid prot status before his/her departure

Residence permits: min **3** years for refugees **1** year for subsid. prot. On renewal: 2 years for b. of s.p.

Travel document: refugees: as in GC, subsid. prot: „document” which enables travel outside MS territory

Recast extended travel doc rights of b. of s.p.

Qualification directive: substantive rights

Employment, self employment, vocational (further) training:

Refugees: subject to rules applicable to the profession

Subsidiary protection beneficiaries: the same

Recast removed difference.

Earlier: B.of S.P.

- examination of the labour market situation
- limited period access
- vocational training: state's discretion

Education: Minors: full access; adults: as third country nationals.

- MS must facilitate (by grants and loans) access to **employment related education and training**
- Access to procedures for **recognition of qualifications** of those, who do not have documents to prove it

Compulsorily
extended to
b. of s.p.

Added by
the
recast

Qualification directive: substantive rights

Social welfare and health care:

national treatment, but for subsid. prot. beneficiaries MS may limit to core benefits

Accommodation:

As legally resident third country nationals

Added by the recast

Allowing „national practice of dispersal”

Freedom of movement: As legally resident third country nationals

Integration: MS must create integration programmes. Access may be dependent on pre-conditions

Recast removed difference b/wween refugees and of b. of s.p.

Repatriation: MS **may** provide assistance to voluntary return.

Unaccompanied minors: 31 § details the protection of their special interests

Recast reinforced family tracing duty (not enough „to endeavour”)

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Thanks!

Boldizsár Nagy

Central European University and Eötvös Loránd University
Budapest

nagyb@ceu.hu

www.nagyboldizsar.hu