

A short course on EU asylum law. II.

THE QUALIFICATION DIRECTIVE

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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)**

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

No longer mentioned

Major features of the first QD 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
- Internal flight alternative is an exclusion ground.
- The directive not only offers detailed definition (as the common position of 1996), but also identifies the rights of the protected persons.

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

new

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

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)

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 all** available evidence and **explained the lack** of others
- the statement is **coherent and plausible** and does not contradict available information
- the a. 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))

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 a. has created by his own decision → may be denied refugee status

QUALIFICATION DIRECTIVE PERSECUTION (CONT'D)

Persecutor / serious harm doer

- the State;
- parties or organisations controlling the State or a substantial part of the territory of the State;
- **non-State actors**, if the state or other agents are **unable** or unwilling to provide protection

Protector

- the State; or
 - parties or organisations, **including international organisations**, controlling the State or a substantial part of the territory of the State.
 - Protection means at least that
 - an effective legal system for the detection, prosecution and punishment of persecution or serious harm is operated
 - the applicant has access to such protection.
-
- 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**.

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 stay** in that part of the country”
- „Have regard” to – general circumstances + personal circumstances of the applicant
- Authorities must have up-to-date info

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.

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;

See: 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

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”

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”

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

QUALIFICATION DIRECTIVE

SUBSIDIARY PROTECTION

See **definition (2§ and 15§)** above

(death penalty, execution; torture, inhuman, degrading treatment, punishment; serious indiv. 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** Geneva Convention refugee status

Individual threat in generalized violence?

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

What about non armed conflict situations?

Important cases: „*Elgafaji*”, CJEU, „*AH and QD v SSHD*” Court of Appeal, UK, „*Abdullah and others*”, CJEU, „*Diakite*”, CJEU

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

1. Does Article 15(c), in comparison with Article 3 of the [ECHR], offer **supplementary or other** protection?

Court: Yes

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

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 §)

„...[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 ..., would, **solely on account of his presence on the territory ...**, face a real risk of being subject to the serious threat referred in Article 15(c) of the Directive” (115 §)

THE MEASURE OF INDIVIDUALISATION AND THE LEVEL OF VIOLENCE
ELGAFAJI, PARA 39.

Individualisation

High

Low

The level of indiscriminate violence

Low

High



CJEU C-285/12, *DIAKITE*, [30 JAN. 2014]

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."

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**

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**

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

In „manufactured cases” (refugee and subs. prot.) MS „may reduce the benefits”

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

QUALIFICATION DIRECTIVE: SUBSTANTIVE RIGHTS

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.

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

QUALIFICATION DIRECTIVE: SUBSTANTIVE RIGHTS

Employment, self employment, vocational (further) training:

Refugees: subject to rules applicable to the profession

Subsidiary protection beneficiaries: the same

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

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

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

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

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

Entry into force: **10 January 2012**

Transition: by **21 December 2013.**

MAJOR INNOVATIONS OF THE DRAFT PRESENTED IN 2016

1. Regulation – not a directive
2. More harmonisation

Stricter rules

- a. Submission of claim
- b. Manufactured cases
- c. Internal protection alternative
- d. Withdrawal in case of security threat

Jurisprudence incorporated

No expectation to be discreet or abstain from practices

3. Enhanced role of the European Asylum Agency (former EASO) in providing country of origin information (existence of protection, internal relocation, cessation)
4. Ambition to end status – review of status (with a view to termination) when the EAA country of origin info suggest or when otherwise renewal of the residence permit is due for the first time (refugees) first and second time (subsidiarily protected)

MAJOR INNOVATIONS OF THE DRAFT PRESENTED IN 2016

5. Deter from secondary movement. New Article 29 No right to reside in another MS unless formally permitted. Take back under Dublin applies. 5 years for Long term residency restarts
6. Further harmonisation of rights (mixed bag, tougher on residence permits, freedom of movement, social assistance more permissive or clearer on family unity, employment rights, social security).
7. Integration measures more explicit – participation may be made compulsory.

THANKS!

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