Subsidiary protection

Interpretation of Art 15 of the Qualification directive, the Elgafaji and more recent cases.

Presentation by Boldizsár Nagy at the 4th Cuenca Collquium, 1 October 2009.

Issues raised

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

Recent cases: „Elgafaji”, ECJ, „AH és QD v SSHD” Court of Appeal, UK, „Abdullah and others”, ECJ.

Interpretations of § 15

- is there a difference between a,b and c
- the necessary individualisation
- armed conflict

Conclusions

Use of terms and the mo,al dilemma – is subsidiary protection of a lesser standing?

Complementary – 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) ⟷ Jane Mc Adam, UNHCR: no

Hungarian Office of Immigration

And Nationality: Yes

J.F. Durieux:

Non Convention refugee = complementary,

Excluded Convention refugee (1 F, 33 (2) = subsidiary

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

Compassion	Integrity, dignity and human rights of the human being
• Differentiation between Convention status and complementary protection is conceivable • State discretion in granting or withholding it	• 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 terrosrist 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

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)

QD (IRAQ) és AH (IRAQ v. SSHD

The case: QD (IRAQ) Appellant and SECRETARY OF STATE FOR THE HOME DEPARTMENT (Respondent) and AH (IRAQ) Appellant and SECRETARY OF STATE FOR THE HOME DEPARTMENT (Respondent)
Court of Appeal judgment, 24 June 2009. [2009] EWCA Civ 620 Case No: 1. C5/2008/1706 & No. 2. C5/2009/0251

Importance: rejects the *KH (Article 15(c) Qualification Directive) Iraq CG [2008] UKAIT* 00023 doctrine, according to which Article 15 c „is limited [to]… those who can show that as civilians they face on return a real risk of suffering certain types of serious violations of IHL caused by indiscriminate violence."

+ states that in interpreting „individual" threat Elgafaji sets the standard

+ rules that , „armed conflict" has to be interpreted in extended fashion: there is no need to have to armed factions one is enough.

Facts: QD comes from Samarra in the Salah Al-Din governorate of Iraq. Under the Saddam regime he was a Ba'ath Party member, and his expressed fear is of reprisals.

AH, who has just turned 18, comes from Baquba in Iraq. He had moved with his family to Kifri in the Diyala governorate.

Past harm and feared harm:

QD's fear is of reprisals for his past party membership, AH fears the general violence

QD (IRAQ) és AH (IRAQ v. SSHD

Rules applicable to armed confict are not governing

as their purpose is not the grant of refuge to people who flee armed conflict. A limitation to the victims would result in a too narrow interpretation of the QD, which goes far wider in its purposes than states of armed conflict

→ „the Directive has to stand on its own legs and to be treated, so far as it does not expressly or manifestly adopt extraneous sources of law, as autonomous." (§ 18)"

This error led the UKAIT it led to construe "indiscriminate violence" and "life or person" too narrowly, to construe "individual" too broadly, and to set the threshold of risk too high. (18 §)

(Article 17§ (1) /exclusion gorunds/ serves as an example of QD really incorporating extraneous sources of law)

QD (IRAQ) és AH (IRAQ v. SSHD

Individual threat

The Court of Appeal literally quotes and approves §§ 31-40 and 43 § of the Elgafaji judgment.

Meaning of „armed conflict” (beyond international humanitarian law)

„ If the overriding purpose of article 15(c) is to give temporary refuge to people whose safety is placed in serious jeopardy by indiscriminate violence, it cannot matter whether the source of the violence is two or more warring factions (which is what ‘conflict’ would ordinarily suggest) or a single entity or faction.” (§ 34)

JOINED CASES C-175/08, C-176/08, C-178/08 AND C-179/08 SALAHADIN ABDULLA AND OTHERS
Advocate General Mazák's Opinion of 15 September 2009

The case: C-175/08 Aydin Salahadin Abdulla v Bundesrepublik Deutschland; C-176/08 Kamil Hasan v Bundesrepublik Deutschland; C-178/08 Ahmed Adem, Hamrin Mosa Rashi v Bundesrepublik Deutschland; C-179/08 Dler Jamal v Bundesrepublik Deutschland reference by the Bundesverwaltungsgerich tfor a preliminary

Importance: The Court will decide what to do if original grounds for persecution cease to exist, but new grounds emerge or serious harm threatens + if there are further preconditions for cessation of the refugee status, beyond the end of the well founded fear of persection + what is the applicable standard of proof + interpretation of „effective protection"

Facts: Four united cases affecting 5 Iraqi persons who arrived in Germany between 1999 and 2002 and had been recognised as refugees for fear of persecution by the Saddam Hussein regime. The status was revoked in 2005 invoking the ceased circumstances.

Past or feared harm:

Essentially the constantly uncertain situation of Iraq and the ensuing threat of harm

JOINED CASES C-175/08, C-176/08, C-178/08 AND C-179/08 SALAHADIN ABDULLA AND OTHERS
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The question relating to subsidiary protection:

Is it a requirement for revoking refugee status that not even serious harm would threaten the person upon return?

Mazák's approach

The QD respects fundamental rights and observes the principles recognised by the Charter of Fundamental Rights of the European Union. Moreover, Directive 2004/83 seeks in particular to ensure full respect for human dignity and the right to asylum of, inter alia, applicants for asylum (§ 42)

Mazák's proposals

Cessation of the original grounds is not enough –circumstances must change in a significant and non-temporary manner. (§§ 42-64)

If the situation in the country of nationality is unsettled or unpredictable or there are severe violations of basic human rights then the change in circumstances cannot be considered significant and non-temporary (§ 57)

Two preconditions of revocation

„the circumstances in connection with which the refugee was recognised as such have ceased"

„the refugee's country of nationality is both able and willing to protect the refugee in question."

Mazák's proposals

Refugee status may cease even if serious harm(15§) is threatening (§ 60.)

The stability of the security situation in the refugee's country of nationality should be assessed as an integral part of the availability of protection from persecution

There must therefore be an actor of protection which has the authority, organisational structure and means, inter alia, to maintain a minimum level of law and order in a refugee's country of nationality.

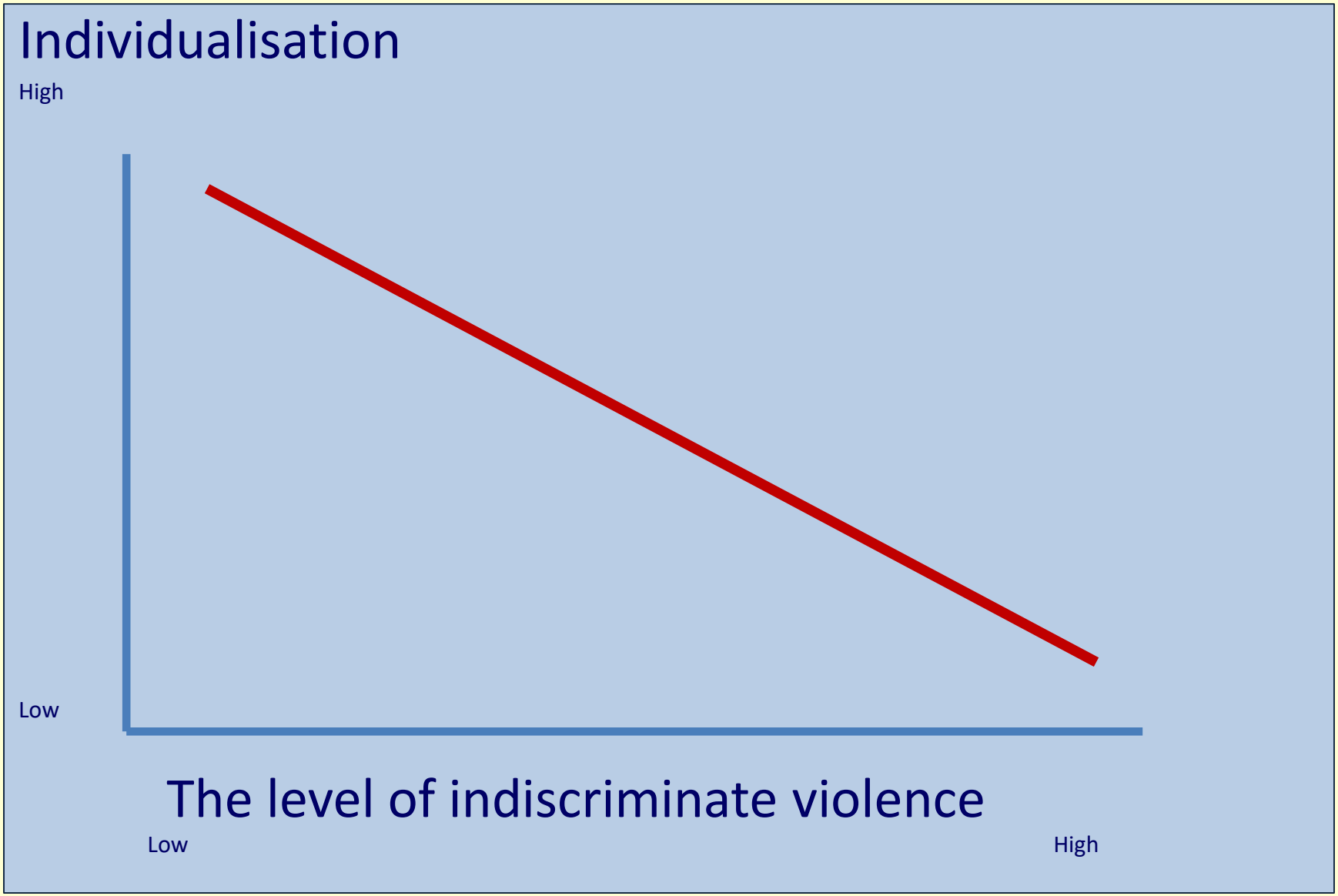
The logic behind the different provisions of Article 15 and the preamble of the QD

Provision		Level of individualisation
Preamble Para 24. Subsidiary protection should be complementary and additional to the refugee protection enshrined in the Geneva Convention.	Article 15. Serious harm consists of	
Para 25. The criteria should be drawn from international obligations under human rights instruments and and existing practices in Member States.	(a) death penalty or execution; (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin;	*„the applicant for subsidiary protection is specifically exposed to the risk of a particular type of harm."*(Elgafaji, § 32.)
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	(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.	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)

Problems related to Article 15

Problem	Possible answer	Example
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)	QD and AH v SSHD: No double contingencies "Risk" in article 2(e) overlaps with "threat" in article 15(c) The latter reiterates but does not qualify or dilute the former.	the placing of car bombs in market places; snipers firing methodically at people in the streets (QD and AH v. SSHD, § 27.)
Contradiction: Indiscriminate violence -- individual threat	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.	
Armed conflict – what does it mean? = two or more warring factions or = one actor using armed violence	Czech Adimistrative High Court: Geneva II. protocol + „Tadic" ↓ QD and AH v SSHD : Not humanitarian law. Independent meaning	

The measure of individualisation and the level of violence
Elgafaji, 39. pont



Elgafaji, 43 §

„the existence of a serious and individual threat to the life or person of an applicant for subsidiary protection is not subject to the condition that that applicant adduce evidence that he is specifically targeted by reason of factors particular to his personal circumstances”
(§ 43)

Individualisation, singling out

Hathaway, 2003 on QD

„There is no clear recognition [in the QD] that a well-founded fear of being persecuted ***does not*** require targeting or individualized risk, but may be established where the individual concerned demonstrates risk to a group of persons defined by a Convention ground of which he or she is found to be a member.” (14.o.)

Hathaway says this on Convention status, but is no less true for subsidiary status

Individualisation ECtHR, NA. v UK, No 25904/07 – Judgment of 17 July 2008

„116. Exceptionally, however, in cases where an applicant alleges that he or she is a member of a group systematically exposed to a practice of ill-treatment, the Court has considered that the protection of Article 3 of the Convention enters into play when the applicant establishes that there are serious reasons to believe in the existence of the practice in question and his or her membership of the group concerned (see Saadi v. Italy, cited above, § 132). In those circumstances, the Court will not then insist that the applicant show the existence of further special distinguishing features if to do so would render illusory the protection offered by Article 3."

The question to be raised to the applicant based on QD and AH v SSHD

Is there in the country of origin or a material part of it such a high level of indiscriminate violence that substantial grounds exist for believing that the applicant would, solely by being present there, face a real risk which threatens his life or person? (point 40.)

Interpretation of the term „armed conflict”

Humanitarian law ⟷ Wider meaning

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

Tadić criteria

- The existence of organised armed groups
- Protracted armed conflict

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

- „[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 és AH v SSHD, § 35

Summary
Arguments agains 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 persecutioin 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 indiviual 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)

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)

Quted cases

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ECJ: C-175/08 Aydin Salahadin **Abdulla** v Bundesrepublik Deutschland; C-176/08 Kamil Hasan v Bundesrepublik Deutschland; C-178/08 Ahmed Adem, Hamrin Mosa Rashi v Bundesrepublik Deutschland; C-179/08 Dler Jamal v Bundesrepublik Deutschland – reference to the ECJ

(UK) Court of Appeal: ***QD (IRAQ) and AH (IRAQ v. SSHD*** [2009] EWCA Civ 620 Case No: 1. C5/2008/1706 & No. 2. C5/2009/0251

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THANKS!

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