Case C-901/19

Request for a preliminary ruling

Date lodged:

10 December 2019

Referring court:

Verwaltungsgerichtshof Baden-Württemberg (Germany)

Date of the decision to refer:

29 November 2019

Applicants and appellants:

CF

DN

Defendant and respondent:

Bundesrepublik Deutschland

VERWALTUNGSGERICHTSHOF BADEN-WÜRTTEMBERG

(HIGHER ADMINISTRATIVE COURT, BADEN-WÜRTTEMBERG)

O r d e r

In the administrative proceedings initiated by

CF

- Applicant -
- Appellant -

[…]

v

Bundesrepublik Deutschland (Federal Republic of Germany), represented by the Bundesminister des Innern, für Bau und Heimat (Federal Minister of the Interior, Building and Community),

represented by the head of the Bundesamt für Migration und Flüchtlinge (Federal Office for Migration and Refugees),

[…]

- Defendant -
- Respondent -

seeking subsidiary protection and a national removal prohibition order

[…]

and

DN

- Applicant -
- Appellant -

[…] **[Or. 2]**

v

Federal Republic of Germany,

represented by the Federal Minister of the Interior,Building and Community,

represented by the head of the Federal Office for Migration and Refugees,

[…]

- Defendant -
- Respondent -

[…]

seeking subsidiary protection and a national removal prohibition order

the 11th Chamber of the Verwaltungsgerichtshof Baden-Württemberg (Higher Administrative Court, Baden-Württemberg) […]

ordered

on 29 November 2019:

The proceedings are stayed.

The following questions are referred to the Court of Justice of the European Union pursuant to Article 267 TFEU:

1. Do Article 15(c) and Article 2(f) of Directive 2011/95/EU 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 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 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? **[Or. 3]**

Statement of reasons

I.

1 The request for a preliminary ruling is made in the context of two cases in which the applicants are pursuing their application for subsidiary protection. This request concerns the interpretation of Article 15(c), read in combination 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 (OJ 2011 L 337, p. 9; 'the Qualification Directive') and taking account of Article 4 of the Charter of Fundamental Rights of the European Union ('the Charter') and Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR').

2 The relevant provisions of national law are set out in the Asylgesetz (Law on Asylum) in the version published on 2 September 2008 (BGBl. I, p. 1798), last amended by Article 45 of the Law of 15 August 2019 (BGBl. I, p. 1307). Paragraph 4(1) and (3) of the Law on Asylum ('Subsidiary Protection'), which transposes Article 2(f) and Article 15 of the Qualification Directive, states:

> (1) A foreigner shall be eligible for subsidiary protection if he has shown substantial grounds for believing that he is at risk of suffering serious harm in his country of origin. Serious harm consists of:
>
> 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.

(2) …

(3) Paragraph s 3c to 3e shall apply accordingly. Persecution, protection against persecution or the well-founded fear of persecution is replaced by the risk of serious harm, protection against serious harm and the real risk of serious harm; refugee status is replaced by subsidiary protection. **[Or. 4]**

3 Paragraph 3e of the Law on Asylum ('Internal Protection'), which transposes Article 8 of the Qualification Directive, states:

(1) A foreigner shall not be granted refugee status, if he:

1. does not have a well-founded fear of persecution or has access to protection against persecution in accordance with Paragraph 3d in a part of his country of origin and

2. can safely and legally travel to this part of the country, will be admitted there and can reasonably be expected to settle there.

(2) In examining whether a part of the country of origin meets the conditions of subparagraph 1, the authorities shall, when deciding on the application, take into account the general circumstances prevailing in that part of the country and the personal circumstances of the foreigner in accordance with Article 4 of Directive 2011/95/EU. To that end, detailed and accurate information from relevant sources, such as the United Nations High Commissioner for Refugees or the European Asylum Support Office, shall be obtained.

II.

4 The applicants are Afghan nationals from Nangarhar province. Their asylum applications, made in the Federal Republic of Germany, were rejected by the Federal Office for Migration and Refugees. The actions brought before the Verwaltungsgerichte (Administrative Courts), Karlsruhe and Freiburg, were unsuccessful. This Chamber has upheld in part the appeals lodged by the applicants. On appeal, the applicants again requested that they be granted subsidiary protection under Paragraph 4 of the Law on Asylum. In the alternative, they also requested a national removal prohibition order, which is regulated under national law and ranks below the assessment for the purpose of international protection[…]. [Admissibility of appeal proceedings]

III.

5 The proceedings have been stayed in order to obtain a preliminary ruling from the Court of Justice of the **[Or. 5]** European Union pursuant to Article 267 TFEU. The Chamber is seeking further clarification of the criteria of EU law by which subsidiary protection is granted in cases of indiscriminate, conflict-related violence against the civilian population. There is doubt as to the interpretation of Article 15(c), read in combination with Article 2(f), of the Qualification Directive, relating to the conditions under which a serious and individual threat exists within the meaning of those provisions. The Court of Justice has not ruled on this to date (1.). The case-law established to date by other courts is inconsistent. Whereas some conducted a comprehensive assessment based on all the circumstances of the case, others predicated their approach primarily on the number of civilian casualties (2.). The ruling by the Court is material to the decision. The success of the actions depends on it. If a serious and individual threat depends essentially on the number of civilian casualties, the main requests seeking subsidiary protection would have to be dismissed. However, based on a comprehensive assessment that includes 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 on account of their presence, face a serious threat (3.).

1.

6. The questions referred to the Court concern the criteria under EU law by which a serious and individual threat within the meaning of Article 15(c), read in combination with Article 2(f), of the Qualification Directive is assessed. They cannot be answered unequivocally on the basis of its case-law to date. Although the Court has previously ruled that, where the person concerned is not specifically targeted by reason of factors particular to his personal circumstances, the existence of a serious and individual threat by reason of indiscriminate violence in situations of armed conflict within the meaning of Article 15(c) of the Qualification Directive can exceptionally be considered to be established where the degree of indiscriminate violence characterising the armed conflict reaches such a high level that substantial grounds are shown for believing 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 (judgment of 17 February 2009, *Elgafaji*, C-465/07), it has not yet ruled on the criteria by which any such risk is determined. It is for the national courts **[Or. 6]** to find and appraise the facts. However, where the precise meaning of a constituent element needs to be expanded and assessed to establish a criterion, that is a matter of EU law. The same applies to the extent and scope of the actual findings required (see, with regard to Article 4 of the Charter, judgment of 15 October 2019, *Dorobantu*, C-128/18, paragraphs 50 et seq., especially paragraph 55, and paragraphs 58 et seq., especially paragraphs 61 and 63).

7. The circumstances in which a civilian not at specific risk from an armed conflict faces a real risk of being subject to a serious and individual threat solely on account of his presence in a conflict area do not follow unequivocally from

Article 15(c), read in combination with Article 2(f), of the Qualification Directive. On the one hand, the level of violence required in accordance with the case-law of the Court suggests that it is to be expected that there has already been a large number of civilian casualties in the past; that would be in keeping with the characterisation of such circumstances as an 'exceptional situation' or of a situation as being of an 'exceptional nature' (see judgment of 17 February 2009, *Elgafaji*, C-465/07, paragraphs 37 and 38). On the other hand, the wording and purpose of the provision suggest that the number of casualties should not be ascribed a precluding function and should be considered cumulatively with other factors as the basis for a comprehensive assessment of the situation. Even conceptually, past casualties are not a necessary precondition to a threat; they are simply an indication on the basis of which such a fact is found. Furthermore, the preventive purpose of subsidiary protection would be frustrated if serious suffering actually had to occur before protection could be granted to other civilians, especially those who have only escaped harm through flight and displacement. That suggests, however, that the exceptional danger to which the civilian population is exposed in a conflict must be assessed on the basis of all the relevant criteria.

8. In that regard, systematic factors must also be taken into account. As a provision of EU law, Article 15(c) of the Qualification Directive has to be interpreted independently. However, the Court of Justice of the European Union ensures that the interpretation which it gives to that provision is compatible with Article 3 of the ECHR, including the case-law of the European Court of Human Rights (ECtHR) relating to it (judgment of 17 February 2009, *Elgafaji*, C-465/07, paragraphs 28 und 44, with reference to the ECtHR **[Or. 7]** judgment of 17 July 2008, *NA v. the United Kingdom*, 25904/07, §§ 115-117; see also, with regard to Article 4 of the Charter, judgment of 15 October 2019, *Dorobantu*, C-128/18, paragraphs 56 and 57). For its part, the ECtHR assumes that Article 3 of the ECHR and Article 15(c) of the Qualification Directive offer comparable protection. In particular, the threshold set by both provisions may, in exceptional circumstances, be attained in consequence of a situation in which a civilian would be at risk simply on account of his presence in the relevant region (ECtHR judgment of 28 June 2011, *Sufi and Elmi v. the United Kingdom*, 8319/07 and 11449/07, § 226). However, if it has to be borne in mind when making any such independent interpretation of Article 15(c) of the Qualification Directive that such interpretation must be compatible with the case-law of the ECtHR, that suggests that the person seeking subsidiary protection should not be subject to stricter requirements than those imposed under Article 3 of the ECHR. That is also suggested by the fact that secondary EU law must be interpreted in accordance with fundamental rights; however, according to Article 52(3) of the Charter, Article 4 of the Charter has the same meaning and scope as Article 3 of the ECHR (judgment of 19 March 2019, *Jawo*, C-163/17, paragraphs 78 and 91).

9. With regard to Article 3 of the ECHR, it is ECtHR case-law that the circumstances of the individual case must be evaluated cumulatively in order to assess if the person seeking protection would face a real risk in the event of his

return (ECtHR judgment of 23 August 2016, *J.K. and Others v. Sweden*, 59166/12, § 95). In this context in particular, the ECtHR has evaluated the intensity of a conflict and the resulting real risk to a civilian (of facing unlawful treatment due a situation of general violence solely on account of his presence) on the basis of a comprehensive assessment of various criteria, which are seen not as an exhaustive list but as appropriate to the case in point, namely the methods and tactics of warfare and whether they are widespread, whether fighting is localised and, finally, the number of persons killed, injured or displaced (ECtHR judgment of 28 June 2011, *Sufi and Elmi v. the United Kingdom*, 8319/07 and 11449/07, §§ 241 et seq.). **[Or. 8]**

2.

10. However, according to German Supreme Court case-law on Paragraph 4(1), first sentence and point 3 of the second sentence, of the Law on Asylum, which transpose Article 15(c), in combination with Article 2(f), of the Qualification Directive, a quantitative evaluation of the risk of death and injury must be carried out, expressed as the ratio of casualties to the total population in the relevant region, before it can be assumed that persons not specifically targeted by reason of factors particular to their personal circumstances face a serious and individual threat. First, that quantitative evaluation is seen as a necessary formal requirement, without which a critical assessment of the individual threat to the person concerned would be vitiated by error: 'An overall judgment … is only possible on the basis of a critical evaluation' […]. Second, the number of casualties established must reach a certain minimum threshold before an individual threat can be assumed. Although the Bundesverwaltungsgericht (Federal Administrative Court, Germany) has not specified a minimum threshold, it has ruled that a probability of being injured or killed of 'approx. 0.12% or approx. 1:800 per annum' (Federal Administrative Court, judgment of 17 November 2011, 10 C 13.10, juris, paragraph 7) is clearly below the necessary minimum threshold. According to the case-law of the Federal Administrative Court, there is no need for further investigation of the level of risk with that number of casualties, as the number of casualties established substantiates a threat of harm that is 'so far removed from the threshold of significant probability, that the failure [i.e. the failure to consider other circumstances] is ultimately of no effect' (Federal Administrative Court, judgment of 17 November 2011, 10 C 13.10, juris, paragraph 23). From this perspective, critical points of view are simply 'corrective considerations' (Berlit, ZAR 2017, 110, 118).

11. Based on these Supreme Court precedents, the higher courts have assumed in their case-law that, where there is a risk of 1:800, 'even a critical overall assessment would change nothing in terms of fulfilling the requirements of point 3 of the second sentence of Paragraph 4(1) of the Law on Asylum' […]. The application of Article 15(c), read in combination with Article 2(f), of the Qualification Directive is therefore linked in the German legal system to the need for a minimum quantitative threshold […] **[Or. 9][…].** [Case-law of German higher administrative courts]

12. The case-law of other European States is highly inconsistent, as different criteria are applied and the facts are judged differently. The Austrian Verwaltungsgerichtshof (Supreme Administrative Court, Austria) bases the risk analysis on an overall evaluation of the potential risks, in which it is guided by the case-law of the ECtHR […]. [Case-law] The courts of the United Kingdom appear to attach great importance to a quantitative investigation. Irrespective of the potential relevance of qualitative criteria, the number of casualties appears to serve an excluding function […] [Case-law] Quantitative considerations also played a large part in a decision by the Cour Nationale du Droit d'Asile (National Court of Asylum law, France) which, however, rates them differently compared to the courts previously cited […] [Case-law] The Conseil du Contentieux des Etrangers (Council for asylum and immigration proceedings, Belgium) evaluates numerous criteria in addition to the number of casualties and displaced persons; they include the type and number of acts of combat, the extent of fighting and the nature of the conflict and its impact on the civilian population […] [Case-law] Switzerland is not bound by the Qualification Directive, but does nonetheless grant protection where a specific risk has arisen as a result of situations such as war, civil war and violence in general. In assessing the risk, the Bundesverwaltungsgericht (Federal Administrative Court, Switzerland) takes a cautious approach to figures **[Or. 10]** if it doubts their reliability or credibility (see also, in that regard, the Federal Constitutional Court, Germany, order of 25 April 2018, 2 BvR 2435/17 […] and also relies on numerous other factors […] [Case-law] Finally, the UNHCR takes a very comprehensive approach which requires it also to take account of factors such as the indirect and long-term consequences of a conflict and the general protection of human rights (UNHCR, Eligibility guidelines for assessing the international protection needs of asylum-seekers from Afghanistan, 30 August 2018, p. 104). Commentators also defend approaches that seek to place the assessment on a broad basis (see, for example, *Lambert* v *Farrell*, URL 22 (2010), pp. 237 et seq.; *Hailbronner* v *Thym*, EU Immigration and Asylum Law, 2nd Edition 2016, pp. 1240 and 1241).

3.

13. The applicants are civilians from Nangarhar province. Based on the hearing of the applicants before the Chamber in the oral proceedings on 28 November 2019 and on their personal testimony, they do not automatically qualify for subsidiary protection under point 1 or 2 of the second sentence of Paragraph 4(1) of the Law on Asylum (Article 15(a) or (b) of the Qualification Directive). Furthermore, the Chamber is not satisfied that the applicants are specifically targeted by reason of their personal circumstances by the indiscriminate violence prevailing in the province within the meaning of the case-law of the Court on Article 15(c) of the Qualification Directive (see judgment of 17 February 2009, *Elgafaji*, C-465/07, paragraph 39).

14. However, according to the facts found by the Chamber as to the general security situation in Afghanistan at the time of this decision (Article 4(3)(a) of the Qualification Directive), the applicants would, solely on account of their presence,

face a real risk of serious and individual harm as a result of indiscriminate, conflict-related violence if they returned to Nangarhar province. However, that presupposes that this assumption is not precluded by the quantitative extent of civilian casualties determined to date and is based on a comprehensive assessment of all relevant criteria including, in particular, the indiscriminate effects of the acts of combat, the number, unpredictability and geographical distribution of those acts and the significant number of displaced persons **[Or. 11]** and civilian casualties caused by them. Those findings can be summarised as follows:

15. The conflict in Afghanistan is being waged between government security forces and anti-government forces. The forces on both sides are seriously fragmented and characterised to varying degrees by corruption, internal power struggles, a lack of discipline and criminality. They are closely integrated in the civilian population. This is true primarily of the Taliban and of the so-called 'Islamic State - Khorasan Province' (ISKP), which recruits some foreign fighters alongside local men. However, additional militias with local roots commanded by tribal leaders, local warlords or criminals are also involved on both sides of the conflict. Therefore combatants and the civil population are intertwined.

16. Large parts of Nangarhar province are not effectively controlled by any one party to the conflict. More importantly, neither the Afghan government nor the Taliban are able to ensure stability. It is not only the Taliban that have a strong presence in the province. It is also a stronghold of the ISKP and several other terrorist groups are active there. Operations by the state-armed forces in Nangarhar, including ground operations as well as air strikes, therefore target the rebel forces. Civilian refuges and civil installations are targeted in both cases, as these places are used by the rebels. The government forces are therefore responsible in large part for the civilian casualties. In particular, the Taliban, which are also still subject to infighting, and the ISKP are at war with each other in Nangarhar. The state security forces are unable to protect the civilian population.

17. However, the security situation in Nangarhar is also highly volatile because the province is still being fought over between the rebels. It borders the former tribal homelands in Pakistan (now the Federally Administered Tribal Areas). Fighters on both sides are able to retreat to the other side across the open border, which enables militant groups to obtain supplies. The border arrangement also enables goods to be smuggled to and from Pakistan. The province also contains huge **[Or. 12]** poppy fields. Nangarhar has the fourth largest area under cultivation in Afghanistan and recorded record levels of opium production in 2017 and 2018. Opium production is one of the most important sources of income of anti-government groups in Nangarhar, which is another reason why they are fighting for control of the region.

18. The rebels are causing massive civilian casualties. The ISKP is deliberately spreading terror among the civilian population, for example by attacking schools, hospitals and charitable or religious institutions. However, the Taliban are also causing civilian casualties. Although they have announced that they want to spare

the civilian population, their fighting methods inevitably lead to indiscriminate violence. The same applies to all the rebels. They hole up in apartments and use civil installations for their purposes and these therefore also become combat zones. The government targets which they attack are often in city centres. Their tactics, which involve detonating bombs in residential areas, attacking publicly accessible installations or failing to distinguish between combatants and non-combatants, are causing indiscriminate harm.

19. The nature of the conflict and these tactics have caused unacceptable consequences for the civilian population to date. In 2018, an average of 12.6 conflict-related incidents a week were recorded involving the rebels. Widespread violence is again reported for 2019. Operations by armed forces, attacks, fighting between rebels and conflict-related criminality resulting in civilian casualties are at a persistently high level. The following are a few examples: civilian deaths during air strikes by armed forces and suicide attacks by rebels (Hisarak and Jalalabad, March), thousands of persons displaced as a result of heavy fighting between the Taliban and the ISKP (Sherzad and Chogiani, April), the accidental killing of a family of six by Afghan armed forces (Sherzad, May), numerous casualties from a suicide attack on a wedding party (Patschir-o Agam, July), dozens of civilian casualties caused by explosive devices on Afghan Independence Day (throughout Nangarhar, August), civilian deaths caused by car bombs and suicide attacks (Jalalabad and Momand Dara, September), approximately 70 casualties caused by a misguided US drone attack (Chogiani, September) and bombs detonated in October throughout the province, including an attack on a mosque in Haska **[Or. 13]** Mina which resulted in more than 120 civilian casualties. In September 2019, there were between one and 26 US military attacks a day on 24 out of 30 days (on average more than six attacks a day).

20. Civilian casualties in Nangarhar, which has a population of between 1.6 and 1.8 million, numbered between 1 517 and 1 815 (killed or injured) in 2018. That corresponds to between 0.08 and 0.11% of the population or a ratio of between 1: 1190 and 1:880. However, there is an alarmingly large number of internally displaced persons. One third of the population of Nangarhar are displaced persons and returnees. In 2018, over 12 000 persons were displaced from, and over 11 000 persons were displaced to, Nangarhar. A large number of people are living in informal settlements and the civilian population pays high costs to satisfy basic needs. There is a shortage of medical supplies, food security and hygiene standards. The number of displaced persons has most likely increased significantly in 2019 to date, especially as a result of fighting between rebels and attempts by the state security forces to drive rebels out of parts of Nangarhar. For example, in March 2019, 21 000 persons were displaced by fighting in Kunar and Nangarhar, including over half the population of one of the districts affected. In May, heavy fighting between rebels in Sherzad and Chogiani, in which state troops subsequently intervened, displaced over 56 000 people. In early August, over 4 000 persons were displaced throughout Nangarhar. These displacements alone have so far affected over 80 000 people or 5% of the population of Nangarhar.

21. The applicants do not have access to internal protection (Paragraph 3e of the Asylum Act, Article 8 of the Qualification Directive). Based on the facts found by the Chamber, the cities of Kabul, Herat and Mazar-e Sharif are places in which internal protection might be accessible in theory, in spite of considerable hardships for parts of the civilian population and the worrying security situation. Capable adult men without dependants can get by, even with no family or social contacts. However, more vulnerable persons cannot as a rule be reasonably expected to settle there […] **[Or. 14]** […] [Case-law of Germany and other European states]

22 The applicant in [one set of] proceedings […] is a widower and, if he returned to Afghanistan, would be solely responsible for his child born in 2015. All other members of his family live in Nangarhar and he has no contacts in Kabul, Herat or Mazar-e Sharif. He would be solely responsible for the child and would be unable, in the situation prevailing in Afghanistan, to provide for himself and the child at the same time. He would be unable to get by.

23 The applicant in [the other set of] proceedings […] is married with five children. It is neither sufficiently certain that the family of seven will be able to find adequate housing nor sufficiently likely that the applicant – who has been under his father's thumb all his life, is uneducated and generally gives little impression of being able to cope with life – will be able to provide for his children, his wife and himself in those three cities without support and backing from his family contacts. He too would be unable to get by.

IV.

24 […]

[…]

[Procedural matters; Signatures]