

Case C-217/23

Summary of the request for a preliminary ruling under Article 98(1) of the Rules of Procedure of the Court

Date lodged:

4 April 2023

Referring court:

Verwaltungsgerichtshof (Austria)

Date of the decision to refer:

28 March 2023

Appellant on a point of law:

Bundesamt für Fremdenwesen und Asyl

Interested party:

A N

Subject matter of the case in the main proceedings

Asylum procedure – Group with a distinct identity – Different (‘andersartig’) – Family as a social group

Subject matter and legal basis of the reference

Interpretation of EU law, Article 267 TFEU

Questions referred for a preliminary ruling

Is the wording contained in Article 10(1)(d) 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 (recast), ‘that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society’, to be interpreted as meaning that a

group only has a distinct identity in the relevant country if it is perceived as being different by the surrounding society, or is it necessary to assess separately whether a ‘distinct identity’ exists, irrespective of whether the group is regarded as being different by the surrounding society?

If, on the basis of the answer to question 1, the existence of a ‘distinct identity’ is to be assessed separately:

2. What criteria are to be used to assess whether there is a ‘distinct identity’ within the meaning of Article 10(1)(d) of Directive 2011/95/EU?

Irrespective of the answers to questions 1 and 2:

3. In determining whether a group is perceived as being different ‘by the surrounding society’ within the meaning of Article 10(1)(d) of Directive 2011/95/EU, must reference be made to the perspective of the actor of persecution or to that of society as a whole or of a substantial part of the society of a country or of part of the country?

4. What criteria are to be used to determine whether a group is perceived as being ‘different’ within the meaning of Article 10(1)(d) of Directive 2011/95/EU?

Provisions of EU law cited

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)

Provisions of national law cited

Asylgesetz 2005 (2005 Law on asylum; ‘the AsylG 2005’)

Succinct presentation of the facts and procedure

- 1 A N, the interested party, is an Afghan national who applied for protection under the AsylG 2005 in Austria on 4 November 2015.
- 2 In support of his application, the interested party claimed that he was subject to asylum-relevant persecution in Afghanistan because of the threat of a blood feud maintained by his father’s cousins. He stated that the background to the blood feud was that his father and his father’s cousins had fought over a plot of land. In the course of the dispute, he said, the father and a brother of the interested party had already been killed.

- 3 The Bundesamt für Fremdenwesen und Asyl (Federal Office for Immigration and Asylum, Austria) rejected that application by decision of 21 June 2017 and issued a return decision in respect of the interested party. It was operating on the premiss that the interested party's story of flight was fabricated and made up and that he had only come to Austria because of a desire for economic and social advancement.
- 4 The interested party brought an action against that decision before the Bundesverwaltungsgericht (Federal Administrative Court, Austria).
- 5 The Federal Administrative Court upheld the action, but its judgment was set aside by the Verwaltungsgerichtshof (Supreme Administrative Court, Austria). The second judgment of the Federal Administrative Court was also set aside by the Supreme Administrative Court. By its judgment of 26 July 2022, the Federal Administrative Court once again upheld the action, granted the interested party asylum status and held that he was consequently entitled to refugee status by operation of law.
- 6 The Federal Administrative Court found that the interested party was an Afghan national and a Pashtun, professed Sunni Islam and came from Langman. His father had bought a piece of agricultural land from his cousins, but the cousins had later claimed that he had only leased it. The father had refused to return the property and had turned to the village elders to resolve the dispute. Before the elders, the cousins had repeated the claim that the land had only been leased, and they had threatened the father. On the following day, the father, brother and the interested party had been shot at on the land in question. The interested party had run away and fled to an uncle. The uncle had brought the interested party and the rest of the family to Kabul, then organised the funeral of the father and brother with the village elders. Later, the house of the interested party's family had been burned down and they had heard that people were looking for him. Thereupon, the uncle had arranged for the interested party to flee and had taken the interested party's family in. Later, however, the uncle and the family had also fled to Pakistan.
- 7 The court thus found that the interested party was involved in a blood feud in his State of origin to the effect that, if he were to return to his village, he would be at risk of attack and even death at the hands of his father's cousins. The court presumed that, although he would not be at risk of such attacks if he settled in another town, the current situation in Afghanistan meant that it was no longer possible for the interested party to gain a foothold there and lead a life without unreasonable hardship.
- 8 As a matter of law, the Federal Administrative Court stated that persecution based on one of the grounds specified in the Geneva Convention Relating to the Status of Refugees and emanating from a private person or private groups was asylum-relevant if the State was unwilling or unable to prevent those acts of persecution. A blood feud was relevant to the asylum proceedings, it held, because

membership of the social group comprising ‘members of the extended family threatened by the blood feud’ should be recognised if the acts of revenge were to be feared solely on the grounds of family ties to the person directly concerned. The court considered that the interested party was persecuted only because of his relationship to his father and could not count on protection from the Afghan authorities. It held that he was therefore at risk of asylum-relevant persecution in his region of origin and there was no way of fleeing the threat within the country.

- 9 The Federal Office for Immigration and Asylum lodged an appeal on a point of law against that judgment before the Supreme Administrative Court.

The essential arguments of the parties in the main proceedings

- 10 The Federal Office for Immigration and Asylum submits that the Federal Administrative Court characterises the interested party’s involvement in a blood feud as falling under the Geneva Convention reason of ‘membership of the social group of the family’, but that, under the case-law of the European Court of Justice (judgment of 4 October 2018, C-652/16, paragraph 10), certain conditions need to be fulfilled for this stand. First, the members of the group must share ‘an innate characteristic’ or a ‘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’. Second, the group must ‘have a distinct identity’ in the relevant country, ‘because it is perceived as being different by the surrounding society’.
- 11 The Federal Office for Immigration and Asylum submits that it is unclear whether a family (or part of a family) constitutes a social group where there are no findings showing that the family (or part of it) is perceived as being different by the surrounding society.
- 12 The Federal Office for Immigration and Asylum also points out that the relevant provision of Directive 2011/95/EU (Article 10(1)(d)) is interpreted differently by the supreme courts in Germany and Austria.
- 13 In his response to the appeal on a point of law, the interested party submits that the family has been recognised as a social group within the meaning of the Geneva Convention in the previous case-law of the referring court. The reasoning in the judgment under appeal makes it clear, he submits, that it is in line with the Pashtun tradition of blood feuds for such a feud to be triggered by, for example, an unresolved dispute over land. The right to revenge and the expectation of retaliation are key here, he states, which is why the father’s cousins also expect the interested party to exact revenge. He submits that a blood feud can also be deferred for decades.
- 14 The interested party argues that persecution on the grounds of membership of a social group does apply because he is perceived, by the cousins of his father’s

who are persecuting him, as belonging to the other group involved in the blood feud.

Succinct presentation of the reasoning in the request for a preliminary ruling

- 15 In the appeal on a point of law, the Federal Office for Immigration and Asylum did not challenge the findings of the Federal Administrative Court, so the referring court is required to operate on the premiss that there is a sufficiently definite likelihood of the interested party being at risk of physical violence and even homicide. These acts are to be classified, within the meaning of Article 9(1), read in conjunction with Article 9(2)(a), of Directive 2011/95/EU, as acts of persecution perpetrated by non-State actors. The interested party can expect no protection from the State.
- 16 To determine whether the interested party should be granted asylum status, a crucial point is whether there is a link between the reasons contained in Article 10 of the Directive and the acts classified as persecution in Article 9(1) or the lack of protection from such acts. The Federal Administrative Court sees this link in the fact that the cousins of the interested party's father only want to kill the interested party because he belongs to the (deceased) father's family; the interested party was not directly involved, it holds, in the land dispute.
- 17 In the present case, the Federal Administrative Court is operating on the premiss that there is persecution on the grounds of membership of a particular social group, namely the family or, more specifically, those family members who are subject to a blood feud. In the appeal on a point of law, it is not disputed that the family can constitute a social group, nor that it has a common background that cannot be changed. What is disputed is whether the family (or the part concerned) is to be regarded, within the meaning of Article 10(1)(d) of Directive 2011/95/EU, as a group which has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society. Only then would qualification as a refugee be possible in the present case.
- 18 The Federal Office for Immigration and Asylum submits in its appeal on a point of law that there are several approaches to resolving the question of whether there is persecution on the grounds of membership of a social group.
- 19 In the view of the referring court, to determine whether the members threatened by the blood feud can be regarded as a social group, a number of points need to be clarified. First, there is the question of when a group can be said to have a distinct identity in the relevant country and thus constitute a social group within the meaning of Article 10(1)(d) of the above-mentioned directive. Clarification is also needed as to what aspects determine the 'surrounding society' of a group and when a group is perceived as being 'different' by that society.

Questions 1 and 2

- 20 The referring court notes that the wording of Article 10(1)(d) of Directive 2011/95/EU expresses a causal link implying that the existence of a group's distinct identity depends on it being perceived as different by the surrounding society. This would mean that, to determine whether a group has a 'distinct identity', it is only necessary to assess whether 'it is perceived as being different by the surrounding society'. Such an understanding would mean that no assessment according to other, separate criteria should take place. According to that understanding, the existence of a social group cannot be established solely on the basis of the self-image and sense of belonging of the members of a group; the crucial factor would be its perception in the eyes of the 'surrounding society', which would have to classify the group as 'different'. This approach appears to have been taken in the *Guidance on membership of a particular social group* issued by the (then) European Asylum Support Office (EASO).
- 21 If such a causal link were to be denied (at least in part) and the existence of a 'distinct identity' were to be assessed separately, the question arises (question 2) as to what criteria should guide such an assessment. That concept has not been defined by the EU legislature. It is also unclear how the perceptibility of a 'distinct identity' is expressed.

Question 3

- 22 It seems unclear to what perspective the EU legislature intended to refer in the formulation about the group being perceived as different 'by the surrounding society'.
- 23 It could be argued that it means society (as a whole or a substantial part of it) in the relevant State or in the region where the person concerned resides. In such an event, a family, precisely because of its members' status as constituting a family, would ordinarily be perceived as being different by the surrounding society only if its way of life as a family differed markedly from the otherwise prevailing customs of family life.
- 24 It moreover seems likely that the surrounding society would have to be aware of the existence of the group in question. If the existence of the group remained hidden from the surrounding society, this alone would suffice to rule out the perception of such a group as being different.
- 25 In the EASO guidance mentioned above, this approach appears to have been adopted, given that it says assessing the existence of a particular social group in a certain country requires relevant and up-to-date country of origin information. It also mentions the need to understand how the society operates and treats groups differently, as a social group is related to a surrounding society.
- 26 Under this approach, the existence of a social group in the present case would presumably have to be denied. After all, presumably only the actors of persecution and the persecuted family are aware of the blood feud in such a case, and not society as a whole or a substantial part thereof. If one assumes, on the other hand,

that the perspective of the actor of persecution is sufficient for classification as a social group, then, for the purposes of Article 10(1)(d) of Directive 2011/95/EU, the actor of persecution should be regarded as the surrounding society of the group and it would define the group as distinct. Under this approach, the family of the interested party's father would be a social group in the present case, because it is perceived as such by the actor of persecution (the father's cousins).

Question 4

- 27 The assessment as to whether a group is perceived 'as being different' by the surrounding society also appears problematic.
- 28 The term 'different' seems so open that any arbitrarily chosen characteristic might result in such a classification. Moreover, the term used in German, 'andersartig', appears to have a negative connotation. It is therefore conceivable that 'difference' entails a denigration of that group in relation to the surrounding society. The EASO guidance mentioned above refers in this context to the 'stigmatisation' of the group, although it is also pointed out elsewhere in the guidance that being different should not be understood as something necessarily negative.
- 29 It may also be, however, that this is merely a linguistic problem and the term 'andersartig' should be understood as synonymous with the more neutral 'anders sein' – given that, in the view of the referring court, the term 'different' used in English has no negative connotations.
- 30 If the salient point was whether a relatively large number of people perceived the group as being 'different', it could be crucial that just one or more than one particular characteristic can lead a group to be perceived as different by a relatively large number of people. Other characteristics which are classified as different by only a few other people would then be irrelevant. Under this approach, the perspective of the actor of persecution would not be significant for classification as a social group.
- 31 Especially in the present case, it is doubtful whether a family involved in a blood feud would be perceived as different by the surrounding society, if that were to mean a relatively large number of people. Apart from the fact that – as mentioned above – such a (wider) surrounding society ordinarily is not even aware of the significant characteristic, the interested party himself pointed out, in his response to the appeal on a point of law, that it was in line with the Pashtunwali tradition practised in the region of origin to resolve such a dispute as the one in the present case by way of a blood feud. It would therefore be hard to see why a family involved in a blood feud should be perceived as different by the surrounding society which also lives by that tradition.
- 32 If, however, the perspective of the actor of persecution is the salient factor, it could suffice to establish membership of a social group if the actor of persecution perceives the family with which it has a blood feud as being different.

- 33 For the present case, this means that, if what matters is perception from the perspective of the actor of persecution, that the interested party was rightly granted asylum status. If that is not what matters, however, then the Federal Administrative Court should not have granted the interested party that status, as there would be no connection with any reason relevant to the granting of asylum. The Federal Administrative Court would then have had to assess, in a subsequent step, whether the interested party should be granted subsidiary protection.

WORKING DOCUMENT