Case C-238/19

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

Date lodged:

20 March 2019

Referring court:

Verwaltungsgericht Hannover (Germany)

Date of the decision to refer:

7 March 2019

Applicant:

EZ

Defendant:

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

Subject matter of the main proceedings

The parties are in dispute before the national court over the question of whether the applicant, who has already been granted subsidiary protection, can, in addition, claim recognition of refugee status from the defendant.

Subject matter and legal basis of the reference

The referring court has submitted to the Court of Justice under Article 267 TFEU a request for an interpretation of Directive 2011/95 in a case where a Syrian national subject to compulsory military service has left his country of origin because of the threat of conscription and is now seeking recognition of refugee status in the Federal Republic of Germany.

Questions referred

1. Is Article 9(2)(e) of Directive 2011/95/EU to be interpreted as meaning that a 'refusal to perform military service in a conflict' does not require the person concerned to have refused to perform military service in a formalised refusal procedure, where the law of the country of origin does not provide for a right to refuse to perform military service?

2. If Question 1 is to be answered in the affirmative:

By the reference to 'refusal to perform military service in a conflict', does Article 9(2)(e) of Directive 2011/95/EU also protect persons who, after the deferment of military service has expired, do not make themselves available to the military administration of the State of origin and evade compulsory conscription by fleeing?

3. If Question 2 is to be answered in the affirmative:

Is Article 9(2)(e) of Directive 2011/95/EU to be interpreted as meaning that, for a conscript who does not know what his future field of military operation will be, the performance of military service would, directly or indirectly, include 'crimes or acts falling within the grounds for exclusion as set out in Article 12(2)' solely because the armed forces of his State of origin repeatedly and systematically commit such crimes or acts using conscripts?

4. Is Article 9(3) of Directive 2011/95/EU to be interpreted as meaning that, in accordance with Article 2(d), there must be a connection between the reasons mentioned in Article 10 and the acts of persecution as qualified in Article 9(1) and (2) of Directive 2011/95/EU or the absence of protection against such acts, even in the event of persecution under Article 9(2)(e) of Directive 2011/95/EU?

5. In the event that Question 4 is to be answered in the affirmative, is the connection, within the meaning of Article 9(3) in conjunction with Article 2(d) of Directive 2011/95/EU, between persecution by virtue of prosecution or punishment for refusal to perform military service and the reason for persecution already established in the case where prosecution or punishment is triggered by refusal?

Provisions of international law cited

Convention relating to the Status of Refugees of 28 July 1951 (Geneva Refugee Convention)

Geneva Convention of 12 August 1949 relative to the Protection of Civilian Persons in Time of War

Protocol additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I)

Protocol additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)

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 (OJ 2011 L 337, p. 9), in particular Article 2(d), Article 9(1), (2)(e) and (3), Article 10 and Article 12(2)

Provisions of national law cited

Asylgesetz (Asylum Law) (AsylG), in particular Paragraph 3(1), (2) and (4), Paragraph 3a(1), point 1, (2), point 5, and (3), and Paragraph 3b(1) and (2)

Völkerstrafgesetzbuch (International Criminal Code) of 26 June 2002

Brief presentation of the facts of the case and the procedure

1 The applicant is a Syrian national. He left his homeland by sea on 6 November 2014 and, on 5 September 2015, travelled by land via a number of countries to the Federal Republic of Germany. On 28 January 2016, he filed a formal application for asylum with the defendant.

2 At a hearing held by the defendant, the applicant stated in essence that he had not yet completed his military service in the Syrian army and had asked to have his military service deferred for fear of having to take part in the civil war. He had been granted a deferment until February 2015 to complete his university studies. He had completed his studies in April 2014 and left his home country in November on account of his impending call-up.

3 By decision of 11 April 2017, the defendant granted the applicant subsidiary protection status. As to the remainder, it turned down the asylum application. The applicant brought an action against that decision before the referring court on 1 May 2017.

Main arguments of the parties to the main proceedings

4 The applicant claims in essence that, irrespective of any individual reasons, he is at risk of persecution in Syria not least because of his flight from Syria and his application for asylum in Germany.

5 The defendant takes the view that the applicant has not himself suffered any persecution in Syria such as to cause him to leave. Neither does he have any reason to fear persecution as a returnee, having fled only to escape the civil war. There is, in any event, no connection between the act of persecution and the reason for persecution.

Brief presentation of the grounds for the reference

The national legal position

6 The applicant seeks to be granted refugee status under Paragraph 3(1) and (4) in conjunction with Paragraph 3a(1) and (2), point 5, of the Asylgesetz (AsylG). According to those provisions, a foreign national is to be granted refugee status if he finds himself outside his country of origin on account of a well-founded fear of persecution for reasons of race, religion, nationality, political conviction or membership of a particular social group. In accordance with Paragraph 3a(2), point 5, of the AsylG, prosecution or punishment for refusing to perform military service in a conflict may count as persecution if the performance of military service would include crimes or acts falling within the scope of the exclusion clauses contained in Paragraph 3(2), first sentence, point 1, of the AsylG. In accordance with Paragraph 3(2), first sentence, point 1, of the AsylG, those exclusion clauses cover crimes against peace, war crimes or crimes against humanity. In accordance with Paragraph 3a(3), there must be a connection between the reasons for persecution mentioned in Paragraph 3(1), point 1, of the AsylG in conjunction with Paragraph 3b of the AsylG and the acts classified as persecution in Paragraph 3a(1) of the AsylG.

7 The case-law of the German administrative courts on the political persecution of (Syrian) conscripts by virtue of prosecution or punishment for refusal to perform military service is inconsistent.

The situation in Syria

8 Syria has been the scene of a domestic armed conflict since 2011. In the view of the referring court, it is a matter of fact that, in the Syrian civil war, all parties to the conflict have committed and continue to commit repeated, serious and systematic violations of international humanitarian law.

9 Syria operates a system of two-year compulsory military service for male Syrian nationals aged 18 and over. Syrian law does not provide for a right to conscientious objection.

10 The Syrian military administration continues to recruit intensively. At the same time, part of that recruitment process is a general expectation that conscripts, on becoming eligible for conscription, following the expiry of a period of deferment for study purposes for example, will report to the recruitment offices of their own accord. After six months, conscripts who do not report to the military administration are routinely placed on a list of draft evaders which is made available to checkpoints and other government agencies. In times of war, draft evaders apprehended in this way are liable under Syrian law to prison sentences of up to five years. The form of punishment imposed is arbitrary and ranges from statutory prison terms, via high-risk front-line operations with no military training, to execution.

11 The referring court is satisfied that the applicant, who escaped from the Syrian authorities shortly before the deferment of his military service expired by leaving Syria and seeking protection in the Federal Republic of Germany, is liable on account of that conduct to prosecution or punishment in his country of origin, Syria, which operates a general obligation of enlistment in military service which the applicant does not wish to fulfil and which would probably involve the commission of war crimes.

The questions referred

The first and second questions referred

12 The referring court wishes to ascertain first whether the evasion of military service by flight is capable of constituting a refusal to perform military service or whether a refusal to perform military service that is expressly declared to the competent authorities must be required. Questions 1 and 2 are intended to determine whether Article 9(2)(e) of Directive 2011/95 is to be understood as meaning that the ‘refusal’ to perform military service requires more than mere flight from the State of origin, even if the law of the country of origin does not provide for the possibility of refusing to perform military service. The assumption that conscripts must in any event make a declaration of refusal to perform military service to the State authorities would mean that they would expose themselves to potential punishment with no prospect of having their conscience-based decision taken into account. For this reason, the referring court is inclined to regard even a conscript’s flight from his State of origin as a refusal to perform military service, provided that there is an objective link in time between his flight and the date of his call-up or the commencement of his eligibility for conscription, and to answer both questions in the affirmative.

The third question referred

13 The exclusion clause contained in Article 12(2)(a) of Directive 2011/95/EU concerns 'war crimes'. That term is based on Article 1(F) of the Geneva Convention of 28 July 1951. In particular, a war crime is deemed to have occurred where military acts are directed against persons and entities specifically protected by the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 and Additional Protocols I and II. That Convention and its Additional Protocols were transposed into German law by the Völkerstrafgesetzbuch (International Criminal Code) of 26 June 2002. It governs, inter alia, which acts fall within the concept of war crimes and which within the concept of 'crimes against humanity', the latter falling to be treated as war crimes.

14 The national court refers to the findings of the Court of Justice in the judgment of 26 February 2015, *Shepherd* (C-472/13, EU:C:2015:117), in particular paragraphs 35 to 46, and the corresponding Opinion of Advocate General Sharpston (EU:C:2014:2360), in particular point 37. It concludes from that case-law that the fugitive does not have to commit war crimes or crimes against humanity himself, the relevant factor being the general context in which the military service is performed. The fugitive must demonstrate, however, that his military service 'would include' acts or crimes falling within the scope of the exclusion clause. The test thus entails a prediction as to how likely it is that the military service in question will in future involve the commission of such an act. In accordance with the case-law of the Court of Justice, protection may be extended to persons who are not directly involved in war crimes only if it seems reasonably plausible that the performance of their duties would require them to participate in such acts in a sufficiently direct fashion.

15 The referring court considers the participation of conscripts in future war crimes in Syria to be sufficiently plausible. It refers, inter alia, to numerous reports by United Nations agencies which have led it to be believe that Syrian government troops have for years been extensively involved in systematic war crimes and have been using conscripts to commit them.

16 The referring court raises the question as to whether it is only in those circumstances that it seems reasonably plausible that the performance of military service by a conscript would include at least indirect participation in a war crime. The national courts infer from the judgment in *Shepherd* that conscripts whose military service has been deferred must also give some indication of the military unit to which they would belong in their home country. That requirement does not seem appropriate to the referring court. First, that criterion is not the only determining factor, the Court of Justice having relied in the judgment in *Shepherd* on a bundle of equally important indicia such as the individual situation, the personal circumstances of the applicant and the facts associated with the country of origin, which must show that the situation obtaining within the context of the military service makes it seem plausible that the alleged war crimes will be committed. Secondly, the referring court takes the view that the factual premisses

relied on by the Court of Justice in *Shepherd* do not apply in Syria. The Court of Justice had thus argued that, in principle, the United States of America punishes war crimes and that the armed intervention in Iraq was engaged in on the basis of a mandate from the Security Council and under the approval and supervision of the international community. The Syrian State does not punish war crimes, however, but promotes them. The Syrian army is being deployed without a mandate from, or the approval or supervision of, the international community; indeed, it is condemned by that community. Thirdly, the fugitive is required to provide information which he generally – as in the case in the main proceedings – cannot provide, namely which military function he would perform and in which unit if he did not evade military service.

17 In the view of the referring court, this raises the (further) question as to whether, in the case of the applicant, the performance of military service 'would include' acts falling within the scope of the exclusion clause even if it turns out that, although his individual situation and his personal circumstances are inconclusive from the point of view of the examination of the matter, the conditions obtaining in the country of origin, in and of themselves, make it seem reasonably plausible to assume that the performance of military service would give rise to a situation involving a risk of war crimes being committed. Account being taken of the particular circumstances of the Syrian civil war, the referring court is of the opinion that the theoretical possibility that the conscript could complete his military service without recourse to crime is not, in and of itself, sufficient to render implausible his contention that the performance of military service would itself include the commission of war crimes or crimes against humanity.

The fourth question referred

18 Article 9(3) of Directive 2011/95 requires there to be a connection between an act of persecution within the meaning of Article 9(2) of Directive 2011/95 or the absence of protection against such acts and the reasons for persecution referred to in Article 2(d) in conjunction with Article 10 of Directive 2011/95. The referring court raises the question as to whether that condition in respect of the protection of refugees also applies to persecution within the meaning of Article 9(2)(e) of Directive 2011/95.

19 The answers provided by the German courts to that question are inconsistent. The referring court harbours doubts as to whether Article 9(3) of Directive 2011/95 is to be applied in the case of Article 9(2)(e) of Directive 2011/95 because the latter provision is the only one of the definitions contained in paragraph 2 which already requires the existence of a causal chain, that is to say prosecution or punishment 'for [in German, literally, 'because of'] refusal to perform military service', whereas all the other definitions concern a single situation. What is more, the conscientious objector would [in that event] have to demonstrate that he fears persecution in his home country 'because of' his race, religion, nationality, political opinion or membership of a particular social group', within the meaning of Article 2(d) of Directive 2011/95. Anyone raising a conscientious objection to

military service will usually argue – as the applicant in these proceedings does – that he is thereby giving expression to his stance on the matter (his 'thought' within the meaning of Article 10(1)(e) of Directive 2011/95). This raises the question as to whether, in circumstances such as those at issue, it is even conceivable that a connection would not be present, given that the opinion that one cannot perform military service in a conflict where this might lead to the commission of war crimes must also be regarded as a political opinion.

The fifth question referred

20 By the fifth question, the referring court wishes to ascertain whether prosecution or punishment for refusal to perform military service within the meaning of Article 9(2)(e) of Directive 2011/95 constitutes a case of persecution for holding a political opinion within the meaning of Article 10(1)(e) of Directive 2011/95.