

Case C-579/20

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:

2 November 2020

Referring court:

Rechtbank Den Haag, sitting in Haarlem (Netherlands)

Date of the decision to refer:

19 October 2020

Applicants:

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Defendant:

Staatssecretaris van Justitie en Veiligheid

Subject matter of the main proceedings

The applicants lodged an appeal against the rejection of their application for a residence permit as applicants for asylum. According to the defendant, they do not qualify for subsidiary protection under Article 15(c) of Directive 2011/95 (‘the Qualification Directive’).

Subject matter and legal basis of the request

The referring court asks the Court of Justice of the European Union (‘the Court of Justice’), in accordance with Article 267 TFEU, to interpret Article 15(c) of the

Qualification Directive. The request concerns the scope of that provision. In particular, the referring court asks whether a non-exceptional situation in the country of origin, characterised by a limited degree of indiscriminate violence, may nevertheless justify subsidiary protection in certain personal circumstances. The question also arises as to the factors to be taken into account in assessing those circumstances.

Questions referred for a preliminary ruling

1. Is Article 15(c) of the Qualification Directive intended to provide protection only in the exceptional situation where the degree of indiscriminate violence in a situation of international or internal armed conflict reaches such a high level that there are substantial grounds 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 threat referred to in that provision? And does that exceptional situation fall under the ‘most extreme cases of general violence’ referred to in the judgment in *N.A. v. United Kingdom* (ECtHR, 17 July 2008, CE:ECHR:2008:0717JUDO02590407)?

If the first part of the first question is answered in the negative:

2. Should Article 15(c) of the Qualification Directive be interpreted as meaning that a lesser degree of indiscriminate violence than the aforementioned exceptional situation, in conjunction with an applicant’s personal and individual circumstances, may also lead to there being substantial grounds for believing that an applicant who returns to the country or region concerned faces a risk of being subject to the threat referred to in that provision?

If the second question is answered in the affirmative:

3. In that situation, should a sliding scale be used which differentiates between possible degrees of indiscriminate violence and the associated degree of individual circumstances? And what are the personal and individual circumstances that can play a role in the assessment by the determining authority and the national court or tribunal?

If the first question is answered in the affirmative:

4. Is Article 15 of the Qualification Directive satisfied where an applicant who finds himself in a situation involving a lesser degree of indiscriminate violence than that of the exceptional situation referred to, and who is able to prove that he is specifically affected thereby (inter alia) for reasons relating to his personal circumstances, is granted subsidiary protection solely on the basis of Article 15(a) or (b) of the Qualification Directive?

Provisions of EU law relied on

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; Article 2(f), and Articles 6, 15 and 18.

Provisions of national law relied on

Vreemdelingenwet 2000 (Law on Aliens of 2000); Article 29(1)(b).

Vreemdelingencirculaire (Circular on Aliens of 2000); paragraph C2/3.3.

Succinct presentation of the facts and procedure in the main proceedings

- 1 The applicants are a family with three children. They all have Afghan nationality. The parents came to the Netherlands with their eldest child in 2015. The other two children were born in the Netherlands. The applicants belong to the Hazara (an ethnic group in Afghanistan) and are Shi'ite. The (female) applicant and the second child have complex psycho-traumatic complaints. Child 2 has long-term behavioural and emotional problems and a language deficit.
- 2 The applicants submitted three previous asylum applications, all of which were rejected. The applicants successfully appealed to the referring court against the rejection of the present application. The defendant lodged an appeal, after which the highest administrative court of the Netherlands, the Afdeling Bestuursrechtspraak van de Raad van State (Administrative Jurisdiction Division of the Council of State, 'Afdeling') set aside that judgment and remitted the case back to the referring court.

Essential arguments of the parties in the main proceedings

- 3 The applicants submit that, in the event of their expulsion to Afghanistan, they face a real risk of 'serious harm' within the meaning of Article 15(c) of the Qualification Directive ('serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict'). The applicants rely first of all on the dangers for them of the general situation in Afghanistan, and specifically in the father's region of origin, Ghazni Province. In addition, they refer to their special factual circumstances, in particular, their ethnic background, the lack of any family or network in Afghanistan, the western way of life of the eldest daughter who has lived in the Netherlands for most of her life, the fact that the other children were born in the Netherlands, and the educational and psychological problems in the family. The applicants argue that those individual circumstances must be taken into account in

assessing whether the conditions set out in Article 15(c) of the Qualification Directive have been satisfied.

- 4 The applicants submit that, by failing to take account of those individual circumstances, the defendant carried out a review which was too limited and which, moreover, is inconsistent with the interpretation of that provision by the Court of Justice in its judgment of 17 February 2009 in Case C-465/07, *Elgafaji*, EU:C:2009:94 (‘the *Elgafaji* judgment’). According to the applicants, that judgment shows that even a low degree of indiscriminate violence may constitute serious harm within the meaning of Article 15(c) of the Qualification Directive. However, the lower the threat of violence, the more evidence the applicant will have to provide of the fact that he is at risk of such serious harm because of personal circumstances (regarding the *Elgafaji* judgment, see also below, paragraphs 6 and 7).
- 5 The defendant stresses in particular that Article 15(c) of the Qualification Directive applies only if there is an exceptional situation where, solely on account of their presence in the country of origin, individuals face a real risk of serious harm. Individual factors are irrelevant. On the other hand, under point (b) of the same Article 15, subsidiary protection may be granted on the basis of a lesser degree of indiscriminate violence in combination with individual factors. If an applicant is found to belong to a high-risk or vulnerable minority group, he is required to demonstrate only to a limited extent that, in his country of origin, he is at risk of ‘torture or inhuman or degrading treatment or punishment’, as referred to in that provision. However, the defendant maintains that the applicants do not belong to a high-risk or vulnerable minority group because of their ethnic origin and there are not even minor indications that Article 15(b) applies.

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

- 6 The referring court cites in detail paragraphs 38, 39 and 43 of the *Elgafaji* judgment. The Court of Justice states that Article 15(c) of the Qualification Directive is at issue where an applicant ‘belongs, like other people, to a circle of potential victims of indiscriminate violence’, but that that provision must be subject to a coherent interpretation in relation to Article 15(a) and (b), which require a clear degree of individualisation. That individualisation is also relevant to the assessment of paragraph (c) of that Article. According to paragraph 39 of that judgment, ‘the more the applicant is able to show that he is specifically affected by reason of factors particular to his personal circumstances, the lower the level of indiscriminate violence required for him to be eligible for subsidiary protection’.
- 7 The Court of Justice held in paragraph 43 and in the operative part of the judgment that a serious and individual threat may exist to the life or person of an applicant for subsidiary protection within the meaning of Article 15(c) of the Qualification Directive without the applicant being ‘specifically targeted by

reason of factors particular to his personal circumstances'. The existence of such a threat can 'exceptionally' be considered to be established on the ground that the applicant 'would, solely on account of his presence [in the country concerned], face a real risk of being subject to that threat'.

- 8 In the view of the referring court, despite those indications from the Court of Justice, uncertainties remain as to the scope of Article 15(c) of the Qualification Directive. It is apparent that the Member States of the European Union have interpreted that provision differently.¹ Moreover, the courts and tribunals in the Union have applied it in different ways, as can be seen from judgments of the Bundesverwaltungsgericht (Federal Administrative Court, the supreme administrative court in Germany),² the Nejvyšší správní soud (Supreme Administrative Court, Czech Republic),³ the Asylum and Immigration Tribunal (second instance court in asylum and immigration cases, United Kingdom)⁴ and the Raad voor Vreemdelingenbetwistingen (Council for asylum and immigration proceedings, Belgium).⁵
- 9 The main distinction relates to the question whether the application of that provision is limited to the exceptional situation where the degree of indiscriminate violence characterising the conflict taking place reaches such a high level that substantial grounds are shown for believing that a civilian would, solely on account of his presence there, face a real risk of being subject to serious harm. In addition, Case C-901/19, which is pending before the Court of Justice, raises the issue of the degree of indiscriminate violence required.
- 10 According to the referring court, it appears from the *Elgafaji* judgment that Article 15(c) may be applied not only in the exceptional situation referred to therein, but also in a non-exceptional situation. The latter would entail a case of conflict involving indiscriminate violence which gives rise to a serious and individual threat, but where the degree of violence is not sufficient for it to be assumed that everyone who is exposed to it faces an individual risk. In such a case, the applicant will have to demonstrate on the basis of individual and personal circumstances that he faces a disproportionate risk of becoming a victim of that 'indiscriminate' violence. In the light of paragraph 39 of the *Elgafaji* judgment, the extent to which the applicant must prove that he is affected by that violence by reason of individual and personal circumstances will depend on the

¹ The referring court bases that finding on the report of the European Commission 'Evaluation of the application of the recast Qualification Directive (2011/95/EU)' of January 2019.

² Bundesverwaltungsgericht, 14 July 2009, No. 10 C 9.08.

³ Nejvyšší správní soud, 13 March 2009, No. 5 Azs 28/2008.

⁴ Asylum and Immigration Tribunal, 19 October 2009, CG (2009) UKAIT 00044.

⁵ Raad voor Vreemdelingenbetwistingen, 20 November 2017 (195 227), 29 March 2018 (201 900), 28 May 2018 (204 404), 5 June 2018 (204 861), 29 June 2018 (206 310) 12 February 2019 (216 632).

degree of indiscriminate violence. According to, inter alia, the European Asylum Support Office (EASO), there is a sliding scale of four levels.⁶ According to EASO, each level requires a different level of individual factors in order for it to be concluded that there is a real risk of serious harm as referred to in Article 15(c) of the Qualification Directive.

- 11 In the Netherlands, however, the Afdeling has interpreted the *Elgafaji* judgment as meaning that Article 15(c) of the Qualification Directive only applies in the aforementioned exceptional situation, where there is so much indiscriminate violence that there are substantial grounds for believing that a citizen returning to the country concerned faces a real risk of being subject to serious harm solely on account of his presence there. That exceptional situation falls under the ‘most extreme cases of general violence’ referred to in the judgment of the European Court of Human Rights of 17 July 2008, *N.A. v. United Kingdom*, CE:ECHR:2008:0717JUDO02590407. According to the Afdeling, individual circumstances are irrelevant in such a situation. The Afdeling is of the view that, in the event of a lesser degree of indiscriminate violence, an applicant can only rely on protection on the basis of Article 15(a) or (b) of the Qualification Directive. He must then demonstrate that he is specifically threatened for reasons relating to his personal circumstances. This corresponds to the position taken by the defendant in the present case.
- 12 The referring court considers, as does, inter alia, EASO, that that interpretation of the *Elgafaji* judgment is too restrictive. The non-exceptional situation also falls within the scope of Article 15(c) of the Qualification Directive. An applicant must also be able to rely on a lesser degree of indiscriminate violence in combination with individual and personal circumstances, which must be all the more substantial the lower the threat of violence. Such violence need not then specifically relate to the applicant. That requirement applies only to paragraphs (a) and (b) of that article.
- 13 In the present case, if that interpretation is followed, applicants belonging to a high-risk or vulnerable minority group may be eligible for subsidiary protection under Article 15(c) of the Qualification Directive without their needing to demonstrate that they are at risk, in their country of origin, of violence specifically directed against them. They only have to demonstrate that they may be subjected to indiscriminate violence owing to personal factors such as their ethnic background, family situation or medical condition. However, if they were only eligible for subsidiary protection under paragraphs (a) or (b), they must demonstrate that there are at least limited indications that they are at risk of suffering the serious harm referred to therein, which is always specifically directed at the applicant.
- 14 In the light of the different interpretations of the *Elgafaji* judgment within the Union, the referring court is of the view that it is necessary, in the present case, to

⁶ EASO Guidelines, *The implementation of Article 15(c) QD in EU Member States*.

request a preliminary ruling on questions concerning the scope of Article 15(c) of the Qualification Directive and the importance of the individual and personal circumstances of an applicant who relies on that provision.

WORKING DOCUMENT