

**THE ECJ AND SUBSIDIARY PROTECTION :**  
**REFLECTIONS ON *ELGAFAJI* - AND AFTER**

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Prior to *Elgafaji*<sup>1</sup> the ECJ had decided only two cases relating to asylum. The first one related to the respective powers of the European Parliament and of the Council<sup>2</sup>. The second one, following a referral of a Swedish court, concerned the implementation of Regulation EC 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third country national<sup>3</sup>. *Elgafaji* is the first decision concerning the substance of the 2004 Qualification Directive ( hereafter: QD) and, more precisely, the scope of subsidiary protection under Article 15-(c).

The role of the ECJ in the determination of refugee and asylum law inside the EU is bound to expand in the near future for at least three reasons. The first one

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<sup>1</sup> *Meki Elgafaji, Noor Elgafaji v Staatssecretaris van Justitie*, Case C - 465 / 07, Grand Chamber, February 17, 2009; ( 2009) 20 *IJRL* 297- 307.

<sup>2</sup> The European Parliament brought an action for annulment, with the support of the Commission, against the Council Directive 2005/85/EC of December 1 2005 on minimum standards of procedure in Member States for granting and withdrawing refugee status: *European Parliament v Council*; Case, C- 133 / 06, May 6, 2008.

<sup>3</sup> *Migrationsverket v Petrosian*, Case C-19 / 08 , January 29, 2009.

is that a number of asylum cases relating to the interpretation of the QD have been sent to it through the referral procedure. They relate to the exclusion (Art.12, (b) and (c)<sup>4</sup> and cessation (Article 11-1(c)<sup>5</sup> clauses of the QD. The second reason is that under Article 234 of the Lisbon Treaty the jurisdiction of the ECJ concerning questions of asylum will be increased. The regrettable limits contained in the present Article 68 ECT will disappear<sup>6</sup>. The third reason is the creation in 2008 of a new urgent reference procedure, which applies to referrals in the areas covered by Title VI TEU and Title IV, part III, ECT<sup>7</sup>.

This report is divided into four parts: Part I analyses the referral of the Dutch Council of State; Part II comments on the submissions of some Member States and of the Commission ; Part III contains an analysis of the *Elfagaji* ruling ; Part IV ,“ After Elgafaji”, concerns domestic cases decided since *Elfagaji*.and infringement proceedings initiated by the Commission.

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<sup>4</sup> German Federal Administrative Court, BVerw G, Cases C-175 / 08, *Aydin Salahadin Abdullah v Federal Republik of Germany*; C-176 / 08, *Kamil Hasan v FRG* ;C-177/08, *Khoshnaw Abdullah c FRG* ;C-178 / 08, *Ahmed Adem and Hamin v FRG*; *Rosa Rashi v FRG*; C-179/ 08, *Oler Jamal v FRG*, OJ (C 197) , 3-5.

<sup>5</sup> German Federal Administrative Court, BVerw G, 10 C 48-07, 14 October 2008; Budapest Municipal Court, January 26, 2009, Case C-31 / 09 *Bolbol Nawras v Bevandorlasi es Allampolgarsagi Hivatal*, OJ c-82-15, April 4, 2009.

<sup>6</sup> As proposed by the Commission : Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee, the Committee on the Regions and the Court of Justice of the European Communities, Adaptation of Title IV of the Treaty establishing the European Community relating to the jurisdiction of the Court of Justice with a view to ensuring more effective judicial protection, COM (2006) 346 final, pp. 3-4.- See D.Ruiz Jarabo-Colomer, ‘ La Cour de justice de l’Union européenne après le traité de Lisbonne’, (2008) *Gazette du Palais*, n° 171, June 19, p. 23.

<sup>7</sup> Cf. T. Millett, ‘ A marked improvement ‘(2008) *New Law Journal* 694- 695.

# I

## THE REFERRAL OF THE DUTCH COUNCIL OF STATE

A few preliminary remarks are in order to understand the wording of the referral. The Netherlands had not transposed Article 15-(c)QD when the Elfagajis applied for a residence permit. Two clauses of the domestic statute (the Law on aliens) applied. Under Article 29-1: “ A residence permit for a fixed period...may be issued to an alien....b) who has proved that he has good grounds for believing that if he is expelled he will run a real risk of being subjected to torture or to inhuman or degrading treatment or punishment<sup>8</sup>....d) for whom return to his country of origin would, in the opinion of (the Minister of Justice) constitute an *exceptional hardship*<sup>9</sup> in the context of the overall situation there”.

The applicants nevertheless invoked Article 15-(c) QD and claimed subsidiary protection. The Hague district court duly applied this Article. It held that the risk mentioned in it should not be assessed as individually as that of Article 15-(b) (torture). The court also held that Article 29-1-d of the Dutch statute mentioned above could provide a legal basis for granting a residence permit corresponding to the right arising from Article 15-(c) QD. It quashed the Minister’s refusal to grant such a permit.

Before the Council of State the Minister’s position could be summed in three affirmations: The risk mentioned in Article 15-(c) QD should be read in conjunction with Recitals 9 and 26. Such a threat is covered by Article 29-1-b mentioned above. The notion of individual threat mentioned by the QD should

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<sup>8</sup> A 2000 circular states that this provision is derived from Article 3 ECHR .

<sup>9</sup> My emphasis.

be interpreted by taking into account the degree of individualisation requested by the case law of the European Court of Human Rights relating to Article 3 ECHR. According to the Minister the aim of Article 15-(c) QD was to codify this case law. The Council of State referred the following questions to the ECJ for a preliminary ruling:

“ 1. Is Article 15 (c) (of the Directive) to be interpreted as offering protection only in a situation in which Article 3 of the (ECHR) , as interpreted in the case-law of the European Court of Human Rights, also has a bearing, or does Article 15 (c), in comparison with Article 3 of the (ECHR), offer supplementary or other protection ?

2. If Article 15(c) of the Directive, in comparison with Article 3 of the (ECHR) offers supplementary or other protection, what are the criteria in that case for determining whether a person who claims to be eligible for subsidiary protection status runs a real risk of serious and individual threat by reason of indiscriminate violence, within the terms of Article 15-(c) of the Directive, read in conjunction with Article 2 (e) thereof ? ”.

Two remarks might be in order here.

- Noting that Article 15 - (c) QD had not been transposed into Dutch law when the Elgafajis applied for a residence permit, the Dutch Council of State wondered whether a transposition was necessary. It affirmed that the answer would depend upon the ECJ’s answer to the two questions contained in the referral. With the fullest respect, this is strange: Under Article 15 (c) “serious harm” consists of “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 two provisions of Article 29-1 of the Dutch statute do not correspond to such a situation.

The obvious conclusion would have been that the transposition was indeed necessary. No referral was necessary on *this* point.

- The two questions contained in the referral mention Article 3 ECHR and the Strasbourg Court case law relating to it. This is also strange, for two reasons: The first one is that the Elgafajis relied on Article 15(c) QD, not (b), which mentions torture. The second one is that under the consistent case law of the ECJ EU Directives and Regulations must be given an autonomous meaning and interpretation. The fact that the ECJ duly takes into account the case law of the European Court of Human Rights does not restrict the scope of this principle. The real question is contained in the second question asked by the Dutch Council of State - provided that one deletes from it the words “ in comparison...protection ”.

## II

### THE SUBMISSIONS OF THE MEMBER STATES AND OF THE COMMISSION

In addition to the Netherlands seven other Member States presented submissions: Belgium, Finland, France, Greece, Italy, Sweden and the UK.

France and the UK presented an extremely restrictive interpretation of Article 15-(c) QD. Its scope was held by them to be the same as that of Article 3 ECHR, but narrower, in view of its wording. Its aim was to codify the case law of the Strasbourg court<sup>10</sup> on this Article, as shown by Recital 26 and the note of the Presidency<sup>11</sup>. The drafting history showed that Member States did not want to add to their obligations. The Netherlands also held that Article 15 - (c) had the same scope and required the same degree of individualisation of the risk as in Article 3 ECHR. Its added value was in the lesser burden of proof

Belgium, Greece and Sweden were in favour of a broad interpretation of Article 15-(c) QD, a new and an autonomous instrument and not a codification of the case law on Article 3 ECHR. They mentioned the doctrine of “effet utile”. Consequently the Article could not require the same level of individual threat as in Article 15 (a) and (b) or Article 3 ECHR.

The Commission affirmed that the “effet utile” of Article 15-(c) QD consisted in a lowering of the standard of proof. It added that it provided a clarification of the uncertain and unclear case law on Article 3 ECHR. The notion of “ individual

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<sup>10</sup> *Vilvaraj and others v UK*, October 30, 1991 and *Salah Sheek v the Netherlands*, January 11, 2007.

<sup>11</sup> Presidency Note, 12148/ 02, 20 September 2002.

threat ” should be interpreted by taking into account three elements: The category of persons who could obtain protection on a collective basis under the Directive 2001/55 on temporary protection. In addition to a general danger, the individual must be targeted. Membership of an endangered group or origin in an embattled region is sufficient<sup>12</sup>.

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<sup>12</sup> Note on the public hearing of the ECJ, July 8, 2008, by R. Bruin, R. Bank and S. Boutruche, UNHCR (Internal document).

### III

#### THE *ELGAFAJI* RULING

I shall consider the following points:

1. The autonomy of EC law
2. The interpretation of Article 15-(c) QD
3. An assessment of the ECJ's judgment
4. The larger picture: A missed opportunity ?
5. A final comment

##### III.1. On the autonomy of EU law: A declaration of independence

The ruling begins with a reaffirmation of the autonomy of EU law, leading to rewriting of the question asked. After a brief summary of it <sup>13</sup> the Court reaffirmed the obvious, i.e.

- The fundamental right guaranteed under Article 3 ECHR is part of the general principles of Community law, the observance of which is guaranteed by the Court.
- The latter takes into consideration the case law of the European Court of Human Rights in interpreting the scope of that right in the Community legal order.
- It is Article 15-(b) QD which corresponds to Article 3 ECHR. The content of Article 15-(c) is different from that of Article 3 ECHR. Therefore its

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<sup>13</sup> § 27.



interpretation “ must...be carried out *independently*<sup>14</sup> with due regard, of course, for fundamental rights<sup>15</sup>.

After mentioning Article 3 ECHR at the outset, as part of the legal context<sup>16</sup> the Court reformulated the issue at stake by excluding it<sup>17</sup>. Article 3 resurfaced somehow later on when the Court felt it necessary, one wonders why, to affirm that its interpretation of Article 15-(c) was fully compatible with the European Convention of Human Rights, including the case law of the Strasbourg court relating to Article 3<sup>18</sup>.

This reaffirmation of the autonomy of the EU legal order is hardly new<sup>19</sup>. In his conclusions Advocate General Poiares Maduro rightly insisted on this point:

“...the real point of the debate, he held,...concerns, in actual fact , the scope of the protection which must be afforded to applicants for asylum on the basis of Community law<sup>20</sup>...the answer to that question cannot be inferred from Article 3 of the ECHR but must be sought principally through the prism of Article 15-(c) of the Directive”<sup>21</sup>.

As to the relation between Community law and the case law of the European Court of Human Rights, the Advocate General aptly said: “ Community provisions, irrespective of which provisions are concerned , are given an *independent*<sup>22</sup> interpretation which cannot therefore vary with according to and/or be dependent on developments in the case law of the European Court

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<sup>14</sup> My emphasis.

<sup>15</sup> § 28.

<sup>16</sup> § 3.

<sup>17</sup> § 28-30.

<sup>18</sup> § 44.

<sup>19</sup> See, for a recent illustration, the important decision of the ECJ in *Yassin Abdullah Kadi, Al Barakkat International Foundation*, September 3, 2008, joint Cases C - 402 / 05 P and C- 415/ 05 P.

<sup>20</sup> § 17.

<sup>21</sup> § 19.

<sup>22</sup> My emphasis

of Human Rights”<sup>23</sup>. Thus “ it is not for the Community courts to determine the interpretation of Article 3 of the Convention which prevails”<sup>24</sup>.

This being said as it should, the Advocate General recalled the important place of the ECHR in the Community case law .He also mentioned Article 52-3 of the Charter of Fundamental Rights<sup>25</sup>.

### III. 2. On the interpretation of Article 15-(c) QD

The judgment underlines the differences of scope and wording between Articles 15-(a) and (b) on the one hand and 15-(c) on the other one<sup>26</sup>. One would have expected to see, in the judgment, some words on what the Advocate General aptly called the “methodology of interpretation”, i.e. the principles applying, in this case, to it<sup>27</sup>: The first element to be taken into account is “ the primary objective of the Qualification Directive and the fundamental right of asylum”<sup>28</sup>. This objective is a two-fold one, a general and a specific one. The general one is the creation, by the QD, of a new basis of international protection, subsidiary protection, in addition to the refugee status granted under the 1951 Geneva Convention. The specific objective lies in the existence of Article 15-(c) in addition to Articles 15-(a) and (b) and its very wording.

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<sup>23</sup> § 19.

<sup>24</sup> § 20. In addition to this reason of principle the Advocate General said that the interpretation of Article 3 by the Strasbourg court was a “ dynamic interpretation which is always changing ” (§ 20).

<sup>25</sup> At § 22 : « In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.”

<sup>26</sup> § 32-33.

<sup>27</sup> § 31 ss.

<sup>28</sup> § 33.

As to the interpretation of “individual threat” the judgment makes the following points:

- “ By contrast ” the harm defined in Article 15-(c) “ covers a more general risk of harm<sup>29</sup>.
- The violence mentioned is an “indiscriminate one”, ” a term which implies that it may extend to people irrespective of their personal circumstances”<sup>30</sup>.
- Consequently the decision affirms a link between the level of indiscriminate violence characterizing the armed conflict and the existence of “ substantial grounds for believing that a civilian’s return to his country would face, *solely on account of his presence*,<sup>31</sup> a real risk of being subject to the serious threat mentioned by Article 15-(c)”<sup>32</sup>.
- This, the decision adds, taking into account Recital 26, would represent “an exceptional situation”<sup>33</sup>. Such situations may occur because “collective factors play a significant role in the application of Article 15-(c), e.g. whenever “ the person concerned belongs, like other people, to a circle of potential victims of indiscriminate violence in situations of internal or international armed conflict”<sup>34</sup>.
- Like the Advocate General the Court affirms that “ the more the applicant is able to show that he is specifically affected by reason of factors particular to his own personal circumstances the lower the level of individual violence required for him to be eligible for subsidiary protection”<sup>35</sup>. The Advocate General based his analysis on the notion of fundamental rights<sup>36</sup>. Keeping in mind the word “indiscriminate” (violence) he said that “There may be circumstances in which a

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<sup>29</sup> § 33.

<sup>30</sup> § 34.

<sup>31</sup> My emphasis

<sup>32</sup> § 35.

<sup>33</sup> § 37.

<sup>34</sup> § 38.

<sup>35</sup> § 39.

<sup>36</sup> § 33 and 34.

substantive breach of fundamental rights can occur even in the absence of any discrimination”<sup>37</sup>. The aim of the QD is to cover this type of situation<sup>38</sup>.

- As to internal protection the court held that “ the geographical scope of the situation of indiscriminate violence and the actual destination of the applicant in the event he is returned to the relevant, as is clear from Article 8 (1) of the Directive” may be taken into account <sup>39</sup>. Hence the reference, at § 45, second indent, to “ the relevant region”.

The final ruling of the ECJ appears to be both clearer and firmer than the final conclusions of the Advocate General, which do not seem to reflect the full content of his reasoning.

As to the final conclusions of the Advocate General, in brief: § 42-1 seems to be a restatement of Article 15-(c) QD with three additions: the threat must be “likely” and serious.” Likely” is an unexplained addition to the text. The person must “demonstrate” that he risk mentioned above. National courts must ensure that these conditions are fulfilled , a statement of the obvious. § 42-2 is made of two distinct statements. Firstly “ the individual nature of the threat does not have to be established to such a high standard under Article 15-(c) as under Articles 15-(a) and (b) thereof . Secondly: “...the seriousness of the violence will have to be clearly established so that no doubt remains as to both the indiscriminate and the serious nature of the violence of which the applicant for subsidiary protection is the target...” Now , serious in Article 15-(c) QD applies to the threat, not to the violence, which must be “indiscriminate”. Why this addition ? Besides, since at § 42-1 the Advocate General said that the applicant must fulfil the conditions mentions in the Article, § 42-2 seems to be a useless repetition.

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<sup>37</sup> §34 .

<sup>38</sup> Id.

<sup>39</sup> § 40, first indent.

### III.3. An assessment of the ECJ's judgment

The following points must be emphasized. They have a direct relation with the task of domestic courts.

1. As to the burden of proof in general the Court held that  
“ the existence of a serious and individual threat to the life and person of an applicant for subsidiary protection is not subject to the condition that that applicant adduces evidence that he is specifically targeted by reason of factors particular to his personal circumstances”<sup>40</sup>.
2. The court affirmed the link between the two elements: the nature of the threat and that of the general context<sup>41</sup>.
3. Following this reasoning the court held that  
“ the existence of such a threat can exceptionally be considered to be established where the degree of indiscriminate violence characterising the armed conflict taking place - assessed by the competent national authorities before which an application for subsidiary protection is made, or by the courts of a Member State to which a decision refusing such an application is referred - 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 that threat”<sup>42</sup>.
4. The judgment duly reminds domestic courts of their own responsibilities, not only in the assessment of the situation of the applicant<sup>43</sup> but also more

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<sup>40</sup> § 45, first indent.

<sup>41</sup> § 34, quoted supra p 9 in fine. See n. 39 supra.

<sup>42</sup> § 45, second indent.

<sup>43</sup> § 35 and 45, second indent

generally. Recalling that the Netherlands transposed Article 15 - (c) QD after the facts giving rise to the dispute ( from April 25, 2008, on) the judgment affirms that when applying national law, whether adopted before or after the Directive and having to interpret a Directive, domestic courts “ are required to do so, as far as possible, in the light of the wording and the purpose of the Directive in order to achieve the result pursued by the latter and therefore comply with the third paragraph of Article 249 EC”<sup>44</sup>.

#### III.4. The larger picture: A missed opportunity ?

As said earlier this was the first case relating to substantive asylum law to reach the ECJ. One would therefore have expected that that, while sticking strictly to his mission, and indeed in order to fulfil it in the best manner and respecting fully the cardinal principle of the autonomy of the interpretation of Community law, the conclusions of the Advocate General would mention , in one way or another, several elements ; inter alia: the relevant information relating to the creation, by the QD, of a new instrument of international protection, subsidiary protection and the legislative history of Article 15, together with the pertinent international human rights instruments other than the ECHR or the Charter of fundamental rights. After all subsidiary protection , and particularly Article 15- (c) were was not borne out of nothing and the quote from Ovid appended by Montesquieu <sup>45</sup> at the beginning of “L’esprit des lois”, *prolem sine matre creatam*, does not apply exactly to it.

More precisely such an expectation would apply to the following

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<sup>44</sup> § 42

<sup>45</sup> Who is quoted by Advocate General Poiares Maduro in his conclusions in *Kadi*, see supra n.19, at § 35.

a) The “ travaux préparatoires” of the QD. The initial proposal of the Commission is briefly mentioned by the Advocate General<sup>46</sup>. It might have made sense to quote it:

“ a threat to his or her life, safety or freedom as a result of indiscriminate violence arising in situation of armed conflict or *as a result of systematic or generalised violation of their human rights*”<sup>47</sup>.

b) Human rights are part of Article 15-(c), even if the wording has changed. This is indeed why “ international obligations under human rights instruments” are mentioned in Recital 25, as well as international obligations of Member States regarding non-refoulement in Recital 36. None of these instruments are mentioned.

c) The same remark applies to humanitarian law, which is surprising in view of the content of Article 15-(c) QD<sup>48</sup>. The first draft of Article 15-(c) proposed by the Council’s legal Service began with the words: “In accordance with the 1949 Convention relating to the protection of civilian persons in time of war”. As H. Storey aptly writes:” Read in international humanitarian law terms the notion of indiscriminate violence is concerned with violence which fails to distinguish between military and civilian targets and which affects civilians disproportionately. Such failure gives rise to serious violations of international humanitarian law”<sup>49</sup>.

d) The UNHCR is mentioned in Recital 15<sup>50</sup>. While no one should of course presume to “ guide” a court , it might have been useful to cite the UNHCR’s views on the QD. The Advocate General mentioned briefly the

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<sup>46</sup> § 29.

<sup>47</sup> My emphasis

<sup>48</sup> See H.Storey, ‘ EU Refugee QD : a Brave New World ? ‘(2008) *IJRJ* 793 - 841 at 827, n.109.

<sup>49</sup> Id, at 82.

<sup>50</sup> « Consultations with the UNHCR may provide valuable guidance for Member States when determining refugee status according to Article 1 of the Geneva Convention ».

2007 UNHCR study on the implementation of the Directive<sup>51</sup>, but neither its commentary of the QD<sup>52</sup> nor Its 2008 statement on subsidiary protection for people threatened by indiscriminate violence<sup>53</sup>, which is to be regretted. The more so since procedural rules before the ECJ<sup>54</sup> preclude the UNHCR as well as NGOs from presenting an amicus brief, unless they were already parties in the litigation before the domestic court<sup>55</sup>.

e) There is no mention at all of international criminal law, i.e. the status and case law of the ICTFY, ICTR and ICC. In his article mentioned above H.Storey quotes<sup>56</sup> the following UNHCR's statement :

“ It would be incongruent if persons facing risks of violation of norms sanctioned by international criminal liability would be unable to claim protection from return to situations where such risks occur”<sup>57</sup>.

f) The legal literature on the QD is not mentioned in the conclusions of the Advocate General, with the exception of a brief reference, in a footnote, to Jane McAdam's “Complementary Protection in International Refugee Law”<sup>58</sup> . As H. Lambert writes in her recent article: “ Advocates General have often referred to foreign jurisprudence and academic writing (e.g. US) for inspiration in competition cases”<sup>59</sup>. What is true of

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<sup>51</sup> UNHCR, *Asylum in the European Union. A Study of the Implementation of the Qualification EC Directive*, November 2007. See conclusions, § 27, n.10.

<sup>52</sup> UNHCR, ‘ UNHCR Annotated Comments on the EC Council Directive 2004/ 83 / EC of 29 April 2004...’

<sup>53</sup> UNHCR, ‘UNHCR Statement on Subsidiary Protection Under the EC Qualification Directive for People Threatened by Indiscriminate Violence’, January 2008.

<sup>54</sup> Statute of the Court of Justice, Article 23.

<sup>55</sup> See, for a recent example, the UNCHR submissions before the UK Court of appeal in *QD and Secretary of State for the Home Department* and *AH and Secretary of State for the Home Department*, June 24, 2009, ( 2009) EWCA Civ 620.

<sup>56</sup> At 828, n.112.

<sup>57</sup> ‘UNHCR Statement on Subsidiary Protection’ , loc. cit., p.6.

<sup>58</sup> § 31, n.11.H.Storey's article was published in April 2008. The conclusions were delivered on September 9, 2008.

<sup>59</sup> H.Lambert, « Transnational Judicial Dialogue, Harmonization and the Common European Asylum System », (2009) 58 *ICLQ*. 519 - 543 at 525, n.32.



competition law is even truer of asylum and refugee law, a new domain for the ECJ<sup>60</sup>.

### III.5. A final comment

On the tasks ahead for the domestic courts, the following remarks might be in order.

1. Subsidiary protection is a new instrument of international protection relating to asylum. It has an added value as such and must therefore be given its full effect (“effet utile”) by taking into account its purpose. Teleological interpretation of EU law, as Advocate General Poiares aptly wrote, “refers to a particular systemic understanding of the EU legal order that permeates the interpretation of all its rules”<sup>61</sup>.

2. It aims at providing protection from serious risks which relate to certain situations rather than purely individual exposure, as shown by the QD wording. Hence the notion of “indiscriminate violence”.

3. The task of domestic courts is not made easier by the wording of Article 15-(c), combined with other provisions. I agree with both Lord Justice Sedley, who wrote that Article 15-(c) was “highly problematical”<sup>62</sup> and with the UKAIT which affirmed that it was “tortuously worded”<sup>63</sup>. The ambiguities and the implicit or apparent inconsistencies are the (usual) outcome of negotiation and compromise.

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<sup>60</sup> For recent examples of such mentions in the conclusions of the Advocate General, see e.g. those of Advocate General Poiares Maduro in *FIAMM and others v Council and Commission*, joint Cases C-120 / 06 P and C-121// 06 P, September 9, 2008, at § 61 and 63, of Advocate General Bot in *Federal Republic of Germany and others v Kronofrance SA*, joint Cases C-75 / 05 P and C / 80 / 05 P, September 11, 2008, at § 102 and 141, of Advocate General Kokott in *UGT-Rioja and others and Juntas Generales del Territorio Historico de Vizcaya*, joint Cases C-428 / 06 to C- 434 / 06, September 11, 2008, at § 47 and of Advocate General Ruiz-Jarabo Colomer in *Jörn Petersen v Landesgeschäftsstelle des Arbeitsmarketservice Niederösterreich*, Case C-228 / 07, September 11, 2008, at § 3, 15, 18, 26,29,30 and 31.

<sup>61</sup> M.Poiares Maduro, ‘ Interpreting European law- Judicial adjudication in a context of constitutional pluralism ‘, (2007) 1 *European Journal of Legal Studies*

<sup>62</sup> In the judgment of the UK Court of Appeal mentioned supra n. 55, § 19.

<sup>63</sup> *KH(Article 15-(c) Qualification Directive Iraq* CG (2008) UKAIT 00023 , § 32

4. The final interpretation of the QD belongs to the ECJ. *Elfagaji* brings a welcome light on the conditions stated in Article 15-(c) and on the relationship between them. This means, concretely that courts have to examine the situation at hand *together* with the elements relating to the applicant's particular circumstances.

5 As shown by the case law of some countries ( see *infra* ) , additional light may come from international human rights law, international humanitarian law and international criminal law.

#### IV

## AFTER *ELGAFAJI*

I shall first comment briefly on the case law of some Member States and then mention infringement proceedings brought by the Commission.

### IV.1. Domestic cases decided since *Elgafaji*.

#### a) Czech Republik

The Czech Supreme Administrative Court decided in March 2009 its first case relating to the QD<sup>64</sup>. Dr Kosar summed it up as follows in his letter : The Court referred in its judgment to Dutch, French German and UK case law. Two decisions were discussed in detail, a German<sup>65</sup> and an English<sup>66</sup> one. The Court considered the three issues arising from Article 15-(c) QD: The situation of international or internal armed conflict; the definition of civilian and that of “serious and individual threat to a civilian’s life or person by reason of indiscriminate violence”. As to the latter the Court held that the notion of such a threat contained several requirements which, following *Elgafaji*, contained two alternative scenarios:

- “1. When there is a so-called ‘ total conflict’ in the country of origin, every civilian ‘ would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to threat to her life or person by reason of indiscriminate violence’ (C-465 / 07, para 43, second indent);
2. when the armed conflict does not reach the threshold of a so-called ‘ total conflict’, an applicant must show further distinguishing features in order to prove that she faces ‘ serious and individual threat to a life or person of

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<sup>64</sup> Supreme Administrative Court, March 13, 2009, n° 5 Azs 28 : 2008.

<sup>65</sup> Federal Administrative Court, BVerw G 10 C 43.07.

<sup>66</sup> Asylum and Immigration Tribunal, KH (2008) UKIAT 00023. The Court found that it contained much valuable background. information and annexed it to the judgment.

indiscriminate violence’ in her country or region” (C-465 / 07 *Elgafaji*, para 38 in conjunction with paras 39 and 40”.<sup>67</sup>

#### b). Netherlands

The Council of State decided the *Elgafaji* case on May 25, 2009<sup>68</sup>. I have not been able to read a translation of the full decision or a résumé of it. I assume that our Dutch colleagues will comment on it. From what we heard from Hemme Battjes and Hesther Gorter it seems that the Council of State concluded that Article 29(1)(b) of the Aliens Act provides for the required protection: it addresses situations covered by Article 3 ECHR. The latter, taking into account the ruling of the European Court of Human Rights in *NA v UK*<sup>69</sup>, mentioned by the ECJ in § 44, also addresses the situation meant in Article 15-(c). The circumstance that Article 15-(c) must be interpreted autonomously and that following § 35 ( of the ECJ’s ruling) it could obtain its own field of application, as the ECJ considers in § 36, does not alter the fact that the interpretation of Article 15-(c) offered by the ECJ in this case is also covered by Article 3 ECHR<sup>70</sup>. The Council of State added that situations described in § 39 and 40 are also covered by Article 3 ECHR<sup>71</sup>.

Later on<sup>72</sup> the Council of State re- affirmed that Article 3 ECHR includes the exceptional circumstances covered by Article 15-(c) QD as laid down in the second indent of § 43 of the ECJ’s ruling. That indent , it held, corresponds to § 115 of *NA v UK*, mentioned above<sup>73</sup>.

#### c). Bulgaria

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<sup>67</sup> Source : Dr Kosar’s letter.

<sup>68</sup> 200702174 /2 / V2

<sup>69</sup> July 17, 2008.

<sup>70</sup> At § 2.3..8 of the decision

<sup>71</sup> Id, § 2.3.9.

<sup>72</sup> July 13, 2009, 2009023237 /1 /V2

<sup>73</sup> See n. 66 supra.

The Supreme Administrative Court quashed a judgment upholding a decision of Refugee State Agency denying to the applicant refugee or humanitarian status. The refusal was based on the lack of substantive grounds under domestic law<sup>74</sup> for granting refugee or humanitarian status. The applicant could return to his country of origin, Iraq, since the sources of information did not point to any groups at risk of their human rights being violated. This, the Court held, was in violation of the Additional Provisions of the statute mentioned above, which transposes Article 15-(c) QD<sup>75</sup>. The judgment quotes *Elgafaji* and adds there is indisputable evidence that the situation in Iraq could be characterized as an internal armed conflict. The appellant came from a town in Southern Iraq where the situation is unstable due to widespread acts of extreme violence, gross violations of human rights and overall lack of rule of law. The threat of serious harm alleged by him was held to be a real one.

The judgment affirms that the uniform interpretation of Community requires national jurisdictions and authorities of the Member States to apply the ECJ's decisions containing an interpretation of EC law in analogous situations. The case was sent back to the administrative authority for a new decision<sup>76</sup>.

#### d). UK

In a recent decision<sup>77</sup> the Court of Appeal held that international humanitarian law could not be used in order to interpret and apply Article 15- (c)QD<sup>78</sup>, because it has “a specific area of operation....defined and limited purposes which do not include the grant of refuge to people who flee armed conflict”<sup>79</sup>. I

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<sup>74</sup> Articles 8 and 9, para1, item 3 of the Law on asylum and refugees.

<sup>75</sup> See Article 1, para 1, item 3.

<sup>767</sup>

Decision N 4291, April 1, 2009, *Ahmed Hassan Fayad*

<sup>77</sup> (2009) EWCA Civ 620, mentioned at n. 55 supra.

<sup>78</sup> Id, § 15-18. See the appealed judgment, *KH (Article 15(c)Qualification directive) Iraq* CG (2008) UKAIT 00023, § 33 ff.

<sup>79</sup> § 16.

disagree. During a very long time, starting at the end of the XIXth century, four distinct bodies of international law have tended to develop separately: International humanitarian law, international refugee law, international human rights law and international criminal law<sup>80</sup>. There is strong and palpable evidence showing that, both at the domestic and at the international level, they are used currently and concurrently in the drafting of legislation, case law and the drafting of treaties<sup>81</sup>.

The UKAIT held that an applicant would have to show that incidents of indiscriminate violence “ were happening on a wide scale and in such a way as to be of sufficient severity to pose a real risk of serious harm...to civilians generally”. The Court of appeal disagreed and stated:

“We would put the critical question, in the light of the Directive, of the ECJ’s recent jurisprudence and of our own reasoning, in this way:

Is there in Iraq or in a material part of it such a high level of indiscriminate violence that substantial grounds exist for believing that an applicant such as QD or AH would, solely by being present there, face a real risk which threatens his life or person ? ”<sup>82</sup>. The case was remitted.

## e) France

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<sup>80</sup> See William A.Schabas, *War Crimes and Human Rights: Essays on the death penalty, justice and accountability* (London, Cameron May, 2008). On international criminal law see Ph. Sands (ed.), *From Nuremberg to The Hague. The Future of International Criminal Justice* (Cambridge University Press, 2003).

<sup>81</sup> See R.Errera, ‘ Humanitarian Law, Human Rights and Refugee Law. The Three pillars’, in International Association of Refugee Law Judges( ed.) *The Asylum Process and the Rule of Law* ( New-Delhi, Manak, )2006, 173- 192; ‘ La directive européenne du 29 avril 2004 sur le statut de réfugié, la protection internationale et les garanties contenues dans la convention européenne des droits de l’homme’ (2008) 74 *Revue trimestrielle des droits de l’homme*, 347- 381 at 367 . See also the examples given in my paper delivered at the 2008 workshop ‘The implementation of the serious and individual threat provision of Article 15-(c) of the qualification Directive in France”, at 11 ff.

<sup>82</sup> § 40.

The QD has been transposed by a 2003 statute, hence a rather substantial case law of the Commission des recours des réfugiés (hereafter: CRR), now the Cour nationale du droit d'asile (hereafter: CNDA) and of the Conseil d'Etat.<sup>83</sup> The recent case law has led both courts to adjudicate on the following issues.

- The principle of family unity

Under the case law this principle is a general principle of refugee law derived from the 1951 Geneva Convention. It therefore does not apply to persons who have been granted subsidiary protection<sup>84</sup>.

- Refugee status and subsidiary protection

When the CNDA grants subsidiary protection to an applicant it must first state why he cannot be granted refugee status. Mrs Kona was a Christian Assyro - Chaldean from Bagdad. She was isolated. Her mother and her sister had been granted refugee status in France before the fall of Saddam Hussein. Her four brothers disappeared. She was regarded as being very rich. The CRR held that, for these reasons, she was exposed to grave, direct and individual threats coming from armed groups or uncontrolled elements of the population. The CRR held that neither the circumstances of her departure from Iraq nor other circumstances were related to one of the grounds stated in the Geneva Convention. It held that, in view of her belonging to the Assyro-Chaldean community, of her position as an isolated woman and of her supposed wealth, she was entitled to subsidiary protection under Article L 712-(c) of the Code de l'entrée et du séjour des étrangers et du droit d'asile, which transposes Article

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<sup>83</sup> See the two papers delivered at the 2008 workshop by V. Zederman 'The French reading of subsidiary protection and myself', 'The implementation of the serious and individual threat provision of Article 15-(c) of the Qualification Directive in France'.

<sup>84</sup> Conseil d'Etat, December 18, 2008, *OFPRA c Mme Ananian*, quashing, for error in law, a CRR decision applying this principle to a person who had been granted subsidiary protection.

15(c) QD. This, the Conseil d'Etat held on appeal on points of law from OFPRA, was an error in law: The CRR has stated that the threats against her came from her belonging to the Assyro - Chaldean community, without stating why the other conditions relating to refugee status were not fulfilled. As the “rapporteur public” (the model of the Advocate General of the ECJ) said in her conclusions, if the CRR thought that her belonging to a religious community was the cause of the threats against her, it should have granted her refugee status. The case was remanded to the CNDA<sup>85</sup>.

- On the application of Article 15-(c) QD as transposed into French law the following remarks are in order

\* *Elfagaji* has been mentioned and applied by the rapporteurs publics in their valuable conclusions<sup>86</sup>.

\* In *OFPRA c M. Baskarathas*, the first case in which the Conseil d' Etat had to adjudicate on the implementation of Article L 712-c of the Code mentioned supra, the following points were made :

- The link the situation of indiscriminate violence and the existence of an armed conflict was affirmed.

\* Neither the QD nor the French statute demanded that the violence and the armed conflict should exist in every place of the same geographic zone.

The CNDA had granted B. subsidiary protection on the ground that the district of Batticaloa ,in Eastern Sri Lanka, where he came from, was subjected to indiscriminate. violence ( “ une violence aveugle et généralisée ” ) characterized by bombings and exactions directed against the civilian population and leading

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<sup>85</sup> Conseil d'Etat, *Kona*, May 15 , 2009

<sup>86</sup> Mrs Burguburu in *Kona*, Mr Boucher in *OFPRA c M.Baskarathas*, July 3, 2009.



to forced transfers . The CNDA had added that the different parties to the conflict (the Sri Lankan Army, the ETLT separatist and rival Tamil movements committed grave violations of international humanitarian law against civilian populations.

\* The existence of a grave, direct and individual threat against the life or the person of the applicant is *not* subordinated to the condition that he establishes that he is specifically exposed in view of elements linked to his personal situation whenever the degree of indiscriminate violence which characterized an armed conflict reach such a high level that there are serious and established reasons to believe that a civilian sent back to the country or the region concerned would risk, solely on the ground of his presence in this territory, to a real risk to be submitted to such threats. This is a direct implementation of *Elfagaji*.

\* In addition to the mention of international humanitarian law in the *Baskarathas* decision, a number of international instruments relating to it have been mentioned in the conclusions of the rapporteur public in this case: The 1977 Second Additional Protocol to the 1949 Geneva Conventions on the protection of victims of non international armed conflicts (Article 1), the Status of the International Court, Article 8-2-d of which reproduces Article 1 of this Additional Protocol, the Internal Committee of the Red Cross Commentary on this provision<sup>87</sup> and the 2008 International Crisis Group Report on the situation in Eastern Sri Lanka.<sup>88</sup>

\* On the regional aspect of the threat two recent CNDA decisions <sup>89</sup> can be mentioned.

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<sup>87</sup> C.Pilloud, Y.Sandoz, C.Swinarski ,J..Pictet and B .Zimmermann, *Commentaire des protocoles additionnels du 8 juin 1977 aux Conventions de Genève du 12 août 1949* ( The Hague, Martinus Nijhoff, 1986)..

<sup>88</sup> International Crisis Group, *Sri Lanka's Eastern Province : Land, Development, Conflict*, Asia Report, n° 159, October 15, 2008.

<sup>89</sup> I wish to express my thanks to Mr Laurent Dufour, from the legal Service of the CNDA, who sent me these decisions.

◦ In *Thiruchelvam*<sup>90</sup>, after refusing to grant refugee status to the applicant, the CNDA refused her subsidiary protection. It considered her claim in the context prevailing at the moment in certain Northern and Eastern zones of Sri Lanka. After the adoption, by the Sri Lanka Parliament, of new provisions on emergency law and after the unilateral breakdown of the 2002 ceasefire agreement by the Government in January 2008 the situation was characterized as follows: armed attacks preceded or accompanied by forced enlistment, including that of children, bombings and exactions against the civilian population, in majority Tamil, leading to forced displacement. The parties to the internal armed conflict are guilty of grave violations of international humanitarian law. This corresponds to the situation described in Article L 712-1-c mentioned above transposing Article 15 - (c) QD. The ground for the refusal was that although Mrs T. was from the Jaffna peninsula, she said she had been living in the Colombo region since 2000 until she left Sri Lanka. This region cannot be regarded as affected by the civil war described.

◦ In *Kurumoorthy*<sup>91</sup> subsidiary protection was granted to an applicant who had been living in the Jaffna province until he left Sri Lanka in 2003. The context of indiscriminate violence in this zone had suppressed any guarantee of security for him, in spite of the fact that it was under the Army's control. In case of return in Sri Lanka and in particular to this zone, where his family lived, he was exposed to a grave, direct and individual threat against his life or person, without being able to be protected by the Sri Lankan authorities, in particular by going to a pacified region of that country.

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<sup>90</sup> CNDA, April 1, 2009.

<sup>91</sup> March 10, 2009.

## IV.2. Infringement proceedings brought by the Commission

Infringement proceedings have been initiated by the Commission against a number of States which have not transposed the QD within the deadline (October 10, 2006). So far this has led two four decisions of the ECJ holding that the following States have infringed the QD: Finland<sup>92</sup>, the UK<sup>93</sup>, Sweden<sup>94</sup> and Spain<sup>95</sup>.

Infringement proceedings have been also brought against Greece<sup>96</sup>, Malta<sup>97</sup>, Portugal<sup>98</sup> and the Netherlands<sup>99</sup>.

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<sup>92</sup> Case C- 293 / 08, February 5, 2009.

<sup>93</sup> Case C- 256 / 08, April 30, 2009.

<sup>94</sup> Case C - 322 / 08, May 14, 2009.

<sup>95</sup> Case C- 272 / 08, July 9, 2009.

<sup>96</sup> Case C- 220 / 08.

<sup>97</sup> Case C- 269 / 08.

<sup>98</sup> Case C- 191 / 08.

<sup>99</sup> Case C- 190 / 08.