



UNHCR Statement on the “Ceased Circumstances” Clause of the EC Qualification Directive

Issued in the context of the preliminary ruling references to the Court of Justice of the European Communities from the German Federal Administrative Court regarding interpretation of Article 11(1)(e) and related provisions of the Qualification Directive

Introduction

The German Federal Administrative Court has requested a preliminary ruling from the Court of Justice of the European Communities¹ (“ECJ”) concerning the interpretation of Article 11(1)(e) of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.² That provision concerns the cessation of refugee status “because the circumstances in connection with which he or she has been recognized as a refugee have ceased to exist”, and is commonly known as the “ceased circumstances” clause. Article 11(1)(e) of the Qualification Directive is based on Article 1(C)(5) of the 1951 Convention relating to the Status of Refugees.³

¹ The German Federal Administrative Court submitted five identical references for preliminary ruling to the Court of Justice of the European Communities (hereafter “ECJ”) on 28 April 2008 concerning the interpretation of Article 11(1)(e) in the following cases: Case C-179/08, *Dler Jamal v Federal Republic of Germany*; Case C-178/08, *Ahmed Adem and Hamrin Mosa Rashi v Federal Republic of Germany*; Case C-177/08, *Khoshnaw Abdullah v Federal Republic of Germany*; Case C-176/08, *Kamil Hasan v Federal Republic of Germany*; Case C-175/08, *Aydin Salahadin Abdulla v Federal Republic of Germany*, Official Journal of the European Union of 2 August 2008 (OJ C 197, 2.8.2008, pp. 3-5), at: http://eur-lex.europa.eu/JOIndex.do?year=2008&serie=C&textfield2=197&Submit=Search&ihm_lang=en.

² Council of the European Union, *Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted* [OJ L 304/12, 30.09.2004], at: <http://www.unhcr.org/refworld/docid/4157e75e4.html> (hereafter: “Qualification Directive”).

³ UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations Treaty Series No. 2545, vol. 189, p. 137, at: <http://www.unhcr.org/refworld/docid/3be01b964.html> (hereafter: “1951 Convention”).

The questions posed by the German Federal Administrative Court⁴ concern the criteria for cessation of refugee status under Article 11(1)(e) as well as the standard and the burden of proof to apply in this context.

These questions represent an opportunity for the ECJ to clarify, for the first time, the application of a provision of the 1951 Convention in the framework of the EU asylum *acquis*. The Office of the United Nations High Commissioner for Refugees (“UNHCR”) has a direct interest in this matter, as the agency entrusted by the United Nations General Assembly with responsibility for providing international protection to refugees, and for seeking permanent solutions for the problems of refugees.⁵ According to its Statute, UNHCR fulfils its mandate *inter alia* by “[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto”.⁶ This supervisory responsibility is reiterated in Article 35 of the 1951 Convention⁷ and Article II of the 1967 Protocol relating to the Status of Refugees⁸ and extends to all EU Member States, as they are all States Parties to both instruments. In keeping with this supervisory role, UNHCR’s Executive Committee⁹ (“ExCom”) specified, in its Conclusion No. 69,¹⁰ that UNHCR should be “appropriately involved” in the application of the “ceased circumstances” clause.

UNHCR’s supervisory responsibility has been reflected in European Community law, including by means of a general reference to the 1951 Convention in Article 63(1) of the Treaty establishing the European Community¹¹, as well as in Declaration 17 to the Treaty

⁴ The English translation of the questions is reproduced in Part Four below.

⁵ UN General Assembly, UNHCR, *Statute of the Office of the United Nations High Commissioner for Refugees*, A/RES/428 (V), Annex, UN Doc. A/1775, para. 1 (14 December 1950); at: <http://www.unhcr.org/refworld/docid/3ae6b3628.html>.

⁶ *Ibid.*, para. 8(a).

⁷ See above footnote 3. According to Article 35(1) of the 1951 Convention, UNHCR has the “duty of supervising the application of the provisions of this Convention”.

⁸ UN General Assembly, *Protocol Relating to the Status of Refugees*, 30 January 1967, United Nations Treaty Series No. 8791, vol. 606, p. 267, at: <http://www.unhcr.org/refworld/docid/3ae6b3ae4.html>.

⁹ The Executive Committee of the High Commissioner’s Programme (“ExCom”) was established in 1958 and functions as a subsidiary organ of the United Nations General Assembly. It has both executive and advisory functions. Its terms of reference are found in United Nations General Assembly Resolution 1166(XII) which states *inter alia* that it is “to advise the High Commissioner, at his request, in the exercise of his functions under the Statute of his Office.” This includes issuing Conclusions on International Protection (often referred to as “ExCom Conclusions”), which address issues in the field of refugee protection and serve as “international guidelines to be drawn upon by States, UNHCR and others when developing or orienting their policies on refugee issues”; see: UNHCR, *General Conclusion on International Protection*, ExCom Conclusion No. 55 (XL) – 1989, 13 October 1989, para. (p), at: <http://www.unhcr.org/excom/EXCOM/3ae68c43c.html>. ExCom Conclusions are adopted by consensus by the States which are Members of the Executive Committee and can therefore be considered as reflecting their understanding of legal standards regarding the protection of refugees; see: G. Goodwin-Gill, J. McAdam, *The Refugee in International Law*, Oxford University Press, 2nd Edition, 2007, p. 128. At present, 76 States are Members of the UNHCR Executive Committee.

¹⁰ UNHCR, *Cessation of status*, ExCom Conclusion No. 69 (XLIII) – 1992, 9 October 1992, at: <http://www.unhcr.org/excom/EXCOM/3ae68c431c.html>.

¹¹ *Consolidated version of the Treaty establishing the European Community* [OJ C 321 E/65, 29.12.2006], at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:321E:0001:0331:EN:pdf>.

of Amsterdam, which provides that “consultations shall be established with the United Nations High Commissioner for Refugees (...) on matters relating to asylum policy”.¹² Secondary EC legislation also emphasizes the role of UNHCR. For instance, Recital 15 of the Qualification Directive states that consultations with the UNHCR “may provide valuable guidance for Member States when determining refugee status according to Article 1 of the Geneva Convention”. The supervisory responsibility of UNHCR is specifically articulated in Article 21 of Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status.¹³

UNHCR has extensive experience with regard to assessing changes in conditions in countries of origin, both in the context of determining when it is appropriate to promote voluntary repatriation and in the application of the “ceased circumstances” clause.¹⁴ Since 1973, UNHCR has found it appropriate to invoke the “ceased circumstances” clause on 25 occasions.¹⁵ Cessation was considered appropriate in situations which reflected one of three types of fundamental change: accession to independent statehood, achievement of a successful transition to democracy and/or the resolution of a conflict. In each of these situations, UNHCR has taken a systematic and careful approach, conducting a comprehensive evaluation of conditions in the country of origin, consulting with the country of origin and the principal asylum countries, and issuing an official statement outlining the reasoning for the application of cessation.

Against this background, UNHCR elaborates below on the issues arising in the preliminary ruling references. Part One of this Statement addresses the need to interpret the Qualification Directive in accordance with the 1951 Convention and in the light of UNHCR’s guidance. Part Two explains UNHCR’s interpretation of Article 1(C)(5) of the 1951 Convention, highlighting that in order to cease refugee status based on this provision, changes in the country of origin must be fundamental and durable, and effective protection must be available there. Part Three provides a short overview of German practice with regard to cessation, which forms the background of the request. Part Four sets out UNHCR’s views on the questions submitted to the Court.

¹² Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities, 2 September 1997, *Declaration on Article 73k of the Treaty establishing the European Community* [OJ C 340, 10.11.1997] at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:11997D/AFI/DCL/17:EN:HTML>.

¹³ Council of the European Union, *Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status* [OJ L 326/13, 13.12.2005], at: <http://www.unhcr.org/refworld/docid/4394203c4.html>. Article 21(c) in particular obliges Member States to allow UNHCR “to present its views, in the exercise of its supervisory responsibilities under Article 35 of the Geneva Convention, to any competent authorities regarding individual applications for asylum at any stage of the procedure.”

¹⁴ A “ceased circumstances” clause is contained in Article 6(A)(e) of UNHCR’s Statute; see above footnote 5.

¹⁵ On UNHCR’s practice regarding cessation through 1999 see: Joan Fitzpatrick and Rafael Bonoan, “Cessation of Refugee Protection”, in E. Feller, V. Turk and Frances Nicholson (eds), *Refugee Protection in International Law*, Cambridge (2003), p. 502, at <http://www.unhcr.org/refworld/docid/470a33bc0.html>. Since 1999, the ceased circumstances clause has been invoked by UNHCR in four cases: Eritrea (for specific groups), Timor Leste, Tajikistan and Sierra Leone.

1. The Qualification Directive and the 1951 Convention

The Treaty establishing the European Community clearly establishes an obligation for EC secondary legislation on asylum to conform to the 1951 Convention and its Protocol.¹⁶ The primacy of the 1951 Convention is further recognized in European Council Conclusions and related Commission policy documents, which affirm that the Common European Asylum System must be based on the “full and inclusive application” of the 1951 Convention.¹⁷ It follows that the transposition of the Qualification Directive into national legislation of EU Member States, all of which are States Parties to the 1951 Convention, must also be in line with the 1951 Convention.¹⁸

The Qualification Directive recognizes the 1951 Convention as the “cornerstone of the international legal regime for the protection of refugees”¹⁹ and stipulates that the Directive’s minimum standards are aimed at ensuring “full respect for (...) the right to asylum”²⁰ as well as guiding Member States in the application of the 1951 Convention.²¹ Certain provisions of the Directive replicate the wording of the 1951 Convention almost exactly.²² One of the purposes of the Directive is thus not only to ensure compliance with the 1951 Convention, but to contribute to its full implementation.

¹⁶ Article 63(1) provides that measures on asylum shall be “in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 Relating to the Status of Refugees and other relevant treaties”. The Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community provides in its Article 63 that the common policy on asylum, subsidiary protection and temporary protection must be “in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties”.

¹⁷ See para. 13 of the *Presidency Conclusions of the Tampere European Council* of 15-16 October 1999, at: <http://www.unhcr.org/refworld/docid/3ef2d2264.html>; para. 6 of *The Hague Programme: Strengthening Freedom, Security and Justice in the European Union*, 13 December 2004, at: <http://www.unhcr.org/refworld/docid/41e6a854c.html>; para. 1 of the Green Paper of the Commission on the future Common European Asylum System COM(2007) 301 final, 6 June 2006, at: <http://www.unhcr.org/refworld/docid/466e5a972.html>; part 1.1 of the European Commission’s *Policy Plan on Asylum: an integrated approach to protection across the EU*, COM(2008) 360, 17 June 2008, at: <http://www.unhcr.org/refworld/docid/4860eee72.html>. The Policy Plan recognizes the fundamental role played by the 1951 Convention in the existing Treaty provisions and those resulting from the Lisbon Treaty.

¹⁸ For UNHCR’s remarks on the Qualification Directive, see: UNHCR, *Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection granted (OJ L 304/12 of 30.9.2004)*, 28 January 2005, at: <http://www.unhcr.org/refworld/docid/4200d8354.html>. See also: Gil-Bazo M-T., “Refugee Status and Subsidiary Protection under EC Law. The EC Qualification Directive and the Right to be Granted Asylum”, in: A. Baldaccini, E. Guild and Helen Toner (eds), *Whose freedom, security and justice? : EU immigration and asylum law and policy*, Oxford: Hart, 2007, pp. 229-264.

¹⁹ Recital 3 of the Qualification Directive.

²⁰ Recital 10 of the Qualification Directive.

²¹ Recital 16 of the Qualification Directive.

²² For instance, Article 2 (c) of the Qualification Directive replicates almost exactly Article 1(A) of the 1951 Convention.

The Conclusions of UNHCR’s Executive Committee as well as the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status²³ and subsequent Guidelines on International Protection²⁴ issued by UNHCR should also be taken into account in interpreting the provisions of the EU asylum *acquis*. These provide guidance for the interpretation and application of the 1951 Convention and significantly influenced the drafting of the Qualification Directive. The Explanatory Memorandum of the Commission’s proposal²⁵ quotes the UNHCR Handbook and ExCom Conclusions as sources, along with the 1951 Convention itself.²⁶

2. The “ceased circumstances” clause in international refugee law: UNHCR’s interpretation of Article 1(C)(5)

2.1. General considerations

UNHCR’s interpretation of Article 1(C)(5) of the 1951 Convention is set out in UNHCR Handbook²⁷ and its Guidelines on Cessation of Refugee Status issued in 2003.²⁸ UNHCR

²³ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, 1 January 1992, at: <http://www.unhcr.org/refworld/docid/3ae6b3314.html> (hereafter: “UNHCR Handbook”).

²⁴ UNHCR issues “Guidelines on International Protection” pursuant to its mandate, as contained in the Statute of the Office of the United Nations High Commissioner for Refugees, in conjunction with Article 35 of the 1951 Convention. The Guidelines, including UNHCR’s Cessation Guidelines, complement the UNHCR Handbook (see above footnote 23) and are intended to provide legal interpretative guidance for governments, legal practitioners, decision-makers and the judiciary, as well as UNHCR staff.

²⁵ European Commission, *Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection*, COM(2001) 510 final, 12 September 2001, at: <http://www.unhcr.org/refworld/docid/47fdfb1ad.html>.

²⁶ *Ibid*, part 3, p. 5. The 1996 Joint Position of the Council on the harmonized application of the definition of the term “refugee”, which constituted the “starting point” of the Qualification Directive, recognized that the Handbook is a “valuable aid to Member States in determining refugee status”; see: *Joint Position of 4 March 1996 defined by the Council on the basis of Article K.3 of the Treaty on European Union on the harmonized application of the definition of the term “refugee” in Article 1 of the Geneva Convention of 28 July 1951 relating to the status of refugees* [OJL 063, 13.3.1996], at: <http://www.unhcr.org/refworld/docid/3ae6b37f44.html>.

²⁷ See above footnote 23, paras. 135-136.

²⁸ UNHCR, *Guidelines on International Protection: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the “Ceased Circumstances” Clauses)*, 10 February 2003, HCR/GIP/03/03, at: <http://www.unhcr.org/refworld/docid/3e50de6b4.html> (hereafter: “UNHCR Cessation Guidelines”).

is also guided by Executive Committee Conclusions No. 65²⁹ and No. 69³⁰ on cessation of status, subsequent legal developments and State practice.³¹

Article 1(C)(5) is part of an exhaustive list of cessation clauses contained in the 1951 Convention.³² It provides that the 1951 Convention shall cease to apply to any person falling under the terms of Article 1(A) if:

“He can no longer, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, continue to avail himself of the protection of the country of his nationality; Provided that this paragraph shall not apply to a refugee falling under section A(1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality”.

Application of the “ceased circumstances” clause should be informed by the overall objective of refugee protection, which aims at finding durable solutions for refugees.³³ Durable solutions are integration in the host State, resettlement to a third State and voluntary return to the home State if this is possible in safety and dignity.³⁴ The “ceased circumstances” clause should therefore not result in uncertain status in the host State nor compel individuals to return to a volatile situation.

While the cessation clauses in paragraphs 1 to 4 of Article 1(C) are linked to a change in an individual’s personal circumstances brought about by that person, Article 1(C)(5) relates to a fundamental change in the objective circumstances in connection with which the refugee has been recognized. This provision does not require the consent or a voluntary act of the refugee.

The application of cessation may place the individual and his or her family members in an extremely vulnerable situation. It may lead to disruption of the refugee’s life and integration process in the host country, the loss of rights attached to refugee status³⁵ and

²⁹ UNHCR, *General Conclusion on International Protection*, ExCom Conclusion No. 65 (XLII) – 1991, 11 October 1991, at: <http://www.unhcr.org/excom/EXCOM/3ae68c404.html>, in particular para. (q), which has been endorsed by UN General Assembly resolution A/RES/46/106 (para. 6), at: <http://www.un.org/documents/ga/res/46/a46r106.htm>.

³⁰ See above footnote 10.

³¹ State practice in the area of cessation is limited. See: Fitzpatrick and Bonoan, see above footnote 15, pp. 538-542.

³² UNHCR Handbook, see above footnote 23, para. 116.

³³ This aim has been recognized in a series of ExCom Conclusions. See: ExCom Conclusions No. 29 (XXXIV) (1983), No. 50 (XXXIX) (1988), No. 58 (XL) (1989), No. 65 (XLII) (1991), No. 79 (XLVII) (1996), No. 81 (XLVIII) (1997), No. 85 (XLIX) (1998), No. 87 (L) (1999), No. 89 (LI) (2000) and No. 90 (LII) (2001), all available at: <http://www.unhcr.org/doclist/excom/3bb1cd174.html>. For further details see also section 4.1.2 of this Statement.

³⁴ See: UNHCR, *Conclusion on Local Integration*, ExCom Conclusion No. 104 (LVI) – 2005, 7 October 2005, para. 1, at: <http://www.unhcr.org/excom/EXCOM/4357a91b2.html>; UNHCR, *Agenda for Protection*, third edition, October 2003, pp. 74-81 at: <http://www.unhcr.org/refworld/docid/4714a1bf2.html>.

³⁵ The rights attached to refugee status under the 1951 Convention (Articles 2 to 34) contribute to integration, in particular provisions on access to education, the labour market and to social assistance as

return to a country where living conditions may be uncertain. In view of the serious consequences of Article 1(C)(5) for the refugee and the fact that this provision does not require his/her consent, UNHCR’s Executive Committee has called for a “careful approach” to its application.³⁶ UNHCR’s Cessation Guidelines stipulate that refugee status should not be the subject of “unnecessary review” in light of “temporary changes, not of a fundamental character, in the situation prevailing in the country of origin”.³⁷ A restrictive interpretation of the “ceased circumstances” clause is therefore warranted.³⁸

2.2. *Assessment of the situation in the country of origin*

The UNHCR Cessation Guidelines set out three basic conditions to be met in order to justify cessation of refugee status under Article 1(C)(5). Changes must be (1) fundamental and (2) durable, and (3) effective protection must be available in the country of origin.³⁹

Changes must be of a fundamental nature so as to allow a person to re-avail him- or herself of the protection of the country of origin. If a particular cause of fear of persecution existed, the elimination of such cause is important, but all the relevant factors must be taken into consideration as circumstances in a country having led to persecution often are closely inter-linked.⁴⁰

Even changes which appear to be of a fundamental nature need to be given time to consolidate, before the situation may be regarded as stable and before cessation may be applied. This is especially important where changes have been brought about violently, as processes of reconciliation require time to take root.⁴¹ Under such circumstances, the human rights situation needs to be especially carefully assessed.

well as certain civil liberties. Article 34 of the 1951 Convention urges States “as far as possible [to] facilitate the assimilation and naturalization of refugees”. The Qualification Directive contains a catalogue of rights similar to that of the 1951 Convention and partly going beyond it (Articles 20 to 34). Article 33 of the Qualification Directive contains an obligation for Member States to facilitate the integration of refugees through integration programmes.

³⁶ ExCom Conclusion No. 69, see above footnote 10, Preamble, para. 4.

³⁷ UNHCR Cessation Guidelines, see above footnote 28, para. 4.

³⁸ As pointed out by Lord Brown in House of Lords judgment, *In re B (FC) (Appellant) (2002) Regina v Special Adjudicator (Respondent) ex parte Hoxha (FC) (Appellant)*, [2005] UKHL 19, [2005] WLR 1063 at 1082 (63), at: <http://www.unhcr.org/refworld/docid/423ec7784.html>, para. 65: “The reason for applying a “strict” and “restrictive” approach to the cessation clauses in general and 1C (5) in particular is surely plain. Once an asylum application has been formally determined and refugee status officially granted, with all the benefits both under the Convention and under national law which that carries with it, the refugee has the assurance of a secure future in the host country and a legitimate expectation that he will not henceforth be stripped of this save for demonstrably good and sufficient reason.”

³⁹ These criteria will be discussed in further detail in Part Four below; only a short overview is provided here.

⁴⁰ UNHCR’s Cessation Guidelines (see above footnote 28, para. 11) underline that “circumstances in a country are inter-linked, be these armed conflict, serious violations of human rights, severe discrimination against minorities, or the absence of good governance, with the result that resolution of the one will tend to lead to an improvement in others”.

⁴¹ *Ibid*, paras. 13-14.

It can only be concluded that a person can no longer refuse to re-avail himself of the protection of the country of origin when protection there is effective and available. In addition to physical security or safety, such protection involves the existence of a functioning government and basic administrative structures as well as an adequate infrastructure to enable residents to exercise their rights,⁴² including their right to a basic livelihood. The general human rights situation in the country of origin is an important indicator in this respect.⁴³

2.3. “Compelling reasons” – exception

Article 1(C)(5) 2nd sentence of the 1951 Convention contains an explicit exception to the cessation provision allowing a refugee to invoke “compelling reasons arising out of previous persecution” for refusing to re-avail him- or herself of protection of the country of origin. This exception is intended to cover cases where refugees, or their family members, have suffered atrocious forms of persecution and therefore cannot be expected to return to the country of origin.⁴⁴

2.4. Procedural issues

Given the serious consequences resulting from an application of the “ceased circumstances” clause in Article 1(C)(5), UNHCR recommends that States take into account a number of procedural aspects, including in particular the burden of proof resting on the country of asylum to show that the requirements for cessation are fulfilled.⁴⁵ UNHCR’s Executive Committee stipulates that States must “make sure in an objective and verifiable way that the situation which justified the granting of the refugee status has ceased to exist”.⁴⁶

⁴² These requirements are applied by the Danish Refugee Board, decision of 21 February 2005, reviewing the application of the “ceased circumstances” clause to an Afghan refugee by the Immigration Service. The Refugee Board explicitly refers to the deficiencies in the functioning of the administrative structures as well as of the judiciary.

⁴³ ExCom Conclusion No. 69, see above footnote 10, para. (a). According to UNHCR’s Cessation Guidelines (see above footnote 28, para. 16) factors to be taken into account in this context include, *inter alia*, respect for fundamental rights such as right to life, liberty and freedom from torture, freedom of opinion, association and religion, the level of democratic development in the country, adherence to international human rights instruments as well as access for international organizations freely to verify respect for human rights.

⁴⁴ ExCom Conclusion No. 65, see above footnote 29, para. (q); ExCom Conclusion No. 69, see above footnote 10, para. (e). The application of the “compelling reasons” exception is interpreted to extend beyond the actual wording of the provision to apply to Article 1(A)(2) refugees; see: UNHCR’s Cessation Guidelines, see above footnote 28, para. 21.

⁴⁵ UNHCR Cessation Guidelines, see above footnote 28, para. 25(ii).

⁴⁶ ExCom Conclusion No. 69, see above footnote 10, para. (a).

3. Comments on the interpretation and application of Article 1(C)(5) of the 1951 Convention as practised in Germany

German law requires the authorities to revoke the decision recognizing a person as a refugee, as soon as the “ceased circumstances” clause apply. The latest reform of country’s aliens and refugee law in 2004⁴⁷ introduced an obligation for the authorities to review refugee status in each individual case with a view to cessation, three years after the recognition decision became final.⁴⁸

In carrying out this review, the authorities have interpreted the criteria for cessation in a manner which focuses on whether, at the time of the review, the individual faces a risk of persecution in the country of origin, either in the form of continuation of the previous danger or a new risk.⁴⁹ The continuation of the previous risk of persecution must be excluded with “sufficient certainty”; regarding new risks of persecution, there must be a considerable probability of suffering such persecution for refugee status not to be ceased.⁵⁰

The availability of effective protection in the country of origin, in particular issues of safety (other than the previous or new risks of persecution), and right to a basic livelihood, have not been considered by the German authorities. This approach met with

⁴⁷ Immigration Act (“Zuwanderungsgesetz”, this Act includes numerous provisions on refugee law) of 30 July 2004, BGBl (Federal Law Gazette). I 1950; the law entered into force on 1 January 2005, at: <http://www.bgblportal.de/BGBl/bgbl1f/bgbl104s1950.pdf>.

⁴⁸ Section 73 (2a) of the Asylum Procedures Act, at: http://www.gesetze-im-internet.de/asylvfg_1992/index.html. This provision was introduced by the Immigration Act (“Zuwanderungsgesetz”) of 30 July 2004 (BGBl, see above footnote 47) which fundamentally reformed previous legislation on aliens and refugees. According to the newly introduced Section 26(3) Residence Act (http://www.gesetze-im-internet.de/aufenthg_2004/index.html) which is part of the Immigration Act, a finding that cessation does not apply is a condition for a permanent residence permit after three years.

⁴⁹ Germany, Federal Administrative Court, judgment of 1 November 2005, – I C 21.04 –, at: http://www.asyl.net/dev/M_Doc_Ordner/7834.pdf. The Federal Administrative Court confirmed the need for a fundamental and durable change of circumstances, as had been previously acknowledged in German practice. However, for a change to be accepted as fundamental, the German courts found it sufficient in case of persecution by the State that the persecuting regime has lost power. For instance, in Iraq, the toppling of the Baath regime was considered a fundamental change. Similarly, for a change to be considered as durable, the only question examined is whether a former regime can be expected to regain power. Instability resulting, for instance, from military intervention is not considered relevant, as long as there is no likelihood of the return of the old regime. See, for instance, Higher Administrative Court Lower-Saxony, judgment of 1 March 2005, – 9 LA 46.05 –, at: http://www.asyl.net/dev/M_Doc_Ordner/8752.pdf; Higher Administrative Court North-Rhine Westphalia, judgment of 4 April 2006, – 9 A 3590/05.A –, at: http://www.asyl.net/dev/M_Doc_Ordner/8226.pdf; Higher Administrative Court Baden-Württemberg, judgment of 4 May 2006, – A 2 S 1122/05, at: http://www.asyl.net/dev/M_Doc_Ordner/8743.pdf. The German practice has not been limited to Iraqi nationals. The status of many refugees from other countries has been revoked in recent years on the basis of the German interpretation of the cessation criteria.

⁵⁰ Germany, Federal Administrative Court, judgment of 18 July 2006, – I C 15.05 –, at: http://www.asyl.net/dev/M_Doc_Ordner/8792.pdf; confirmed in judgment of 20 March 2007, – I C 21.06 –, at: http://www.asyl.net/dev/M_Doc_Ordner/10408.pdf.

increasing resistance from Administrative Courts of first instance,⁵¹ but was confirmed by a judgment of the Federal Administrative Court of 1 November 2005.⁵²

In practice, this approach has, since 2003, led to the systematic revocation of the refugee status of Iraqis who had fled the Saddam Hussein regime and received protection in Germany. The widespread insecurity, precarious living conditions and the transitional character of the occupation of Iraq by multinational forces were not regarded as relevant arguments against cessation. Until mid-2007, the authorities considered that the dangers prevailing in Iraq were general dangers threatening the entire population and – as a rule – could not be equated with persecution. Based on this approach, refugee status of some 14,000 Iraqi refugees was revoked by the Federal Office for Migration and Refugees between November 2003, when systematic revocation of refugee status of Iraqi refugees started, and May 2007.⁵³

Practice changed in May 2007, when the German authorities recognized that the dangers faced by members of non-Muslim minorities in Iraq amounted to persecution.⁵⁴ As of that date, no further revocation decisions were issued by the Federal Office for Migration and Refugees in cases of Iraqis belonging to non-Muslim religious minorities. As a result, the number of revocation decisions declined significantly.⁵⁵ Since this instruction acknowledged the existence of a new well-founded fear of persecution for some groups, in the period May 2007 – May 2008, a significant number of persons whose refugee status had been revoked after 2003 and who had submitted a new application for asylum were once again recognized as refugees.⁵⁶

⁵¹ See for instance, Administrative Court Cologne, judgment of 1 July 2005, – 18 K 7716/04.A –, at: http://www.asyl.net/dev/M_Doc_Ordner/6815.pdf; Administrative Court Munich, decision of 17 October 2005, – M 8 K 05.51194 –, at: http://www.asyl.net/dev/M_Doc_Ordner/8070.pdf; Administrative Court Schleswig-Holstein, judgment of 30 June 2005, – 6 A 59/05 –, at: http://www.asyl.net/dev/M_Doc_Ordner/6852.pdf; Administrative Court Sigmaringen, judgment of 7 December 2005, – A 3 K 11539/04 –, at: http://www.asyl.net/dev/M_Doc_Ordner/7727.pdf.

⁵² Federal Administrative Court, judgment of 1 November 2005, – I C 21.04 –, at: http://www.asyl.net/dev/M_Doc_Ordner/7834.pdf.

⁵³ The exact number of revocations of refugee status and subsidiary protection status between January 2003 and May 2007 was 14,495. While statistics do not differentiate between revocation of the refugee status and revocation of the subsidiary protection status, it should be noted that the number of persons with subsidiary protection was very small.

⁵⁴ See: Letter from the German Federal Ministry of Interior to the Federal Office for Migration and Refugees, 15 May 2007, printed in: Infodienst Asyl in Rheinland-Pfalz, August 2007, published by Arbeitskreis Asyl Rheinland-Pfalz, at: <http://www.auslaenderpfarramt.de/fileadmin/ak-asyl/infodienste/Infodienst73.pdf>, p. 30.

⁵⁵ The Federal Ministry’s instruction (see above footnote 54) also put on hold revocation practice regarding other particularly vulnerable groups. Subsequent revocation decisions most frequently pertain to Kurdish men from Northern Iraq.

⁵⁶ The exact number of Iraqis recognized on the basis of a repeat application after previous revocation is not known. During the period May 2007 and May 2008, 6,155 repeat applications were submitted by Iraqi nationals. During the same period, asylum under the terms of the German Constitution was granted in 13 cases, Convention refugee status in 4,416 cases and subsidiary protection in 26 cases. Only 14 applications were rejected, and 716 cases were otherwise closed. (Numbers obtained by UNHCR from the Federal Office for Migration and Refugees).

After the request for a preliminary ruling was filed with the ECJ, the German Federal Office for Migration and Refugees stopped revoking the status of Iraqi refugees from Central and Southern Iraq on the basis of the “ceased circumstances” clause.⁵⁷ At the same time, the Federal Office annulled its revocation decisions in Iraqi cases which were not yet final – in other words, those potentially affected by the questions presented to the ECJ. This has resulted in a more secure residence situation for a significant number of refugees, who had challenged the revocation decisions of the Federal Office in the administrative courts.⁵⁸

Although under German law, revocation of refugee status does not automatically lead to withdrawal of the residence permit, this may in some situations be the case, or the permit may simply expire.⁵⁹ As of 31 December 2007, of 8,380 cases in which the revocation of refugee status of Iraqi nationals had become final, 72.2 % did not have a permanent residence permit. As a consequence, these persons face imminent termination of their residence permit. In 13 % of all the cases (1,093), the persons concerned were staying in Germany on the basis of toleration permits (“*Duldung*”). This toleration permit does not constitute a legal residence permit and places the individual in a very weak legal position.⁶⁰

It is UNHCR’s assessment that it is premature to invoke the “ceased circumstances” clause in the case of refugees originating from Iraq, in view of the highly volatile security situation there, as well as of the continuing internal and external displacement due to violence and serious human rights violations.

⁵⁷ In individual cases, revocations may still occur on the basis of other provisions, in particular, if the person has been convicted of a criminal offence or has travelled back to Iraq.

⁵⁸ Due to the suspensive effect of the appeal, persons concerned maintain their legal position. In practice, however, if they seek an extension of a residence permit, they often are only provided with a provisional document (a so-called *Fiktionsbescheinigung*, Section 81 Residence Act) until there is a final decision on the revocation question. This provisional character prompts difficulties in exercising the full range of rights accorded to refugees, in particular, with a view to competing on the labour market. Persons who do not have a permanent residence permit and apply for one or for an extension of their temporary residence permit are issued a so-called *Fiktionsbescheinigung* (Section 81 Residence Act). This document indicates that the person concerned has had a legal title granting a right to remain, the extension of which is under review. Even if this means that the legal position under the previous permit continues to apply, the provisional situation of the person affected is visible to everyone to whom the document needs to be presented, in particular, employers. Consequently, access to the labour market is impeded.

⁵⁹ Revocation under Section 73 of the Asylum Procedures Act terminates refugee status: refugee status forms the legal ground for a temporary residence permit of three years (Sections 25(1) or (2), 26(1) Residence Act) or, under certain additional conditions, a permanent residence permit (Section 26(3) Residence Act). Revocation of refugee status as such does not lead to termination of the residence permit. However, irrespective of its duration, a residence permit may be revoked on a discretionary basis after revocation of refugee status (Section 52 (1) No. 4 Residence Act). Unless there are other reasons under general aliens law providing for a right to stay in Germany, refugees whose status has been revoked will lose their residence permit upon its expiry.

⁶⁰ Numbers obtained by UNHCR from the Central Aliens Register of the German Government.

4. UNHCR’s comments on the questions referred to the ECJ⁶¹

4.1 Sufficiency of absence of fear of persecution (on Question 1)

Is Article 11(1)(e) of Council Directive 2004/83/EC of 29 April 2004 (1) to be interpreted as meaning that — apart from the second clause of Article 1(C)(5) of the Convention of 28 July 1951 relating to the Status of Refugees (Geneva Convention on Refugees) — refugee status ceases to exist if the refugee’s well-founded fear of persecution within the terms of Article 2(c) of that directive, on the basis of which refugee status was granted, no longer exists and he also has no other reason to fear persecution within the terms of Article 2(c) of Directive 2004/83?

In the view of UNHCR, the absence of a present risk of persecution is necessary but not sufficient. As set out above, the change of circumstances in the country of origin must be of a significant and non-temporary character. Moreover, cessation only applies if the refugee can no longer refuse to avail him- or herself of the protection of his country of origin. Protection in this sense encompasses more than the absence of a risk of persecution; it requires the availability of effective protection.

4.1.1. *The change of circumstances of a significant and non-temporary nature*

The fact that the extent and durability of the change of circumstances need to satisfy certain requirements is confirmed by the Qualification Directive and State practice.⁶² According to Article 11(2) of the Directive, the changes need to be of a significant and non-temporary nature. Courts as well as UNHCR⁶³ and its Executive Committee⁶⁴ require “fundamental” and “durable” changes for application of the “ceased circumstances” clause in Article 1(C)(5) of the 1951 Convention. The terms used in the Qualification Directive are to be examined against this backdrop.

The “significant change” requirement set out in Article 11(2) of the Qualification Directive serves to establish reliably that the refugee will be safe from persecution in the country of origin. An analysis is required which covers all factors which had made the fear of persecution well-founded. Typically, this has been understood to mean a far-reaching political change, including democratic elections, reforms of the basic structure

⁶¹ See above footnote 1.

⁶² See, for example, in Germany: Federal Administrative Court, judgment of 1 November 2005, – *I C 21.04* –, at: http://www.asyl.net/dev/M_Doc_Ordner/7834.pdf; and in Switzerland: Asylrekurskommission, judgment 1996 no. 9 of 25 October 1995, at <http://www.ark-cra.ch/emark/1996/9609069PUB.htm>, and: judgment 2002 no. 8 of 5 July 2002, at: <http://www.ark-cra.ch/emark/2002/08.htm>. The criteria have been implicitly recognized by the House of Lords in the United Kingdom; see: judgment in *Hoxha*, see above footnote 38, paras. 63-65. Also the Danish Refugee Board turned down cessation decisions concerning Afghans in early 2005 based, *inter alia*, on the lack of a fundamental change; see: decision of the Danish Refugee Board of 21 February 2005.

⁶³ See above footnote 28, paras. 10-14.

⁶⁴ ExCom Conclusion No. 65, see above footnote 29, para. (q); ExCom Conclusion No. 69, see above footnote 10, para. (b).

of the State, and (re)establishment of protection against the actions which caused the refugees to leave.⁶⁵

There are examples in the existing State practice in which this approach is explicitly endorsed. For instance, regarding the interpretation of the concept in application of the 1951 Convention,⁶⁶ the Swiss Asylrekurskommission found that a change of circumstances may be established because, for instance, of a general amnesty, state institutions functioning in accordance with the rule of law, compliance with human rights obligations, general physical and social safety.⁶⁷ Also in German case law, some courts have endorsed an interpretation of the criteria as set out in UNHCR’s Cessation Guidelines.⁶⁸

The “non-temporary change” requirement aims at precluding the cessation of refugee status at a time when the recurrence of previous dangers of persecution, or the occurrence of new dangers of persecution, are possible because developments in the country of origin are still unpredictable in view of the instability of the situation.⁶⁹ The available State practice in the area of cessation provides examples which support this interpretation.⁷⁰

4.1.2. Restoration of effective protection

The application of the “ceased circumstances” clause is sometimes understood as the mirror image of the recognition decision taken on the basis of Article 1(A)(2) of the 1951

⁶⁵ Fitzpatrick and Bonoan, see above footnote 15, p. 495.

⁶⁶ *Ibidem*, p. 514.

⁶⁷ Switzerland, Asylrekurskommission, *judgment 1995, No. 16 of 4 July 2005*, p. 159, at: <http://www.ark-cra.ch/emark/1995/9516153PUB.htm>.

⁶⁸ AC Cologne, judgment of 12 January 2007, 18 K 3234/06.A, at: http://www.asyl.net/dev/M_Doc_Ordner/9552.pdf, based on the application of the Qualification Directive; AC Cologne, judgment of 1 July 2005, – 18 K 7716/04.A –, at: http://www.asyl.net/dev/M_Doc_Ordner/6815.pdf; AC Sigmaringen, judgment of 7 December 2005, – A 3 K 11539/04 –, at: http://www.asyl.net/dev/M_Doc_Ordner/7727.pdf. While recognizing in principle the “significant change” requirement, the Federal Administrative Court, does not provide details on how it should be interpreted, see above footnote 62.

⁶⁹ The wording used by UNHCR (UNHCR Handbook, see above footnote 23, para. 135; UNHCR Cessation Guidelines, see above footnote 28, para. 13) and the Commission (see above footnote 25) is “durable”. The Oxford Dictionary defines “durable” as “lasting”; “temporary” is also defined as “not-lasting”. Consequently, the various terms used are equivalent by their literal meaning.

⁷⁰ The Swiss Asylrekurskommission in a 2002 decision on the cessation of status concerning a refugee from Kosovo emphasized that stabilization of a new political situation is required, to judge future developments in a reliable manner. The Commission found that this requirement was not fulfilled (Asylrekurskommission, judgment no. 9 of 5 July 2002, see above footnote 62). Also in German case law, some courts of first instance have interpreted the requirement in this manner and concluded that the changes in Iraq are not of a durable nature. See, for example: Administrative Court Schleswig-Holstein, judgment of 30 June 2005, – 6 A 59/05 –, at: http://www.asyl.net/dev/M_Doc_Ordner/6852.pdf; Administrative Court Sigmaringen, judgment of 7 December 2005, – A 3 K 11539/04 –, at: http://www.asyl.net/dev/M_Doc_Ordner/7727.pdf. See also the decision of the Danish Refugee Board, see above footnote 62.

Convention.⁷¹ However, as highlighted above, cessation requires a specific assessment of the nature of the changes, which goes beyond the criteria for recognition. Moreover, refugee status will only cease if effective protection is available in the country of origin. The availability of effective protection constitutes a distinct criterion and is to be understood in a broad sense which is not limited to protection against persecution.⁷²

Article 11(1)(e) of the Qualification Directive stipulates that cessation of refugee status only applies if the refugee “can no longer ... continue to refuse to avail himself or herself of the protection of the country of his nationality”. It thus identifies protection in the country of origin as a distinct criterion by mentioning it explicitly in addition to the ceased circumstances. An equivalent wording is used in Article 1(C)(5) of the 1951 Convention. This wording would be superfluous if it did not add anything to the requirement of absence of persecution addressed in the first part of the sentence.

This view is further supported by the object and purpose of international protection under the 1951 Convention and the Qualification Directive.⁷³ International protection aims to substitute for the absence of national protection of the country of origin. International protection entails protection against return to persecution (as enshrined in the principle of *non-refoulement*⁷⁴) and protection allowing for a life in dignity in the host State.⁷⁵ Applying the cessation provisions of Article 11(1)(e) of the Qualification Directive and Article 1(C)(5) of the 1951 Convention amounts to recognition that the need for international protection no longer exists and that international protection can be replaced by effective protection by the country of origin.

The term “protection” is not defined. Within the Qualification Directive and the 1951 Convention, the term is used with different meanings.⁷⁶ The context and the object and purpose of international protection demonstrate that the effective protection required for applying the “ceased circumstances” clause encompasses not only protection against persecution but also respect for human rights, including the right to a basic livelihood, which implies access to a subsistence minimum.

⁷¹ Federal Administrative Court, decision of 7 February 2008, – 10 C 33.07 –, p. 13, at: http://www.asyl.net/dev/M_Doc_Ordner/13118.pdf.

⁷² UNHCR Cessation Guidelines, see above footnote 28, paras. 15-16.

⁷³ Para. 5(b) of the European Commission’s proposal for the Qualification Directive (see above footnote 25) underlines that “its guiding principle is that international protection of any sort is a type of surrogate protection to be provided in lieu of national protection only when the realistic possibility of obtaining protection from an applicant’s country of origin is absent.”

⁷⁴ Article 21 of the Qualification Directive; Article 33 of the 1951 Convention.

⁷⁵ Articles 20, 22 to 34 of the Qualification Directive; Articles 3 to 34 of the 1951 Convention.

⁷⁶ In Article 2 (c) of the Qualification Directive and Article 1 A (2) of the 1951 Convention, “protection” means “protection against persecution”; however, in the context of applying an internal protection alternative, “protection” also entails an assessment of the conditions in the alternative area with a view to determining whether it can be expected from the applicant to relocate. Moreover, the “content of international protection” (Chapter VII Qualification Directive) relates to protection against return to persecution and the provision of conditions for a life in dignity in the host state. Article 11(1)(a) and (c) of the Qualification Directive do not envisage a specific content of protection, but situations where the individual submits himself/herself to the jurisdiction of the home state.

The over-arching objective of international protection is to provide the refugee with a durable solution in addition to and beyond safety from persecution. Cessation practices should be developed in a manner consistent with this goal and not result in persons being compelled to return to a volatile situation, as this would undermine the likelihood of a durable solution. The assessment of the availability of effective protection in the country of origin must therefore include a review of the enjoyment of fundamental rights.

This broader understanding of protection in the context of Article 11(1)(e) of the Qualification Directive is in line with the overall objective of the Directive, which “seeks to ensure full respect for human dignity”⁷⁷ and with general principles of Community law.⁷⁸ These conclusions are further informed by a parallel with the concept of internal protection in the Qualification Directive.

To refuse to recognize refugee status on the basis of an internal protection alternative under Article 8 of the Qualification Directive, the Member State must demonstrate not only that the applicant would be safe from persecution there, but also that he/she can reasonably be expected to relocate to the concerned zone in his/her country of origin.⁷⁹ This requires taking into account the general conditions and the individual circumstances of the applicant in the concerned location.⁸⁰ UNHCR’s interpretation of this concept similarly requires not only safety from persecution but also the possibility for the individual to live without undue hardship, including basic security, respect for fundamental human rights and access to a minimum level of subsistence.⁸¹

Article 8 of the Qualification Directive as well as Article 1(C)(5) of the 1951 Convention and Article 11(1)(e) of the Directive are based on the expectation of a change of place of residence. Article 8 relates to the availability of a relocation alternative within the country of origin, whereas the application of the “ceased circumstances” clause refers the person to the protection of the country of origin and thereby may imply the return to that country. Given these similarities, the broad understanding of the term “protection” in the context of internal protection is also relevant for the application of the “ceased circumstances” clause.

⁷⁷ See Recital 10 of the Qualification Directive.

⁷⁸ Respect for human dignity also belongs to the general principles of Community law; see: ECJ, Judgment in Case C-377/98, *Kingdom of the Netherlands v European Parliament and Council*, 2001 E.C.R. I-7079, paras. 70-77, available through <http://curia.europa.eu/en/content/juris/index.htm>.

⁷⁹ See above footnote 25. The explanatory memorandum of the Commission’s proposal clarifies the concept as follows: “[T]his provision allows Member States to reject applications for international protection if it can be established that *effective protection is available* in at least part of the country of origin to which the applicant can reasonably be returned [emphasis added].”

⁸⁰ Article 8(2) of the Qualification Directive.

⁸¹ UNHCR, *Guidelines on International Protection: “Internal Flight or Relocation Alternative” within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, 23 July 2003, para. 22 and further, at: <http://www.unhcr.org/refworld/docid/3f2791a44.html>.

4.2 Requirements additional to the absence of persecution (on Question 2)

If Question 1 is to be answered in the negative: does the cessation of refugee status under Article 11(1)(e) of Directive 2004/83 also require that, in the country of the refugee’s nationality,

(a) an actor of protection within the meaning of Article 7(1) of Directive 2004/83 be present, and is it sufficient in that regard if protection can be assured only with the help of multinational troops,

(b) the refugee should not be threatened with serious harm, within the meaning of Article 15 of Directive 2004/83, which leads to the granting of subsidiary protection under Article 18 of that directive, and/or

(c) the security situation be stable and the general living conditions ensure a minimum standard of living?

4.2.1. Actor of protection

Article 11(1)(e) of the Qualification Directive refers to protection of the “country of nationality” and thereby to State protection. UNHCR does not consider that cessation is appropriate, as a rule, in a situation where protection can only be provided with the help of other actors, including multinational forces. While in some cases, the presence of multinational forces or an interim international administration can be an indicator of progress towards the resolution of a conflict, it may also signal the inability of that country to protect its nationals. In such circumstances, the requirement of the enduring and fundamental nature of change would not yet be met.⁸²

Article 7 of the Qualification Directive defines actors of protection *against persecution*. That Article stipulates that protection against persecution may be provided by the State or by other parties or organizations. UNHCR has expressed serious concerns about the inclusion of non-State actors and organizations as actors of protection under Article 7(1) of the Qualification Directive.⁸³ UNHCR considers it inappropriate to equate the protection provided by States with the exercise of a certain administrative authority and control over territory by other parties or organizations, including international organizations. Under international law, international organizations do not have the attributes of a State. In practice, this generally means that their ability to enforce the rule of law is limited.

As set out above, the protection envisaged in the context of the “ceased circumstances” clause is not limited to protection against persecution, but includes considerations relating to the general situation of human rights, the effectiveness of the machinery of law, order and justice in the country and the living conditions in the country of origin. In this context, it is all the more unlikely that such protection can be provided by actors other than the State.

⁸² The Swiss Asylrekurskommission (in its judgment 2002, No. 8, p. 64, see above footnote 62) invalidated an application of the “ceased circumstances” clause to a refugee from Kosovo in 2002 and ruled that as long as the UN believes that an international protection force is required, there is no fundamental change.

⁸³ UNHCR Comments on the Qualification Directive, see above footnote 18, p. 18.

4.2.2. *Threat of serious harm*

The presence of a real risk of serious harm which would lead to the granting of subsidiary protection on the basis of Article 18 of the Qualification Directive, would exclude the application of the “ceased circumstances” clause of Article 11(1)(e) of that Directive.

Serious harm is defined in Article 15 of the Qualification Directive with reference to the most fundamental rights.⁸⁴ If there is a real risk of serious harm in the sense of Article 15, this means that effective protection allowing for a life in safety and dignity is not available. In such a situation, it is also unlikely that significant and non-temporary changes of the type required for cessation will have taken place. Rather, a risk of torture, inhuman or degrading treatment or of death penalty demonstrate the absence of effective protection. Irrespective of the other criteria for protection under this Article, a situation of indiscriminate violence in the context of an armed conflict as referred to in Article 15(c) of the Qualification Directive would indicate that the security situation is not stable.

4.2.3. *Stable security situation and a minimum standard of living*

As outlined in detail in paragraph 4.1.2 above, safety and the possibility to exercise fundamental human rights, including the right to a basic livelihood are important indicators to determine the availability of effective protection. In UNHCR’s view, in the absence of a stable security situation and of a minimum standard of living, the criteria for cessation would not be met.

4.3 ***Standard and burden of proof for assessing new risks of persecution (on Question 3)***

In a situation in which the previous circumstances, on the basis of which the person concerned was granted refugee status have ceased to exist, are new, different circumstances persecution to be

(a) measured against the standard of probability applied for recognising refugee status, or is another standard to be applied in favour of the person concerned, and/or

(b) assessed having regard to the relaxation of the burden of proof under Article 4(4) of Directive 2004/83?

As set out above, to apply the “ceased circumstances” clause, it must be shown that the risk of persecution has disappeared due to a significant and non-temporary change of circumstances, and that effective protection is available in the country of origin. This

⁸⁴ Article 15 of the Qualification Directive, see above footnote 2, defines as serious harm the death penalty or execution; torture or inhuman or degrading treatment or punishment; or a serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

includes not only that the previous risk of persecution has disappeared but also that the change has not led to a new risk of persecution.⁸⁵

Article 14(2) of the Qualification Directive is the central provision to be taken into account when responding to this question, as it specifically concerns the application of Article 11. Article 4(4) of the Directive would only be relevant if the new circumstances were to be examined in the context of the assessment of a new asylum application, lodged after the application of the “ceased circumstances” clause.⁸⁶

Article 14(2) makes clear that the burden of proof rests with the authorities of the State invoking the “ceased circumstances” clause.⁸⁷ Article 14(2) provides that “the Member State, which has granted refugee status, shall on an individual basis demonstrate that the person concerned has ceased to be (...) a refugee”.⁸⁸ This requires demonstrating that all conditions for cessation of refugee status under Article 11(1)(e) are fulfilled. That includes, in UNHCR’s view, demonstrating that the old danger of persecution has ceased, that changes are of a fundamental and stable nature, that there is no new danger and that the individual concerned will enjoy effective protection in his/her country of origin.

The standard of proof (or standard of probability) required for the application of the “ceased circumstances” clause must be high, in particular due to the serious consequences of cessation for the refugee, and the fact that the “ceased circumstances” clause is not triggered by a voluntary act on the part of the refugee. The high standard of proof required for application of the “ceased circumstances” clause can be understood as a mirror image of Article 4(4). In the same way as a lower standard of proof is required to recognize the person as a refugee when fear of persecution is invoked, a higher standard of proof is required to apply cessation when the person has already been recognized as refugee. UNHCR recommends that the State be “completely satisfied” that all the elements of this “ceased circumstances” clause have been fulfilled.⁸⁹ This is also called

⁸⁵ ExCom Conclusion No. 69, see above footnote 10, para. (c), “emphasizes that the “ceased circumstances” cessation clauses shall not apply to refugees who continue to have a well-founded fear of persecution”.

⁸⁶ According to its wording and context, Article 4(4) is related to the assessment of an *application* for international protection, not to an assessment of cessation. According to Article 2(g) of the Qualification Directive, an application for international protection means “a request made by a third country national or a stateless person for protection from a Member State, who can be understood to seek refugee status or subsidiary protection status”.

⁸⁷ Regarding standards required under the 1951 Convention, see Fitzpatrick and Bonoan, see above footnote 15, p. 515. In national case law this is confirmed, for instance, by the Danish Refugee Board, see above footnote 62.

⁸⁸ The application of this provision is not barred by the time limit set out in Article 14 (1), at least in the present case. The German legislator has transposed the Directive by the Transposition Act 2007 of 19 August 2007 (Federal Law Gazette I, p. 1970, at: <http://www.bmi.bund.de/Internet/Content/Common/Anlagen/Gesetze/Richtlinienumsetzungsgesetz>, entry into force on 28 August 2007), without further defining temporal scope of the applicability of Article 14 of the Qualification Directive while at the same time amending the cessation provisions in the German Asylum Procedures Act. The time bar was not transposed into German law.

⁸⁹ UNHCR, *Note on the Cessation Clauses*, EC/47/SC/CRP.30, 30 May 1997, para. 36, at: <http://www.unhcr.org/refworld/docid/47dfaf1d.html>.

for by UNHCR’s Executive Committee.⁹⁰ Even if full certainty is not possible, new dangers of persecution must be excluded with high probability.

UNHCR
August 2008

⁹⁰ ExCom Conclusion No. 69, see above footnote 10, para. (a), affirms that States “must make sure in an objective and verifiable way that the situation, which justified the granting of refugee status has ceased to exist”.