

OPINION OF ADVOCATE GENERAL

POIARES MADURO

delivered on 9 September 2008 ¹(1)

Case C-465/07

M. Elgafaji,

N. Elgafaji

v

Staatssecretaris van Justitie

(Reference for a preliminary ruling from the Nederlandse Raad van State (Netherlands))

(Refugee status – Minimum standards for determining who qualifies as a refugee – Level of protection equal to that under Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms)

1. The dispute giving rise to this reference for a preliminary ruling gives the Court the opportunity to define the conditions for subsidiary protection granted on the basis of refugee status to third-country nationals pursuant to Article 15 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) ('the Directive'). The national court's reference is set out in such a way as to invite the Community Courts to carry out a comparative study on the scope of Community protection in the light of that provided for in Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 ('the ECHR'). Such a question involves reconsideration of the relationship between the two legal orders, a relationship which cannot be disregarded in view of the objective of creating a European area of protection of fundamental rights such as the right to asylum. Even more important is the fundamental question presented by this case, which is to determine to what degree the real risk to which a person is exposed must be individualised in order for him to be eligible for the subsidiary protection conferred by the Directive.

I – The facts in the main proceedings, the legal framework and the questions referred for a preliminary ruling

2. The dispute in which the questions were referred to the Court for a preliminary ruling arose from the rejection by the Staatssecretaris van Justitie (State Secretary for Justice) of the applications by Mr and Mrs Elgafaji, Iraqi nationals, for temporary residence permits in the Netherlands.

3. The Staatssecretaris van Justitie, the defendant in the main proceedings, gave reasons for his refusal of 20 December 2006, taking the view that the applicants in the main proceedings had not shown satisfactorily that they were running a real risk of serious and individual harm in their

country of origin. He relies, in particular, on Article 29(1)(b) and (d) of the Netherlands Law on Aliens 2000 (Vreemdelingenwet 2000; 'the Vw 2000') and the interpretation it has been given.

4. According to Article 29(1)(b) and (d) of the Vw 2000:

'A residence permit for a fixed period, as referred to in Article 28, 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;

...

(d) for whom return to his country of origin would, in the opinion of the [Staatssecretaris van Justitie], constitute an exceptional hardship in the context of the overall situation there.'

5. The Circular on Aliens of 2000 (Vreemdelingencirculaire 2000; 'the 2000 Circular'), in the version which was in force on 20 December 2006, states in paragraph C 1/4.3.1:

'Article 29(1)(b) of the [Vw 2000] allows the grant of a residence permit where the alien has proved satisfactorily 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.' The 2000 Circular states that that provision is derived from Article 3 of the ECHR under which '[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment'. Accordingly, the removal of a person to a country in which he runs a real risk of being subjected to such treatment constitutes an infringement of that article. If that real risk has been or is established, a temporary (asylum) residence permit is in principle issued by the competent Netherlands authorities.

6. The applicants consider that they have proved that they run a real risk if they are expelled to Iraq. In support of their arguments, they rely on the facts which are individual to their case. They therefore relate that Mr Elgafaji, of Shiite origin, worked for approximately two years as a security officer in Baghdad for the British organisation Janusian Security which provides security for personnel transport between the 'green zone' and the airport. Mr Elgafaji's uncle, who worked in the same organisation, was targeted by militia, his death certificate stating that his death followed a terrorist attack. Several days later, a threatening letter was fixed to the door of Mr and Mrs Elgafaji, his wife of Sunni origin, which stated 'death to collaborators'. On the basis of those events, the Elgafajis submitted their asylum application to the authorities in the Netherlands, where Mr Elgafaji's father, mother and sisters already live.

7. The Staatssecretaris van Justitie nevertheless considered that the documents produced by the applicants in the main proceedings, particularly in the absence of official documents, did not suffice to show the threat they would be under if they were expelled to their country of origin. Their situation did not therefore fall within the scope of Article 29(1)(b) and (d) of the Vw 2000.

8. The applicants challenged that decision, relying on Article 15(c) in conjunction with Article 2(e) of the Directive.

9. Article 2(e) of the Directive defines a person eligible for subsidiary protection as 'a third-country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15 ...'.

10. Under Article 15, "serious harm" consists of:

(a) death penalty or execution; or

(b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or

(c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict'.

11. The applicants observe that only the situation referred to in Article 15(b) is covered by Article 29(1)(b) of the Vw 2000 which reproduces its wording almost literally. Taking the view that the threat referred to in Article 15(c) can be distinguished from those preceding it and that they fall within that situation, on that basis they should or at least could have obtained a favourable outcome to their asylum application.

12. The Staatssecretaris van Justitie rejects that plea. In his view, the standard of proof remains identical whether this is a question of the protection granted under Article 15(b) of the Directive or that referred to in Article 15(c). The defendant notes that those two provisions, like Article 29(1)(b) of the Vw 2000, mean that applicants for asylum must show satisfactorily that they would face a risk of serious and individual harm if they were to return to their country of origin. Consequently, in the absence of adducing such proof under Article 29(1)(b) of the Vw 2000, they cannot reasonably rely on Article 15(c) of the Directive which requires similar proof.

13. Following that decision, the applicants then brought proceedings before the Rechtbank (District Court) (Netherlands). That court sets out a different interpretation of the relevant provisions of the Directive. In particular, the national court takes the view that the high degree of individualisation of the threat required by Article 15(b) of the Directive and by the national legislation at issue is required to a lesser degree in the case referred to by Article 15(c) of the Directive, which takes into account situations of armed conflict in the country of origin. The proof relating to the existence of an individual and serious threat against the applicant could thus be adduced more easily in application of Article 15(c) of the Directive, in comparison with Article 15(b). Consequently, the Rechtbank annulled the orders of 20 December 2006 refusing to grant subsidiary protection since the standard of proof required under Article 15(c) of the Directive had been aligned with that required for the application of Article 15(b) as reproduced in Article 29(1)(b) of the Vw 2000. The Netherlands Justice Minister ought, according to that court, to have examined whether there were grounds for issuing the applicants with a temporary residence permit under Article 29(1)(d) of the Vw 2000 by reason of serious harm referred to in Article 15(c) of the Directive.

14. The referring court, the Nederlandse Raad van State (Netherlands Council of State), before which the dispute was brought on appeal, shares the difficulties of interpretation of the relevant provisions of the Directive expressed by the defendant and the court of first instance. Moreover, Article 15(c) of the Directive had not been transposed into Netherlands law on 20 December 2006, when Mr and Mrs Elgafaji made their applications. Accordingly, in order to be able to assess whether such transposition was necessary, the Raad van State decided to stay the proceedings and refer the following questions to the Court 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?'

II – Legal analysis

15. By its first question, the national court asks, essentially, whether Article 15(c) offers protection which is supplementary or merely equivalent to that arising from Article 3 of the ECHR concerning applicants for asylum. The second question seeks to determine the criteria underlying the grant of subsidiary protection.

16. In other words, the Court is called upon to rule on the scope of the protection granted by Article 15(c) of the Directive, in comparison with that offered by Article 3 of the ECHR. The observations of the parties relate, essentially, to that question. However, they demonstrate above all the differences between the Member States concerning the interpretation of Article 3 and of the case-law of the European Court of Human Rights which stems from it. Those conflicts are illustrated by the fact that, even among the Member States which take the view that Article 15(c) of the Directive does not provide protection which is supplementary to that already conferred by the ECHR, some consider nevertheless that the protection granted by the Convention extends, in the light of the case-law of the Strasbourg court, to situations which other Member States attempt, by contrast, to exclude from the scope of the Directive, taking precisely the view that the subsidiary protection conferred by the Directive is restricted to that which can be obtained under the ECHR.

17. Those disagreements on the scope of Article 3 of the ECHR fail to conceal the real heart of the debate which concerns, in actual fact, the scope of the protection which must be afforded to applicants for asylum on the basis of Community law. Accordingly, prior to the actual legal analysis of the protection offered by Community law to applicants for asylum, it seems helpful, in the light of the observations submitted by the parties, to reconsider the controversy surrounding the interpretation and consideration of Article 3 of the ECHR for the purposes of answering the questions referred for a preliminary ruling.

A – Clarification on the scope and consideration of Article 3 of the ECHR in the context of the answer to be given to the national court

18. Beyond the comparison of the respective scope of Article 3 of the ECHR and Article 15 of the Directive, the Court is asked, primarily and essentially, whether the protection granted under the Directive covers only situations in which the person may be a victim of a particularly serious breach of his fundamental rights on the basis of conditions concerning him individually or specifically, or whether that protection also covers situations in which a person may be exposed to a similar risk by reason of a general background of indiscriminate violence.

19. My belief is that 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. Community provisions, irrespective of which provisions are concerned, are given an independent interpretation which cannot therefore vary according to and/or be dependent on developments in the case-law of the European Court of Human Rights.

20. I would add, furthermore, that the interpretation of the Convention by the Strasbourg court is a dynamic interpretation which is always changing. In terms of the dynamic interpretation, it must be noted that the interpretation of Article 3 of the ECHR has not been linear and that the European Court of Human Rights currently gives a broader content and therefore scope to that article. (3) Moreover, it is necessary for the interpretation of that provision to evolve and it should not, therefore, be fixed. In that context, it is not for the Community Courts to determine the interpretation of Article 3 of the Convention which prevails.

21. None the less, the importance that the ECHR may assume in the interpretation of the Community provisions which concern us cannot be overlooked. The Directive pursues the objective of developing a fundamental right to asylum which follows from the general principles of Community law which, themselves, are the result of constitutional traditions common to the Member States and the ECHR, as reproduced, moreover, in the Charter of Fundamental Rights of the European Union proclaimed in Nice on 7 November 2000 (OJ 2000 C 364, p. 1). (4) As I pointed out in a previous case, 'although the charter in question cannot in itself constitute a sufficient legal basis for the creation of rights capable of being directly invoked by individuals, it is nevertheless not without effect as a criterion for the interpretation of the instruments protecting the rights mentioned in Article 6(2) EU. From that perspective, that charter may have a dual function. In the first place, it may create the presumption of the existence of a right which will then require confirmation of its existence either in the constitutional traditions common to the Member States or in the provisions of the ECHR. In the second place, where a right is identified as a fundamental right protected by the Community legal order, the Charter provides a particularly useful instrument for determining the content, scope and meaning to be given to that right.' (5)

22. In that regard, the ECHR is reproduced in Community case-law for two main reasons. First of all, because the commitment which each Member State has expressed to the Convention demonstrates the status of those rights as corresponding to values common to the Member States, which therefore necessarily wish to safeguard them and reproduce them in the context of the European Union. Next, the protection of fundamental rights in the Community legal order exists alongside other European systems of protection of fundamental rights. These include both systems developed within the national legal systems and those stemming from the ECHR. Each of those protection mechanisms certainly pursues objectives which are specific to it and the mechanisms are certainly constructed from legal instruments particular to them, but sometimes they apply none the less to the same facts. In such a context, it is important, for each existing protection system, while maintaining its independence, to seek to understand how the other systems interpret and develop those same fundamental rights in order not only to minimise the risk of conflicts, but also to begin a process of informal construction of a European area of protection of fundamental rights. The European area thus created will, largely, be the product of the various individual contributions from the different protection systems existing at European level.

23. Accordingly, although the case-law of the Strasbourg court is not a binding source of interpretation of Community fundamental rights, it constitutes none the less a starting point for determining the content and scope of those rights within the European Union. Taking that case-law into account is, moreover, essential to ensure that the Union, founded on the principle of respect for human rights and fundamental freedoms, (6) will contribute to extending the protection of those rights in the European area. In that respect, it is perfectly natural that the Charter of Fundamental Rights, while acknowledging that it 'contains rights which correspond to rights guaranteed by the [European] 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', (7) adds that '[t]his provision shall not prevent Union law providing more extensive protection'. (8)

24. For all of those reasons, it is important to state that it is not a question so much of determining whether the subsidiary protection provided by the Directive is more or less identical to that granted on the basis of the Convention as of defining its content in Community law. That objective does not in the least preclude taking into account the case-law resulting from the application of the ECHR.

B – *Interpretation of Article 15(c) of the Directive*

25. Interpretation is not easy and is, to a large extent, open to debate, so much so that it is ultimately considered to be an art, hermeneutics. However, it is not often that, on the basis of reasoning which is broadly similar and based on shared arguments, the result is none the less conflicting, requiring reconsideration of the very methodology of interpretation.

1. Conflicting interpretation on the basis of similar reasoning

26. It is striking that recitals 25 and 26 in the preamble to the Directive are used in turn by the parties to support interpretations of Article 15(c) which are diametrically opposed. Thus, according to one approach, it follows from those recitals that the requirement of an individual link between the indiscriminate violence and the threat to a civilian's life or person presupposes that the applicant show that he is covered by reason of features particular to him, whereas, according to the second approach, those recitals tend to sever the individual link required. Furthermore, there are some, who are not necessarily those who take the view that the individual link required under Article 15(c) of the Directive must be weaker than that required for the application of Article 3 of the ECHR, who consider that Article 15(c) represents protection which is supplementary to Article 3 of the ECHR, whereas others think it equivalent.

27. Accordingly, recital 25 under which '... [t]hose criteria [on the basis of which applicants for international protection are to be recognised as eligible for subsidiary protection] should be drawn from international obligations under human rights instruments and practices existing in Member States' supports a reading of Article 15(c) which varies appreciably in the two principal lines of argument. To that effect, the Netherlands and the United Kingdom Governments infer from that recital that Article 15 of the Directive and in particular Article 15(c) thereof are modelled on Article 3 of the ECHR, the case-law on which, according to those States, attests to the requirement of a

strong individual link. (9) At least they consider, pursuant to that recital, that the Community legislature did not intend to burden the Member States with new obligations such as to offer a wider protection to third-country nationals concerning the right to asylum. They thereby play down, if not evade, the reference made by recital 25 to other international and European instruments for protection of human rights and practices existing in Member States. The States have admittedly adopted very different protection systems but the absence of uniformity does not necessarily mean that their interpretative value is precluded. Therefore the fact that certain States, in their domestic legal systems, have provided for a higher level of protection than that conferred under Article 3 of the ECHR cannot be disregarded. (10) The Swedish Government places specific emphasis to that effect on the reference by recital 25 to practices existing in Member States and infers that the protection referred to in Article 15(c) necessarily then complements that laid down in Article 15(a) and (b). It represents protection supplementary to that already guaranteed by the ECHR and in particular by Article 3 thereof, which is indeed reproduced literally in Article 15(b) of the Directive.

28. Likewise, although the parties call to mind, on both sides, recital 26 in the preamble to the Directive according to which '[r]isks to which a population of a country or a section of the population is generally exposed do normally not create in themselves an individual threat which would qualify as serious harm' in support of one interpretation of Article 15(c), they manage none the less to draw a conflicting interpretation from that provision. Accordingly, for the majority of the parties, that recital necessarily requires the applicant for asylum to show that there is an individual link, by setting out the principle, through reference to the word 'normally', that the risk to which the population of a country or a section of the population is generally exposed does not represent an individual threat. Therefore the Directive is not intended to cover the situations of indiscriminate violence referred to in Article 15(c) of that legislation. In those circumstances, only proof of a threat against the applicant for asylum by reason of features particular to him could justify the grant of subsidiary protection. On the other hand, the Italian Republic concedes that the word 'normally' implies that in other circumstances, that is to say, exceptional circumstances which go beyond the 'normal', the risk to which a population or a section of a population is generally exposed may be described as an 'individual threat'. It is possible to go on to state that, under that interpretation, the exceptional circumstances are therefore those covered by Article 15(c) of the Directive.

29. In the same way, the origin of the Directive, depending on whether emphasis is placed on the express introduction of the requirement of a threat which is individual following the initial proposal of the Commission of the European Communities or on the intention to reproduce the best of the national systems of protection, may come to the support of one or other interpretation.

30. Ultimately, it must be accepted that the very wording of Article 15(c) of the Directive places the two approaches to interpretation on equal terms. The fact that there is weight on both sides cannot however prevent an interpretation from being identified which is suitable to guarantee the fundamental right to asylum.

2. Methodology of interpretation

31. Indeed, it must be accepted that, against such a background, the person seeking an interpretation is condemned to try to reconcile what seems *prima facie* irreconcilable. So he must be guided in that task by the primary objective of the legislation concerned. In other words, he must arrive at an interpretation which, while recognising that Article 15(c) is, above all else, inherently bound to the concept of 'indiscriminate violence', must also take into account the requirement of an individual threat. (11)

32. For that purpose, it seems to me that the interpretation to the effect that Article 15(c) covers any situation of indiscriminate violence would overlook that dual condition of interpretation, in the same way that the interpretation to the effect that the concept of 'individual threat' corresponds to a threat directed at a person by reason of circumstances concerning him individually or specifically (or a social group to which he belongs) would contradict Article 15(c) which is intended specifically and even expressly to apply to situations of indiscriminate violence. (12) In the light of those factors, it would be inconsistent to consider, as certain Member States do, that Article 15(c) does not offer protection supplementary to that laid down in Article 15(a) and (b). How can it be understood that Article 15(c) serves only to clarify eligibility for the subsidiary protection defined in the cases referred to in paragraphs (a) and (b) in situations in

which there is also indiscriminate violence if paragraphs (a) and (b) apply generally and irrespective of any situation of indiscriminate violence? It would in fact be absurd to have a special rule serving to clarify the protection granted by a general rule by stating that that rule will apply also in cases in which the protection is even more essential.

33. In actual fact, the interpretation of Article 15(c) is dependent, as has been stated, on concentrating on the primary objective of the Directive and the fundamental right to asylum. The aim pursued by that provision is to grant international protection to a person placed in a situation in which he is at risk of suffering a breach of one of his rights, which is one of the most fundamental (like the right to life, the right not to be tortured, and so on). Accordingly, the criterion established by the Directive, in order to obtain the status of refugee as well as subsidiary protection, must be understood as the instrument making it possible to evaluate whether that risk and harm to fundamental rights are likely to arise. Therefore the importance and the nature of the individual link required to obtain subsidiary protection must be assessed from that point of view.

34. The requirement of an individual link tends in fact to raise a presumption that the person who is covered for reasons concerning him specifically or because he belongs to a certain group will face a particular risk of suffering a breach of his fundamental rights. Further, the discrimination which is intrinsically linked to and therefore inherent in that individualisation or to membership of a social group makes the breach of fundamental rights more serious. It is difficult to deny that, in accordance with a similar analysis, there may be circumstances in which a substantive breach of fundamental rights can occur even in the absence of any discrimination. That latter case refers to situations which Article 15 and in particular Article 15(c) are intended to cover, namely, situations of indiscriminate violence which is so serious that, as the case may be, any individual within the ambit of that violence may be subject to a risk of serious harm to his person or life. That risk, if it must be measured, is in fact tantamount to the risk run by those who may claim refugee status or the application of Article 15(a) or (b).

35. From that point of view, the requirement of a threat which is 'individual' is fully justified. That requirement serves to make apparent the fact that indiscriminate violence must be such that it cannot fail to represent a likely and serious threat to the applicant for asylum. The distinction between a high degree of individual risk and a risk which is based on individual features is of defining importance. Although a person is not covered by reason of features concerning him particularly, that person is no less individually affected when indiscriminate violence substantially increases the risk of serious harm to his life or person, in other words to his fundamental rights.

36. In order to answer the second question referred more specifically, and in particular from the point of view of the standard of proof to be borne by the applicant for asylum, it must be noted that the standard of proof in respect of the individual link required is certainly lower for the individual targeted under Article 15(c) than under Article 15(a) and (b). However, the standard of proof will be higher in respect of demonstrating indiscriminate violence, which must be generalised (in the sense of non-discriminatory) and so serious that it raises a strong presumption that the person in question is the target of that violence. In reading recital 26 in the preamble to the Directive, we are reminded that that violence exceeds the risks to which the population of a country or a section of the population is generally exposed.

37. Those two aspects may in actual fact be closely connected: the more the person is individually affected (for example, by reason of his membership of a given social group), the less it will be necessary to show that he faces indiscriminate violence in his country or a part of the territory which is so serious that there is a serious risk that he will be a victim of it himself. Likewise, the less the person is able to show that he is individually affected, the more the violence must be serious and indiscriminate for him to be eligible for the subsidiary protection claimed.

38. Ultimately, only that interpretation makes it possible to fulfil the priority objective of the Directive. Any other option would introduce unjustified discrimination between applicants for asylum in respect of the protection to which they might be entitled. It would have the absurd result that the more indiscriminate the violence and, consequently, the greater the number of persons likely to suffer harm to their life or person, the weaker the Community protection. If the individual link were to be understood as requiring that the person must be targeted by reason of features particular to him, even in circumstances of indiscriminate violence so serious that the individual risk run by persons coming from a particular territory was greater than that run by persons applying for refugee status, only the latter would qualify for protection even though they

came from a territory in which breach of their fundamental rights would not be as serious, where the violence would not be as 'indiscriminate'. In other words, the protection granted on the basis of the Directive would depend on whether or not the person is discriminated against in respect of his fundamental rights but would not depend on the degree of the threat to those fundamental rights. That would amount to saying that the only purpose of refugee status is to protect persons discriminated against in relation to certain fundamental rights but that it is not intended to protect other persons who are victims of similar or even more serious breaches of the same fundamental rights in so far as those breaches are generalised.

39. Finally, I would observe that the most recent case-law of the European Court of Human Rights, (13) from which it appears that where there is indiscriminate violence a person is eligible for international protection provided that he demonstrates, however, that he is individually affected by reason of specific features, does not relate to subsidiary protection but refers to the grant of refugee status. In addition, the objective pursued by that court is rather to extend the protection granted under Article 3 of the ECHR to persons threatened with torture and inhuman or degrading treatment. Consequently, it seems not only contrary to the case-law of the Strasbourg court to seek to restrict the international protection of applicants for asylum but equally difficult to transpose the conditions which in fact apply only to applications for the grant of refugee status from the point of view, moreover, of Article 3 alone or sometimes Article 2 of the ECHR.

40. In conclusion, Article 15(c) of the Directive must be interpreted as conferring subsidiary protection where the person concerned demonstrates that he runs a real risk of threats to his life or person in situations of international or internal armed conflict by reason of indiscriminate violence which is so serious that it cannot fail to represent a likely and serious threat to that person. It is for the national courts to ensure that such conditions are fulfilled.

41. Furthermore, that implies from the point of view of the standard of proof that the individual nature of the threat does not have to be established to such a high standard under Article 15(c) of the Directive as under Article 15(a) and (b) thereof. However, 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.

III – Conclusion

42. In conclusion, the answer to the questions referred to the Court for a preliminary ruling should be as follows:

(1) Article 15(c) 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 must be interpreted as conferring subsidiary protection where the person concerned demonstrates that he runs a real risk of threats to his life or person in situations of international or internal armed conflict by reason of indiscriminate violence which is so serious that it cannot fail to represent a likely and serious threat to that person. It is for the national courts to ensure that such conditions are fulfilled.

(2) Furthermore, that implies from the point of view of the standard of proof that the individual nature of the threat does not have to be established to such a high standard under Article 15(c) of the Directive as under Article 15(a) and (b) thereof. However, 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.

1 – Original language: French.

2 – OJ 2004 L 304, p. 12.

3 – See, inter alia, the judgments of the European Court of Human Rights, *Vilvarajah and Others v. the United Kingdom* of 30 October 1991 (Application Nos 13163/87; 13164/87; 13165/87; 13447/87; 13448/87, paragraph 37) and *Salah Sheekh v. the Netherlands* of 11 January 2007 (Application No 1948/04, paragraph 148).

4 – Recital 10 in the preamble to the Directive indeed states that '[t]his Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular this Directive seeks to ensure full respect for human dignity and the right to asylum of applicants for asylum and their accompanying family members'.

5 – Point 48 of the Opinion delivered in Case C-305/05 *Ordre des barreaux francophones et germanophone and Others* [2007] ECR I-5305.

6 – See Article 6(1) and (2) TEU.

7 – Article 52(3) of the Charter. It can also be noted that Article 18 of the Charter enshrines and confirms the right to asylum.

8 – Ibid.

9 – See the judgments of the European Court of Human Rights *Vilvarajah and Others v. the United Kingdom*; *Salah Sheekh v. the Netherlands*; and *Saadiv. Italy* of 28 February 2008 (Application No 37201/06).

10 – See, in particular, the study of the UNHCR, *Asylum in the European Union. A Study of the Implementation of the Qualification Directive*, November 2007, at www.unhcr.org.

11 – Certain authors lament the ambiguity of Article 15 in which the concept of indiscriminate violence seems to them irreconcilable with that of individual threat; see, inter alia, McAdam, J., *Complementary Protection in International Refugee Law*, p. 70.

12 – See, to that effect, also the observations of the Commission which note that '[t]he value added by the condition in paragraph (c) in relation to that in paragraph (b) [of Article 15] lies however in the fact that that [individual] link does not require that it is a question of specific forms

of violence directed at the person concerned by name, so to speak, but requires that an individualisation of the threat may be inferred from all of the circumstances’.

13 – *Salah Sheekh v.the Netherlands*, paragraph 148.