

Title: Judgment of the Supreme Administrative Court, No. 3 Azs 48/2008 of 16/09/2008

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Subject: Non-state actors of persecution, Domestic violence

The appellant lodged a cassation complaint with the *Nejvyšší správní soud* (Supreme Administrative Court) whereby she contested the judgment of the *Krajský soud v Ostravě* (Regional Court in Ostrava) under which her appeal was dismissed. The applicant argued that the application could not be rejected as manifestly unfounded if she claimed a fear of being subjected to inhuman and degrading treatment by her husband in the country of origin, which is Muslim, undemocratic and does not observe the human rights.

The Court noted that Article 6 of Directive 2004/83/EC 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 (Qualification Directive) which relates to the actors of persecution or serious harm has not been properly transposed into *Zákon č. 325/1999 Sb., o azylu (Asylum Act)*. The amended wording of the Asylum Act has adopted the principle formulated in Article 6 of the Qualification Directive solely in relation to the definition of persecution, ergo, in turn solely in relation to persons eligible for asylum, however, not in relation to the definition of serious harm, i.e., persons eligible for subsidiary protection. According to the Court, this is a legislative lapse and it should be addressed by an EU-conforming interpretation as follows: as regards actors of persecution or serious harm (or, rather, the nature of such actors), the definition set out in Section 2 (7) of Asylum Act (in the wording effective as of 20 December 2007) shall be interpreted in accordance with Article 6 of the Qualification Directive. This means that as regard the nature of actors of persecution, or serious harm, the definition stated under this provision will apply also in relation to persons eligible for subsidiary protection. In other words, private persons can be the actors of both persecution and serious harm.

As the Court further pointed out, the issue of non state actors is connected with the issue of sufficiency of protection provided to prevent suffering of serious harm by state where the applicant shall be returned. The Court noted that for the purpose of examining the question of whether or not a State is able to provide protection against persecution or serious harm, the Qualification Directive outlines certain guidance for interpretation in its Article 7(2). According to this provision, protection is generally understood to be provided “*when the actors mentioned in paragraph 1 (the State; parties or organizations controlling the State) take reasonable steps to prevent the persecution or suffering of serious harm, inter alia, by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and the applicant has access to such protection*”. This interpretative rule has not been included into the amended wording of Asylum Act, which nevertheless does not mean that it should not be applied in practice. It can be concluded in summary that the risk of both persecution and serious harm can come from the State, and/or the organization that controls the State, as well as from non-State actors, i.e., private persons. In the latter case, it is then necessary to demonstrate that the State (party or organization controlling the State) is unable or unwilling to provide protection against persecution or serious harm, i.e., does not take reasonable steps to prevent the persecution or suffering of serious harm. Having applied the above

theses to the case being considered, the SAC concluded that the applicant's cassation complaint had to be dismissed as unfounded.