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THE SUPREME ADMINISTRATIVE COURT

KHO: 2010:84

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Alien – International Protection – Asylum – Subsidiary protection – Humanitarian protection – Degree of indiscriminate violence – Armed conflict – Specific and accurate country of origin information

There were no grounds for granting A asylum in Finland due to personal experience in the home country Iraq. However, according to a current report on the security situation in central Iraq he would face a real risk of being subjected to serious harm in his home city Baghdad as a result of indiscriminate violence referred to in section 88, subsection 1, point 3 of the Aliens Act. A should therefore be granted residence permit based on subsidiary protection.

When reaching the decision the KHO took into consideration what the European Court of Justice expressed in their judgement 17.12.2009 (C-465/07, Elgafaji) regarding the interpretation of the provisions on alternative protection in the Qualification Directive (2004/84/EC).

The decision that the application for leave to appeal concerns:

A decision by the Helsinki Administrative Court 18.6.2010 number 10/0751/1

The stages of the case

The Finnish Immigration Service has 12.10.2009 rejected the Iraqi national A's application for asylum and residence permit (client number 1064517).

The Finnish Immigration Service has given the following reasons for its decision:

Granting of international protection for aliens residing in Finland is regulated in section 87, 88 and 88a of the Aliens Act. According to section 87, subsection 1 of the Aliens Act aliens residing in Finland are granted asylum if they reside outside their home country or country of permanent residence owing to a well-founded fear of being persecuted for reasons of ethnic origin, religion, nationality, membership in a particular social group or political opinion and if they, because of this fear, are unwilling to avail themselves of the protection of that country.

An alien residing in Finland is issued with a residence permit on grounds of subsidiary protection if the requirements for granting asylum under section 87 are not met, if he or she would face a real risk of being subject to death penalty or execution, torture or other inhuman or degrading treatment or punishment or serious and individual threat as a result of indiscriminate violence in

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situations of international or internal armed conflicts in the country of origin or country of former habitual residence. Additionally it is required that the person is unable, or owing to such risk, unwilling to avail him or herself of the protection of that country.

An alien residing in Finland is issued with a residence permit on the basis of humanitarian protection, if the requirements under section 87 or 88 are not fulfilled, but he or she cannot return to his or her country of origin or country of former habitual residence as a result of an environmental catastrophe or a bad security situation which may be due to an international or internal armed conflict or a poor human rights situation.

The security situation in Iraq has improved significantly during 2008-2009 in comparison to earlier. Daily cases of violence have decreased about 80 per cent after 2005. Iraq's enforced security forces have taken over the responsibility for the security from international forces in 13 of 18 counties and the USA are, as according to their agreement with Iraq in November 2008, gradually reducing their forces in Iraq. The internal conflict between Sunni and Shia's has mostly ceased. Rebel groups are predominantly local and their actions do not form a serious threat to the Iraqi security forces or the political development anymore.

Iraq has taken a significant step forward by holding reasonably smooth elections in January 2009. The elections eliminated previous parties supporting ethnic cleansing and more secularized groups, supporting more pragmatic developments for Iraq, were elected. The level of violence has decreased significantly during 2008-2009 due to the enforcement of state authorities and the decrease of influence and capacity of rebel groups. Violence due to rebel groups and criminals, such as bomb-attacks still occur in Iraq.

The security situation in the autonomous Kurdish area in the North of Iraq is stable. In nine Shia counties in Southern Iraq the security situation has been relatively stable during some time. The situation in the disputed parts of central Iraq has become the central issue in domestic politics. The reasons for the conflict situation are historical, particularly due to demography and energy industry conflicts during Saddam Hussein's era, especially between Arabs and Kurds. The security situation in the Central parts of Iraq including Ninewa, Salah-al-Din, Kirkuk and Dijala are therefore considered unstable.

As basis for his need for international protection the applicant has claimed that he has been subject to several threats in his home town Baghdad. He claims that he has been victim of assassination attempts, threatened several times and that his brother has been kidnapped only because the applicant belongs to a Sunni Muslim sect and is studying at a Technical University.

The applicant has stated that one reason that he has been facing problems with Shia Muslim extremist groups in Baghdad is that he is Sunni Muslim. According to country information both Sunni and Shia Muslims in Baghdad have faced organized killings especially during the internal conflict between Sunni and Shia Muslims in 2006-2007. The "background" for these killings was often lists of undesired Sunni and Shia Muslims, established by each block leader. Religious violence of this kind has, however, decreased in recent years in Iraq and especially in Baghdad because of increased security and dividing up of religious and ethnic groups in separate areas. Nowadays the government and government buildings are more targeted by violence than specific groups (*UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Iraqi Asylum-seekers, April 2009 and Migration Board: Fact-finding mission to Baghdad 1/2009*).

The applicant does not claim to be known for any religious, social or political activities in his home area. Therefore, there is no reason to believe, at the moment of making this decision, that in

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the mollified Baghdad any armed group would be interested in him because of these particular reasons.

In addition to his Sunni Muslim religion the applicant has claimed to face problems due to his studies at the Technical University. According to the information of the Finnish Immigration Service there have not been attacks targeting students from Baghdad in 2006-2009. However, according to other information students have been more randomly killed in comparison with other groups in connection to attacks on other targets. Iraqi country information has also reported of violence targeting specific professional groups, such as teachers and professors at the University with the aim of influencing the cultural, economic and democratic development in Iraq. In addition, i.e. academics are by some groups viewed as bringing western ideas to Iraq and supporting the US forces present in the country as well as the present government of Iraq. The applicant has only studied for four years and has not distinguished him self as anything else than a good student. In the present improved security situation in Baghdad, where actions of rebel groups have diminished, it is not likely that the applicant would be of interest because of any individual reasons to the extent of giving him a well-founded fear of being persecuted or facing him with risks that would cause him serious harm.

The applicant was neither religiously, politically or socially active in his country of origin Iraq. He has not had any problems with the domestic authorities or groups in connection to these. Based on his own statements he cannot be considered to be threatened by death penalty or execution, torture or other inhuman or degrading treatment or punishment. The applicant has not faced such violations that could by its nature or repetition be considered as persecution in accordance with the Aliens Act. The applicant has not been able to fairly show that the attack against the minibus, in which he was, targeted him in particular or that he would have been wounded in the situation described.

When considering the above mentioned the Finnish Immigration Service considers that the applicant does not have a well-founded fear of being persecuted in his country of origin as enumerated in section 87, subsection 1 in the Aliens Act. The case does not present any significant grounds to believe that he would face a real risk of being subjected to a serious harm in his country of origin in accordance with section 88, subsection 1.

According to the applicants own statements and the identification documents proved to be authentic the applicant originates from Baghdad. Therefore, based on the presented country information the applicant cannot be considered in accordance with section 88, subsection 1 of the Aliens Act to be in need of humanitarian protection due to the situation in his country of origin.

According to section 52 of the Aliens Act aliens residing in Finland are issued with a continuous residence permit if refusing a residence permit would be manifestly unreasonable with regard to their health, ties to Finland or on other compassionate grounds, particularly in consideration of the circumstances they would face in their home country or of their vulnerable position. The Finnish Immigration Service does not consider the case to present grounds that would grant him residence permit.

The applicant has not presented any other grounds for granting him residence permit in accordance with the Aliens Act. Continuous presence in Finland would require a residence permit, which the applicant has not been granted. In accordance with section 148, subsection 1 of the Aliens Act this is a ground for sending an alien back. When making the decision the Finnish Immigration Service has taken into consideration the facts presented in the case as well as other relevant factors and the overall circumstances.

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The Finnish Immigration Service considers that the applicant can be returned to his country of origin Iraq without being subjected to inhuman treatment in accordance with article 3 of the European Convention of Human Rights or any other treatment in accordance with section 9, subsection 4 of the Finnish Constitution or section 87, subsection 1, section 88, subsection 1 or section 88a, subsection 1 of the Aliens Act or without the risk of being sent to such an area.

The decision by the Administrative Court of Helsinki

The Administrative Court has rejected the appellants request for an oral hearing.

The Administrative Court has rejected the appeal regarding the asylum decision by the Finnish Immigration Service.

The Administrative Court has reversed the decision in other respects and returned the decision to the authorities for a re-examination, claiming that A should get a residence permit on subsidiary grounds.

The Administrative Court has given the following reasons for its decision:

The appellant originates from Baghdad. His ethnic background is Arab and he is a Sunni Muslim. The appellant has told that he applied for asylum in Finland because he has been threatened by Shia Muslims. The appellant is studying to become an engineer at a Technical University but has stopped his studies after four years because of fear. The University is situated in an area dominated by Shia Muslims. According to the appellant armed Shia groups choose Sunni Muslim students as their target and the minibus carrying students has been attacked. In addition, the appellant has received threatening letters and a threatening phone call. The brother of the appellant has been kidnapped in order to obtain ransom. The appellant states that the kidnappers required him to stop studying. Earlier during the asylum interview the appellant has stated that his father has had problems with local Sunni groups, since he complained to the members of the group for leaving dead bodies on their plot.

For the handling of the appeal in the Administrative Court the appellant has, for further clarification, informed that his father was in a high position as an engineer chief at the Ministry of Housing and Construction during the rule of Saddam Hussein and a Baath-party representative in the government. In addition, the father has received a medal of honour and a certificate of belonging to Saddam Hussein's circle of acquaintances. According to the clarification the appellant's father has also received threatening letters.

The United Nations High Commissioner for Refugees (UNHCR) has in its guidelines classified certain groups at risk and former Baath-party members as well as persons having cooperated with them are enumerated. Baath-party members have faced violations of law and attacks especially since the elections in 2005. The attacks have diminished, partially because a large part of the former active Baath-party members have left Iraq or been replaced in the current government. Sporadic attacks may still take place. Killings have also been reported in 2008 and 2009 (*UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Iraqi Asylum-seekers, April 2009*). The father of the appellant has been a member of the Baath-party on a normal high position in the Ministry of Housing and Construction. However, the appellant has not made it probable that he would have a well-founded fear of being persecuted in his country of origin in accordance with section 87, subsection 1 of the Aliens Act because of his father's actions or his own studies.

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The development of the security situation in the central parts of Iraq and Baghdad is unstable and bomb-attacks by armed groups and violence still occur. During 2009 an increase in the amount of car bombs and suicide bombings was noticed. The violence has especially been concentrated to i.e. Baghdad. The United Nations High Commissioner for Refugees (UNHCR) considers asylum-seeking Iraqis from Baghdad, inter alia, to be in need of international protection (*UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Iraqi Asylum-seekers, April 2009* and *UK Home Office: Country of Origin Information Report Iraq, 10 December 2009*). On the basis of the information of the security situation in the place of domicile of the appellant there are significant reasons to believe that he faces a risk of being subjected to serious harm in accordance with section 88, subsection 1 of the Aliens Act if returned to Baghdad. Therefore, the appellant should be granted residence permit on the grounds of subsidiary protection needs.

Legal norms applied by the Administrative Court

Sections 52, 87, 87a, 87b, 88 and 88 a of the Aliens Act

Examination in the Supreme Administrative Court

1. The Finnish Immigration Service has requested leave to appeal against the decision from the Administrative Court and required that the decision by the Administrative court is overturned and that the decision by the Finnish Immigration Service acquires legal force. Moreover, the Service has required that the case is returned to the Administrative Court for re-examination.

As a basis for its request the Finnish Immigration Service presents, inter alia, the following:

The Administrative Court has misinterpreted section 88, subsection 1 of the Aliens Act and has not sufficiently justified its position for subsidiary protection. As for country of origin information the Administrative Court has referred to reports by the UNHCR and the UK Home Office. However, the Administrative Court has not assessed the concept of armed conflict in accordance with the criteria set out in the country information. In the decision by the Administrative Court the intensity and organization of the conflict has not been pondered upon in a way that would express why and how in general one draw the conclusion that there is an armed conflict. The decision does not assess the concept of individual threat as a criterion for subsidiary protection nor why in this case it would be a question of such an exceptional situation that the applicant would be dispensed from showing an individual threat. The Administrative Court has neither applied updated country information from various sources nor has it assessed the appellant's individual situation.

When examining the case one has to take into consideration the judgment by the European Court of Justice 17.2.2009 (C-465/07, Elgafaji) which concerns the interpretation of article 15 (c) read in conjunction with article 2 (e) of the Qualification Directive (2004/83/EC). The judgment stated that in exceptional cases a person does not have to prove an individual threat if the ongoing violence due to the armed conflict reaches such a high level that there are considerable reasons to believe that the civilian would face a real threat upon return. The judgment cannot be interpreted in such a way as to release an applicant for international protection from the obligation to prove an individual threat in other situations.

When assessing the level of the prevailing violence in Baghdad, actors restraining the indiscriminate violence must be taken into consideration. These can be, inter alia, state authorities or international forces.

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According to current information from the Finnish Immigration Service the situation in Baghdad has mollified substantially since the internal conflict between the Sunni and Shia Muslims in 2006-2007 and in many ways people have returned to everyday life. Bomb attacks by terrorists have, however, increased during summer and autumn 2009 and there were some serious attacks also in spring 2010. This information is based on the statement by the UN Security Council regarding the organization of the parliamentary elections in Iraq and the subsequent security situation, on the Finnish Broadcasting Company's news reports as well as on the report by the Finnish Immigration Service from June 2010 on the current situation in Baghdad including the IOM's (International Organization for Migration) estimation of the number of returnees. Information on the situation in Iraq has to be collected from reliable and objective sources. The most essential is that the information is precise, updated and reliable. The UNHCR does not provide information on the situation in Iraq or its guidelines are not updated.

Updated information from different sources regarding the situation in the Baghdad area does not support the view that there would be an ongoing armed conflict as defined in section 88, subsection 1 of the Aliens Act that could subject anyone from that area to violations of law or serious threats due to indiscriminate violence in accordance with section 88, subsection 1 point 3 of the Aliens Act. The appellant would have to prove a real risk of being subjected to individual harm in accordance with section 88, subsection 1.

2. A has asked for leave to appeal against the decision from the Administrative Court. He has requested that the decisions by the Administrative Court and the Finnish Immigration Service are overturned and sent back to the Finnish Immigration Service for granting of asylum. In addition, he has requested an oral hearing or that the case is sent back to the Administrative Court for such a hearing.

To support his request A states the following:

A's father has served at a high position in the government and he has been a member of the Baath-party. Before fleeing the country he had received several threats. A couple of days before the attack on the minibus, where he was injured, he had gotten a hidden threat in his school book where his background as a Sunni was emphasized and he was asked to stop studying. Several threatening letters had been delivered to the family's apartment and he had been threatened to life by phone.

The appellant's younger brother was kidnapped 15.4.2008. The brother was released after long negotiations. One condition of the release was that the appellant stops studying. In April 2010 masked men killed the appellant's brother in law in the appellant's home in front of his mother and sister and the children of the brother in law.

The appellant has a well-founded fear of being subjected to persecution in his home country for reasons membership in a particular social group or political opinion considering as well his Sunni background. Prior to fleeing he has been subject to several serious threats and he has been in mortal danger when the minibus was attacked. His brother and his brother in law have been victims of violence. The appellant's well-founded fear is based on events that he or his company in a similar situation have faced. He is unable to avail himself of efficient protection in his home country.

The Finnish Immigration Service has provided an explanation.

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A has, due to the leave to appeal, the appeal and the explanation submitted by the Finnish Immigration Service noted that the decision by the Administrative Court is based on information of Baghdad's weak security situation presented during the process. The Finnish Immigration Service did not manage to present convincing explanations to why Baghdad and its administrative district would be excluded from the UNHCR guidelines. The Iraqi authorities have found that during July 2010 396 civilians, 89 policemen and 50 soldiers were killed. In June the victims were 284. Baghdad has been classified as one of Iraq's most dangerous administrative districts. The Iraqi security forces do not manage to protect the nationals and have even participated in attacks themselves. The security situation has markedly deteriorated subsequent to the guidelines established by the Finnish Immigration Service in May 2009.

Considering the security situation in Baghdad, a person who is sent back there faces an individual threat of being subjected to indiscriminate violence only because of his or her presence in the area as stated in the guiding principles established in the European Court of Justice Judgement Elgafaji (C-465/07). In addition, as regards the appellant, the conditions for individual persecution are met and there is no reason to believe that the persecution or individual threat would not recur. The appeal by the Finnish Immigration Service must be rejected and if the appellant is not granted asylum, the decision by the Administrative Court must be upheld.

Decision by the Supreme Administrative Court

The Supreme Administrative Court grants the Finnish Immigration Service and A leave to appeal and examines the case.

The request for an oral hearing is dismissed.

The appeals are dismissed. The decision by the Administrative Court is not changed.

Reasoning

Oral hearing

According to section 37, subsection 1 of the Administrative Judicial Procedure Act an oral hearing may be held to clarify the case if needed. Considering the reasons for A's request for an oral hearing and the explanations provided by him as well as explanations from the documents an oral hearing is not considered to be necessary to clarify the case.

International Protection

1. Questions that need to be settled

The Administrative Court has considered that A should be granted residence permit on grounds of subsidiary protection.

In view of A's appeal it must be settled whether he falls under section 87, subsection 1 of the Aliens Act concerning asylum instead of subsidiary protection.

For the Finnish Immigrations Service's part it must be settled whether the prevailing security situation in central Iraq and especially in Baghdad is considered to fulfil the criteria in regards to the appellant for granting residence permit on grounds of subsidiary protection in accordance with section 88, subsection 1 of the Aliens Act.

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The question to be settled regarding international protection includes, in addition to the legal assessment, an assessment of the facts. The previous experience of the person applying for international protection as well as current information on the security situation in the country must be taken into consideration for the assessment. In this regard, the assessment concerns a specific person, time and place.

2. The rules and legal provisions to be applied and their background

2.1. Fundamental and human rights

According to section 7 subsection 1 of the Finnish Constitution everybody has the right to life, personal liberty, integrity and security.

According to section 7 subsection 2 no one shall be sentenced to death, tortured or otherwise treated in a manner violating human dignity.

According to section 9 subsection 4 the right of foreigners to enter Finland and to remain in the country is regulated by an Act. A foreigner shall not be deported, extradited or returned to another country, if in consequence he or she is in danger of a death sentence, torture or other treatment violating human dignity.

According to article 3 of the European Convention on Human Rights no one shall be subjected to torture or to inhuman or degrading treatment or punishment.

According to article 2 of the Charter of Fundamental Rights of the European Union everybody has the right to life. Article 18 concerns the right to asylum and article 19 concerns protection in the event of removal, expulsion or extradition.

2.2. The United Nations Refugee Convention

According to article 1, subsection A (2) of the Convention relating to the status of refugees (SopS 77-78/1968) the term "refugee" shall apply to any person who owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

2.3. The Aliens Act and its background

2.3.1. The Qualification Directive

According to article 2 (e) of the 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, a 'person eligible for subsidiary protection' means 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, and who is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country.

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According to article 15, serious harm is defined as follows:

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.

According with article 16 (1) a third country national or a stateless person shall cease to be eligible for subsidiary protection when the circumstances which led to the granting of subsidiary protection status have ceased to exist or have changed to such a degree that protection is no longer required. In accordance with subsection 2 member states shall, in applying paragraph 1, have regard to whether the change of circumstances is of such a significant and non-temporary nature that the person eligible for subsidiary protection no longer faces a real risk of serious harm.

The Qualification Directive has been transposed into national legislation with amendment 323/2009 to the Aliens Act and entered into force the 1.6.2009.

2.3.2 The rules in the Aliens Act and its preparatory work

According to section 3, subsection 13, international protection means refugee status, subsidiary protection status or a residence permit granted on the basis of humanitarian protection.

According to section 87, subsection 1 of the Aliens Act aliens residing in the country are granted asylum if they reside outside their home country or country of permanent residence owing to a well-founded fear of being persecuted for reasons of ethnic origin, religion, nationality, membership in a particular social group or political opinion and if they, because of this fear, are unwilling to avail themselves of the protection of that country.

According to section 88, subsection 1 of the Aliens Act an alien residing in Finland is issued with a residence permit on grounds of subsidiary protection if the requirements for granting asylum under section 87 are not met, but substantial grounds have been shown for believing that the person, if returned to his or her country of origin or country of former habitual residence, would face a real risk of being subjected to serious harm, and he or she is unable, or owing to such risk, unwilling to avail him or herself of the protection of that country. Serious harm means:

- 1) the death penalty or execution;
- 2) torture or other inhuman or degrading treatment or punishment;
- 3) serious and individual threat as a result of indiscriminate violence in situations of international or internal armed conflicts.

Subsection 2 of the same section regulates situations where residence permit on the grounds of subsidiary protection is not issued.

According to section 88a, subsection 1 of the Aliens Act an alien residing in Finland is issued with a residence permit on the basis of humanitarian protection, if there are no grounds under section 87 or 88 for granting asylum or providing subsidiary protection, but he or she cannot return to his or her country of origin or country of former habitual residence as a result of an environmental catastrophe or a bad security situation which may be due to an international or internal armed conflict or a poor human rights situation.

The Government proposal (HE 166/2007) regarding the Aliens Act states in regard to section 88 on subsidiary protection that the section should be formulated as to correspond to article 2,

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subsection (e) and article 15 of the Directive and the title of the section should be change as to correspond to the content. In the detailed explanation to the law it is also stated that:

“... It has been proposed to add inhuman or degrading punishment as a basis for subsidiary protection. Torture or other inhuman or degrading treatment in the current act has been regarded as including inhuman or degrading punishment, but the amendment is suggested to correspond to article 15 (b).

The section should be specified as to correspond to article 15 (c) of the Directive. Subsidiary protection should be granted to an alien, who is able to show an individual and serious threat as a result of indiscriminate violence in situations of international or internal armed conflicts. By international or internal armed conflicts is meant, not only armed conflicts as defined in the Geneva Convention from 1949 and its additional protocol relating to humanitarian law, but also other armed violence and disorder.

According to article 4 (4) of the Directive the fact that an applicant has already been subject to persecution or serious harm or to direct threats of such persecution or such harm, is a serious indication of the applicant's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated.”

Regarding humanitarian protection the Government proposal has stated the following:

“It has been proposed to add a new section 88a regarding humanitarian protection to the Aliens Act, according to which an alien residing in Finland would be issued with a residence permit on the basis of humanitarian protection, if there are no grounds for granting asylum or providing subsidiary protection, but he or she cannot return to his or her country of origin or country of former habitual residence as a result of the current situation. International protection granted due to the current situation in the country of origin or country of former habitual residence is included in the existing section 88, but a division into a separate section is proposed so the subsidiary protection in the Act would correspond to the definition in the Directive. The Directive does not prevent member states from applying the article more extensively; it only aims for unity in regards to the central definitions of the Directive.

Residence permit on humanitarian grounds would be granted to aliens if return to the country of origin or country of former habitual residence is impossible due to current disorder, poor human rights and security situation, poor humanitarian situation or similar circumstances. All possible future situations are impossible to define in advance.

The conditions for possibly being considered as subject to a violation of the law does not have to relate to the individual itself, but the overall situation in the country may result in violations of the law for any person. Humanitarian protection may be granted i.e. to an alien, who only due to his or her residential area is at risk of being subject to indiscriminate armed violence. A distant possibility of threat cannot be considered as a risk, if the violence is taking place in other parts of the country.

The administration committee of the parliament has in its report (HaVM 26/2008) stated in regard to the proposed section 88a of the Aliens Act that the proposed scope of application of section 88a should include the aliens currently falling under the scope of section 88, that cannot return to their country of origin due to an armed conflict, even if the threat due to the indiscriminate violence cannot be considered to be individual as defined in the section on subsidiary protection.

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When examining the international protection needs of the applicant one has to consider the application in regard to section 87 and 88 first. Only after this one should consider the impact of the current general situation in the country on the applicant upon return. The difference to section 88 on subsidiary protection is consequently that the conditions for possibly being subjected to a violation of law is not directly related to the person him- or herself, but due to the armed conflict the situation in the country may subject any person to a violation of law. It may concern a situation that is insecure and dangerous for the local people overall due to the armed conflict.

According to section 88b of the Aliens Act the well-founded fear of being persecuted referred to in section 87 (1) or the real risk of being subjected to serious harm referred to in section 88(1) may be based on incidents after the applicant's departure from his or her home country or country of permanent residence or on acts that the applicant has participated in after his or her departure.

According to section 88c of the Aliens Act Actors of persecution or serious harm include: 3) non-State actors, if it can be demonstrated that the actors under section 88d are unable or unwilling to provide protection against persecution or serious harm.

According to section 88d of the Aliens Act protection can be provided by the State or an international organization controlling the State or a substantial part of the territory of the State.

Section 88c of the Aliens Act regards the internal flight possibilities. According to subsection 1 an alien may be refused asylum or a residence permit under section 88 or 88a, if he or she, in a part of his or her home country or country of permanent residence, does not have a well-founded reason to fear to be persecuted or face a real risk of being subjected to serious harm, and if he or she can reasonably be expected to reside in that part of the country. According to subsection 2, account shall be taken of the general circumstances prevailing in that part of the country and of the applicant's personal circumstances when assessing if a part of the country is in accordance with subsection 1.

According to section 107, subsection 2 of the Aliens Act a person's subsidiary protection status is withdrawn if the circumstances which led to the granting of subsidiary protection status have ceased to exist or have changed to such a degree that protection is no longer required.

3. Decisions in connection to the Qualification Directive

The European Court of Justice has in its judgment 17.2.2009 (C-465/07, *Elgafaji against Statssecretaris van Justitie*) stated, inter alia, the following:

27. At the outset, it should be noted that the referring court seeks guidance on the protection guaranteed under Article 15(c) of the Directive, in comparison with that under Article 3 of the ECHR as interpreted in the case-law of the European Court of Human Rights (see, inter alia, Eur. Court H.R. *N.A .v .the United Kingdom*, judgment of 17 July 2008, not yet published in the *Reports of Judgments and Decisions*, subsections 115 to 117, and the case-law cited).

28. In that regard, while the fundamental right guaranteed under Article 3 of the ECHR forms part of the general principles of Community law, observance of which is ensured by the Court, and while the case-law of the European Court of Human Rights is taken into consideration in interpreting the scope of that right in the Community legal order, it is, however, Article 15(b) of the Directive which corresponds, in essence, to Article 3 of the ECHR. By contrast, Article 15(c) of the Directive is a provision, the content of which is different from that of Article 3 of the

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ECHR, and the interpretation of which must, therefore, be carried out independently, although with due regard for fundamental rights, as they are guaranteed under the ECHR.

29. The questions referred, which it is appropriate to examine together, thus concern the interpretation of Article 15(c) of the Directive, in conjunction with Article 2(e) thereof.

30. Having regard to those preliminary observations, and in the light of the circumstances of the case in the main proceedings, the referring court asks, in essence, whether Article 15(c) of the Directive, in conjunction with Article 2(e) thereof, must be interpreted as meaning that the existence of a serious and individual threat to the life or person of the applicant for subsidiary protection is subject to the condition that that applicant adduce evidence that he is specifically targeted by reason of factors particular to his circumstances. If not, the referring court wishes to know the criterion on the basis of which the existence of such a threat can be considered to be established.

31. In order to reply to those questions, it is appropriate to compare the three types of ‘serious harm’ defined in Article 15 of the Directive, which constitute the qualification for subsidiary protection, where, in accordance with Article 2(e) of the Directive, substantial grounds have been shown for believing that the applicant faces ‘a real risk of [such] harm’ if returned to the relevant country.

32. In that regard, it must be noted that the terms ‘death penalty’, ‘execution’ and ‘torture or inhuman or degrading treatment or punishment of an applicant in the country of origin’, used in Article 15(a) and (b) of the Directive, cover situations in which the applicant for subsidiary protection is specifically exposed to the risk of a particular type of harm.

33. By contrast, the harm defined in Article 15(c) of the Directive as consisting of a ‘serious and individual threat to [the applicant’s] life or person’ covers a more general risk of harm.

34. Reference is made, more generally, to a ‘threat ... to a civilian’s life or person’ rather than to specific acts of violence. Furthermore, that threat is inherent in a general situation of ‘international or internal armed conflict’. Lastly, the violence in question which gives rise to that threat is described as ‘indiscriminate’, a term which implies that it may extend to people irrespective of their personal circumstances.

35. In that context, the word ‘individual’ must be understood as covering harm to civilians irrespective of their identity, where the degree of indiscriminate violence characterising the armed conflict taking place – assessed by the competent national authorities before which an application for subsidiary protection is made, or by the courts of a Member State to which a decision refusing such an application is referred – reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to the serious threat referred in Article 15(c) of the Directive.

36. That interpretation, which is likely to ensure that Article 15(c) of the Directive has its own field of application, is not invalidated by the wording of 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’.

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37. While that recital implies that the objective finding alone of a risk linked to the general situation in a country is not, as a rule, sufficient to establish that the conditions set out in Article 15(c) of the Directive have been met in respect of a specific person, its wording nevertheless allows – by the use of the word ‘normally’ – for the possibility of an exceptional situation which would be characterised by such a high degree of risk that substantial grounds would be shown for believing that that person would be subject individually to the risk in question.

38. The exceptional nature of that situation is also confirmed by the fact that the relevant protection is subsidiary, and by the broad logic of Article 15 of the Directive, as the harm defined in paragraphs (a) and (b) of that article requires a clear degree of individualisation. While it is admittedly true that collective factors play a significant role in the application of Article 15(c) of the Directive, in that the person concerned belongs, like other people, to a circle of potential victims of indiscriminate violence in situations of international or internal armed conflict, it is nevertheless the case that that provision must be subject to a coherent interpretation in relation to the other two situations referred to in Article 15 of the Directive and must, therefore, be interpreted by close reference to that individualisation.

39. In that regard, the more the applicant is able to show that he is specifically affected by reason of factors particular to his personal circumstances, the lower the level of indiscriminate violence required for him to be eligible for subsidiary protection.

40. Moreover, it should be added that, in the individual assessment of an application for subsidiary protection, under Article 4(3) of the Directive, the following may be taken into account: – the geographical scope of the situation of indiscriminate violence and the actual destination of the applicant in the event that he is returned to the relevant country, as is clear from Article 8(1) of the Directive, and – the existence, if any, of a serious indication of real risk, such as that referred to in Article 4(4) of the Directive, an indication in the light of which the level of indiscriminate violence required for eligibility for subsidiary protection may be lower.

41. Lastly, in the case in the main proceedings, it should be borne in mind that, although Article 15(c) of the Directive was expressly transposed into Netherlands law only after the facts giving rise to the dispute before the referring court, it is for that court to seek to carry out an interpretation of national law, in particular of Article 29(1)(b) and (d) of the Vw 2000, which is consistent with the Directive.

42. According to settled case-law, in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 249 EC (see, inter alia, Case C-106/89 *Marleasing* [1990] ECR I-4135, paragraph 8, and Case C-188/07 *Commune de Mesquer* [2008] ECR I-0000, paragraph 84).

43. Having regard to all of the foregoing considerations, the answer to the questions referred is that Article 15(c) of the Directive, in conjunction with Article 2(e) thereof, must be interpreted as meaning that:

- the existence of a serious and individual threat to the life or person of an applicant for subsidiary protection is not subject to the condition that that applicant adduce evidence that he is specifically targeted by reason of factors particular to his personal circumstances;
- the existence of such a threat can exceptionally be considered to be established where the degree of indiscriminate violence characterising the armed conflict taking place – assessed by the

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competent national authorities before which an application for subsidiary protection is made, or by the courts of a Member State to which a decision refusing such an application is referred – reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to that threat.

44. It should also, lastly, be added that the interpretation of Article 15(c) of the Directive, in conjunction with Article 2(e) thereof, arising from the foregoing paragraphs is fully compatible with the ECHR, including the case-law of the European Court of Human Rights relating to Article 3 of the ECHR (see, inter alia, *N.A. v. the United Kingdom*, subsections 115 to 117 and the case-law cited).

In the European Union's member states' case law the Elgafaji-judgement in relation to Iraq has been examined in the English decision *HM and Others (Article 15 (c)) Iraq CG 2010 UKUT 331 (IAC)*, 8-10.6.2010, Upper Tribunal (Immigration and Asylum Chamber). The German Supreme Administrative Court has in its judgment 14.7.2009 (BvwewG10 C9.08) also examined the Qualification Directive and subsidiary protection in regard to an applicant from Baghdad. In the Swedish judgement MIG 2009:27 (Migrationsöverdomstolen) the meaning of the Elgafaji-judgement in relation to some other countries has been examined.

4. Country information on Iraq

UNHCR states in its guidelines assessing the international protection needs of Iraqi Asylum-seekers published in April 2009 that it considers all asylum-seekers from all five central governorates to be in need of international protection (*UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Iraqi Asylum-seekers*, www.refworld.org). Baghdad belongs to the areas mentioned.

The question of belonging to a particular social group is examined in paragraph IV.A.2.b of the guidelines. Academics are mentioned as such a possible professional group. On the other hand, it is stated that these kinds of persons may often be targeted due to their activities or political opinions.

UNHCR examines the internal flight possibilities for persons from Baghdad in paragraph IV.C.1 of the guidelines. First it refers to guidelines from 2003 that regards internal flight alternatives in general. Upon examination one has to consider whether a new relocation is relevant and whether it is reasonable in the future as well (points 85-86). In Iraq it is essential whether the person has the same ethnic and religious background as well as clan and family ties in the area because these give a specific social protection and access to services. This regards cities as well as the countryside (point 95). The overall assessment of the UNHCR is that an internal flight is not possible in regard to the five central governorates nor is it a relevant option (point 110).

UNHCR has updated its Iraq report 2.5.2009 and 28.7.2010. In addition it has given information on the situation in central Iraq and Baghdad the 8.6.2010, 18.6.2010, 3.9.2010, 8.10.2010 and 19.10.2010.

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The Finnish Immigration Service has made an assessment of the situation 8.5.2009: The international protection needs for Iraqi asylum-seekers. The Finnish Immigration Service has presented this information as a support for their appeal and it is described previously on page 2.

The UN Secretary General has 26.11.2010 given a report to the UN Security Council which regards the United Nations Assistance Mission for Iraq. Initially, the report discusses the fact that Iraq has, after long negotiation, formed a government which consists of members from the groups elected in the parliamentary election 7.3.2010. According to the report the formation of the government has been welcomed positively by the international community and in neighbouring countries. The report draws attention to the attacks that took place in Baghdad in October 2010, mainly in Christian areas and in November 2010 in Shia areas. The report also mentions that UNHCR registers 2000 new Iraqis in the area each month, mainly in Syria. At the same time 1300 refugees returned to Iraq in September 2010 which is the lowest number in 2010. The reasons for the decelerated returns are estimated to be due to violence as well as lack of employment opportunities and public service in addition to the delay in forming the Government. The report also mentions that several European Countries have forcibly returned Iraqis to Iraq against the recommendations by UNHCR. In point 36 of the report it is stated that the security situation in Iraq still concerns civilians, especially because of terrorism and violent crimes. The report estimates that the withdrawal of the US forces will affect the security situation in a short and long term.

Amnesty International has in its public statement 10.11.2010 asked the European states to stop forced returns to Iraq to the five central governorates and to other particularly dangerous areas. The recent attacks, where several civilians were killed, have again showed how dangerous the situation is in Baghdad and in many other areas in Iraq. Several hundreds of civilians are killed and wounded each month even if the victims have decreased since 2008.

The Swedish Migration Board (Migrationsverket) has the 22.10-24.11.2010 stopped the return of about 200 Iraqis. The decision is related to the decision by the European Court of Human Rights to grant an interim decision in each case where the applicant has turned to the court in regard to a return to Baghdad (www.migrationsverket.se/info/3202.html).

The European Court of Human Rights had 5.11.2010, in connection to its interim decisions, asked UNHCR about its updated position in regard to Iraqis forcibly returned to Iraq. UNHCR has in its response 9.11.2001 stated that the guidelines from April 2009 are still valid. UNHCR follows the situation and updates its guidelines when the situation has changed sufficiently. UNHCR still recommends that states restrain from returning Iraqis originating from the five central governorates or that belongs to particular groups in the southern governorates or in the AL-Anbar area (www.unhcr.org/refworld/country,LEGAL,,,IRQ,4562d8cf2,4cda5c362,0.html).

The European Court of Human Rights has informed 24.11.2010 that in the future it will make individual assessments for each applicant from the areas previously mentioned.

5. Explanations given of the individual circumstances

A has stated to be from his city of birth, Baghdad. He is Arab and Sunni Muslim. He has been studying four years in the Technical University of Baghdad to become an engineer. The appellant has told that armed Shia groups target studying Sunni Muslims and the minibus driving students has been attacked. He was injured himself in the attack. He has received threatening letters and calls. The brother of the appellant has been kidnapped for ransom and the kidnappers required

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that the appellant stops studying. According to the appellant his brother in law was killed in a terror attack after the appellant had left the country.

According to the statement by the Finnish Medical Center 30.10.2008 splinters can be recognized in the X-ray of A and they correspond to the statements given by the appellant and seem to be grenade splinters.

6. Evaluation

6.1. Asylum

A's ethnic and religious background does not show that he has a well-founded fear of being persecuted for these reasons in Baghdad. His studies as university level cannot be said to define him as belonging to a particular social group in accordance with section 87, subsection 1 of the Aliens Act. The individual experiences presented do not show that he would fulfil the criteria in section 87, subsection 1 of the Aliens Act to be granted asylum.

In accordance with the above stated and when considering the requirements of the Supreme Administrative Court, the facts of the case and the reasoning in the decision of the Administrative Court, the decision by the Administrative Court in regards to asylum should not be overturned.

6.2. Subsidiary protection

When examining the needs for subsidiary protection both collective and individual facts must be taken into consideration. The European Court of Justice has stated that the better the applicant manages to prove that the threat regards him individually due to his personal characteristics the lower the level of indiscriminate violence is required for granting subsidiary protection.

The appellant has personal and serious experiences of indiscriminate violence in his circle of acquaintances. These experiences do not show that the indiscriminate violence would concern the appellant in particular in regards to his individual characteristics under these circumstances. The experiences must, nevertheless, be taken into consideration when assessing the security situation and to which extent the undeniable violence in Baghdad may target any one without exception.

When assessing the overall country information of Baghdad previously mentioned in section 4 and when considering the nature of the violence and the long duration as well as the facts that appeared during the asylum-interview with the appellant, A's need for subsidiary protection should not be assessed differently than has the Administrative Court, even if recent reports have presented improvements in the situation. In this regard the case should not be assessed in accordance with section 88a of the Aliens Act regarding humanitarian protection.

Reliance on internal flight alternatives are at this moment not possible or relevant, also when considering the applicants individual situation.

When considering the nature of the case, data from the websites of international organizations and other European Union Countries' authorities and courts has been taken into consideration during the whole process.

On the basis of the above mentioned and when considering the requirements of the Supreme Administrative Court and the explanations presented in the case, it is not in light of the present facts reasons to overturn the decision by the Administrative Court.

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The case was examined by board of directors: Anne E. Niemi, Sakari Vanhala, Riitta Mutikainen, Eija Siitari-Vanne and Heikki Harjula. Kai Träskelin presented the case.