Neutral Citation Number: [2009] EWCA Civ 620

Case No: 1. C5/2008/1706 & No. 2. C5/2009/0251

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
No1. AA/09525/2007
No.2 AA/03993/2007

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/06/2009

Before :

LORD JUSTICE SEDLEY
LORD JUSTICE LONGMORE
and
LORD JUSTICE MAURICE KAY

- -

Between :

No.1 QD (IRAQ)	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**
No.2 AH (IRAQ)	**Appellant**
- and –	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**
UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES	**Intervener**

- -
- -

Mr Raza Husain and Ms Samantha Knights (instructed by Messrs Bhatt Murphy) for **Appellant No.1**
Mr Simon Cox and Ms Samantha Knights (instructed by Refugee & Migrant Justice) for **Appellant No.2**
Mr Pushpinder Saini QC and Mr Deok-Joo Rhee (instructed by Treasury Solicitor) for the **Respondent**
Mr Michael Fordham QC and Mr Tom Hickman (instructed by Baker & McKenzie LLP) for the **Intervener in both cases**

Hearing dates: Tuesday 9 and Wednesday 10 June 2009

- -

Judgment

Lord Justice Sedley :

This is the judgment of the court.

1. The outcome of both of these appeals depends, at least in the first instance, on whether the approach of the Asylum and Immigration Tribunal to the meaning and effect of article 15 of the Qualification Directive is legally flawed. In the second instance it depends on whether, even if the AIT's understanding of the law was incorrect, a correct reading and application of the law could make any difference to the outcome of either case, which was adverse to both appellants.

2. For reasons which will become apparent when we deal with the law, we consider it impossible to predict with certainty what would be the outcome on the facts already found. These are, in outline, as follows.

3. QD comes from Samarra in the Salah Al-Din governorate of Iraq. Under the Saddam regime he was a Ba'ath Party member, and his expressed fear is of reprisals. On arrival here in August 2004 he therefore claimed asylum. This was refused, with the result that he faces return unless return is prevented by article 15(c). The immigration judge, applying the law set out in *KH (Iraq)*, to which we will come, concluded that the level of violence in QD's home area did not pose a sufficiently immediate threat to his safety to attract the protection of article 15(c) and so dismissed his appeal. On reconsideration, no material error of law was found. It is against this finding that QD now appeals.

4. AH, who has just turned 18, comes from Baquba in Iraq. The AIT on a second-stage reconsideration found that, to escape serious local violence, he had moved with his family to Kifri in the Diyala governorate. The tribunal, likewise applying *KH*, were not satisfied that the level of violence prevalent in Kifri would place AH at sufficient individual risk if (subject to Home Office policy on unaccompanied minors) he were to be returned.

5. Both cases therefore hinge on the true meaning and effect of article 15 of the Qualification Directive. In addressing this we have had assistance of high calibre submissions, for which we record our gratitude, both from counsel representing the parties and by way of intervention from the Office of the United Nations High Commissioner for Refugees, represented pro bono by the counsel and solicitors named at the head of this judgment. Because UNHCR's written submission contains much valuable background information which it will not be necessary for us to reproduce for the purposes of our decision, we propose, with the authors' permission, to annexe it to this judgment.

6. While in the nature of things the AIT has been under scrutiny without being separately represented, the determination with which we have been principally concerned – *KH (Article 15(c) Qualification Directive) Iraq CG* [2008] UKAIT 00023 – is a lucid and scholarly judgment capable of holding its own under what has been a concerted attack by the parties and the intervener.

The 2004 Qualification Directive

7. In the half-century and more that has passed since the 1951 Geneva Convention created the modern concept of the refugee, new tranches of need for protection and new international obligations to provide protection have developed. By the turn of the century it had become apparent that for a variety of reasons it was necessary that the member states of the European Union should give effect to their shared obligations in a way which distributed the burdens equally according to common standards.

8. The Qualification Directive (Council Directive 2004/83/EC) thus forms part of the Common European Asylum System. It sets, according to its headnote and (with one immaterial variation) its first article,

> "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."

9. As this suggests, the Directive brings together classical Geneva refugee status with what it calls subsidiary protection status. The latter status has broadly two sources. One is the obligation assumed by all EU member states as part of the Council of Europe to give effect to the rights contained in the European Convention on Human Rights and Fundamental Freedoms – essentially rights of non-refoulement for individuals who cannot establish an affirmative right to asylum. The other is the humanitarian practices adopted by many EU states, the UK included, towards individuals who manifestly need protection but who do not necessarily qualify under either convention. Among these are people whose lives or safety, if returned to their home area, would be imperilled by endemic violence.

10. Article 2 (in its material parts and with emphasis added) provides:

> For the purposes of this Directive:
>
> ……..
>
> (e) 'person eligible for subsidiary protection' means a third country national …. 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, … would face **a real risk of suffering serious harm as defined in article 15**, … and is unable, or, owing to such risk, unwilling to avail himself of the protection of that country."

11. Article 15 provides:

> **Serious harm**
>
> 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.

12. Such persons are required to be granted subsidiary protection status (article 18) unless an internal relocation alternative is open to them (article 8) or until the risk in the country of origin ceases (article 16).

13. It is also left open to member states, by article 3, to adopt more favourable standards of protection. This the UK has already done by paragraph 339C of the Immigration Rules, which repairs the surprising omission of article 15 to provide for protection from a real risk of targeted deprivation of life in breach of ECHR article 2. Rule 339C accordingly adds unlawful killing to the tabulation of forms of serious harm which, for the rest, it takes directly from article 15.

14. Among the 40 paragraphs of the preamble to the Directive, at least three have a bearing on the meaning of these provisions:

> (24) Minimum standards for the definition and content of subsidiary protection status should also be laid down. Subsidiary protection should be complementary and additional to the refugee protection enshrined in the Geneva Convention.

> (25) It is necessary to introduce criteria on the basis of which applicants for international protection are to be recognised as eligible for subsidiary protection. Those criteria should be drawn from international obligations under human rights instruments and practices existing in Member States.

> (26) Risks 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.

International humanitarian law

15. It is appropriate to begin by considering the approach to these provisions taken by the AIT in *KH (Iraq)*. Their analysis was, in summary, that because the vocabulary of article 15 was clearly drawn from international humanitarian law, that was the context

within which and the end to which the article should be interpreted and applied. The determination explains carefully why the AIT arrived at their premise; and if we took the same view of the premise, we would have much sympathy with their conclusions. But, in agreement with all three counsel, we respectfully consider the premise to be incorrect and the conclusions to fall with it. Since both tribunals from which the present appeals come took their law, as they were required to do, from *KH*, their decisions too cannot stand.

16. International humanitarian law (IHL) is the name given to the body of law which seeks to protect both combatants and non-combatants from collateral harm in the course of armed conflicts. It thus has a specific area of operation. It also, however, has defined and limited purposes which do not include the grant of refuge to people who flee armed conflict. This should, we respectfully think, have sounded a warning bell to the tribunal which decided *KH*. But the Home Secretary had accepted that Iraq was currently in a state of internal armed conflict within the meaning given to the phrase by IHL and the tribunal went on (§33-39) to reason out why, despite indicators to the contrary in its drafting history, article 15(c) sought to give effect to IHL. The result, they concluded (§51), was that its purpose was to give refuge from "international crimes caused by a serious threat of indiscriminate violence"; in other words "a realistic threat of being victims of war crimes or other serious breaches of IHL". If this were right, every article 15(c) claim would prompt an inquiry of which the Directive gives no hint and which would depend on an extraneous body of law.

17. We recognise that the drafting history is complex and in places ambiguous in the ways noted by the AIT, not least in the removal of an early reference to Geneva Convention IV without an abandonment of its vocabulary. As they put it:

> "several of the terms used in article 15(c) are terms of art within international humanitarian (and international criminal) law: e.g. 'civilian', 'life and [or] person', 'indiscriminate' and, of course, 'international or non-international [internal] armed conflict'. The only body of law in which all of these terms feature is IHL (together with international criminal law)."

18. None of this, however, is in our view sufficient to introduce an unarticulated gloss of a fundamental kind into a Directive which goes far wider in its purposes than states of armed conflict. We consider that the Directive has to stand on its own legs and to be treated, so far as it does not expressly or manifestly adopt extraneous sources of law, as autonomous. It is not necessary, this being so, to track in *KH* the effects of the AIT's erroneous premise, but we accept broadly Mr Husain's submission that it led them to construe "indiscriminate violence" and "life or person" too narrowly, to construe "individual" too broadly, and to set the threshold of risk too high.

Articles 2(e) and 15(c)

19. This, however, is a long way from the end of the road. Article 15(c), both on its own and even more so when married with article 2(e), is highly problematical - in large

part, we are bound to say, because of poor drafting. Three particular sticking points are readily perceptible:

> (1) the ostensibly cumulative but logically intractable test of "a real risk" of a "threat";
>
> (2) the contradictory postulation of an "individual threat" to life or safety from "indiscriminate violence";
>
> (3) the requirement of "armed conflict" when there may well be only one source of indiscriminate violence.

The first of these has to be coped with pragmatically. The second has now been resolved in principle by the European Court of Justice. The third, albeit troubling, is the subject of agreement before us.

20. The shape of article 15 follows the guidelines contained in the preamble. Paragraph (a) reflects the prohibition on the use or execution of the death penalty contained in the Sixth and Thirteenth Protocols to the ECHR. Paragraph (b) reflects article 3. ECHR. In *NA v United Kingdom* (25904/07; 17 July 2008) the European Court of Human Rights made it clear (§114-7) that the risk of ill-treatment contrary to this article could arise from general as well as from particular circumstances. It said:

> 115. From the foregoing survey of its case-law, it follows that the Court has never excluded the possibility that a general situation of violence in a country of destination will be of a sufficient level of intensity as to entail that any removal to it would necessarily breach Article 3 of the Convention. Nevertheless, the Court would adopt such an approach only in the most extreme cases of general violence, where there was a real risk of ill-treatment simply by virtue of an individual being exposed to such violence on return.

21. Paragraph (c) draws not on prescribed standards, except insofar as it has regard to the right to life enshrined in ECHR article 2, but on state practice, a source explicitly contemplated in paragraph 25 of the preamble. For reasons of common humanity most EU states, the United Kingdom among them, had by 2004 made it a practice not to return unsuccessful asylum-seekers to war zones or situations of armed anarchy. Article 15(c) elevated this practice to a minimum standard. The problems arise from the wording by which it has been done.

Elgafaji v Staatssecretaris van Justitie

22. Since these appeals were decided by the AIT, the Grand Chamber of the European Court of Justice has given its ruling in the *Elgafaji* case (C-465/07; 17 February

2009). The two questions referred to it by the Dutch Raad van State (council of state) were these:

> 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?

23. The Court held, unsurprisingly, that "it is article 15(b) of the Directive which corresponds, in essence, to article 3 of the ECHR". It continued (§28):

> "By contrast, article 15(c) of the Directive is a provision, the content of which is different from that of article 3 of the 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."

24. Having thus answered the first referred question, the Court went on to address the question whether article 15(c) required proof of a threat directed at the individual applicant, and, if not, what was the correct test. It said:

> 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'.

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.

…….

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) of the Directive, 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 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, *NA. v. The United Kingdom*, § 115 to 117 and the case-law cited).

"individual threat" and "indiscriminate violence"

25. In this way the ECJ has sought to reconcile two things which Advocate-General Maduro in his Opinion (§31) had described as seeming "prima facie irreconcilable" – an individual threat arising from indiscriminate violence. The Court did not, as it might have done, decide that "individual" was there simply to exclude persons who enjoyed some form of protection from the violence faced by the population generally. Nor, however, has the judgment introduced an additional test of exceptionality. By using the words "exceptional" and "exceptionally" it is simply stressing that it is not every armed conflict or violent situation which will attract the protection of article 15(c), but only one where the level of violence is such that, without anything to render them a particular target, civilians face real risks to their life or personal safety.

26. While this formulation leaves open a very large area of factual judgment, it answers, so far as can be done, the second difficulty mentioned above.

"a risk" of "a … threat"

27. The ECJ's judgment, however, does not resolve the multiplication of contingencies by articles 2(e) and 15(c). In fact the final words of its answer to the second question appear to adopt it: "a real risk of being subject to that threat". It is possible to devise a theoretical situation in which people can be said to face a risk of a threat (the possibility that a quiescent militia will re-emerge; a rumour that the local wells have been poisoned) but it is not thinkable that the Directive seeks to cover such remote and not truly dangerous situations rather than the real risks and real threats presented by the kinds of endemic act of indiscriminate violence – the placing of car bombs in market places; snipers firing methodically at people in the streets – which have come to disfigure the modern world.

28. In this regard it is possible that the Directive is less strong than IHL, which – as the AIT point out in §126 of *KH* – prohibits "threats of violence the primary purpose of which is to spread terror among the civilian population". It seems to us clear, nevertheless, that when article 15(c) speaks of a threat to a civilian's life or person it is concerned not with fear alone but with a possibility that may become a reality.

29. In our judgment "risk" in article 2(e) overlaps with "threat" in article 15(c), so that the latter reiterates but does not qualify or dilute the former. As a matter of syntax this no doubt has its problems, but as a matter of law and common sense it does not. Tribunals will of course need to address them in the light of the ECJ's ruling, but as a single, not a cumulative, contingency.

30. Beyond what was decided in *Elgafaji*, however, lie at least two further questions that arose in *KH* and have been debated again before us.

31. One is whether the word "serious" qualifies "threat", as grammatically it would appear to do, or "harm", as the appellants contend it substantively does. In our judgment it would be an unjustified departure from the wording of the paragraph to tinker with its grammatical meaning. Not every threat is real and not every real threat is serious. Article 15(c) is intelligibly concerned with serious threats of real harm.

32. The second is what kind or degree of risk to individuals is required to bring a situation of armed conflict within the purview of article 15(c). The AIT in *KH* (§135) adopted the test, approved by this court in *AA (Zimbabwe)*[2007] EWCA Civ 149, of a "consistent pattern" of mistreatment of returning asylum-seekers by state authorities at the airport. Mr Saini, for the Home Secretary, supports this much of the decision. For our part we would not endorse the simple reading across of a porous concept like risk or threat from one context to another. What in one situation requires consistency of practice if a risk to an individual is to be established may simply not be relevant in another. The contrast between the methodical victimisation of those suspected of disloyalty and the occurrence of indiscriminate violence is a good example. The risk of random injury or death which indiscriminate violence carries is the converse of consistency.

33. In fact the AIT in *KH*, at §136, go a long way towards recognising this. An applicant would have to show, they say, that incidents of indiscriminate violence

> "were happening on a wide scale and in such a way as to be of sufficient severity to pose a real risk of serious harm … to civilians generally."

"armed conflict"

34. One of the reasons for doubting the use of IHL as an aid to the construction of article 15 is the difference between the need for the purposes of the law of war to define international and internal armed conflict and the quite different objects of article 15. As Mr Fordham points out, the Directive in article 17(1)(a) is specific in invoking the treaty definitions of crimes against peace, war crimes and crimes against humanity, so that its corresponding silence in article 15(c) is eloquent. This, however, makes the adoption of the phrase "armed conflict" no less problematical. If the overriding purpose of article 15(c) is to give temporary refuge to people whose safety is placed in serious jeopardy by indiscriminate violence, it cannot matter whether the source of the violence is two or more warring factions (which is what "conflict" would ordinarily suggest) or a single entity or faction.

35. We therefore accept the proposition, on which the parties before us and the intervener agree, that the phrase "situations of international or internal armed conflict" in article 15(c) has an autonomous meaning broad enough to capture any situation of indiscriminate violence, whether caused by one or more armed factions or by a state, which reaches the level described by the ECJ in *Elgafaji*. The Home Secretary in *KH* accepted that there was currently an armed conflict in Iraq, and the AIT proceeded on that acceptance.

36. We would accept UNHCR's submission that, for the purposes of article 15(c), there is no requirement that the armed conflict itself must be exceptional. What is, however, required is an intensity of indiscriminate violence – which will self-evidently not characterise every such situation – great enough to meet the test spelt out by the ECJ.

37. It must follow, as again all counsel agree, that "civilian" in article 15(c) means not simply someone not in uniform – which by itself might include a good many terrorists – but only genuine non-combatants (though UNHCR submitted that former "combatants" should not be excluded).

Disposal

38. Both these appeals therefore succeed in principle, requiring on the face of it remission for redetermination on the facts in accordance with the law as we have held it to be. But Mr Saini has endeavoured to persuade us that they should nevertheless not be allowed because it is a foregone conclusion that, if remitted, they will fail again.

39. It is sufficient to say that it became quickly apparent that the submission could succeed only if this court were to turn itself into a primary fact-finding body. The evidence we have been shown certainly does not affirmatively demonstrate an absence of individual risk from indiscriminate violence in either appellant's home governorate. Once it is established that the edifice of law which both tribunals took from *KH* is defective, there is in our judgment no option but to locate the evidence within a different legal paradigm and reach a fact-sensitive fresh conclusion. That is what the AIT is for.

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

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

By "material part" we mean the applicant's home area or, if otherwise appropriate, any potential place of internal relocation.

41. Each appeal will therefore be allowed to the extent of being remitted to a differently constituted tribunal. It will be for the acting president of the AIT to decide whether they should be heard separately or together.

ANNEXE

IN THE COURT OF APPEAL **C5/2008/1706**
ON APPEAL FROM THE IAT

QD (Iraq) v Secretary of State for the Home Department

SUBMISSIONS BY
UNHCR

---

1. These submissions address the following issues,
    - UNHCR mandate and position in relation to international protection;
    - the object and purpose of Subsidiary Protection Status ("SPS") under the Qualification Directive, 2004/83/EC, 29 April 2004;
    - the context and object of Article 15(c);
    - the meaning of "individual threat";
    - the meaning of "internal armed conflict";
    - the meaning of "indiscriminate violence";
    - the meaning of a real risk of a threat to life or person;
    - country condition update: Iraq.

2. UNHCR has previously intervened in a number of cases before the English courts: e.g. *Fornah/K* [2006] UKHL 46 and *Asfaw* [2008] UKHL 31. UNHCR also intervenes in important cases in other countries and before the European Court of Human Rights ("ECtHR"), including in *Mir Isfahani v. Netherlands*, App. No. 31252/03, 31 January 2008 and *Saadi v. United Kingdom* (2008) 47 EHRR 17. UNHCR also issued Statements on specific issues in the context of preliminary ruling references to the

Court of Justice of the European Communities, in particular in *Elgafaji v The Netherlands* C-465/07, 17 February 2009.[1]

3. When intervening in court cases it is UNHCR's practice to address its submissions to issues of international refugee law and doctrine. References are to tabs in UNHCR's bundle of documents, submitted with these written submissions.

UNHCR mandate and position in relation to international protection

4. The Office of the United Nations Commissioner for Refugees ("UNHCR") has a direct interest in this matter, as the agency entrusted by the United Nations General Assembly with responsibility for providing international protection to refugees, and for seeking permanent solutions for the problem of refugees.[2]

5. According to its Statute, UNHCR fulfils its mandate *inter alia* by, "[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto".[3] UNHCR's supervisory responsibility under its Statute is reiterated in Article 35 of the 1951 Convention relating to the Status of Refugees ("1951 Convention") and Article II of the 1967 Protocol relating to the Status of Refugees.[4]

6. In the years following the adoption of UNHCR's Statute, the UN General Assembly and Economic and Social Committee extended UNHCR's competence *ratione personae*.[5] This was done not by amending the statutory definition of "refugee" but by empowering UNHCR to protect and assist particular groups of people whose circumstances did not necessarily meet the definition in the Statute.[6]

---

[1] See *UNHCR Statement on Subsidiary Protection Under the EC Qualification Directive for People Threatened by Indiscriminate Violence*, January 2008 **[Tab 11]**.

[2] Statute of the Office of the UNHCR, GA Res. 428(V), Annex, UN Doc A/1775, at [1] (1950) **[Tab 1]**.

[3] Ibid., at [8(a)].

[4] UNTS No. 2545, Vol. 189, p.137 and UNTS No. 8791, Vol. 606, p.267.

[5] See *UNHCR Note on International Protection*, submitted to the 45th session of the Executive Committee of the High Commissioner's Programme, UN Doc. A/AC.96/830, 7. Sept. 1994 **[Tab 3]**.

[6] In such cases, the institutional competence of UNHCR is based on paragraph 9 of its Statute: "The High Commissioner shall engage in such additional activities, including repatriation and resettlement, as the General Assembly may determine, within the limits of the resources placed at his disposal."

7. In practical terms, this has extended UNHCR's mandate to a variety of situations of forced displacement resulting from conflict, indiscriminate violence or disorder even in relation to persons who are not refugees within the 1951 Convention. In the light of this evolution, UNHCR considers that serious (including indiscriminate) threats to life, physical integrity or freedom resulting from generalised violence or events seriously disturbing public order are valid reasons for international protection under its mandate.[7]

8. UNHCR's function under its Statute and under the 1951 Convention is also reflected in EC law. Article 21.1(c) of the Asylum Procedures Directive (2005/85/EC) states that Member States shall allow UNHCR to "*present its views, in the exercise of its supervisory responsibilities under Article 35 of the Geneva Convention, to any competent authorities regarding individual applications for asylum at any stage of the procedure.*"

9. UNHCR has issued three position papers containing its views on complementary protection.[8] These documents examine the position of complementary protection within the broader international protection regime; its beneficiaries and appropriate standards of treatment and procedural questions. As stated above, in UNHCR's view, persons benefitting from complementary protection include those persons who are outside their country of origin because there is a serious threat to life, to physical integrity, liberty, and security of the person in the country of origin as a result of an armed conflict or serious public disorder. These documents examine the position of complementary protection within the broader international protection regime its beneficiaries and appropriate standards of treatment and procedural questions.

---

[7] UNHCR, *Providing International Protection Including Through Complementary Forms of Protection*, Executive Committee of the High Commissioner's Programme, Standing Committee, UN Doc. EC/55/SC/CRP.16, 2 June 2005, at [26] **[Tab 8]**.

[8] (1) UNHCR, *Complementary Forms of Protection: Their Nature and Relationship to the International Protection Regime*, UN Doc. EC/50/SC/CRP.18, 9 June 2000 **[Tab 4]**; (2) UNHCR, *Providing International Protection Including through Complementary Forms of Protection* (supra) **[Tab 8]**; (3) UNHCR, *Complementary Forms of Protection, Global Consultations on International Protection*, EC/GC/01/18, 4 September 2001 **[Tab 5]**.

10. In 2005 UNHCR's Executive Committee (ExCom), currently made up of 72 States, including United Kingdom, adopted a "Conclusion on the Provision of International Protection including through Complementary Forms of Protection".[9] This conclusion *inter alia*:

10.1. affirmed that complementary protection should be resorted to only after full use has been made of the 1951 Convention;

10.2. underlined the importance of developing the international protection system in a way which avoids protection gaps, and enables all those in need of international protection to find and enjoy it.

Subsidiary Protection Status

11. The four EC Directives and the EC Regulation making up the Common European Asylum System ("CEAS") as it currently stands,[10] pursue the basic objectives set out by the European Council at its meeting in Tampere in October 1999. The Council agreed to work towards the CEAS based on the full and inclusive application of the 1951 Convention. The Presidency Conclusions adopted in Tampere in 1999 record the determination of the European Council to develop the Union as an area of freedom security and justice under Articles 61 and 63 of the EC Treaty (inserted by the Treaty of Amsterdam (1997)). The Conclusions further state:

> "4. The aim is an open and secure European Union, fully committed to the obligations of the Geneva Refugee Convention and other relevant human rights instruments, and able to respond to humanitarian needs on the basis of solidarity. A common approach must also be developed to ensure the integration into our societies of those third country nationals who are lawfully resident in the Union."

---

[9] UNHCR's Executive Committee of the High Commissioner's Programme, *Conclusions on the Provision of International Protection Including through Complementary Forms of Protection*, No. 103 (LVI) 2005, 7 October 2005 **[Tab 9]**.

[10] Temporary Protection Directive 2001/55/EC, 20 July 2001; Reception Directive 2003/9/EC, 27 January 2003; Qualification Directive 2004/83/EC, 29 April 2004; Asylum Procedures Directive 2005/85, 1 December 2005; Council Regulation (EC) No. 343/2003 establishing the criteria and mechanisms for examining asylum applications.

12. The Conclusions explicitly recognise that in addition to clear and efficient procedures for determining asylum claims, and common criteria to determine refugee status, the CEAS "should also be completed with measures on subsidiary forms of protection offering an appropriate status to any person in need of such protection." (at [14]; emphasis supplied)

13. Pursuant to this goal, the Qualification Directive has as its "main objective" ensuring common criteria for the identification of those in need of international protection and ensuring such people a minimum level of benefits (Recital (6)).

14. The Qualification Directive establishes two forms of protection: "Refugee Status", which essentially corresponds to the criteria for recognising individuals as refugees under the 1951 Convention, and "Subsidiary Protection Status" ("SPS"). A person only qualifies for SPS if they do not qualify for Refugee Status but where they are at risk of suffering serious harm if returned to their country of origin: Article 2(e).

15. UNHCR wishes to ensure that subsidiary protection complements and does not undermine refugee status under the 1951 Convention. UNHCR thus has an interest in seeing that EC law on subsidiary protection adequately reflects international standards, and helps to avoid protection gaps. But importantly, if a person does fall through a "protection gap" in the Qualification Directive this does not relieve States of their obligations towards such individuals under international law, including under the European Convention on Human Rights ("ECHR").

16. SPS draws in particular on international and regional human rights law and State practice prior to its adoption[11] as set out in Recital 25 of the Qualification Directive:

    16.1. **State practice:** At the time of the Tampere Conclusions there was consistent State practice in European States recognising that persons may be in need of international protection even if none of the 1951 Convention grounds is the cause of the feared harm. However, the precise scope of the

[11] For State practice following the adoption of the Qualification Directive, see UNHCR, *Asylum in the European Union, A Study of the Implementation of the Qualification Directive*, November 2007 **[Tab10].**

protection offered varied across European States.[12] (see the ECRE Report, April 1999,[13] summarised at Annexure 1 to these submissions.) The Qualification Directive provided an opportunity to harmonise State practice in this respect.

16.2. **International human rights law:** most importantly,

(1) the obligation not to return a person to a country where they face a risk of suffering the death penalty or execution (Article 15(a)) reflecting Member State's obligations under Protocol 6 of the ECHR and the principle in *Soering v UK* (1989) 11 EHRR 439 (death row phenomenon);

(2) the obligation not to return a person to a country where they are substantial grounds to believe that he/she will face a real risk of inhuman or degrading treatment or torture, reflecting the *non-refoulement* obligation arising under Article 3 of the ECHR (Article 15(b)). This was extended to Article 2 in *Gonzalez v Spain*, App. No. 43544/98, 29 June 1999;

(3) the *non-refoulement* obligation under Article 3 of the Convention Against Torture. This *non-refoulement* obligation has attained the status of jus cogens.

(4) the *non-refoulement* obligation arising under Articles 6 and 7 of the International Covenant on Civil and Political Rights. See Human Rights Committee in its General Comments No. 31 on the Nature of the General Legal Obligation on States Parties to the Covenant.[14]

---

[12] See UNHCR, *Some Additional Observations and Recommendations on the European Commission Proposal, Geneva*, July 2002, p.6 **[Tab 6]**.

[13] European Council on Refugees and Exiles, *Complementary / Subsidiary Forms of Protection in the EU States – An Overview*, ELENA National Coordinators, April 1999 **[Tab 17]**.

[14] U.N. Doc. CCPR/C/21/Rev.1/Add.13, 21 April 2004, at [12]; also General Comment No. 6 (2005) on the Treatment of unaccompanied and separate children outside their country of origin.

17. In particular, Article 3 of the ECHR and related jurisprudence of the ECtHR played an important role in the drafting of Articles 2(e) and 15 of the Qualification Directive. The objective risk assessment of the term "substantial grounds for believing" in Article 2 (e) was taken from the case law of the ECtHR, as were the criteria for serious harm set out in Article 15 (a) and (b). Accordingly, ECHR law provides an important source for interpretation of Article 15. However, the subsidiary protection regime of the Qualification Directive is not a mere copy of Article 3 or the ECtHR's interpretation of that provision.

18. More caution and a flexible approach is required when relying on **International Humanitarian Law** ("IHL") and international criminal law to interpret the scope of the Qualification Directive, and specifically Article 15(c) which introduces terminology associated with IHL.

19. The evolution of the law of armed conflict and, related thereto, of international criminal law, most notably the Statute of the International Criminal Court and its adoption by the EU Member States, offer an important legal rationale for extending the scope of international protection beyond Convention refugees. The jurisprudence of the International Tribunal for the former Yugoslavia as well as the Statute of the International Criminal Court have reinforced the norms of international humanitarian law, especially for the protection of civilians. It would be incongruent if refugee law and *non-refoulement* law did not protect persons against being returned to places where they would be at risk of harm caused by breaches of IHL.

20. However, whilst IHL law is a source of law that can inform the interpretation of Article 15(c), caution is warranted in seeking to draw too heavily on IHL,

    20.1. the Qualification Directive itself states that the criteria for SPS "should be drawn from international obligations under human rights instruments and practices in Member States" – it does not mention IHL (Recital 25);

20.2. the ECJ in *Elgafaji* stated that the Qualification Directive, and Article 15(c) in particular, must be interpreted with "due regard for fundamental rights, as they are guaranteed under the ECHR" (at [28]), but did not refer to IHL.

20.3. IHL and SPS are two separate legal regimes. IHL imposes responsibilities on the protagonists to an armed conflict or on States within whose territory armed conflict is occurring or who are occupying powers.[15] IHL is interpreted in the light of its object and purpose, which is not necessarily the same as the object and purpose of SPS. It would not therefore be surprising if the same or similar term were to be given a different meaning in IHL and under Article 15(c). By way of example, in *Prosecutor v Tadic*[16] the Appeal Chamber of the International Criminal Court ("ICC") explained that the reference to "armed conflict" under the Geneva Conventions must be given a very broad temporal scope, extending States obligations up until a general conclusion of peace (in international conflict) or a peaceful settlement (in internal conflict) (at [70]). This interpretation of "armed conflict" is obviously necessary to ensure that IHL continues to apply until such a formal cessation of a conflict and to lend clarity to the temporal application of IHL;[17] but different considerations will be relevant when interpreting Article 15(c).

21. It is submitted that the following principles should therefore guide the interpretation of SPS,

21.1. The criteria for recognising SPS must be interpreted broadly, in order to achieve the objective of securing protection to persons in need of

---

[15] There is no obligation under the Geneva Conventions that is directly analogous to the *non-refoulement* obligation imposed on non-parties to an armed conflict under the 1951 Convention and international human rights law, but obligations under IHL do impose rules in relation to displacement and displaced persons. See Jean-Marie Henckaerts and Louise Doswald-Beck, ICRC, *Customary International Humanitarian Law*, Cambridge University Press 2005, Chapter 38, pp.457-474 **[Tab 19]**.

[16] International Criminal Tribunal for the Former Yugoslavia Appeals Chamber, *Prosecutor v Dusko Tadic*, Case No. IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 **[Tab 22]**.

[17] Likewise, the Appeal Chamber stated that the notion of armed conflict in IHL had to be given a very broad geographical scope because the obligations arising from an armed conflict, such as those relating to treatment of POWs and civilians, are clearly intended to apply outside the area of hostilities (at [68]-[69]).

international protection who do not meet the criteria of the 1951 Convention.

21.2. Regional and international and regional human rights instruments inform –but do not limit—the scope and meaning of SPS;

21.3. IHL and international criminal law inform—but do not limit—the scope and meaning of Article 15 (c), and some caution is warranted when drawing on IHL in the context of complementary protection against *non-refoulement*.

22. The Qualification Directive must also be interpreted harmoniously with the other EC Directives forming the CEAS as it currently stands.

The object and context of Article 15(c)

Background to Article 15(c)

23. Article 15(c) was formulated to address the need to protect individuals who have fled indiscriminate violence, owing to which they have a justified fear for their safety if they return to their country of origin. It has long been recognised that people fleeing indiscriminate violence are a category of persons deserving international protection but who may fall outside the protection of the 1951 Convention where no grounds for persecution can be shown.[18]

24. A number of countries have addressed the need to protect persons who have fled indiscriminate violence by broadening the concept of refugee:

24.1. The Organization of African Unity agreed the Convention Governing the Specific Aspects of the Refugee Problems in Africa, 1969 **[Tab 13]**, also included Article 1.2 in the following terms:

[18] The Qualification Directive follows the 1951 Convention by requiring a well founded fear of persecution before a person will qualify for Refugee Status under the Directive (Article 2(c)).

> "The term "refugee" shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality."

24.2. The Cartagena Declaration on Refugees[19], adopted by Latin American Countries in November 1984 **[Tab 14],** included the following conclusion at III.3:

> "…in view of the experience gained from the massive flows of refugees in the Central American area, it is necessary to consider enlarging the concept of a refugee, bearing in mind, as far as appropriate and in the light of the situation prevailing in the region, the precedent of the OAU Convention (article 1, paragraph 2) and the doctrine employed in the reports of the Inter-American Commission on Human Rights. Hence the definition or concept of a refugee to be recommended for use in the region is one which, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order."

25. The need to harmonize EU rules on all "de facto refugees" was acknowledged in the European Commission's 1991 Communication on the Right to Asylum.[20] The Communication referred to an important category of refugee who is a person "who flees his country not in order to escape political persecution … but because his or her life is threatened, say, by civil war…" (pp.2, 6-7).

26. As the Cartagena Declaration on Refugees makes clear, the need to offer protection to persons fleeing indiscriminate violence is closely associated with the problem of "mass influx". Soon after the 1991 Communication was issued, the attention of

---

[19] Adopted at a Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, held at Cartagena, Colombia, 22 November 1984 **[Tab 14]**. The work of the Colloquium was attended by representatives from the UNHCR and United Nations Development Program ("UNDP"); human rights experts from throughout Latin America; and representatives from the governments of Belize, Colombia, Costa Rica, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, and Venezuela.

[20] *Communication from the Commission to the Council and the European Parliament on the right to asylum of 11 October 1991*, SEC (91) 1857 fin **[Tab 15].**

Member States was focused on the problem of indiscriminate violence by the mass influx of asylum seekers caused by the break-up of the former Yugoslavia.[21] This ultimately led to the adoption of the Temporary Protection Directive, which sets out minimum standards for giving protection to asylum seekers in the event of a mass influx of displaced persons.

27. Article 2(c) of the Temporary Protection Directive defines displaced persons as persons who are:

> "unable to return in safe and durable conditions because of the situation prevailing in that country, who may fall within the scope of Article 1A of the Geneva Convention or other international or national instruments giving international protection, in particular:
>
> (i) persons who have fled areas of armed conflict or endemic violence;
>
> (ii) persons at serious risk of, or who have been the victims of, systemic or generalised violations of their human rights;…"

28. The acknowledgement in the Tampere Conclusions, even as negotiations on the Temporary Protection Directive were still underway, that the CEAS should include permanent "measures of subsidiary forms of protection" where the criteria of refugee status were not met, encompassed the need to protect persons who have fled indiscriminate violence.[22]

29. The Commission's Proposal for the Qualification Directive, presented in September 2001, included proposals for a subsidiary protection status. The Proposal made clear that draft Article 15(c) was directed at the issue of indiscriminate violence. The Explanatory Memorandum stated that Article 15(c) was "drawn from Article 2(c) of the Council Directive on minimum standards for giving temporary protection in the event of a mass influx of displaced persons" (COM(2001) 510 final, 12 Sept. 2001).[23]

---

[21] European Council in Edinburgh, 11-12 December 1992, *Conclusions of the Presidency; Declaration on the Former Yugoslavia*, 12 December 1992 **[Tab 16]**.

[22] *Presidency Conclusions*, Tampere European Council, 15-16 October 1999, at [14] **[Tab 18].**

[23] The Commission's Draft stated,

"…Member States shall grant subsidiary protection status to an applicant for international protection who is outside his or her country of origin, and cannot return there owing to a well-founded fear of being subject to the following serious and unjustified harm:

30. Similarly, the Recommendation of the Committee of Ministers of the Council of Europe on 27 November 2001 recommended that subsidiary protection should be granted where a person is in need of international protection after being forced to flee "indiscriminate violence" giving rise to a threat to life, security or liberty from situations "such as" armed conflict.[24]

31. An important dimension to the protection afforded by Article 15(c) is therefore its ability to afford protection that is situational rather than individually targeted. Its basic purpose is to cover persons in need of international protection from indiscriminate violence occurring in their country of origin who do not qualify as refugees. This was affirmed by the ECJ's decision in *Elgafaji*, considered below.

The context of Article 15(c)

32. In *Elgafaji* the ECJ emphasised that Article 15(b) of the Qualification Directive is the *lex specialis* in cases engaging Article 3 of the ECHR: at [28]. Following the jurisprudence of the ECtHR, in exceptional cases, persons fleeing indiscriminate violence, even if they do not give rise to valid claims for refugee status, will also fall under Article 15(b) (if a person would face a real risk of suffering inhuman or degrading treatment or torture if returned to their country of origin).

33. It is not necessary for a person to show that the "real risk" arises from personal circumstances in order for them to have a valid claim to protection under Article 3, and thus under Article 15(c). Whilst some ECtHR cases had suggested that an applicant had to show special distinguishing features (*Vilvarajah v United Kingdom* (1991) 14 EHRR 248, at [111]; *Muslim v Turkey* (2006) 42 EHRR 16, at [68]-[69] *Kaldik*

… (c) a threat to his or her life, safety or freedom as a result of indiscriminate violence arising in situations of armed conflict, or as a result of systematic or generalised violations of their human rights."

[24] The Committee's Recommendation stated,

"Subsidiary protection should be granted by members to a person who, on the basis of a decision taken individually by the competent authorities, does not fulfil the criteria for refugee status under the 1951 Convention and its 1967 Protocol but is found to be in need of international protection:

…. [c]-- because that person has been forced to flee or remain outside his/her country or origin as a result of a threat to his/her life, security or liberty, for reasons of indiscriminate violence, arising from situations such as armed conflict, …" (Recommendation Rec (2001)18, 27 Nov. 2001)

v Germany Application 28526/05, p.8; *Salah Sheekh v The Netherlands* (2007) 45 EHRR 50) this was expressly disproved in *NA v United Kingdom*, App. No. 25904/07, 17 July 2008, where the Court held that Article 3 protection applies where the general situation of violence is such that the applicant is systemically exposed to ill-treatment (at [116]).

34. Article 15(c) must be regarded as having distinct, and in certain respects a wider, application than both Article 15(b) and Article 3 of the ECHR. In *Elgafaji*, the ECJ stated that it is, "a provision, the content of which is different from that of Article 3 ECHR" and it has to be interpreted "independently" with "its own field of application" (at [28] and [36]).

Individual threat

35. Article 15(c) refers to "an individual threat to an individual's life or person". In *Elgafaji* the ECJ held that the words "individual threat" should be interpreted to mean only that each individual must establish that their return would give rise to a real risk to their life or person: it does not require that the risk to them is any greater than that to which other people are exposed, nor does it impose any requirement that the risk be related to their personal circumstances (at [34]-[36]). The ECJ explained that Recital 26, which anticipates that risks to which an entire population is exposed will not "normally" in themselves qualify as serious harm, is consistent with this interpretation of Article 15(c) (at [37]).

Internal Armed Conflict

36. Article 15(c) states that SPS status is limited to persons fleeing internal or external "armed conflict". We understand that the existence of an armed conflict is not in dispute on this appeal. The decision in this case that the situation is one of internal

armed conflict is consistent with the position taken by the ICRC and UNHCR,[25] French Courts[26] and by the German FedOff.[27]

37. However certain observations on the requirement of internal "armed conflict" are warranted given the potential importance of this term in other cases and given the fact that the IAT in *KH (Article 15(c) Qualification Directive) Iraq CG* [2008] UKIAT 0002 considered that Article 15(c) should be interpreted through the lens of IHL,

37.1. Article 15(c) has to be read in light of the object and purpose of SPS, namely, to protect from a risk of serious harm if returned to their country of origin in circumstances that fall outside the 1951 Convention. Persons who face a real risk of serious harm due to indiscriminate violence are in need of international protection regardless of whether the context is classified in international law as one of "armed conflict".[28]

37.2. International protection needs arising from indiscriminate violence are not limited to situations of declared war or internationally recognized conflicts. It is therefore of importance that the requirements for an "internal armed conflict" are not set too high.

37.3. The Temporary Protection Directive applies to persons who have fled "armed conflict or endemic violence" and persons at serious risk of "systemic and generalised violations" of their human rights.

---

[25] The ICRC continues to qualify Iraq as an armed conflict situation. See the documents referred to in UNHCR *Eligibility Guidelines for Assessing the International Protection Needs of Iraqi Asylum-Seekers*, Geneva, April 2009, fn. 23 **[Tab 12]**. UNHCR considers that the degree of violence in the central Governorates continues to qualify asylum seekers in the EU for protection under Article 15(c): ibid. fn. 13 and paragraph 59 below.

[26] The French CRR stated, "the situation prevailing in Iraq is characterised in particular by the perpetration of attacks, extortion and threats targeting certain groups, which conduct continuous and concerted military operations in certain parts of the territory. Therefore, this situation should be considered as a situation of generalized violence resulting from a situation of internal armed conflict": cited in UNHCR, *Study of the Implementation of the Qualification Directive* **[Tab 10]** supra, p.76. The study found a divergent approach in the national law of Member States.

[27] Ibid., pp.76-7, although not the Bavarian higher administrative court.

[28] Ibid. p.78: UNHCR therefore asked, "what added value this term brings to a legal provision on subsidiary protection?"

37.4. State practice in 1999 showed that a majority of EU states offered complementary protection from a risk of suffering serious human rights abuses beyond cases of IHL "armed conflict": see Annexure 1.

37.5. A UNHCR study in 2007 reported that of the three States covered by the Study on which data was then available, there was already a divergence as to the meaning given to "armed conflict".[29] In one, Sweden, SPS is granted where there is a "severe conflict".[30] The German Administrative Court has subsequently held that only internal disturbances and tensions, such as riots and sporadic acts of violence and other acts of a similar nature are clearly not armed conflicts.[31]

37.6. The European Court of Human Rights recognises that, exceptionally, a "general situation of violence" is capable of giving rise to a breach of Article 3: *NA v United Kingdom*, App. No. 25904/07, 17 July 2008.

37.7. IHL is of limited (although some) assistance interpreting the meaning of Article 15(c), not least because,

37.7.1. the absence of a settled definition in IHL: see Annexure 2 to these submissions.

---

[29] Ibid. p.79. Data was available on France, German and Swedish practice, but not Greece or the Slovak Republic (the five countries surveyed). A Report by ELENA, dated October 2008, also found a variation in approaches amongst Member States to the notion of "armed conflict": *The Impact of the EU Qualification Directive on International Protection*, ECRE, European Legal Network on Asylum, p.28 **[Tab 21]**.

[30] UNHCR, *Asylum in the European Union: A Study of the Implementation of the Qualification Directive*, November 2007, p.78 **[Tab 10].**

[31] BVerwG 10 C 43.07, 24 June 2008 **[Tab 24]**. After citing the Second Additional Protocol to the Geneva Conventions, 12 August 1949 ("APII"), Arts. 1 and 2, the Court stated: "thus there are only internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, which are [query: clearly] not armed conflicts. In internal crises falling in between [such situations and APII, Art.1(1)] it is this Court's opinion that the presumption of an armed conflict within the meaning of Article 15 Letter c of the Directive is not automatically excluded. But in any event, to satisfy the conditions the conflict must present a certain degree of intensity and permanence….The concept of "armed conflict" under international law was chosen to show clearly that only conflicts of a certain magnitude fall within the purview of this provision….The orientation toward the criteria of international humanitarian law runs up against its limits in any case where it is contradicted under Art. 15 Letter c of the Directive by the purpose of granting protection to persons seeking refuge in third countries…" (at [22]).

37.7.2. the different object and purpose of IHL: see paragraph 20.3 above, and Annexure 2.

37.8. In *Elgafaji* the ECJ referred to an armed conflict under Article 15(c) being "characterised" by the presence of indiscriminate violence. It stated that there would be a sufficient individual threat where the indiscriminate violence "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 face a real risk of being subject to a serious threat (at [35]).

38. It the light of the above, it is submitted that "armed conflict" must be given a broad autonomous meaning, reflecting the object and purpose of Article 15(c) and the SPS regime.[32] IHL is informative but Article 15(c) is not tied to IHL definitions.

39. It is submitted that a persistent violent conflict or insurgency which is of unpredictable duration and is of an intensity which gives rise to a real risk of a threat of serious harm should be within Article 15(c).[33]

Indiscriminate violence

40. UNHCR understands the term "indiscriminate" or "generalised" violence to mean the exercise or force not targeted at a specific object or individual.

41. It is vital that the object and purpose of Article 15(c) is not undermined by confusing the notion of "indiscriminate violence" with the IHL concept of

---

[32] See e.g. UNHCR, *Annotated Comments on the EC Council Directive*, January 2005 **[Tab 7],** p.33: "Persons fleeing indiscriminate violence and gross human rights violations more generally would, however, similarly be in need of international protection. [UNHCR therefore] hopes that States will recognize the need to grant protection broadly in transposing and applying this provision."

[33] See UNHCR, *Study of the Implementation of the Qualification Directive*, supra, **[Tab 10]** p.77. Likewise, it is submitted that the reference to "a civilian" in Article 15(c) should not exclude a former combatant from protection where they can show that they have renounced military activities. Such a person should not be at risk of risk of being returned because of their former combatant status, and there is nothing in ECHR jurisprudence that would permit such a removal.

"indiscriminate attack", as the IAT did in *KH (Article 15(c) Qualification Directive) Iraq CG* [2008] UKIAT 0002 (at [85]-[94]).

42. Under Additional Protocol I to the Geneva Convention ("API") "Indiscriminate attacks are prohibited" (Article 51(4)). As explained above, the objects of IHL differ in important respects from refugee law and *non-refoulement* obligations. Neither the definition of "indiscriminate" nor the definition of "attack" under API are apt to apply to Article 15(c).

43. Under API an attack is defined as an "act of violence against the adversary" (Article 49(1)). This is very different from the ordinary meaning of "violence", which does not connote adversarial conflict. Indeed, if "indiscriminate violence" under Article 15(c) were to be equated with "indiscriminate attack" under IHL, the object and purpose of Article 15(c) would be entirely undermined, since a non-combatant could not be described as an adversary and so could not be in fear of violence (=attack) if returned to his or her country of origin. This would run against the very wording of Article 15(c), which refers to a serious threat to a civilian. This underscores the inappositeness of seeking to interpret Article 15(c) through the lens of IHL in the manner attempted by the IAT.

44. API defines "indiscriminate" attack as an attack which is not directed at a military target (Article 51). The IAT in *KH* relied on this provision in holding that "indiscriminate violence" is violence inflicted in breach of IHL against civilians (at [93]). The effect is essentially to import API into Article 15(c). It means that in determining whether violence is indiscriminate, a court will first have to determine whether a combatant in an armed conflict is in breach of IHL. An important consequence of this approach is that a person cannot claim SPS on the basis of a risk of violence unless it derives from a combatant that is bound by API.

45. The following criticisms can be made of the IAT approach,

    45.1. The IAT adopts a special meaning of "indiscriminate" which is unnecessary and contrary to the object and purpose of the Qualification Directive.

45.2. From the perspective of refugee / human rights law, the distinction between violence employed against military targets and civilians is a false one. The correct distinction is between violence giving rise to a well-founded fear of persecution and violence that does not but which nonetheless gives rise to the need for international protection outside the regime of the 1951 Convention. It is in the latter sense that violence is "indiscriminate" within the meaning of Article 15(c).

45.3. Moreover, the approach taken by the IAT—as it acknowledged (at [97])—gives rise to a protection gap. For instance, it means that where armed conflict leads to a break down in law and order leading to endemic criminal violence, those fleeing would be unable to claim SP because the violence would not be committed against civilians in breach of the Geneva Conventions.

45.4. This protection gap is not only contrary to the object and purpose of the Qualification Directive in general, but is contrary to Article 6, which makes clear that actors of serious harm include "non-State actors".

45.5. Indeed, there is nothing in Article 15(c) that refers to or limits the source of the violence to which a person is entitled to claim protection from, as long as it arises in the context of an armed conflict. From the perspective of the individual, and following the object and purpose of SPS, it does not matter whether the risk of serious harm arises from acts of the state, insurgents or others.

45.6. The fact that IHL does not address violence arising from criminal gangs and non-combatants is a product of the fact that the purpose of IHL is to protect human rights by imposing obligations on the parties to armed conflict. By contrast, refugee / *non-refoulement* obligations impose obligations on host States and therefore do not address precisely the same type of harm.

45.7. There is also a practical objection to the approach taken by the IAT. It is frequently difficult to distinguish between threats of violence emanating from combatants and those deriving from mere criminals. In Iraq, for instance, the distinction between insurgent groups and criminal gangs has never been clear and has fluctuated over time. As the UNHCR has stated in a recent report,

> "Due to the complex situation of a high number of actors involved in providing security and actors involved in violence, where the lines are often blurred, an asylum-seeker's failure to identify the perpetrator of violence should not be considered as detrimental to his/her credibility."[34]

Likewise, the complexity of a situation should not prejudice the substance of a person's asylum claim. It is submitted that it would be contrary to the object and purpose of SPS for a person's status to turn on the classification and motivation of actors committing violence at any particular time.

Real risk of a threat of harm to life or person

46. Article 15(c) read with Article 2(e) makes clear that in order for a person to benefit from SPS under Article 15(c) the court must be satisfied that there is a "real risk" of a "serious…. threat to an individual's life or person". UNHCR submits that the courts should adopt a pragmatic approach, but that the following should guide the courts' consideration.

47. First, the notion of "real risk" is taken from the case law on the ECHR under Article 3 and should not be interpreted as imposing any higher test or burden on individuals claiming SPS under Article 15. The requirement that the risk of harm must be "real" makes clear that the responsibility of the States will not be engaged by risks that are fanciful or implausible or so remote as to be unreal. The ECtHR has spoken of "tenuous" risks of ill-treatment as insufficient to satisfy the test: *F v United Kingdom*, 22 June 2004, App. No. 17341/03.

---

[34] *Eligibility Guidelines for Assessing the International Protection Needs of Iraqi Asylum-Seekers*, April 2009 **[Tab 12]**, pp.23-4, at [27].

48. It is also relevant to note that UNCAT has stated that under Article 3 of the Convention Against Torture,[35] "the risk of torture must be assessed on grounds that go beyond mere theory and suspicion" and does not have to meet the threshold of being highly probable.[36]

49. Secondly, the threat must be to life or person. The reference to "person" obviously contemplates that serious harm can be a threat which is not a threat to life. It must also contemplate threats different from threats of torture or inhuman and degrading treatment, otherwise Article 15(c) would not have "its own field of application" from Article 15(b): *Elgafaji*, at [36]. This was expressly endorsed by the ECJ in *Elgafaji*, which stated that whereas Article 15(a) and (b) refer to "particular type[s] of harm", Article 15(c), "covers a more general risk of harm" (at [33]).

50. It is submitted that all forms of physical and psychological harm are capable of falling within the definition if they are sufficiently serious. This includes a person's mental health (see by analogy, *R (Razgar) v SSHD* [2004] 2 AC 368 -- effect on psychological well-being can prevent removal under Article 8 ECHR).

51. The Commission and the Council recommended a wider notion of harm, including "security"/"safety" and "freedom"/"liberty" (see paragraphs 29 and 30 above). In one sense, "person" is more inclusive than "security" and "safety", most notably in that it would encompass mental harm (which security and safety would less clearly do). On the other hand the reference to "person" excludes risk to material or legal safety.[37]

52. Threats to "freedom" and "liberty" would also be apt to include a wider range of threats than threats to the "person". However, it is submitted that a risk of

---

[35] Article 3 provides, "No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." No difference arises from the use of the word "danger" rather than "risk": see *Soering v United Kingdom* (1989) 11 EHRR 439, at [88]: "substantial grounds for believing that he would be in danger of being subjected to torture…" (emphasis supplied).

[36] Germany – CAT/C/32/D/214/2002 [2004] UNCAT 7 (17 May 2004), at [13.5]. The Office of High Commissioner on Human Rights' General Comment No. 1 on the CAT, states that: "the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. However, the risk does not have to meet the test of being highly probable" (at [6]).

[37] UNHCR, *Some Additional Observations and Recommendations*, supra, July 2002 **[Tab 6]**, p. 7.

arbitrary detention would amount to a threat to the "person" in certain situations (such as kidnapping, disappearances and incommunicado detention). In part this is because such denials of liberty also give rise to grave risks of physical and psychological harm. As the Strasbourg Court has said in the context of Article 5,

> "What is at stake is both the protection of the physical liberty of individuals as well as their personal security in a context which, in the absence of safeguards, could result in a subversion of the rule of law and place detainees beyond the reach of the most rudimentary forms of legal protection" (*Kurt v Turkey* (1998) 27 EHRR 373, at [123].

53. But a threat of indefinite arbitrary detention would, it is submitted, in itself constitute a serious threat to an asylum-seeker's "person". In *R (Ullah) v Special Adjudicator* [2004] 2 AC 323 Lord Steyn gave the following example of when a person would be deserving of international protection:

> "Imagine a case of intended expulsion to a country in which the rule of law is flagrantly flouted, habeas corpus is unavailable and there is a real risk that the individual may face arbitrary detention for many years. I could, of course, make this example more realistic by citing the actualities of the world of today. It is not necessary to do so. The point is clear enough. Assuming that there is no evidence of the risk of torture or inhuman or degrading treatment, is the applicant for relief to be told that the ECHR offers in principle no possibility of protection in such extreme cases?" (at [43])

54. It is submitted that in light of its object and purpose, and the need for it to be informed by the requirements of the ECHR, Article 15(c) should extend to protect against such a risk.

55. The House of Lords in *Ullah* also refused to rule out the potential application of Articles 9 (Freedom of thought, conscience and religion), Article 10 (Freedom of expression), Article 11 (Freedom of assembly and association) and Article 14 (Freedom from discrimination), to prevent the removal of a person to their country of origin (esp. [48] (Lord Steyn) and [67] (Baroness Hale)). Likewise it is submitted that the potential for Article 15(c) to apply to flagrant breaches of such rights, as well as other freedoms, should not be ruled out but should be addressed on a case-by-case basis. For example, where a person's livelihood has been completely

destroyed and prevented, such that his economic existence and survival is threatened, a person should benefit form protection under Article 15(c).[38]

56. Third, the requirement that the threats of harm are "serious" serves to ensure that the harm at risk of being suffered is of a severity deserving of international protection.[39] It should not be read as adding an additional probabilistic element to the "real risk" test.

57. Fourth, Article 15(c) read with Article 2(e) requires the recognition of SPS where there is a "real risk" of a "threat" to a person's life or person. The reference to "threat" makes clear that the risk that must be assessed is not a risk of actual harm but a risk of a sufficiently serious threat if the person is returned. The focus of assessment must be on the future not the severity of indiscriminate violence in the past. Furthermore, the reference to a "threat" makes clear that where a community is genuinely terrorized by indiscriminate violence, the actual probability of being physically harmed will be of limited relevance.

58. Fifth, when considering whether or not there is a real risk that removal of a person would give rise to threat to their life or person it will be open to the court to have regard to a wide variety of considerations. These may include, (1) the general situation in the country, (2) the number of casualties, (3) whether the situation is improving or degenerating, (4) foreseeable worsening of the situation, (5) whether the conflict is country wide or regional, (6) whether other Member States have refrained from deportation.

Country condition update: Iraq

59. UNHCR's analysis of the current situation in Iraq is set out in detail in recently published Eligibility Guidelines.[40] In view of the serious human rights violations and ongoing security incidents which are continuing predominantly in the five Central Governorates of Bagdhad, Diyala, Kirkuk, Ninewa and Salah Din (capital:

---

[38] See *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, January 1992, Geneva **[Tab 2]**, at [63].

[39] UNHCR, *Some Additional Observations and Recommendations*, supra **[Tab 6]**, p. 7.

[40] UNHCR, *Eligibility Guidelines*, April 2009 **[Tab 12]**.

Samarra), the UNHCR continues to assess that all Iraqi asylum-seekers from these five Governorates are in need of international protection.[41] UNHCR considers that asylum-seekers from these Governorates qualify for protection under Article 15(c) of the Qualification Directive if they do not qualify as refuges or qualify for protection under Article 15(a) or (b).[42]

MICHAEL FORDHAM QC

TOM HICKMAN

Blackstone Chambers
(*acting pro bono)*

ELIZABETH WILLIAMS

ALEXIS MARTINEZ

SAM PARR

Baker & McKenzie LLP
(acting pro bono)

UNHCR London

31 May 2009

UNHCR, London **27 May 2009**
IN THE COURT OF APPEAL **C5/2008/1706**
ON APPEAL FROM THE IAT

QD (Iraq) v Secretary of State for the Home Department

---

[41] Ibid. p.18, at [12]-[13]. In these Governorates there remains a prevalence of instability, violence and human rights violations by various actors. Armed groups remain lethal and suicide attacks and car bombs directed against the MNF-I/ISF, Awakening Movements and civilians, in addition to targeted assassinations and kidnappings, continue to occur on a regular basis. These methods of violence are usually targeted at chosen areas where civilians of specific religious or ethnic groups gather, including places of worship, market places, bus stations, and neighbourhoods. The overall situation is that there is a likelihood of persons being subjected to serious harm: ibid. p.23, at [27].

[42] Ibid. p.19, fn.24.

SUBMISSIONS BY

UNHCR

ANNEXURE 1: STATE PRACTICE IN 1999

---

1. This table summarises some of the findings of the ECRE Report, *Complimentary/Subsidiary protection in the EU states,* April 1999 [Tab 17]**.**

2. Other grounds of complimentary/subsidiary protection offered by the countries listed are set out in the report. This table includes those most relevant to the present case.

PAGES	COUNTRY	COMPLIMENTARY/SUBSIDIARY PROTECTION AFFORDED
5-6	AUSTRIA	Persons at risk of serious human rights violations[43]
7-9	BELGIUM	1. Persons at risk of serious human rights violations 2. Persons who have fled civil war or generalised violence
10-15	DENMARK	Persons who ought not to be returned (but: persons who flee situations of civil war or generalised violence not generally protected)
16-17	FINLAND	1.Persons at risk of serious human rights violations 2. Persons who have fled civil war or generalised violence
18-19	FRANCE	Persons at risk of treatment contrary to Article 3 ECHR
20-23	GERMANY	1. Persons who have fled situations of war and civil war 2. Tolerated: persons at risk of inhuman or degrading treatment, torture, death or physical harm
24-25	GREECE	1. Persons who have fled war and civil war

[43] Reference in this table to "serious human rights violations" means violations such as inhuman and degrading treatment or torture.

		2. Cases of civil conflict accompanied by mass violations of human rights
26-27	IRELAND	Persons who have fled war or civil war
28-30	ITALY	Persons who due to humanitarian reasons or international/constitutional obligations cannot be returned
31	LUXEMBOURG	Persons at risk of serious human rights violations
34-38	THE NETHERLANDS	Persons who have fled situations of civil war and generalised violence
39-40	PORTUGAL	Persons who have fled situations of civil war or generalised violence
41-45	SPAIN	Persons who have fled situations of civil war or generalised violence
46	SWEDEN	1. Persons who need protection from internal or external armed conflict 2. Persons who have a well-founded fear of being subjected to torture or inhuman and degrading treatment.
48	UNITED KINGDOM	1. Persons at risk of serious human rights violations 2. Persons who have fled situations of civil war or generalised violence

IN THE COURT OF APPEAL **C5/2008/1706**
ON APPEAL FROM THE IAT

QD (Iraq) v Secretary of State for the Home Department

SUBMISSIONS BY

UNHCR

ANNEXURE 2: "ARMED CONFLICT" IN IHL

---

1. At least the following references to, and definitions of, internal "armed conflict" can be found in IHL[44]: (1) Common Article 3, (2) Additional Protocol II, Article 1(2), (3) Additional Protocol II, Article 1(1), and (4) Statute of the International Criminal Court, Article 8(2), (5) Case law of the ICC. These are briefly considered in Annexure 2 to these submissions.

Common Article 3

2. Common Articles 3 of the Geneva Conventions, which constitutes customary international law, refers to the obligations of States during an "armed conflict" but does not provide any definition of that term. According to the ICRC it has generally been accepted that the lower threshold found in Article 1(2) of Additional Protocol II ("APII"), which excludes internal disturbances and tensions from the definition of NIAC, also applies to common Article 3.[45]

Additional Protocol II

3. Additional Protocol II ("APII") which "develops and supplements" Common Article 3 states in Article1(2) that APII, *"shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts"*. The concluding words of this sentence make clear that it is seeking to clarify the meaning of the concept of armed conflict under Common Article 3.

---

[44] We set out here the various definition of armed conflict under IHL but it is not part of UNHCR's mandate to interpret IHL.

[45] ICRC Opinion Paper, *How is the Term "Armed Conflict" Defined in International Humanitarian Law?* March 2008 **[Tab 20]**, p.3.

4. APII also sets out additional qualifications to its field of application in Article 1(1). The ICRC regards these as restricting the definition of armed conflict.[46] Article 1(1) states that APII,

> "shall apply to all armed conflicts which are not covered by the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of the High Contracting Party between its armed forces and dissident armed forces or other organised armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this protocol."

5. These words make clear that APII applies only to certain situations of armed conflict. The purpose of the restricted field of application of APII is to ensure that the protagonists to the conflict continue to apply the principles of the Protocol. Common Article 3 applies only to conflicts within the territory of a contracting parties.

6. In respect of Article 1(2), the ICRC has stated that,

> "Two criteria are usually used in this regard:10
> · First, the hostilities must reach a minimum level of intensity. This may be the case, for example, when the hostilities are of a collective character or when the government is obliged to use military force against the insurgents, instead of mere police forces.
> · Second, non-governmental groups involved in the conflict must be considered as "parties to the conflict", meaning that they possess organized armed forces. This means for example that these forces have to be under a certain command structure and have the capacity to sustain military operations."[47]

Statute of the ICC

7. The Statute of the International Criminal Court contains a further definition of non-international "armed conflict". Article 8(1) confers jurisdiction on the Court in respect of war crimes. The definition of war crimes in Article 8(2) includes in paragraph 2(e): "Other serious violations of the laws and customs applicable in armed conflicts not of an international character", as specified. Paragraph 2(f) then states:

---

[46] Ibid., p.4.

[47] Ibid. p.3, footnotes omitted.

> "Paragraph 2(e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups."

8. In addition to the findings set out in paragraph 20.3 of the submissions, the Appeal Chamber of the International Criminal Tribunal on the Former Yugoslavia confirmed in *Prosecutor v Tadic* held that,

> "an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State." [48]

9. The ICRC has stated,[49]

> "Case law has brought important elements for a definition of an armed conflict, in particular regarding the non-international armed conflicts in the meaning of common Article 3 which are not expressly defined in the Conventions concerned.
>
> Judgments and decisions of the ICTY throw also some light on the definition of NIAC. … the ICTY [in *Tadić*] went on to determine the existence of a NIAC "whenever there is […] protracted armed violence between governmental authorities and organised armed groups or between such groups within a State". The ICTY thus confirmed that the definition of NIAC in the sense of common Article 3 encompasses situations where "several factions [confront] each other without involvement of the government's armed forces". Since that first ruling, each judgment of the ICTY has taken this definition as a starting point.." (references omitted)

Relevance to the Qualification Directive

10. A number of features of an "armed conflict" important under IHL (and to the scope of application of Common Article 3) are of much less relevance to the scope of the protection offered by Article 15(c) of the Qualification Directive, given its different object and purpose and the fact that it applies non-combatants in the armed conflict.

---

[48] International Criminal Tribunal for the Former Yugoslavia Appeals Chamber, *Prosecutor v Dusko Tadić*, Case No. IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 at [70] **[Tab 22]**. *Tadić* was applied in Pre-Trial Chamber of the International Criminal Court, *Prosecutor v Thomas Lubanga Dyilo*, the Situation in the Democratic Republic of Congo, ICC-01/04-01/06-803, 26 January 2009 **[Tab 23].**

[49] ICRC Opinion Paper, *How is the Term "Armed Conflict" Defined in International Humanitarian Law?* March 2008, p.4 **[Tab 20]**.

These include, (1) the length of the conflict, (2) the degree of organisation and command structure within armed groups, and (3) the territorial control of armed groups. However, the guidance on the necessary intensity of violence is more relevant.