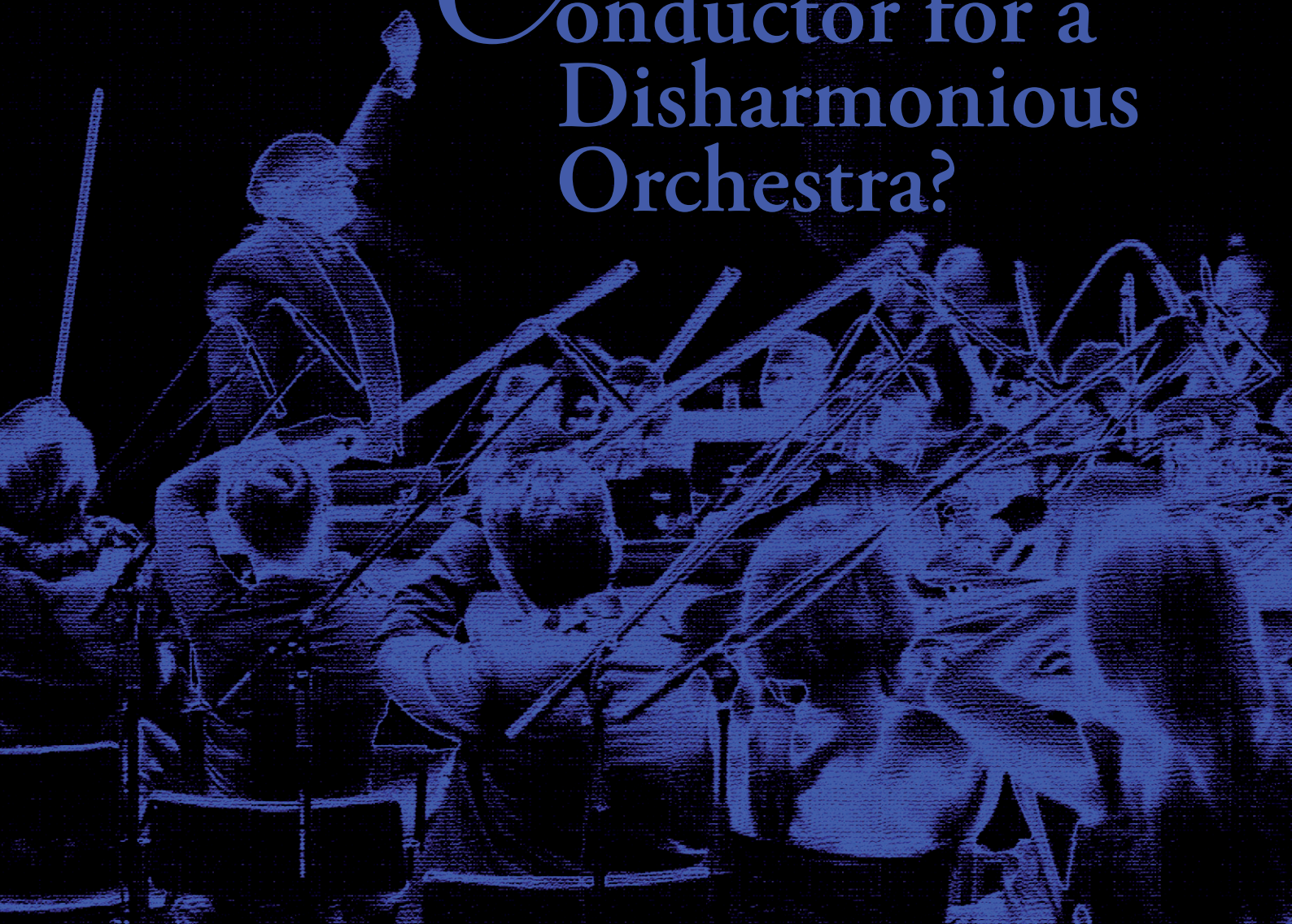


# The Luxemburg Court: Conductor for a Disharmonious Orchestra?



**Mapping the national impact of the four initial  
asylum-related judgments of the EU Court of Justice**



Project co-financed by the  
European Refugee Fund



Hungarian Helsinki Committee

**Written by Gábor Gyulai  
Hungarian Helsinki Committee, 2012**

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# Executive Summary

Since the nineties, asylum and immigration has gradually gained importance as an area of cooperation and harmonisation in the European Union. The **Court of Justice of the European Union** has become the first **supranational judicial body** in history which is entitled to provide **mandatory guidance** regarding the interpretation of asylum-related provisions in EU law in response to “**references for preliminary rulings**” submitted by national courts. In 2009–2010, the Court ruled in its **first ever asylum-related cases**, namely

- ▶ the *Elgafaji* case (dealing with Article 15 (c) of the Qualification Directive and subsidiary protection);
- ▶ the *Abdulla* case (on the cessation of refugee status);
- ▶ the *Bolbol* case (on Article 1D of the Geneva Convention and the specific legal regime applicable to Palestinian refugees) and
- ▶ the *B and D* case (on exclusion from refugee status).

As a **pilot initiative**, the present research aimed to:

1. Assess the **national legislative and policy impact** of the first asylum-related judgments of the Court of Justice (to what extent it modified previous rules and practices);
2. Identify **national guidance documents and jurisprudence** which interpret the rulings in question or key concepts included therein; as well as to
3. Establish a **methodology and recommendations for systematic monitoring** in the future.

## General findings:

**The four initial asylum-related judgments by the Court of Justice of the European Union had only limited impact on the harmonisation of national asylum practices.**

- ▶ None of the judgments generated **legislative amendments** in the member states.
- ▶ Very few national authorities (**SWEDEN**, the **NETHERLANDS** and the **UK**) published **interpretative guidelines**, position papers or any official reaction to these judgments.
- ▶ **Judicial interpretations** of and references to these judgments were relatively more frequent, even though quite often courts referred to them as a confirmation of their previous jurisprudence.
- ▶ **Policy changes** as a result of these judgments were **rare and modest**, and mainly (even if not exclusively) affected the member state from where the reference for preliminary ruling had been made (with the exception of the *Bolbol* case).
- ▶ Nevertheless, the four cases in question managed to **identify and bring in line with the majority some rather “dissenting interpretations”** on specific issues among the practices of member states (in particular that of **GERMANY**, the **UK** and the **NETHERLANDS** regarding different aspects).
- ▶ **Differences in the national transposition of the Qualification Directive do not appear to cause significant divergence** in related practices, as national jurisprudence, together with that of the Court of Justice, tend to “adjust” these differences in light of the relevant rule in EU law.
- ▶ The judgments had an impact on the **visibility** of and awareness about certain provisions of international and European refugee law (e.g. Article 1D of the Geneva Convention or Article 15 (c) of the Qualification Directive), even though this varied significantly in different member states.

- ▶ The judgments definitely contributed to a **more structured debate and interpretation** of the provisions concerned.

### Case-specific findings: *Elgafaji*

- ▶ The policy on when to consider an armed conflict as a situation of indiscriminate violence determines to a large extent the frequency and manner of applying Article 15 (c) of the Qualification Directive. EU member states have **divergent policies** in this respect: some (such as **BELGIUM, SWEDEN** or **PORTUGAL**) seem to apply it more comprehensively, while others (like **GERMANY, the NETHERLANDS** or the **UNITED KINGDOM**) only grant protection on this basis in rather exceptional circumstances. Some member states (like **POLAND** or **SLOVENIA**) have not made use of this concept so far.
- ▶ There is **no authoritative or widely accepted common guidance** on what indiscriminate violence means. Only a handful of states published any sort of guidelines on this (either in general terms or referring to concrete regions).
- ▶ Most member states and courts tend to agree on the fact that **both quantitative and qualitative factors** shall be considered in a comprehensive or “holistic” manner when deciding whether or not a certain situation qualifies as indiscriminate violence. The concrete factors usually evaluated in this process are quite similar in different EU jurisdictions, and **country of origin information** usually plays a determinant role everywhere.
- ▶ The fact of **not having transposed the term “indiscriminate” into national legislation does not appear to lead to differing practices**, as courts in these member states tend to assess the presence of an armed conflict (rather than the indiscriminateness of violence) based on similar factors.
- ▶ The **GERMAN** practice (based on guidance by the Federal Administrative Court) of limiting this assessment to a **“simple arithmetic calculation”** represents a **dissentive approach** as compared to the established practice in other EU member states.
- ▶ The *Elgafaji* judgment – in general – **did not provoke any significant policy change** regarding the application of the indiscriminate violence concept. However, in the **NETHERLANDS** (where the referral to the Court of Justice came from) it reportedly contributed to a more formalised test on what situations entail the application of Article 15 (c).
- ▶ The *Elgafaji* judgment created **more clarity** and helped promote **more structured thinking** in connection with the extent to which the demonstration of an **individual exposure or risk** can be required and when applying Article 15 (c). The relevant principles established in *Elgafaji* (no individualisation in cases of exceptionally high level of indiscriminate violence, sliding scale in other cases) are **coherently applied and interpreted by many national courts**.
- ▶ The *Elgafaji* judgment **did not increase the burden of proof** required in establishing the entitlement to protection under Article 15 (c).
- ▶ With regard to cases where indiscriminate violence does not reach an extreme level, national judicial practices seem to converge in the sense that they **do not require special distinguishing features or refugee law-like nexus** when assessing individual exposure to indiscriminate violence. Notwithstanding this, **divergences regarding the required level of individual risk factors** persist; some member states and courts are rather flexible with this, while others tend to be stricter. The most authoritative post-*Elgafaji* judgment concerning subsidiary protection in the **UK** rejected the previous practice of requiring special distinguishing features as a general condition for the application of Article 15 (c).
- ▶ National jurisprudence provides various examples of what can be considered as a **factor suggesting higher personal exposure to violence**, including past experiences, experiences of family members or friends, profession, age, gender or disability.
- ▶ The leading jurisprudence of **GERMANY** on this matter gives rise to concerns, as it **blurs the line between individual risk factors under Article 15 (c) and grounds for persecution** as in the refugee definition.

This may open the door for a policy of unduly substituting refugee protection with subsidiary protection in the case of refugees fleeing an armed conflict.

- ▶ The practice of the **DUTCH Council of State**, which considers indiscriminate violence under Article 15 (c) as a purely **situational matter** (and a rare, extreme situation) and therefore does not enable the application of the sliding scale test in less extreme scenarios, seems to be a **unique practice in the EU**, the compliance of which with the *Elgafaji* judgment needs to be further analysed.
- ▶ The fact whether a certain member state transposed or not **the word “individual”** in its national legislation **does not appear to have a significant impact** on the actual post-*Elgafaji* implementation of Article 15 (c). In member states where the national wording of this provision does not include “individual” courts still seem to directly apply the individualisation criterion in relevant cases, often with reference to *Elgafaji*.

### Case-specific findings: *Abdulla*

The *Abdulla* decision entailed a significant change in practices only in **GERMANY**:

- ▶ The cessation clause is **used much less frequently** than previously;
- ▶ **Protection is now understood in a broader sense** (in line with Article 7 of the Qualification Directive), instead of the mere assessment of whether or not the previously referred acts of persecution may still (re-)occur;
- ▶ The **standard of proof** in demonstrating that the circumstances which gave rise to refugee status have ceased to exist **has become higher** and equal to that applied in establishing a well-founded fear of being persecuted.

### Case-specific findings: *Bolbol*

- ▶ The *Bolbol* judgment **did not have a clear impact on member states’ and courts’ readiness to apply Article 1D and their main lines of interpretation**. While in **BELGIUM** the *Bolbol* case stimulated the use of this provision as a ground for inclusion/protection, in **SLOVAKIA** it may have had a different impact, whereas the Advocate General’s opinion was quoted as an argument for a more restrictive application in administrative practices. In general, the additional **visibility** the *Bolbol* case created for this often “forgotten” provision cannot be denied. Nevertheless, many states still **fail to apply** Article 1D in practice, and interpretations regarding the applicability of this provision have remained **as divergent as ever**.
- ▶ The vast majority of member states applying Article 1D (except for the **UK**) **have never differentiated** between those displaced because of the 1948-49 and 1967 hostilities when determining the personal scope of this provision. This case therefore appears to have particular relevance for the **UNITED KINGDOM**, which as a result of the *Bolbol* judgment **had to reconsider its rather dissenting interpretation** on this matter.

### Case-specific findings: *B and D*

- ▶ The *B and D* judgment only affected the practices of **GERMANY**, which had differed from that of other member states. Prior to the judgment, the **GERMAN** Federal Office for Migration and Refugees (BAMF) had held that **any type of membership or involvement in the structures of a terrorist organisation should lead to exclusion**. The judicial approval of this policy was not uniform though, with diverging approaches at different courts. As a result of the *B and D* judgment, the Federal Administrative Court expressly and authoritatively ruled in 2011 that being listed with a terrorist organisation or having actively supported the armed struggle of such an organisation **does not automatically constitute a ground for exclusion**.
- ▶ **Representing a danger to the host society or national security is defined as an additional exclusion ground** from refugee status in seven member states (**AUSTRIA, ITALY, LATVIA, LITHUANIA, PORTUGAL, SLOVAKIA and SPAIN**). This is not in conformity with either the Geneva Convention or the Qualification Directive, particularly in light of the interpretation given by the EU Court of Justice in *B and D* (which did not lead to the modification of these legislative rules).

# I. Introduction

## I.1 The relevance and timeliness of the issue in focus

According to the long-standing interpretation, the Achilles heel of international refugee law is that **there is no international body which could provide authoritative guidance on its interpretation or could effectively force states to comply with their relevant obligations**. The organic development of the international refugee protection regime in the past decades has created an impressive body of academic literature, jurisprudence, soft law and national legislations. Nevertheless, refugee law is still understood and applied in a highly diverging manner all over the world. The lack of an “International Asylum Court” (or at least a UN Treaty Body specialised in asylum matters) undoubtedly contributes to the survival of these differences and inconsistencies. One should of course not underestimate the role and efforts of the **United Nations High Commissioner for Refugees (UNHCR)** in tackling this challenge and promoting a more unified and protection-oriented interpretation world-wide. However, the UN Refugee Agency lacks the mandate and means to actually force states to adopt a certain interpretation or policy.

Until recently the situation in Europe was not significantly better, either. The **European Court of Human Rights (ECtHR)** – seemingly the most successful international human rights body – does have the means to produce authoritative decisions, as well as the capacity to monitor their implementation. At the same time, its scope of jurisdiction does not cover asylum as such, as the latter is not explicitly included in the European Convention on Human Rights<sup>1</sup> or its Protocols. Thanks to the developing extraterritorial interpretation of the prohibition of torture, inhuman or degrading treatment or punishment, the Court has ruled in a growing number of asylum- or non-refoulement-related cases since the eighties. The impact of these judgments on European asylum practices is evident: it was, for instance, because of the recent *M.S.S. v. Belgium and Greece*<sup>2</sup> case that EU member states stopped the transfer of asylum-seekers to Greece under the EU’s Dublin II Regulation.<sup>3</sup> Moreover, the ECtHR jurisprudence has indirectly contributed to an evolving interpretation of important refugee law concepts, such as persecution<sup>4</sup> or the internal protection alternative.<sup>5</sup> But even so, the role of the ECtHR does not include the provision of internationally authoritative guidance on how to apply refugee law and therefore its related impact will always remain within strict boundaries.

The real change in this respect is therefore in the hands of the **European Union**. Since the nineties, asylum and immigration has gradually gained importance as an area of cooperation and harmonisation. The 1997 Treaty of Amsterdam allowed member states to adopt common and legally binding instruments related to asylum and immigration policies, with the European Commission being entitled to initiate such legislation. In the framework of the 1999–2004 Tampere Programme,<sup>6</sup> the EU created its primary legislation on asylum matters, covering

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1 Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950

2 *M.S.S. v. Belgium and Greece*, Application no. 30696/09, European Court of Human Rights, 21 January 2011

3 Council Regulation (EC) no. 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national

4 Through interpreting torture, inhuman or degrading treatment

5 For more information see for example: Nuala Mole and Catherine Meredith, *Asylum and the European Convention on Human Rights (Human Rights Files No. 9)*, Council of Europe Publishing, 2010

6 Council of the European Union, Presidency Conclusions, Tampere European Council, 15–16 October 1999



qualification and definition issues,<sup>7</sup> asylum procedures,<sup>8</sup> temporary protection,<sup>9</sup> the reception of asylum-seekers,<sup>10</sup> family reunification,<sup>11</sup> as well as internal “burden-sharing” and responsibility determination mechanisms.<sup>12</sup> Whilst these legislative acts create a yet unprecedented, sophisticated regional legal framework for refugee protection, the true harmonisation of practices is still far away. The relevant directives mainly set minimum, rather than genuinely common standards.<sup>13</sup> A number of crucial areas remain untouched by the harmonisation process,<sup>14</sup> and even where clear joint standards exist, diverging practices often prevail.<sup>15</sup> In such a context, the role of authoritative judicial interpretation may prove to be pivotal in promoting harmonised approaches. The **Court of Justice of the European Union** (hereinafter Court of Justice or CJEU) is entitled to provide **mandatory guidance** regarding the interpretation of asylum-related provisions in EU law, in response to “**references for preliminary rulings**” submitted by national courts. The entry into force of the **Lisbon Treaty**<sup>16</sup> in 2009 further enhanced the importance of the Court of Justice with regard to interpreting European asylum law, in particular as it abolished the limitation according to which only highest national judicial instances could formulate references for preliminary rulings. Beyond enlarging the circle of courts entitled to turn to the Court of Justice, this measure may also extend the scope of issues in examination. Another crucial consequence of the Lisbon Treaty is the conferral of legally binding effect on the **EU Charter of Fundamental Rights**.<sup>17</sup> The Charter includes provisions regarding both the right to asylum and the principle of *non-refoulement*; therefore national courts will be able to seek an authoritative interpretation of these obligations as well.<sup>18</sup>

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- 7 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 – “Qualification Directive”
- 8 Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status – “Procedures Directive”
- 9 Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof – “Temporary Protection Directive”
- 10 Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers – “Reception Conditions Directive”
- 11 Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification – “Family Reunification Directive”
- 12 Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national – “Dublin Regulation”
- 13 The revision (“recast”) process of key directives, on-going at the time of writing this study, does not appear to bring a radical change in this respect.
- 14 See for example: Gábor Gyulai and Tudor Roşu, *Structural Differences and Access to Country Information (COI) at European Courts Dealing with Asylum*, Hungarian Helsinki Committee, July 2011, Chapter II; European Migration Network, *The different national practices concerning granting of non-EU harmonised protection statuses*, December 2010
- 15 See for example: European Council on Refugees and Exiles, *The Impact of the EU Qualification Directive on International Protection*, October 2008; UN High Commissioner for Refugees, *Safe at Last? Law and Practice in Selected EU Member States with Respect to Asylum-Seekers Fleeing Indiscriminate Violence*, 27 July 2011; UN High Commissioner for Refugees, *Asylum in the European Union. A Study of the Implementation of the Qualification Directive*, November 2007
- 16 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, 13 December 2007
- 17 Charter of Fundamental Rights of the European Union (2000/C 364/01), 7 December 2000
- 18 For further analysis see: Madeline V Garlick, *The Common European Asylum System and the European Court of Justice – New Jurisdiction and New Challenges*, in: Elspeth Guild, Sergio Carrera, Alejandro Eggenchwiler (ed.), *The Area of Freedom, Security and Justice Ten Years on – Successes and Future Challenges Under the Stockholm Programme*, Centre for European Policy Studies, 2010, pp. 49–62

After all, for the first time in history, a **supranational judicial body has become entitled to provide a mandatory interpretation of refugee law provisions**. The challenge is remarkable, as the Court of Justice has not really dealt with human rights-related issues in the past, and the impact of individual decisions may be fundamental for hundreds of thousands of asylum-seekers arriving in Europe. It is no wonder then that grand expectations encircle the future involvement of the Court of Justice in the construction of the Common European Asylum System. In 2009–2010 the Court ruled in its **first ever asylum-related cases**. As no systematic “implementation monitoring mechanism” is in place, the Hungarian Helsinki Committee decided to embark on the present mapping initiative, in order to examine the immediate impact of these judgments at the national level, as well as to assess whether or not the expectations for a strong harmonising effect appear to be founded.

## 1.2 Objectives, scope and limits

As a **pilot initiative**, the present research aimed to:

1. Assess the **national legislative and policy impact** of the first asylum-related CJEU judgments (to what extent they modified previous rules and practices);
2. Identify **national guidance documents and jurisprudence** which interpret the judgments in question or key concepts included therein; as well as to
3. Establish a **methodology and recommendations for systematic monitoring** in the future.

The **target audience** of this publication comprises in particular **European policy-makers and other stakeholders**, such as the European Commission or the European Asylum Support Office. At the same time, the author hopes that the information here presented will be of use for national policy-makers, judges, NGOs, refugee advocates, asylum authorities and the UNHCR as well.

The research (conducted in 2011) was limited to relevant **cases decided in 2009 and 2010**. These include:

- ▶ the *Elgafaji* case;<sup>19</sup>
- ▶ the *Abdulla* case;<sup>20</sup>
- ▶ the *Bolbol* case<sup>21</sup> and
- ▶ the *B and D* case.<sup>22</sup>

The 2009 *Petrosian* case<sup>23</sup> was not included in the research due to its overwhelmingly technical character.

The following factors were considered when **setting the limits** of the research:

- ▶ This is a **pioneering** initiative, with hardly any previous research to build upon.<sup>24</sup>
- ▶ Three out of the four cases in focus (the exception being *Elgafaji*) touch upon rather **marginal issues** of asylum practice (exclusion from and cessation of refugee status); therefore the impact of these judgments had been expected to be insignificant in a number of member states before conducting the research.
- ▶ The research was expected to face inevitable **methodological difficulties and limitations**.<sup>25</sup>
- ▶ Only **limited time elapsed** between the judgments and the research.

19 *Elgafaji v. Staatssecretaris van Justitie*, C-465/07, European Court of Justice, 17 February 2009

20 *Salahadin Abdulla and Others v. Bundesrepublik Deutschland*, Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08, European Court of Justice, 2 March 2010

21 *Nawras Bolbol v. Bevándorlási és Állampolgársági Hivatal*, C-31/09, European Court of Justice, 17 June 2010

22 *Bundesrepublik Deutschland v. B and D*, Joined Cases C-57/09 and C-101/09, Court of Justice of the European Union, 9 November 2010

23 *Migrationsverket v. Petrosian and Others*, Case C-19/08, European Court of Justice, 29 January 2009

24 Basically the only exception being the UNHCR's recent study: *Safe at Last? Law and Practice in Selected EU Member States with Respect to Asylum-Seekers Fleeing Indiscriminate Violence*, 27 July 2011

25 See details in next sub-chapter

Based on these considerations, this report intends to be a **concise and practice-oriented mapping paper**, rather than a detailed comparative study. It therefore limits the scope of analysis to the **main concrete impacts of CJEU judgments at the national level**, instead of an extended analytical presentation of the issues at hand (subsidiary protection, cessation and exclusion) and how they have evolved in national practices in recent years. In line with the impact assessment objective of this publication, those developments will be considered in particular which took place **after the publication of the relevant judgments**.

### 1.3 The research methodology and its inherent difficulties

The research covered **twenty-two EU member states**,<sup>26</sup> the vast majority of countries participating in the construction of a Common European Asylum System, and therefore the present report's conclusions can be considered as **representative** at the EU level. A **balanced group of various experts** provided information for the research, including researchers with an academic, judicial and civil society background.<sup>27</sup> As in a number of previous similar initiatives of the Hungarian Helsinki Committee, this variety of experience has been considered as an enriching factor in the research process. Researchers used **four standardised questionnaires** (one per case), prepared with the invaluable contribution of the European Council on Refugee and Exiles (ECRE), a key partner of this project.

Throughout the research process, the following **obstacles and difficulties** were experienced:

- ▶ Administrative asylum decisions are not available for public research in any EU member state. General conclusions about administrative policies are therefore extremely difficult to draw without conducting a thorough, internal analysis (falling beyond the scope and possibilities of the present research).
- ▶ Except for few examples (such as the **UNITED KINGDOM** or the **NETHERLANDS**), legal positions and guidance documents of asylum authorities are not made public and thus impossible to analyse or contest by an independent researcher.
- ▶ In many member states asylum-related jurisprudence and appeal decisions are not accessible for research purposes. In some cases this means an explicit prohibition of publication (e.g. **IRISH** Refugee Appeals Tribunal), while in others it is just a lack of practical arrangements – e.g. uploading to a searchable database – that blocks access (e.g. **HUNGARY**). In some countries, jurisprudence is accessible and searchable, but only a selected part of it (e.g. **SPAIN** or **FRANCE**). Moreover, in states where the judicial review of asylum cases is decentralised and/or no specialised courts or chambers exist, it is basically impossible to gain a full overview of judicial practices on a certain issue (e.g. **GERMANY** or **ITALY**).<sup>28</sup>

The author has strived to tackle these difficulties through building to the maximum extent on the **local expertise** of national researchers and through concentrating on:

- ▶ **legislative amendments**;
- ▶ **authoritative administrative guidance** (e.g. position papers or instructions available for the public) and/or clearly identifiable or formally acknowledged **policy changes** by administrative asylum authorities; and
- ▶ leading or otherwise relevant **judicial interpretations**,

when analysing the impact of CJEU judgments at the national level.

26 Despite significant efforts by the research coordinator, no available researcher could be identified in Luxembourg, Cyprus, Greece or Estonia. Nevertheless, on the basis of a wide range of anecdotal information shared by local contact persons, as well as previous research experience, the author has good grounds to presume that additional information from these countries would not significantly modify the present report's findings and conclusions. Denmark, as it does not participate in common EU asylum policies (and the future Common European Asylum System), was not included in the research.

27 See the list of contributors at the end of this publication

28 On diverging judicial review structures in Europe see: Gábor Gyulai and Tudor Roşu, *Structural Differences and Access to Country Information (COI) at European Courts Dealing with Asylum*, Hungarian Helsinki Committee, July 2011, Chapter II

## II. The *Elgafaji* case

### II.1 Short description of the judgment

The judgment concerns the interpretation of Article 15 (c) of the Qualification Directive and in particular the **scope of subsidiary protection** under this provision:

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.

The case was referred to the Court by the **DUTCH Council of State** in the case of a Shiite Iraqi asylum-seeker, who worked about two years as a security officer in Baghdad for a British Security company. The applicant's uncle, who worked in the same organisation, was targeted by militia and was killed in a terrorist attack. Mr Elgafaji and his wife, who is of Sunni origin, received a letter stating "death to collaborators". On that basis, Mr and Mrs Elgafaji applied for a temporary residence permit in the **NETHERLANDS**. This was refused on the basis that the applicants had not proved the circumstances on which they were relying and had not established a "real risk of serious and individual threat to which they claimed to be exposed in their country of origin". According to **DUTCH** authorities, the standard of proof required for protection under Article 15 (b) of the Qualification Directive is identical to that required for the protection granted under Article 15 (c) of the Directive. As a result, in both situations, as is the case under **DUTCH** domestic law, applicants must show satisfactorily, in their individual circumstances, the risk of serious and individual threat to which they would be exposed were they to be returned to the country of origin. As they could not produce such evidence, they could not rely on Article 15 (c) of the Qualification Directive. This decision was annulled on appeal by the District Court of the Hague, which held that Article 15 (c) does not require the high degree of individualisation of the threat required by Article 15 (b), as it takes into account the situation of armed conflict in the country of origin. According to the District Court, the administrative authority ought to have examined whether there were grounds for issuing temporary residence permits on account of the existence of serious harm within the meaning of Article 15 (c) of the Qualification Directive.

Seized on appeal, the **DUTCH** Council of State referred two questions to the EU Court of Justice which can be summarised as follows:

- ▶ Does Article 15 (c) of the Qualification Directive offer supplementary or other protection in comparison with Article 3 of the European Convention on Human Rights (ECHR)?
- ▶ If it offers supplementary or other protection, what are the criteria for determining whether a person runs a real risk of serious and individual threat by reason of indiscriminate violence within the terms of Article 15 (c)?

The Court of Justice first confirmed that **Article 15 (b) corresponds in essence to Article 3 of the ECHR, while the content of Article 15 (c) differs from it and must be interpreted independently**, although with due regard of fundamental rights as guaranteed under the ECHR. The answers to the preliminary questions can be summarised as follows:

With regard to the **scope** of Article 15 (c):

- ▶ Article 15 (a) and (b) cover situations in which the applicant for subsidiary protection is specifically exposed to the risk of a particular type of harm, while **Article 15 (c) covers a more general risk of harm**.

- ▶ The term “indiscriminate” in Article 15 (c) implies that it may extend to people **irrespective of their personal circumstances**.

With regard to the degree of individualisation of the risk required:

- ▶ 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 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 Qualification Directive.
- ▶ Recital 26 of the Qualification Directive must be interpreted accordingly: as a rule, the recital means that an objective existence of a risk linked to the general situation in a country is not sufficient alone to establish that the conditions of Article 15 (c) have been met in respect of a specific person. However, exceptionally this may be the case where the degree of risk is high enough.
- ▶ There is a **sliding scale as to the necessity of proving individualisation of the risk**: 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 is required for her/him to be eligible for subsidiary protection.

With regard to the criteria to be used by national administrations and courts to assess the **level of indiscriminate violence**:

- ▶ The Court **does not provide a clear answer** to the second question of the **DUTCH** Council of State. It merely provides an indication or the type of factors that may be taken into account within the context of the individual assessment of an application for subsidiary protection under Article 4 (3) of the Qualification Directive:
  - the geographical scope of the situation of indiscriminate violence and the actual destination of the applicant in the event that she/he is returned to the relevant country within the context of the possible application of the **internal protection alternative** according to Article 8 (1) of the Qualification Directive;
  - the fact that the applicant **has been subjected to persecution or serious harm** or to a threat to such persecution or harm in the past (by reference to Article 4 (4) of the Qualification Directive). In this case, according to the Court of Justice, the level of indiscriminate violence required may be lower.

## II.2 The aftermath of the judgment in EU member states

### II.2.1 Background and general impact

Among the CJEU judgments in focus, *Elgafaji* clearly had **the most significant impact**. While no impact whatsoever could be measured in many member states with regard to the other three cases, *Elgafaji* triggered some – at least – visible effects nearly everywhere. The main reasons for this may be the following:

- ▶ Unlike the other cases, *Elgafaji* touches upon a **core issue** of asylum in Europe (namely the common European subsidiary protection regime), affecting tens of thousands of asylum-seekers year by year.
- ▶ The provision in question is a result of difficult **political compromise** and its language is therefore not free from **overt contradictions** (“individual threat” vs. “indiscriminate violence”), frequently criticised by scholars, as well as practitioners. This creates a hotbed for diverging interpretations.<sup>29</sup>

<sup>29</sup> Note that four member states (Austria, Belgium, Hungary and the Czech Republic) did not even transpose the term “individual” into their national legislation, even though administrative and judicial practices may still refer to it (directly or indirectly).

- ▶ As recent UNHCR research concluded, in some member states “a narrow interpretation of Article 15 (c) seems to have rendered this provision **an empty shell in protection terms**”.<sup>30</sup>

**No member state adopted new legislation** in order to reflect the *Elgafaji* judgment, except for the **NETHERLANDS**, which actually incorporated Article 15 (c) in its legislation as a result of this judgment. The relatively (see above) important, yet limited impact can thus be identified mainly through looking at interpretative national jurisprudence and some policy effects. **POLAND** and **SLOVENIA** have not applied Article 15 (c) since the transposition of the Qualification Directive; consequently no impact could be measured in these countries. **SPAIN** only introduced its EU-harmonised subsidiary protection regime in 2009, making impossible the comparison between pre- and post-*Elgafaji* national practices.

One of the main general impacts of the *Elgafaji* judgment was that it emphasised the necessity of **more structured and coherent thinking** about Article 15 (c). An important manifestation of this effect is a judgment of the **CZECH** Supreme Administrative Court from 2009, which concludes that assessing the circumstances under Article 15 (c)<sup>31</sup> consists of three steps:<sup>32</sup>

- (1) whether the country of origin is in situation of international or internal armed conflict; (2) whether the person concerned is a civilian; and (3) whether the person concerned faces serious and individual threat to a life or person by reason of indiscriminate violence.

The *Elgafaji* judgment touches upon a number of difficult and interesting issues. Nevertheless, keeping in mind the scope and limits of the present mapping initiative, as well as the actual findings in member states, two main questions will be dealt with in more detail:

- ▶ First, what sort and level of armed conflict is considered to generate a situation of indiscriminate violence in state and judicial practice?
- ▶ Second, to what extent states and courts expect a beneficiary of subsidiary protection under Article 15 (c) to demonstrate an individual risk of exposure to indiscriminate violence?

## II.2.2 Measuring indiscriminate violence

Most member states **do not disaggregate statistics on subsidiary protection according to different types of serious harm** (Article 15 (a), (b) and (c)). This hinders the researcher in obtaining an overall statistical picture about what concrete situations are considered as “indiscriminate violence”. However, the present and previous research initiatives have been able to reveal some general trends in applying this provision. Article 15 (c) was in recent years most frequently referred to in cases of Afghan, Iraqi and Somali asylum-seekers, while it was also evoked in some member states with regard to Chechens, Colombia, the Sudan, Sri Lanka, the Gaza Strip or the Ivory Coast. The application may be limited to certain areas of these countries, such as Mogadishu, Central and Southern Iraq or Darfur. The European Council on Refugees Exiles (ECRE) already identified **a variety of different national interpretations** in 2008,<sup>33</sup> and the present research could not reveal any spectacular advancement towards a uniform (or at least harmonised) approach.

The researchers could hardly identify any publicly available official guidance by administrative asylum authorities concerning which areas are to be considered relevant for the application of Article 15 (c) or what factors should be weighed in this analysis. One of the few post-*Elgafaji* exceptions is the Policy Paper of the Belgian Commissioner

30 UN High Commissioner for Refugees, *Safe at Last? Law and Practice in Selected EU Member States with Respect to Asylum-Seekers Fleeing Indiscriminate Violence*, 27 July 2011, p. 29 (emphasis added)

31 Note that throughout this chapter, the expression “Article 15 (c)” is also used as a general reference to parallel national legal provisions in individual member states.

32 Judgment No. 5 Azs 28/2008-68 of 13 March 2009

33 European Council on Refugees and Exiles, *The Impact of the EU Qualification Directive on International Protection*, October 2008, p. 28

General for Refugees and Stateless Persons with regard to Afghan asylum-seekers published in September 2010, which qualifies the following regions for the use of 15 (c):<sup>34</sup>

North	Takhar (certain districts), Kunduz, Baghlan (with the exception of certain districts), Balkh (certain districts), Jawzjan (certain districts), Faryab (certain districts)
Centre	Kapisa (certain districts), Parwan (certain districts), Kabul (not Kabul city, certain districts), Logar, Wardak, Daykundi (certain districts)
East	Nuristan, Kunar, Laghman, Nangarhar
West	Herat, Farah, Ghor, Badghis (with the exception of certain districts)
South	Nimroz, Hilmand, Kandahar, Uruzgan, Zabul, Ghazni, Paktika, Paktya, Khost

The UK Border Agency in its relevant casework instruction<sup>35</sup> explains in more general terms that

Indiscriminate violence is the converse of consistency; it carries the risk of random death or injury. It covers real risks and real threats presented, for example, by car bombing in market places or snipers firing at people in the street.

Despite not being a document of authoritative guidance, the letter of the DUTCH Minister of Justice to the Speaker of the Lower House of the Parliament, sent right after the publication of the *Elgafuji* judgment, provides an interesting snapshot of how state authorities may interpret indiscriminate violence in light of the CJEU's rulings:<sup>36</sup>

I am of the opinion that the wording of the judgment shows that this will involve a very limited number of situations, namely the fact that each civilian, whoever he or she may be, finds himself or herself in a situation that poses a concrete threat to him or her, as can be the case for example when war crimes such as genocide or human rights violations are being committed on a large scale against the population.

The DUTCH Ministry of Immigration and Asylum also deals with this issue in its key policy guidance document<sup>37</sup> and stipulates that the decision-maker when assessing whether a situation qualifies as indiscriminate violence should *inter alia* assess

- ▶ whether the parties to the conflict employ methods and tactics of warfare which increase the risk of civilian casualties or which directly target civilians;
- ▶ whether the use of such methods and/or tactics is widespread;
- ▶ whether the fighting is localised or widespread; and
- ▶ the number of civilians killed, injured and displaced as a result of the fighting.

Besides these few guidelines, it is of interest to adduce what the UNHCR reported in 2011 regarding some selected EU member states' practices qualifying the situation in specific regions as indiscriminate violence:<sup>38</sup>

- ▶ **BELGIUM:** in addition to the provinces of Afghanistan quoted earlier in this chapter, the eastern region of the Democratic Republic of Congo, Darfur, the Gaza Strip, Southern and Central Somalia;
- ▶ **FRANCE:** Mogadishu and its "neighbouring areas";

34 Commissioner General for Refugees and Stateless Persons, *Beleid van het CGVS inzake asielaanvragen van Afghaanse asielzoekers Regio's Subsidiaire Bescherming*, September 2010

35 UK Border Agency, *Interim Asylum Instruction on Humanitarian Protection: Indiscriminate Violence*, September 2010, para. D.6

36 Letter from the Minister of Justice to the Speaker of the Lower House of the Dutch Parliament, 17 March 2009. The requirement that everybody in the area must be at real risk of serious harm was repeated in a letter by the Minister of Justice to the Chairman of the Dutch House of Representatives on 29 March 2010.

37 Decision No. HC 2011/12 of the Minister of Immigration and Asylum of 28 September 2011, amending the Aliens Circular of 2000

38 UN High Commissioner for Refugees, *Safe at Last? Law and Practice in Selected EU Member States with Respect to Asylum-Seekers Fleeing Indiscriminate Violence*, 27 July 2011, pp. 34–35 – The information has been updated wherever possible in order to reflect policy changes since the publication of the UNHCR study.

- ▶ **GERMANY:** Mogadishu;
- ▶ **NETHERLANDS:** Mogadishu; some provinces of the Democratic Republic of Congo (North Kivu, South Kivu, Haut-Uele and Bas-Uele);<sup>39</sup>
- ▶ **UNITED KINGDOM:** Mogadishu;
- ▶ **SWEDEN:** ten provinces of Afghanistan (Farah, Ghazni, Kandahar, Khost, Kunar, Helmand, Oruzgan, Paktia, Paktika and Zabul), the North-Eastern region of the Democratic Republic of Congo, Darfur, Southern and Central Somalia.

Based on the information available, the researcher cannot but affirm the **extremely limited administrative guidance** available on this matter, as well as the **diverging interpretations** of this concept by asylum authorities.

**Judicial interpretations are more frequent**, both in general and concrete terms. Moreover, the arguments used in the *Elgafaji* judgment clearly infiltrated national jurisprudence on this matter. The Asylum and Immigration Tribunal in the **UNITED KINGDOM**, interpreting *Elgafaji*, provided useful examples of what acts can be qualified as indiscriminate violence and also assessed whether criminal acts can be considered as such:<sup>40</sup>

62. [...] It would, in our judgment, be indiscriminate violence if a suicide bomber were to attempt to assassinate one individual in a crowded market place. Similarly, the bombing of insurgents who were sheltering in a school, or other area known to be populated by civilians, would be indiscriminate. On the other hand, a targeted attack on opposition fighters, which unexpectedly caught individuals in the crossfire would not. More problematic areas may include the use of improvised explosive devices intended to attack coalition forces, but where explosions may occur in such a way that civilians are affected. Another problematic example is the incident we refer to later where a man driving a car bomb, intended to be used against a coalition convoy, unexpectedly collided with a tractor and detonated the bomb, thereby killing civilians nearby. The extent to which driving a car, that is in effect a bomb, through a crowded place on the way to attack coalition forces is an act that is so reckless that any adverse consequences are indiscriminate, was not debated before us. [...]

65. We see no reason in principle why criminal acts should not be included in the scope of indiscriminate violence and, indeed, it is often difficult to separate armed conflict from a criminal act. It is hard to envisage an act more criminally culpable than carrying and detonating a bomb in a crowded marketplace, whatever the intention of the person concerned. Similarly, could it properly be argued that the roadblocks set up for reasons of extortion around Mogadishu in recent years are not the consequence of a complete breakdown in law and order arising from the armed conflict which is manifestly occurring there? The correct approach is not simply to ask whether the indiscriminate violence is criminal, or in pursuance of the armed conflict. It is a question of causation. The words used in Article 15 (c) are “by reason of indiscriminate violence in situations of international or internal armed conflict”. There therefore needs to be a causal link between the threat to life or person and the indiscriminate violence, but that indiscriminate violence does not need to be caused by one or more armed factions or the state. We emphasise that, criminal acts, as with any other form of indiscriminate violence, need be of sufficient severity to pass the *Elgafaji* test, and produce a serious and individual threat to a civilian’s life or person [...]. Not all criminal acts, by a very long way, would fall into that category.

In another 2009 judgment, the **UK** Court of Appeal agreed with the UNHCR’s submission in concluding that<sup>41</sup>

36. [...] 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 [*Elgafaji* test].

39 The decision regarding these regions of the Democratic Republic of Congo is very recent and suggests that an internal protection alternative may be available in Kinshasa, see: *Besluit van de Minister voor Immigratie, Integratie en Asiel van 29 maart 2012, nr. WBV 2012/6, houdende wijziging van de Vreemdelingencirculaire 2000*, Staatscourant, 13 April 2012

40 GS (Existence of Internal Armed Conflict) Afghanistan v. Secretary of State for the Home Department, CG [2009] UKAIT 00010, 23 February 2009

41 QD (Iraq) v. Secretary of State for the Home Department; AH (Iraq) v. Secretary of State for the Home Department, [2009] EWCA Civ 620, 24 June 2009



The **BELGIAN** Council for Aliens Law Litigation for example provides a detailed explanation concerning why the situation in Baghdad does not qualify for indiscriminate violence.<sup>42</sup> On the one hand, the Council recognised that

- ▶ the situation in Iraq and Baghdad particularly is still “serious and worrisome”, with “heightened political tension”; and
- ▶ there are “asymmetric attacks”, bombings and suicide bombings against particular groups.

Nevertheless, the judicial body refused to consider these factors sufficient for a qualification of indiscriminate violence, and underpinned this conclusion with a number of arguments:

- ▶ The situation in the region has improved significantly, among others due to the “New Way Forward” military strategy of the US armed forces and the cease-fire announced by different armed groups;
- ▶ Despite the retreat of US troops in August 2010, the number of attacks in the region was “at its lowest level for the last five years” at the time of the decision;
- ▶ There is no “open combat” in Baghdad and violence has steadily declined since 2007;
- ▶ There are no reports about heavy and on-going fighting between insurgents and government and coalition forces, systematic intimidation by insurgents, forced recruitment by terrorist organisations or fighting between rival factions;
- ▶ “Violence is not persistent and its impact is rather limited on the lives of the ordinary Iraqis”;
- ▶ A judgment of the European Court of Human Rights using parallel argumentation, which also refers to the UNHCR’s position on this matter and the existence of voluntary return programmes supported by the UNHCR and the International Organisation for Migration (IOM);<sup>43</sup>
- ▶ Other countries (such as **GERMANY**, the **UNITED KINGDOM**, **SWEDEN**, **DENMARK** and the **NETHERLANDS**) do not provide protection, either, on the sole basis of indiscriminate violence to Iraqi asylum-seekers.

The **DUTCH** Council of State considered the following factors in its 2010 landmark judgment, when it argued that the State Secretary had not sufficiently reasoned its decision of not qualifying the situation in Mogadishu as indiscriminate violence:<sup>44</sup>

- ▶ The on-going armed conflict at the time of the administrative decision (June 2009) between the Ethiopian-backed government forces and a variety of rebel groups on the one hand, and the fighting between these rebel groups, on the other;
- ▶ The violence in Mogadishu flared up in May 2009, the nature and intensity of the violence;
- ▶ The impact on the civilian population, concretely the high number of civilian casualties and a significant refugee flow.

The Metropolitan Court in **HUNGARY** also considered a set of factors when establishing in two 2010 judgments (with reference to *Elgafaji*) that a situation of indiscriminate violence prevails in Ghazni province in Afghanistan.<sup>45</sup> These factors were the following (with reference to a number of country information sources):

- ▶ The Taliban and other anti-government forces intensified their attacks, also in territories previously considered as safe (in the central and northern areas), insurgents are becoming more effective in destabilising previously stable regions;
- ▶ Attacks are becoming more “sophisticated” and coordinated, resulting in more and more civilian casualties;
- ▶ The government did not manage to ensure the basic services even in those regions which are under its control;

42 Judgment No. 72.787 of 5 January 2012, paragraphs 2.2.2.1.1–2.2.2.2.1

43 F.H. v. Sweden, No. 32621/06, European Court of Human Rights, 20 January 2009

44 Judgment No. 200905017/1/V2 of 26 January 2010

45 Judgment No. 15.K.31.482/2009/12 of 16 February 2010 and Judgment No. 15.K.34.141/2009/12 of 28 September 2010

- ▶ The UNHCR's position, according to which Ghazni is unsafe for return;
- ▶ The growing and widespread use of improvised explosive devices (IED), which "by nature" constitute means of indiscriminate violence, and the high number of their civilian victims.

Another judgment of the Metropolitan Court reached the same conclusion with regard to Ghazni province, based on the following (similar) arguments:<sup>46</sup>

- ▶ the clear situation of armed conflict in parts of this province;
- ▶ the constantly changing and generally worsening security situation;
- ▶ the raids, attacks, targeted killings, suicide bombings and kidnappings committed by opposition forces (the Taliban) which also affect civilians.

The Supreme Court of LITHUANIA in a 2010 judgment ruled that the situation in Chechnya cannot be qualified as a situation of indiscriminate violence, since even if military incidents were still occurring, large-scale military actions had already ended, and the scope and intensity of the conflict had decreased.<sup>47</sup> In another decision, the Supreme Court set more general sign-posts for the interpretation of indiscriminate violence:<sup>48</sup>

There is no information confirming that an armed conflict of this nature would have taken place in the [country of origin] at the time the contested decision was adopted, or currently. Also, there is no information that in this country the use of violence, creating conditions for systematic human rights violations, would be widespread. I.e. the nature and scope of the use of violence in the country of origin is not such to establish that the violence is used indiscriminately and a well-founded fear exists that a person may become a victim of violence only because of his presence in the country of origin, irrespectively of his identity, specifically, of his behaviour, personal characteristics or situation (belonging to a particular social group or something similar).

In ITALY, just a few months after the *Elgafaji* judgment, the Civil Court of Trieste made direct reference to the criteria established by the EU Court of Justice when it established that there are reasonable grounds to believe that the applicant, once returned to his country of origin, only on the basis of his presence, would face a serious threat to his life or his person.<sup>49</sup> The court reached this conclusion by considering:

- ▶ the growing insecurity in the country;
- ▶ the number of civilian deaths in 2008;
- ▶ the appeal made by the UNHCR relating to the lack of security in various regions of the country;
- ▶ the 2008 annual report of Amnesty International referring to indiscriminate violence faced by the local population.

The Civil Court of Rome reached a similar conclusion with regard to Nigeria, also making direct reference to the *Elgafaji* judgment. The court found that local conflicts were taking place in some areas of Nigeria, that an overall climate of general violence existed in the country (generating a risk for the life of the civilian population) and that there was an absolute lack of minimum conditions of security, in particular for women.<sup>50</sup> The Court of Appeal of Catania established that there was a situation of indiscriminate violence existing in the Ivory Coast in 2008, characterised by widespread violence and criminal acts (kidnappings, sexual violence, torture and killings). The court also pointed out that due to the malfunctioning of the judiciary system these acts remained unpunished.<sup>51</sup>

46 Judgment No. 17.K.30.864/2010/18 of 22 April 2011

47 Judgment No. A-575-848/2010 of 23 June 2010

48 Judgment No. A-858-901/2010 of 07 June 2010

49 Judgment No. 98 of 9 March 2009

50 Judgment No. 5944 of 21 June 2011

51 Judgment of 22 May 2009 (case number omitted for privacy reasons), this judgment did not make explicit reference to *Elgafaji*

The **FINNISH** Supreme Administrative Court in its main interpretative judgment referred to “the overall country information [...], the nature of the violence and its long duration” when establishing the applicability of Article 15 (c).<sup>52</sup>

**FRENCH** law transposed the term indiscriminate violence as “generalised violence” (*violence généralisée*). The **FRENCH** National Asylum Court used the following arguments, when qualifying the situation in Mogadishu as generalised violence in a 2009 judgment:<sup>53</sup>

The degrading political and security situation in Somalia is stemming from violent fight between the Transition Federal Government and several clans and Islamic militia, including the Al Shabab clan, that in some areas of Somalia lead continuous and concerted military operations in order to control those areas; these fights, as stated by the United Nations Security Council in the resolution 1872 adopted on 26 May 2009, are currently characterised in some areas, including in and around Mogadishu, by a climate of generalised violence illustrated by exactions, slaughters, murders and mutilations targeting the civil population; therefore, this situation shall be seen as a situation of generalised violence stemming from a situation of internal armed conflict according to [Article 15 (c)].

**BULGARIA** did not transpose the term “indiscriminate” into its national legislation, therefore the assessment whether a certain situation in the country of origin qualifies for the application of Article 15 (c) is limited to the question of whether there is an armed conflict or not. This, however, is conducted in a way very similar to that applied in other jurisdictions for the indiscriminate violence test, as testified, for example, by a 2009 judgment of the Supreme Administrative Court:<sup>54</sup>

According to the information provided by the International Law Directorate of the Ministry of Foreign Affairs, the situation in Iraq is characterised as one of internal tension and disorder against the background of significant foreign presence, while specifically the situation in Central and Southern Iraq, especially Baghdad, is characterised by widespread forms of extreme violence, grave violations of human rights and lack of legal order. The Iraqi citizens face physical and material insecurity; they are constantly subject to violence, including by the members of the Iraqi security services, the Shiite militia and rebel groups. The armed conflict between the multinational forces, the Iraqi forces and the Sunni militia leads to civil victims and destruction of property. There is lack of protection by the state against this violence. Baghdad is seen as the place with the most intensive violence in the country and although the situation is changing very quickly, this does not mean that the city has parts where the threat for murders, kidnapping and violence is excluded. The city transport does not function and movement is very risky.

**SWEDISH** law uses a different wording<sup>55</sup> in its provision parallel to Article 15 (c), which does not include the term “indiscriminate violence” either. Nevertheless, as in the case of **BULGARIA**, **SWEDISH** judicial interpretation focuses on the assessment whether there is an armed conflict, and applies a test similar to that used in examining indiscriminate violence. The Migration Court of Appeal clarified in a series of 2009 judgments the conditions for qualifying a situation as an “armed conflict”:<sup>56</sup>

There are severe tensions between communities, which include protracted and on-going fighting between armed government forces and one or more other organised armed groups or between two or more such groups in a conflict situation. The fighting is of such character that it goes beyond what can be classed as internal disturbances or merely sporadic or isolated acts of violence. It is salient for the situation of the civilian population that the violence brought by the conflicts is indiscriminate and so serious that there exist established reason to presume that a civilian by his mere presence would run a real risk of being subjected to serious and personal threat to life and limb.

52 Judgment No. KHO:2010:84 of 30 December 2010

53 Judgment No. 639474, H of 9 June 2009

54 Judgment of 26 May 2009 in case No. 2605/2009, decided in a panel of five judges

55 The protection ground arises because of a well-founded fear of being subjected to serious abuses due to an “external or internal armed conflict or, because of other severe conflicts in the country of origin”, Aliens Act (2005:716) of 29 September 2005, Chapter 4, Section 2 (2)

56 Judgments No. UM 133-09, UM 334-09 and UM 8628-08

While the above-mentioned jurisdictions all follow a rather similar line (involving both quantitative and qualitative factors in a flexible manner when assessing the presence of indiscriminate violence), GERMAN jurisprudence seem to interpret this issue differently. German jurisprudence applies a “**simple arithmetic calculation**”, as reported by the UNHCR in 2011:<sup>57</sup>

In Germany, the Federal Administrative Court held that this assessment requires a quantitative determination of the total number of inhabitants living in a certain area and the number of acts of violence committed by the parties to the conflict against the life or person of civilians in this region, as well as a general assessment of the number of victims and the severity of the casualties (deaths and injuries).<sup>58</sup> Neither the applicable time frame nor the geographic scope has been specified by the Federal Administrative Court.

The case law of the Federal Administrative Court has been interpreted by the administrative and higher administrative courts to require, as a starting point, a calculation of the number of civilian casualties in a particular area related to the number of inhabitants living in the same area. This calculation does not always appear to include numbers of civilians injured and is sometimes confined to deaths only. Furthermore, from the texts of court judgments reviewed, when the courts consider that the number of civilian deaths or casualties, as a percentage of the total population in a particular area, is low, it is concluded that the level of indiscriminate violence is not sufficiently high to pose a risk of serious harm, without seeming to take into account or give due weight to any other qualitative evidence or other quantitative indicators.

A demonstrative example of how administrative courts apply this principle in practice can be found in the jurisprudence of the Higher Administrative Court of Baden-Württemberg:<sup>59</sup>

Such a high degree of danger that practically every civilian would be subject to a serious individual threat simply because of his or her presence in the affected area, can, however, not be determined for Tameem province, from which the petitioner comes. [...] In Tameem province, with the provincial capital Kirkuk, where a total of between 900 000 and 1 130 000 people live (approx. 750 000 in the capital Kirkuk), there were 99 attacks with a total of 288 deaths in 2009, [...]. For 900 000 inhabitants, this would be 31.9 deaths per 100 000 inhabitants and/or, if assuming 1 130 000 inhabitants, 25.5 deaths per 100 000 inhabitants. According to these findings, even if an internal or international conflict in Tameem province is presumed, the degree of indiscriminate violence characterizing this conflict cannot be assumed to have reached such a high level that practically every civilian is subject to a serious individual threat simply because of his or her presence in this region.

A more recent judgement of the Higher Administrative Court of Hesse seems to challenge this strict (and rather unique) judicial approach to some extent.<sup>60</sup> The 2011 decision concluded that a sufficient degree of indiscriminate violence was present in the Afghan province of Logar. The finding was based on an average number of 2.2 insurgent attacks, usually harming civilians, in a relatively small but densely populated area (approximately 409 900 inhabitants). It is remarkable that the court took into account that reported numbers of victims to such attacks are often significantly below respective numbers as reported by the affected population, and that official accounts of such attacks frequently lack reliable information concerning civilian losses. Instead of a strict reliance on arithmetic figures, the court relied on a comprehensive overall evaluation (*wertende Gesamtbetrachtung*) with due consideration of the background of the armed conflict taking place in the Logar province.

Previous similar attempts to limit the “indiscriminate violence test” to a simple quantitative assessment were **clearly rejected by courts** in the NETHERLANDS, BELGIUM and the UNITED KINGDOM. Judicial bodies in these countries further refused the approach according to which the quantitative assessment of violence could be limited to

57 UN High Commissioner for Refugees, *Safe at Last? Law and Practice in Selected EU Member States with Respect to Asylum-Seekers Fleeing Indiscriminate Violence*, 27 July 2011, p. 43

58 See Judgment No. BVerwG 10 C 4.09 – VGH 8 A 611/08.A of 27 April 2010 of the Federal Administrative Court, paragraph 33

59 Judgment No. A2 p. 364/09 of 25 March 2010, quoted in: UN High Commissioner for Refugees, *Safe at Last? Law and Practice in Selected EU Member States with Respect to Asylum-Seekers Fleeing Indiscriminate Violence*, 27 July 2011, p. 43

60 Judgement No. 8 A 1657/10.A of 25 August 2011, paragraphs 74 and 76

examining the death toll, emphasising that injuries, kidnappings, as well as the occurrence of rape, arbitrary arrest and detention should also be considered in this respect.<sup>61</sup>

Based on the above findings, the following conclusions can be drawn:

- ▶ The policy on when to consider an armed conflict as a situation of indiscriminate violence determines to a large extent the frequency and manner of applying Article 15 (c) of the Qualification Directive. EU member states have **divergent policies** in this respect: some (such as **BELGIUM**, **SWEDEN** or **PORTUGAL**) seem to apply it more comprehensively, while others (like **GERMANY**, the **NETHERLANDS** or the **UNITED KINGDOM**) only grant protection on this basis in rather exceptional circumstances. Some member states (like **POLAND** or **SLOVENIA**) have not made use of this concept so far.
- ▶ There is **no authoritative or widely accepted common guidance** concerning what indiscriminate violence means. Only a handful of states published any sort of guidelines on this (either in general terms or referring to specific regions).
- ▶ Most member states and courts tend to agree on the fact that **both quantitative and qualitative factors shall be considered in a comprehensive or “holistic” manner** when deciding whether or not a certain situation qualifies as indiscriminate violence. The concrete factors usually evaluated in this process are quite similar in different EU jurisdictions, and **country of origin information** usually plays a determinant role everywhere.
- ▶ The fact of **not having transposed the term “indiscriminate” into national legislation does not appear to lead to differing practices**, as courts in these member states tend to assess the presence of an armed conflict (rather than the indiscriminateness of violence) based on similar factors.
- ▶ The **GERMAN** practice (based on guidance by the Federal Administrative Court) of limiting this assessment to a **“simple arithmetic calculation” represents a dissentive approach** as compared to the established practice in other EU member states.
- ▶ The *Elgafaji* judgment – in general – **did not provoke any significant policy change** regarding the application of the indiscriminate violence concept. However, in the **NETHERLANDS** (where the referral to the Court of Justice came from), it reportedly contributed to a more formalised test on what situations entail the application of Article 15 (c).<sup>62</sup>

### II.2.3 Exigence in proving individual risk

The other pivotal question related to the practical application of Article 15 (c) is the required degree of **demonstrating an individual exposure to violence**. With regard to this issue, the Court of Justice has provided more concrete guidance than in the case of indiscriminate violence, giving rise to expectations of better harmonised and clearer practices post-*Elgafaji*. To test the impact of the judgment in this respect, the researchers concentrated on two questions:

1. Did the *Elgafaji* judgment result in an increased burden of proof on applicants?
2. Did the *Elgafaji* judgment modify asylum authorities’ and courts’ decision-making policy regarding the expected degree of individualisation of risk under Article 15 (c), and how is the “sliding scale” concept interpreted in this context?

Most researchers confirmed that the *Elgafaji* judgment **did not, in general, result in an increased burden of proof** on applicants. The only contrary indication encountered is a 2010 judgment of the High Court of **IRELAND**, which

61 Cf. UN High Commissioner for Refugees, *Safe at Last? Law and Practice in Selected EU Member States with Respect to Asylum-Seekers Fleeing Indiscriminate Violence*, 27 July 2011, pp. 44–45

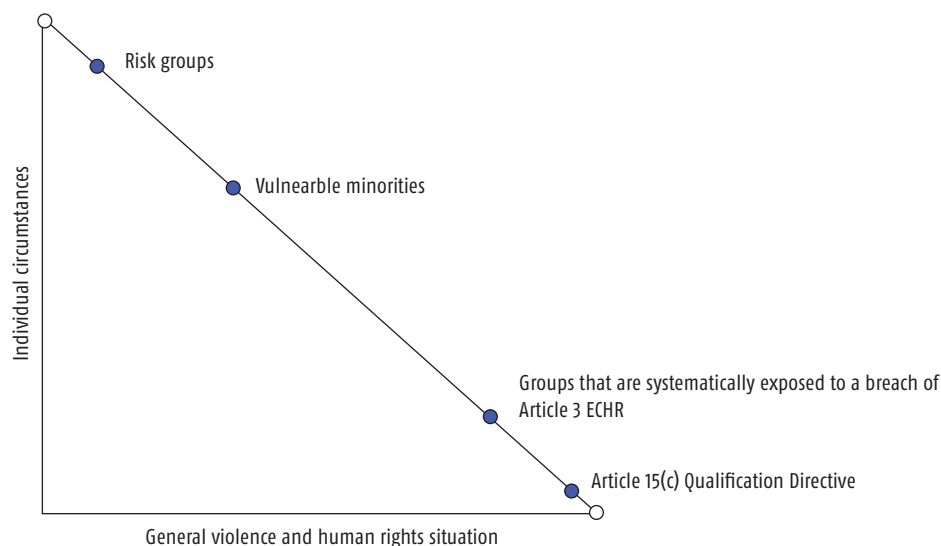
62 Pre-*Elgafaji*, Dutch authorities held that Article 15 (c) had no added value as compared to Article 15 (b), the prohibition of torture, inhuman or degrading treatment or punishment.

emphasised that in *Elgafaji*, the Court of Justice set “a very high threshold [...] for the requirements of Article 15 (c) to be fulfilled.”<sup>63</sup> In the same judgment the High Court held that the asylum authority does not have “a free-standing obligation” to investigate whether a person is eligible for subsidiary protection under Article 15 (c) when the applicant has not identified the risk to her/his life or person because of an armed conflict, as well as it emphasised that the role of the applicant is not “merely to assist” the asylum authority in this respect. At the same time, it was reported that the *Elgafaji* judgment actually eased the burden of proof in **BULGARIA**. The number of persons granted subsidiary protection increased following the judgment, and *Elgafaji* was very frequently quoted by national courts when quashing administrative decisions which denied subsidiary protection to Iraqi asylum-seekers.

As for the required degree of individualisation, **very little administrative policy guidance** could be retrieved. Following the *Elgafaji* case, the **DUTCH** Minister of Justice clarified his interpretation in a letter to the parliament:<sup>64</sup>

Based on the development of the law in the past years, the following picture emerges concerning the individual facts and circumstances the applicant is required to submit for the assessment of his asylum application: Individual aspects on the one hand, and the general security and human rights situation on the other, are like communicating vessels. When the general security and human rights situation in the country of origin deteriorates, the burden on the applicant to submit facts and circumstances about his individual situation is lessened.

The minister further demonstrated his understanding of the sliding scale test with the following graph, going even beyond the principles set by the Court of Justice in this respect:<sup>65</sup>



The **SWEDISH** Migration Board’s short comment on the *Elgafaji* judgment did not go into such details; it just rather confirmed that the verdict of the Court of Justice is in line with previous **SWEDISH** jurisprudence on this matter. The Immigration Board also underlined that<sup>66</sup>

In this recent judgment, the Court of Justice did not assess whether or not there is an internal armed conflict in Iraq. However, it is clear that in cases where there is an armed conflict, the applicant is not required to show that the threats are specifically directed to him by reason of factors particular to his personal situation. This is fully consistent with the [jurisprudence of the] Migration Court of Appeal

63 *Obuseh v Minister for Justice, Equality and Law Reform* [2010] IEHC 93, 14 January 2010

64 *Brief van de Minister van Justitie Aan de Voorzitter van de Tweede Kamer der Staten-Generaal*, The Hague, 29 March 2010

65 Cf. reference to Dutch jurisprudence on this matter later in this chapter

66 Swedish Migration Board, *Kommentar till EG-domstolens dom i målet C-456/07 (Meki Elgafaji and Noor Elgaffi v. Staatssecretaris van Justitie) den 17 februari 2009 avseende tolkning av art. 15 c i Skyddsgrundsdirektivet och begreppet “väpnad konflikt”*, 26 May 2009

[...] according to which in the case of an armed conflict the demonstration of individual vulnerability is not required. On the other hand, according to Swedish law, when there are other severe conflicts<sup>67</sup> – as the situation is currently considered to be in Iraq – it is necessary that the applicant proves that he or she is subjected an individual threat depending on his or her specific personal circumstances.

The UK Border Agency in its relevant casework instruction<sup>68</sup> explains the meaning of the sliding scale test as follows:

[...] the more the applicant is able to show that he is specifically affected by factors particular to his personal circumstances (e.g. age, disability, gender, ethnicity or by virtue of being a perceived collaborator, teacher or government official etc), the lower the level of indiscriminate violence required for him to be eligible. Care should be taken with such groups in case refugee status is more appropriate than humanitarian protection.

As in the case of indiscriminate violence, **judicial interpretations are much more frequent**. Research has revealed a number of judgments from FRANCE,<sup>69</sup> ITALY,<sup>70</sup> LATVIA,<sup>71</sup> LITHUANIA,<sup>72</sup> SLOVAKIA<sup>73</sup> and the UK<sup>74</sup> which echo *Elgafaji* in ruling that **when violence reaches an extremely high level, there is no need to demonstrate any additional individual factor** for a civilian to be at risk of a serious harm and thus entitled to protection under Article 15 (c). The GERMAN Federal Administrative Court actually saw its previous practice requiring an “individual concentration of a general danger” confirmed by *Elgafaji* in a 2009 judgment, concluding that even the presence of an extremely high level of violence can be seen as a form of “individualisation”, even if there are no specific risk factors:<sup>75</sup>

When the EU Court of Justice posits that the indiscriminate violence characterising the armed conflict should reach such a level that there are substantial grounds for believing that upon his return, a civilian would face a real risk of being subject to a serious threat under Article 15 (c) of the Directive solely on account of his presence in the territory in question, this is equivalent in substance to the individual concentration of a general danger that this Court considered necessary [in its previous practice]. In the opinion of the EU Court of Justice as well, such individualisation of a general danger can result from circumstances that increase risk and that are specific to the person of the foreigner. But irrespective of those circumstances, such an individualisation may also, by exception, arise in an extraordinary situation that is characterised by such a high degree of risk that practically any civilian would be exposed to a serious individual threat simply by being present in the relevant territory.

Other numerous court decisions confirm that **when the indiscriminate violence does not reach such a high level, individual factors are necessary** or can help establish the real risk of suffering serious harm. The FRENCH National Asylum Court, for instance, considered the “isolation and vulnerability” of an unaccompanied minor in Afghanistan as such a factor.<sup>76</sup> The High Court of IRELAND reclaimed the lack of “particulars, documentation, information or evidence in relation to such a threat” when rejecting the applicability of Article 15 (c).<sup>77</sup> The

67 Fleeing from “other severe conflicts” (*andra svåra motsättningar*) is another protection ground existing in Swedish domestic legislation, with no parallel provision in EU law.

68 UK Border Agency, *Interim Asylum Instruction on Humanitarian Protection: Indiscriminate Violence*, September 2010, para. D.8

69 E.g. Council of State, Judgment No. 320295 of 3 July 2009; National Asylum Court, Judgment No. 639474, H of 9 June 2009

70 Civil Court of Trieste, Judgment No. 98 of 9 March 2009; Civil Court of Rome, Judgment No. 5944 of 21 June 2011

71 District Administrative Court, Judgment No. A420481611 of 22 June 2011

72 Supreme Administrative Court, Judgments No. A-822-1366-10 of 17 November 2010; A-822-1376-10 of 16 November 2010 and A-858-901/2010 of 07 June 2010

73 Regional Court of Bratislava, Judgment No. 10Saz 52/2008-75 of 6 March 2009

74 HM and Others (Article 15(c)) Iraq CG [2010] UKUT 331 (IAC), Upper Tribunal of the Asylum and Immigration Chambers, 22 September 2010; QD (Iraq) v Secretary of State for the Home Department [2009] EWCA Civ 620, Court of Appeal, 24 June 2009

75 Judgment No. 10 C 9/08 of 14 July 2009

76 National Asylum Court, Judgment No. 10000587, M. of 23 September 2010

77 *Obuseh v Minister for Justice, Equality and Law Reform* [2010] IEHC 93, 14 January 2010

Supreme Administrative Court of **LITHUANIA**<sup>78</sup> and the Supreme Court of **SLOVENIA**<sup>79</sup> required individual factors giving rise to a real risk of serious harm in more general terms.

The **GERMAN** Federal Administrative Court provided an especially concrete description of what can constitute individual factors that raise the exposure of a civilian to indiscriminate violence:<sup>80</sup>

These factors that increase risk primarily include those personal circumstances that make the applicant appear more severely affected by general, non-selective violence, for example because he is forced by reason of his profession – e.g. as a medical doctor or journalist – to spend time near the source of danger. But in this court’s opinion, it may also include personal circumstances by reason of which the applicant, as a civilian, is additionally subject to the danger of selective acts of violence – for example, because of his religious or ethnic affiliation – to the extent that the recognition of refugee status would not be justified on that basis.

The latter example of “not-so-strong” refugee convention grounds may raise concerns regarding the primacy of the refugee protection regime and may open (without this fact being researched or proved at the time of writing) an avenue for a “substituting policy” (where subsidiary protection is granted to persons who should in principle qualify for refugee status). This issue requires further research and analysis.<sup>81</sup>

The **FINNISH** Supreme Administrative Court, in its main interpretative judgment explained that direct experiences of violence suffered by close relatives in the given case did not substantiate the elevated individual exposure to indiscriminate violence, but rather demonstrated the extreme level thereof<sup>82</sup>

When examining the needs for subsidiary protection both collective and individual facts must be taken into consideration. The EU Court of Justice stated that the more 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 with regard to his individual characteristics under these circumstances. The experiences shall, nevertheless, be taken into consideration when assessing the security situation and to which extent the undeniable violence in Baghdad may target anyone without exception.

The **UK** Court of Appeal ruled in a key 2010 judgment<sup>83</sup> that the Asylum and Immigration Tribunal (pre-*Elgafaji*) wrongly equated Article 15 (c) protection with that provided by the prohibition of torture, inhuman or degrading treatment or punishment. The Court of Appeal also pointed out that it is erroneous to require the asylum-seeker to demonstrate “differentiation” between her/his situation and “that of the population at large”, emphasising that

31. [...] It is possible for any potential member of the civilian population to be eligible for subsidiary protection, provided that the level of indiscriminate violence is high enough in the war zone to which he is to be returned. If there are any factors special to the applicant, either as an individual or as a member of a group, which increase the risk to him or her over that faced by the general population, the risk of serious harm must be assessed taking those factors into account.

The Court of Appeal later in the same judgment pointed out that measuring individual exposure to indiscriminate violence may be justified in the given case; however, the use of the expression “sufficient differentiator”, emanating from refugee law and cases concerning the application of Article 3 of the European Convention on Human Rights

78 Judgments No A-756-1638-10 of 30 December 2010; A-822-1536-10 of 09 December 2010 and A-756-142-11 of 13 June 2011

79 Judgment No. I Up 224/2011 of 9 June 2011

80 Judgement No. 10 C 4.09 of 27 April 2010

81 Cf. with para. 134 of the judgment GS (Existence of Internal Armed Conflict) Afghanistan v. Secretary of State for the Home Department, CG [2009] UKAIT 00010, 23 February 2009 of the UK Asylum and Immigration Tribunal (quoted later in this sub-chapter), which also indicates indirectly that strong scrutiny is needed in order to avoid this impact.

82 Judgment No. KHO:2010:84 of 30 December 2010

83 HH (Somalia) and Others v. Secretary of State for the Home Department, [2010] EWCA Civ 426, 23 April 2010



may not be appropriate in the context of Article 15 (c). The judgment also makes reference to the sliding scale test when stipulating that

12. [...] where specific personal or group factors apply which increase the risk to the particular applicant over and above that faced by the population at large, the level of indiscriminate violence [required to establish a real risk of suffering a serious harm] will not need to be as high, and that where effective personal protection is accessible the risk may abate.

To conclude, it appears that the most authoritative judgment concerning subsidiary protection in the **UK** does not exclude the necessity of assessing individual exposure and risk factors when applying Article 15 (c), but rejects the previous practice of requiring special distinguishing features as a general condition. This judgment indicates a **significant change in judicial practices as a result of *Elgafaji* in the UNITED KINGDOM**, an impact that the present research could not detect in any other member state.

The **UK** Asylum and Immigration Tribunal provided interesting examples in a 2009 judgment of what characteristics can increase personal exposure to indiscriminate violence in the Article 15 (c) context:<sup>84</sup>

134. [...] [enhanced risk categories in Afghanistan] may include teachers, local government officers and government officials. [...] The way in which an enhanced risk might arise for a group can best be demonstrated by example. If, say, the Taliban wanted to make a point about teachers continuing to teach girls, it may resolve to kill a teacher. It would not be any specific teacher but one who came into their sights. A teacher is of course not a combatant and an attempt to kill the first teacher they came across could be argued to demonstrate that teachers were then at enhanced risk of indiscriminate violence. Another possible example could be disabled people. If a bomber, or sniper, were to walk into a crowded marketplace, the public may well flee. A man with only one leg would move considerably more slowly and arguably as a result would be in a higher risk group than the general public. In view of the paucity of evidence, we cannot give a list of risk categories, and certainly cannot say that any particular occupation or status puts a person into such a higher risk category. We merely record that there may be such categories, and that if a person comes within one, the degree of indiscriminate violence required to succeed may be reduced depending upon the particular facts of the case both in terms of the individual concerned, and the part of Afghanistan from which he comes. It should also be borne in mind that such a person may, depending on the facts, be entitled to refugee status rather than relying on the subsidiary protection [...]. We emphasise that those examples should not be taken to indicate that teachers, or the disabled, are members of enhanced risk groups, without proof to that effect.

It is of specific interest to examine those jurisdictions, where **the term “individual” has not been transposed into national legislation**.<sup>85</sup> It appears that this legislative difference **does not create visibly different judicial practices** in these few countries. The **CZECH** Supreme Administrative Court interprets Article 15 (c) in line with the original text of the Qualification Directive, even if **CZECH** law does not make direct reference to a requirement of individualisation. In its interpretation it basically quotes the *Elgafaji* judgment:<sup>86</sup>

[...] the word “individual” shall be understood as covering harm to civilians irrespective of their identity, where the degree of indiscriminate violence characterising the armed conflict [...] 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.

The Supreme Administrative Court introduced the term **“total conflict”** (*totalní konflikt*) in order to describe the situation where

[...] basically all applicants coming from the country of origin or the affected region are threatened by a serious harm [...] since the mere presence in the territory of that country or region exposes them to a

84 GS (Existence of Internal Armed Conflict) *Afghanistan v. Secretary of State for the Home Department*, CG [2009] UKAIT 00010, 23 February 2009

85 See for example: European Council on Refugees and Exiles, *The Impact of the EU Qualification Directive on International Protection*, October 2008, p. 27

86 Judgment No. 5 Azs 28/2008-68 of 13 March 2009

real danger to their life and physical integrity. This implies, among other things, that in this case even a non-credible applicant for international protection is entitled to subsidiary protection, if there is no doubt, at least, that he comes from the country or region affected by the conflict.

Regarding those conflicts not reaching this high threshold, the Supreme Administrative Court held (extensively referring to *Elgafaji*) that

[...] the applicant must demonstrate a sufficient degree of individualisation, for example by proving (1) that he has already suffered serious harm or was exposed to direct threats of serious harm [...]; (2) that an armed conflict is currently prevailing in the region of his country of origin, in which he actually resided, and that he cannot find effective protection in another part of the country [...]; or (3) that there are other elements present (whether personal, related to family or other factors) which increase the risk that the he will be directly targeted by arbitrary (indiscriminate) violence [...]

In this lead judgment, the **CZECH** court also quoted the sliding scale provisions from the *Elgafaji* judgment.

**HUNGARIAN** jurisprudence also explicitly confirms that the assessment of Article 15 (c) is **independent from the credibility of the asylum-seeker**, and even non-credible applicants shall be granted this form of protection, once it is established that they indeed originate from a zone where indiscriminate violence prevails in terms of the *Elgafaji* judgment.<sup>87</sup> In another judgment, the Metropolitan Court explained that according to the guidance provided in *Elgafaji*,<sup>88</sup>

[...] the “exceptional nature” and the “high level” [of indiscriminate violence] do not mean that the civilian concerned should be more exposed to armed violence than other persons, or that the risk of serious harm should be exceptionally high in the armed conflict.

In the sense of the judgement of the European Court of Justice, the determinant characteristic is the “reality” of the risk, i.e. a real risk of serious harm should threaten the asylum-seeker in case of returning to his or her country of origin. [...]

Even the defendant recognised in its decision in the repeated procedure that albeit that most of the attacks in Afghanistan are targeted, the majority of them are committed without respect to civilians’ life and limb, moreover there are also attacks explicitly targeting the civilian population. This being established – as it can be concluded with respect to the place of origin of the applicant, Baghlan province in Afghanistan, in light of up-to-date country information – there is no need to examine, in addition to this, whether there is a special situation in which armed violence reaches such a high level that it threatens civilians’ life and limb as well.

It is not the primary target, but the actual result of armed violence which decides whether civilians’ life and limb is at a real risk. If country information gives account of civilians regularly becoming victims, then there is a real risk.

Finally, the practice of the **DUTCH** Council of State (the court referring the *Elgafaji* case to the EU Court of Justice) deserves special attention. Even though **DUTCH** law has transposed the term “individual”, it appears that the highest instance of administrative jurisdiction in that country (in line with the previously quoted administrative guidance) considers the application of Article 15 (c) as a predominantly “situational” question, which

- ▶ requires and exceptionally high level of violence;
- ▶ but does not necessitate the demonstration of individual risk factors.<sup>89</sup>

The District Court of Amsterdam in some cases interpreted *Elgafaji* in a sense that Article 15 (c) could also be applicable when there is a lower level of indiscriminate violence than in an exceptional situation, provided that

87 Judgment No. 15.K.31.482/2009/12 of 16 February 2010 and Judgment No. 15.K.30.403/2009/21 of 10 December 2009 of the Metropolitan Court

88 Judgment No. 17.K.30.900/2011/10-II of 19 October 2011

89 Cf. for example Judgment No. 201000956/1/V2 of 26 April 2010, as well as information regarding administrative policy on this issue presented earlier in this chapter

the asylum-seeker is affected by the violence due to his or her personal circumstances.<sup>90</sup> However, these judgments have not led to a change in the jurisprudence of the Council of State. It can therefore be concluded that the **DUTCH** practice may to some extent differ from that of other member states and **may not sufficiently apply the “sliding scale” principle** as established by the Court of Justice.

Based on the above findings, the following conclusions can be drawn:

- ▶ The *Elgafaji* judgment created **more clarity** and helped promote a **more structured thinking** in connection with the extent to which the demonstration of an **individual exposure or risk** can be required when applying Article 15 (c). The relevant principles established in *Elgafaji* (no individualisation in cases of exceptionally high level of indiscriminate violence, sliding scale in other cases) are **coherently applied and interpreted by many national courts**.
- ▶ The *Elgafaji* judgment **did not lead to significant policy changes** in most member states; many courts evaluated the judgment as the confirmation of their previous practice. The only **exception** encountered is the **UNITED KINGDOM**, where the relevant judicial guidance changed as a result of *Elgafaji*.
- ▶ The *Elgafaji* judgment **did not increase the burden of proof** required in establishing entitlement to protection under Article 15 (c).
- ▶ With regard to cases where indiscriminate violence does not reach an extreme level, national judicial practices seem to converge in the sense that they **do not require special distinguishing features or refugee law-like nexus** when assessing individual exposure to indiscriminate violence. Notwithstanding this, **divergences regarding the required level of individual risk factors** persist; some member states and courts are rather flexible with this, while others tend to be stricter.
- ▶ National jurisprudence provides various examples of what can be considered as a **factor suggesting higher personal exposure to violence**, including past experiences, experiences of family members or friends, profession, age, gender or disability.
- ▶ The leading jurisprudence of **GERMANY** on this matter gives rise to concerns, as it **blurs the line between individual risk factors under Article 15 (c) and grounds for persecution** as in the refugee definition. This may open the door for a policy of unduly substituting refugee protection with subsidiary protection in the case of a refugee fleeing an armed conflict.
- ▶ The practice of the **DUTCH Council of State**, which considers indiscriminate violence under Article 15 (c) as a purely situational matter (and a rare, extreme situation) and therefore does not enable the application of the sliding scale test in less extreme scenarios, seems to be a **unique practice in the EU**, the compliance of which with the *Elgafaji* judgment needs to be further analysed.
- ▶ The fact whether or not a certain member state transposed **the word “individual”** in its national legislation **does not appear to have a significant impact** on the actual post-*Elgafaji* implementation of Article 15 (c). In member states where the national wording of this provision does not include “individual”, courts still seem to directly apply the individualisation criterion in relevant cases, often with reference to *Elgafaji*.

90 For example Judgment No. 08/15991 of 30 December 2009

## III. The *Abdulla* case

### III.1 Short description of the case

The case concerns the **cessation of refugee status** under Article 1C (5) of the 1951 Refugee Convention.

The Iraqi applicants sought asylum in **GERMANY** between 1999 and 2002, fearing persecution in Iraq by the regime of Saddam Hussein's Baath Party. The **GERMAN** asylum authority granted them refugee status in 2001 and 2002. In 2004 and 2005 the asylum authority, as a result of the changed circumstances in Iraq, revoked the applicants' refugee status. By decisions delivered in July and October 2005, the competent administrative courts set aside the revocation decisions. They held, in essence, that given the extremely unstable situation in Iraq it could not be concluded that there had been a durable and lasting change in the situation such as to justify revocation of the recognition as refugees which had been granted. Following appeals, the higher administrative courts, by rulings delivered in March and August 2006, overturned the first-instance decisions and dismissed the actions for annulment which had been brought against the revocation decisions. Referring to the fundamental change in the situation in Iraq, those courts held that the appellants were now safe from the persecution suffered under the previous regime and that they were not under any significantly likely threat of further persecution on any other grounds.

The two asylum-seekers lodged appeals against the appellate rulings before the **GERMAN** Federal Administrative Court, which submitted a reference for preliminary ruling to the EU Court of Justice with the following questions:

1. Is Article 11 (1) (e) of the [Qualification] Directive [...] to be interpreted as meaning that – apart from the second clause of Article 1C (5) of the [Geneva] Convention [...] – refugee status ceases to exist if the refugee's well-founded fear of persecution within the terms of Article 2 (c) of that directive, on the basis of which refugee status was granted, no longer exists and he also has no other reason to fear persecution within the terms of Article 2 (c) of the [Qualification] Directive?
2. If Question 1 is to be answered in the negative: does the cessation of refugee status under Article 11 (1) (e) of the [Qualification] Directive also require that, in the country of the refugee's nationality,
  - (a) an actor of protection within the meaning of Article 7 (1) of the [Qualification] Directive be present, and is it sufficient in that regard if protection can be assured only with the help of multinational troops,
  - (b) the refugee should not be threatened with serious harm, within the meaning of Article 15 of the [Qualification] Directive, which leads to the granting of subsidiary protection under Article 18 of that directive, and/or
  - (c) the security situation be stable and the general living conditions ensure a minimum standard of living?
3. In a situation in which the previous circumstances, on the basis of which the person concerned was granted refugee status, have ceased to exist, are new, different circumstances founding persecution to be:
  - (a) measured against the standard of probability applied for recognising refugee status, or is another standard to be applied in favour of the person concerned, and/or
  - (b) assessed having regard to the relaxation of the burden of proof under Article 4 (4) of the [Qualification] Directive?

The Court of Justice ruled that

1. Article 11 (1) (e) of the Qualification Directive must be interpreted as meaning that:
  - ▶ Refugee status ceases to exist when, having regard to a change of circumstances of a significant and non-temporary nature in the third country concerned, the circumstances which justified the person's fear of persecution, on the basis of which refugee status was granted, no longer exist and that person **has no other reason to fear being persecuted**;
  - ▶ For the purposes of assessing a change of circumstances, the competent authorities of member states must verify, having regard to the refugee's individual situation, that the **actor or actors of protection** referred to in Article 7 (1) of the Qualification Directive have **taken reasonable steps to prevent the persecution**, that they therefore operate, *inter alia*, an effective legal system for the detection, prosecution and punishment of acts constituting persecution and that the national concerned will have access to such protection if he ceases to have refugee status.
  - ▶ The actors of protection referred to in Article 7 (1) (b) **may comprise international organisations** controlling the state or a substantial part of the territory of the state, including by means of the presence of a multinational force in that territory.
2. When the circumstances which resulted in the granting of refugee status have ceased to exist and the competent authorities of the Member State verify that there are no other circumstances which could justify a fear of persecution either for the same reason as that initially at issue or for another reason, **the standard of probability used to assess the risk stemming from those other circumstances is the same as that applied when refugee status was granted.**
3. Article 4 (4) of the Qualification Directive (which says that the fact that an applicant has already been subject to persecution or to direct threats of such persecution is a serious indication of the applicant's well-founded fear of persecution, unless there are good reasons to consider that such persecution will not be repeated) may apply when authorities plan to withdraw refugee status under Article 11 (1) (e) of the Qualification Directive and the person concerned, in order to demonstrate that there is still a well-founded fear of persecution, relies on circumstances other than those as a result of which he was recognised as being a refugee. However, that may normally be the case only when the reason for persecution is different from that accepted at the time when refugee status was granted and only when there are earlier acts or threats of persecution which are connected with the reason for persecution being examined at that stage.

### III.2 The aftermath of the judgment in EU member states

Cessation of refugee status is **not a "core issue"** in European asylum practices. The use of cessation clauses is rare and **only a handful of member states are reported to have used it** in recent decades. It seems that **only FRANCE<sup>91</sup> and GERMANY<sup>92</sup> applied the cessation clause in question** (Article 11 (1) (e) of the Qualification Directive) in significant numbers. **LITHUANIA** is reported to have applied the parallel cessation clause (Article 16 (1) of the Qualification Directive) for subsidiary protection in a number of cases. In most other member states this clause has not been used, while in some others it has been used only in a few cases.

91 In France, the cessation clause has been applied to situations of change of political regime and democratisation in the country of origin (e.g. Hungary, Benin, Spain or Chile), ceasefire in the case of a civil war, an amnesty act (e.g. Senegal) or the independence of a country (Lithuania). There is a "1C (5) list" that includes Benin, Bulgaria, Cape Verde, Chile, Hungary, Poland, the Czech Republic, Romania and Slovakia. Refugees from these countries lost their refugee status but could usually keep their residence permit.

92 Until mid-2007, the German Federal Office for Migration and Refugees (BAMF) regularly and routinely resorted to revocation of refugee status, relying on the basis of this cessation clause. By then, over 14 000 Iraqi refugees had respectively lost refugee status. This practice was also confirmed by a 2005 judgment of the Federal Administrative Court

It is not surprising then that **none of the EU member states amended its legislation or publicly available guidance** on this matter after the *Abdulla* judgment.

**Significant changes in practice have only been reported from GERMANY.** Even following the submission of the request for a preliminary ruling (but before the judgment), the Federal Office for Migration and Refugees (BAMF) stopped revoking the status of refugees from Central and Southern Iraq. It also annulled its revocation decisions in Iraqi cases that were not yet final.<sup>93</sup>

The **judicial criteria** of applying this cessation clause also **changed in considerable manner** due to the *Abdulla* judgment. According to the pre-*Abdulla* jurisprudence of the Federal Administrative Court, a relevant change of circumstances would require that upon return the person affected would – for the foreseeable future and with a sufficient degree of certainty (*auf absehbare Zeit mit hinreichender Sicherheit*) – not have to fear a repetition of persecutory acts which caused her/his flight. Revocation of refugee status presupposed that the relevant circumstances at the time of granting refugee status had changed in the meantime in such a way that if the foreigner returned to her/his country of origin, any repetition of the persecution that had provoked her/his flight could be ruled out for the foreseeable future with “sufficient” probability.<sup>94</sup> The Federal Administrative Court of GERMANY interpreted “protection” in a narrow sense, meaning mere **protection from the re-occurrence of persecution**.<sup>95</sup> At the same time, several administrative courts opted for a broader understanding of the term “protection”, interpreting it so as to require the actual presence and effectiveness of protection, including effective protection from new persecution which would arise as a consequence of the “changed circumstances”.<sup>96</sup>

As a consequence of the *Abdulla* judgment, the Federal Administrative Court significantly altered its above-mentioned practice. It basically upheld its primary focus on the cessation of the original grounds of persecution; however it developed **more severe requirements** for the application of this clause. In a 2011 judgment, the court, following the line established by *Abdulla*, held that<sup>97</sup>

[...] [r]evocation of refugee status under [the provision transposing] Article 11 (1) (e) of [the Qualification Directive] presupposes that in view of a significant and non-temporary change in the circumstances in the country of origin, the circumstances that formed the basis of the individual’s well-founded fear of persecution, and for his recognition as a refugee, have been eradicated.

The court also explained in the same judgment that

[...] [a] significant change in the circumstances on which persecution was based exists if the actual circumstances in the country of origin have changed clearly and materially. New facts must have given rise to a significantly changed basis, material to a decision, for the determination of the likelihood of persecution, so that there is no longer any considerable probability of persecution.

The judgment confirmed this later on with reference to *Abdulla*:

[a] change is permanent if a prognosis indicates that the change in circumstances is stable, i.e. that the factors on which persecution was based will remain eradicated for the foreseeable future.

Furthermore, the judgment also clarifies that a change may be regarded as permanent only if **the state or other actor of protection** within the meaning of Article 7 of the Qualification Directive is present in the country of origin and has made **suitable steps to prevent the persecution** that had been the basis for the earlier recognition of refugee

93 The BAMF had already ceased to apply its revocation policy earlier against non-Muslim minorities and other vulnerable groups, recognising that the treatment these persons may face upon return would amount to persecution.

94 Judgement No. 1 C 21/04 of 1 November 2005, para. 17 and Judgement BVerwG 10 C 24.07 of 12 June 2007, para. 18 of the Federal Administrative Court – Note that “sufficient” (*hinreichend*) probability constitutes a lower standard of proof than that applied in establishing a well-founded fear of persecution, which is “considerable” (*beachtlich*) probability. The court later dismissed this differentiation.

95 Judgement No. 1 C 21/04 of 1 November 2005, para. 23

96 Cf. for example Judgement No. 18 K 4074/04 of 10 June 2005 of the Administrative Court of Cologne; Judgement No. A 3 K 11212 of 26 October 2005 of the Administrative Court of Sigmaringen

97 Judgement No. 10 C 3.10 of 24 February 2011

status. The court dismissed the use of a different (lower) standard of proof – “sufficient” instead of “considerable” probability – arguing that the Qualification Directive applies a **uniform standard of proof**, regardless of whether the applicant has already suffered persecution in the past.

In another 2011 judgment, the **GERMAN** Federal Administrative Court reiterated the need for stable circumstances and permanent protection upon return in the following terms:<sup>98</sup>

[The] revocation of refugee status is justified only if the individual concerned is offered permanent protection in the country of origin against being (re)exposed, with a considerable probability, to measures of persecution. The assessment of probability in determining the likelihood of persecution requires a “qualifying” mode of consideration, in the sense of weighing and balancing all ascertained circumstances and their significance from the viewpoint of a rational, judicious person in the same position as the individual concerned, not least of all with an added consideration of the severity of the feared encroachment; thus that assessment must also take due account of the aspect of what can be reasonably expected from a person [...] Exactly the same mode of consideration applies for the criterion of permanence. The greater the risk of persecution, even if it remains below the threshold of a considerable probability, the more permanent, and as such, the more foreseeable, the stability of the change in circumstances shall be. If – as in the present case – changes that are thought to result in the termination of refugee status must be assessed within a regime that still remains in power, a high standard must likewise be required for their permanence. EU law requires that the assessment of the risk must be carried out with vigilance and care, since the issues at stake relate to the integrity of the person and to individual liberties, matters which relate to the fundamental values of the Union [...] Nevertheless, one also cannot demand a guarantee that the changed political circumstances will continue indefinitely into the future.

It can therefore be concluded that unlike in other member states, the *Abdulla* decision entailed a significant change in practices in **GERMANY**. This, in particular, includes the following:

- ▶ The cessation clause is **used much less frequently** than before the *Abdulla* case;
- ▶ **Protection is now understood in a broader sense** (in line with Article 7 of the Qualification Directive), instead of the mere assessment of whether or not the previously referred acts of persecution may still (re-) occur;
- ▶ The **standard of proof** in demonstrating that the circumstances which gave rise to refugee status have ceased to exist **has become higher** and equal to that applied in establishing a well-founded fear of being persecuted (considerable probability).

A visible (yet not radical) impact of the *Abdulla* judgment could also be identified in **LITHUANIA**, but with relation to the cessation of subsidiary protection (in particular in cases of Chechen asylum-seekers). In a 2010 judgment, the **LITHUANIAN** Supreme Administrative Court interpreted *Abdulla* in a way that establishes a requirement for the authority to assess whether there are no other risks of serious harm, independently from the one which had previously justified subsidiary protection, when applying the parallel cessation clause to subsidiary protection.<sup>99</sup> The court also ruled that this process requires the assessment of individual circumstances and not only that of the general situation in the country of origin. This judgment modified the relevant practices of asylum authorities by **increasing the level of individualisation** (for example, a personal interview is now usually conducted in cessation cases).

In two other judgments, the Supreme Administrative Court made direct reference to the preparatory work of the Qualification Directive when it held that in<sup>100</sup>

98 Judgement No. 10 C 25.10 of 1 June 2011

99 Judgment No. A-858-737/2010 of 29 April 2010

100 Judgments No A-858-1220/2010 of 1 October 2010 and No A-858-196/2011 of 24 January 2011 (the quoted text appears identically in the two decisions)

[...] explaining the concept of “change of circumstances is of such a significant and non-temporary nature” [...] *inter alia* the preparatory work of the 2004/83/EC Directive and the practice of the EU Court of Justice must be taken into consideration. In the explanatory notes of the draft directive (COM (2001) 210 final), among other things, it is indicated that the situation, which has changed but still shows the signs of instability, in its essence is not of a long-term nature. In the mentioned explanatory notes of the draft directive it is also indicated, that objective and verifiable evidence must be established demonstrating that human rights are respected in that country in general and, specifically, that the factors which caused the well-founded fear of the beneficiary of subsidiary protection “are durably suppressed or eliminated”. It is also noteworthy that the practice of EU Court of Justice confirms this explanation of the provisions of the 2004/83/EC Directive as well.

Besides the **GERMAN** and **LITHUANIAN** examples, research could **hardly identify any judicial interpretation** of what “significant and non-temporary” changes of circumstances mean. As an exception, the **AUSTRIAN** Supreme Administrative Court held repeatedly that in order to be able to assume a relevant change of circumstances a longer observation period (*längerer Beobachtungszeitraumes*) is required.<sup>101</sup>

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101 Judgments No. 2003/20/0111 of 1 March 2007, No. 2006/19/0378 of 26 January 2007, No. 2006/19/0372 of 19 October 2006, No. 2002/20/0170 of 27 April 2006, No. 2006/19/0030 and No. 2006/19/0032 of 16 February 2006



## IV. The *Bolbol* case

### IV.1 Short description of the judgment

The case concerns a Palestinian asylum-seeker from the Gaza Strip. Ms Bolbol submitted an application for asylum to the HUNGARIAN Office of Immigration and Nationality, basing her application on the second sub-paragraph of Article 1D of the Geneva Convention:<sup>102</sup>

This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance.

When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall ipso facto be entitled to the benefits of this Convention.

Ms Bolbol pointed out that she was a Palestinian residing outside the area of operations of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA). Ms Bolbol has not availed herself of the protection or assistance of UNRWA. She claimed, however, to be entitled to such protection and assistance, relying in support of that claim on a UNRWA registration card issued to the family of her father's cousins.

According to Ms Bolbol, the purpose of Article 1D is to make clear that where a person registered or entitled to be registered with the UNRWA resides, for any reason, outside the UNRWA's area of operations and, for good reason, cannot be expected to return there, the states party to the Geneva Convention must **automatically (*ipso facto*) grant her/him refugee status**. In view of the fact that, through her father, she is entitled to be registered with the UNRWA but resides in Hungary and therefore outside its area of operations, she should be automatically recognised as a refugee without further examination.

According to the national authorities' grounds for refusal of the asylum application, the second sub-paragraph of Article 1D of the Geneva Convention does not require unconditional recognition as a refugee but **defines the category of persons to whom the provisions of the Geneva Convention apply**. It follows that Palestinians must also be given access to the asylum procedure and that it is necessary to examine whether they meet the definition of refugee for the purposes of Article 1A of that convention. In the individual case, the HUNGARIAN asylum authority concluded that Ms Bolbol does not have a well-founded fear of being persecuted in terms of Article 1A and consequently rejected the asylum claim. The applicant was, however, granted tolerated status on the basis that return to the Gaza Strip would lead to a real risk of inhuman or degrading treatment, due to the critical conditions that prevail there.

The questions of the referring HUNGARIAN Metropolitan Court were the following (with reference to Article 12 (1) (a) of the Qualification Directive which makes direct reference to Article 1D of the Geneva Convention):

1. Must someone be regarded as a person receiving the protection and assistance of a United Nations agency merely by virtue of the fact that he is entitled to assistance or protection, or is it also necessary for him actually to avail himself of that protection or assistance?
2. Does cessation of the agency's protection or assistance mean residence outside the agency's area of operations, cessation of the agency and cessation of the possibility of receiving the agency's

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<sup>102</sup> This provision and its copies in national legislation are referred to as "Article 1D" throughout this chapter.

protection or assistance or, possibly, an objective obstacle such that the person entitled thereto is unable to avail himself of that protection or assistance?

3. Do the benefits of the directive mean recognition as a refugee, or either of the two forms of protection covered by the directive (recognition as a refugee and the grant of subsidiary protection), according to the choice made by the Member State, or, possibly, [does it mean] neither automatically but merely [lead to] inclusion [of the person concerned within] the scope *ratione personae* of the Directive?

The Court ruled that for the purposes of the first sentence of Article 12 (1) (a) of the Qualification Directive, **a person receives protection or assistance from an agency of the United Nations other than the UNHCR, when that person has actually availed her/himself of that protection or assistance.** As this did not happen in Ms Bolbol's case, the Court **refrained from examining the other two questions.**

The UNITED KINGDOM in its intervention to the case argued that only those Palestinians are covered by Article 1D who became refugees as a result of the 1948 conflict who were receiving protection or assistance from the UNRWA at the time when the original version of the Geneva Convention was concluded in 1951, and that **persons displaced following the 1967 hostilities should not be included** within the scope of Article 1D of the Geneva Convention. **The Court rejected** this argument as unfounded.

## IV.2 The aftermath of the judgment in EU member states

### IV.2.1 Background and general impact

Article 1D is probably the most problematic and neglected provision of the Geneva Convention. Two consecutive studies by the BADIL Centre confirmed that **only a handful of states parties actually apply this provision, and the related practices diverge to a great extent**, both in and outside Europe.<sup>103</sup> Great expectations preceded, therefore, the *Bolbol* judgment, which was seen by many advocates as a historic opportunity to finally clarify the scope and proper use of this provision, with a crucial impact on European asylum policies towards Palestinian asylum-seekers. It is not surprising then that the judgment, which avoided providing an answer to the “difficult” questions, was received with strong disappointment. It is interesting to note that, in response to the *Bolbol* judgment, the Metropolitan Court in HUNGARY decided to refer another Palestinian asylum case to the Court of Justice in 2011.<sup>104</sup> Since the HUNGARIAN judge this time united three different cases in order to cover all main aspects of Article 1D, it is significantly less likely that the Court of Justice can avoid formulating clear guidance on this occasion.

As for the general impact of the *Bolbol* judgment, it is first to be noted **that none of the EU member states adopted new legislation** as a result of this decision. The only publicly available official commentary that could be encountered (namely from SWEDEN) does no more than summarising the key rulings, without getting into any additional explanation or interpretation.<sup>105</sup>

It appears that the *Bolbol* judgment **did not have a significant impact on states' readiness to apply Article 1D** of the Geneva Convention in practice. In some countries (such as FINLAND or ITALY), *Bolbol* was actually perceived as a confirmation of previous practices. In most countries where Article 1D has never been used, or where its use was exceptional, *Bolbol* did not lead to a different approach in this respect.

103 BADIL Resource Centre for Palestinian Residency and Refugee Rights, *Closing Protection Gaps – Handbook on Protection of Palestinian Refugees in States Signatory to the 1951 Refugee Convention*, 2005; BADIL Resource Centre for Palestinian Residency and Refugee Rights, *Closing Protection Gaps – Handbook on Protection of Palestinian Refugees in States Signatory to the 1951 Refugee Convention, Jurisprudence Regarding Article 1D 2005–2010*, revised second edition, 2010

104 *Abed El Karem El Kott and Others v. Bevándorlási és Állampolgársági Hivatal*, C-364/11, Court of Justice of the European Union, case in progress at the time of writing

105 Swedish Migration Board, *Dom från EU-domstolen i mål C-31/09 avseende statslösa palestiniers rätt till erkännande av flyktingstatus på grundval av artikel 12.1 a i Skyddsgrundsdirektivet*, 2 May 2011

A major shift in practices was only reported from **BELGIUM**, inspired by not only the *Bolbol* judgment, but also a 2010 decision of the Council for Aliens Law Litigation, which pre-dates *Bolbol*, yet is based on the questions asked in the preliminary reference.<sup>106</sup> In this milestone judgment, the **BELGIAN** court held that when an asylum-seeker provided sufficient proof that she/he had enjoyed assistance by UNRWA (either by documents and/or statements), Article 1D of the Geneva Convention would have to be applied as a matter of policy. Besides the Qualification Directive and **BELGIAN** law, the court referred to and quoted UNHCR guidance:<sup>107</sup>

If, however, the person is outside the UNRWA's area of operations, he or she no longer enjoys the protection or assistance of the UNRWA and therefore falls within paragraph 2 of Article 1D, providing of course that Articles 1C, 1E and 1F do not apply. Such a person is automatically entitled to the benefits of the 1951 convention and falls within the competence of UNHCR. The fact that such a person falls within paragraph 2 of Article 1D does not mean that he or she cannot be returned to the UNRWA's area of operations, in which case, once returned, the person would fall within paragraph 1 of Article 1D and thereby cease to benefit from the 1951 Convention. There may, however, be reasons why the person cannot be returned to the UNRWA's area of operations. In particular: (i) He or she is unwilling [...]; or (ii) He or she may be unable to return to that area because, for instance, the authorities of the country concerned refuse his or her re-admission or the renewal of his or her travel documents.

As a result of this verdict, as well as the *Bolbol* judgment published five months later, the **BELGIAN** asylum authority **started applying Article 1D in individual cases**. No subsequent change was reported post-*Bolbol* in the jurisprudence of the Council for Aliens Law Litigation, as the above-referred judgment was already in line with the decision of the Court of Justice.

A somewhat **different tendency** could be witnessed in **SLOVAKIA**. In that country Article 1D was reportedly used in justifying recognition as refugee in 2007–2009, based on guiding jurisprudence,<sup>108</sup> and referring to the fact that the circumstances which led the UNRWA to provide the applicant with the protection still persist, while the actual assistance ceased without the situation of Palestinian refugees being solved. Then in 2010 the **SLOVAK** asylum authority started rejecting the application of this provision. The key argument witnessed in some cases was that the applicants left the UNRWA's area of operation as a voluntary action; therefore, referring to Advocate General Sharpston's opinion,<sup>109</sup> Article 1D's protection (inclusion) clause cannot be applied to them. While the judicial "approval" of this policy remained unclear at lower-instance courts (due to divergent jurisprudence), a 2011 judgment of the **SLOVAK** Supreme Court rejected the validity of this position:<sup>110</sup>

It follows from the Article 12 (1) (a) of the Directive that it is not important for what reason this protection ceased to exist and such a person will be *ipso facto* entitled to the benefits of this Directive.

However, later in September 2011, the Supreme Court clarified in another judgment that<sup>111</sup>

It however does not follow from Article 1D of the Convention that in case of a person who benefited from UNRWA's protection, but for any reason does not enjoy such protection, and no other agency such as the UNHCR provides protection to him at present time, the existence of well-founded fear of persecution [...] should not be considered. Such a person is registered as a Palestinian refugee, but this does not mean that he or she is automatically a refugee in terms of the Convention relating to the status of refugees. Article 1D of the Convention provides only for the possibility of granting refugee status, it is not explicitly stated in the text of the Convention that such a person who benefited from the UNRWA's help should be granted asylum automatically. To have the right to enjoy *ipso facto* the benefits of the Convention does not establish an automatic right to be granted asylum in terms of

106 Judgment No. 37.912 of 29 January 2010 (decided in a panel of three)

107 UN High Commissioner for Refugees, *Note on the Applicability of Article 1D of the 1951 Convention relating to the Status of Refugees to Palestinian Refugees*, 2 October 2002, paras 7–8

108 See for example Judgment No. 10Saz 3/2006 of 6 June 2006 of the Regional Court of Bratislava

109 Opinion of Advocate General Sharpston delivered on 4 March 2010, Case C-31/09, *Nawras Bolbol v Bevándorlási és Állampolgársági Hivatal* – Note that this issue was finally not dealt with in the *Bolbol* judgment (cf. sub-chapter IV.1), therefore reference is not made to the judgment, but the Advocate General's position.

110 Judgment No. 1Sza/5/2011 of 22 February 2011

111 Judgment No. 1Sza/43/2011 of 13 September 2011

the Convention. Every such request should be examined individually and in the light of the benefits of Article 1A of the Convention in the meaning of the fact that a person is a refugee in terms of the Convention once it fulfils the criteria specified in the [refugee] definition.

Last but not least, an important change of judicial guidance should be mentioned with respect to **FRANCE** which does not seem to be directly linked with the decision of the Court of Justice, yet it constitutes a major shift in interpreting Article 1D, which may have been partly influenced by the *Bolbol* case.<sup>112</sup> A 2008 judgment of the National Asylum Court held that<sup>113</sup>

[...] it follows from the *travaux préparatoires* of the Geneva Convention that states party to the Convention intended to establish for Palestinians registered with the United Nations Relief and Work Agency for Palestine Refugees in the Near East (UNRWA) a specific protection, leading to a specific regime of care; the provisions of the second paragraph of Article 1D shall be interpreted in a way to guarantee the continuity of this protection; as soon as it stops, a similar protection foreseen in the Geneva Convention shall substitute it, except when Articles 1E and 1F of the same Convention apply and another state or another international or regional organisation offers protection.

The **FRENCH** Council of State overturned this decision and ruled in 2010 that Palestinian asylum-seekers could only benefit from “automatic inclusion” as foreseen in paragraph 2 of Article 1D **if the UNRWA “stopped its activities and if no resolution was adopted by the General Assembly of the United Nations to solve definitively the fate of Palestinian populations”**.<sup>114</sup> This restrictive interpretation, which basically empties Article 1D in practical terms, will probably have to be revisited in light of the future ruling of the EU Court of Justice in the on-going *El Kott* case.<sup>115</sup>

Based on the above, it can be concluded that the *Bolbol* judgment **did not have a clear impact on member states’ and courts’ readiness to apply Article 1D and their main lines of interpretation**. While in **BELGIUM** the *Bolbol* case stimulated the use of this provision as a ground for inclusion/protection, in **SLOVAKIA** it may have had a different impact, whereas the Advocate General’s opinion was quoted as an argument for a more restrictive application in administrative practices. In general, the additional “**visibility**” the *Bolbol* case created for this often “forgotten” provision cannot be denied. Nevertheless, many states still **fail to apply** Article 1D in practice, and interpretations regarding the applicability of this provision have remained **as divergent as ever**.

#### IV.2.2 Change in the personal scope of Article 1D

Given the **very limited scope of judicial guidance** provided in the *Bolbol* judgment, the only concrete issue any national impact assessment can look at, besides the general impact on the application or non-application of Article 1D, is the **potential change of its personal scope**, or more precisely:

- ▶ whether a requirement of “having actually availed her/himself to the protection or assistance of the UNRWA” has been introduced; or
- ▶ whether refugees displaced because of the 1967 hostilities have been included in the scope of application of this provision.

112 Unfortunately no publicly available information could be retrieved to confirm this assumption.

113 Judgment 493412, A. of 14 May 2008 – Note that this judgment was used as key point of reference by the Hungarian Helsinki Committee (the organisation which represented Ms Bolbol) before the Metropolitan Court in Hungary.

114 Judgment No. 318356 of 23 July 2010 – Note that this argumentation is in line with the leading jurisprudence in the UK. The Court of Appeal in *El-Ali v Secretary of State for the Home Department* [2002] EWCA Civ 1103 (26 July 2002) held that “Article 1D does not apply to individuals who, of their own initiative, cease to avail themselves of assistance provided by UNRWA, notwithstanding that UNRWA continues to offer such assistance”, which in practice is interpreted in a way that Article 1D only becomes relevant when the UNRWA ceases to operate. The Supreme Administrative Court of Poland also provided similar guidance in its Judgment No. V SA 1673/01 of 14 February 2002.

115 *Abed El Karem El Kott and Others v. Bevándorlási és Állampolgársági Hivatal*, C-364/11, Court of Justice of the European Union, case in progress at the time of writing – see explanation in the introductory part of this sub-chapter

As for the first question, a number of national court decisions (from **AUSTRIA**<sup>116</sup> **BELGIUM**,<sup>117</sup> **BULGARIA**<sup>118</sup> and **SLOVAKIA**<sup>119</sup>) quote and **confirm the relevant position of the Court of Justice** declared in the *Bolbol* judgment. Research could not reveal any dissenting interpretation or any explicit change in decision-making policies with regard to this issue.

As for the second question, it appears that the vast majority of member states applying Article 1D **have never differentiated** between those displaced because of the 1948-49 and 1967 hostilities. **FRENCH** jurisprudence, for example, has only referred to registration with the UNRWA, without referring to any difference between the two groups. **DUTCH** regulation adopted in 2000 explicitly refers to the UNRWA's mandate in this respect, which equally covers both groups.<sup>120</sup> Therefore, the relevant ruling of the Court of Justice appears to have particular relevance for the **UNITED KINGDOM**, which as a result of the *Bolbol* judgment **had to reconsider its dissenting interpretation** on this matter. The relevant 2009 Operational Guidance Note of the **UK** Border Agency held that<sup>121</sup>

[...] Article 1D is relevant only to a person who was receiving protection or assistance from UNRWA on or before 28 July 1951. It is not relevant to anyone else, not even to the descendants of people who were receiving such protection or assistance on that date.

The updated, post-*Bolbol* version of the Operational Guidance Note makes concrete reference to the *Bolbol* judgment and acknowledges that the UK's previous policy should no longer be applied.<sup>122</sup> This may be considered as probably the most concrete impact of the *Bolbol* judgment toward a more harmonised approach to Article 1D.

116 Judgments E7 405964-1/2009 of 4 January 2011, E7 405960-1/2009 of 4 January 2011, E7 405963-1/2009 of 4 January 2011, E7 405965-1/2009 of 4 January 2011, E7 232982-2/2008 of 8 October 2010, E8 414218-2/2010 of 27 October 2010 and E8 414218-1/2010 of 6 August 2010 of the Asylum Court

117 Judgment No. 69.167 of 24 October 2011 of the Council for Aliens Law Litigation

118 Judgments No. 7152/2010 of 16 December 2010 and No. 5482/2010 of 19 May 2011 of the Supreme Administrative Court

119 Judgment No. 1Sža/5/2011 of 22 February 2011 of the Supreme Court

120 Aliens Circular of 2000, Para. C2/2.2.

121 UK Border Agency, *Israel, Gaza and the West Bank, Operational Guidance Note*, February 2009, Para. 3.12.2

122 UK Border Agency, *The Occupied Palestinian Territories, Operational Guidance Note*, 10 February 2011, Para. 2.7

# V. The *B and D* case

## V.1 Short description of the judgment

The judgment concerns the interpretation of Article 12 (2) (b) and (c) of the Qualification Directive on **exclusion from refugee status** and Article 3 of the same directive allowing member states to introduce or retain **more favourable standards** than laid down in the directive.

The cases concern two Turkish nationals of Kurdish origin. In the first case of *B*, the applicant was excluded from refugee status by the **GERMAN** asylum authority (BAMF) on the basis that he had committed a **serious non-political crime**. This decision was overturned by the Administrative Court of Gelsenkirchen, which annulled the decision and ordered the BAMF to grant asylum. This decision was confirmed by the Higher Administrative Court of North Rhine-Westphalia, stating that *B* should be granted a right of asylum in accordance with Article 16a of the **GERMAN** Constitution together with refugee status. It also found that the application of the exclusion clause requires an **overall assessment of the particular case** in the light of the principle of **proportionality** and the **danger** which the applicant could pose to the host state. In the second case of *D*, the applicant had been a senior official of the Kurdistan Workers' Party (PKK) and had been granted refugee status by **GERMANY**. As a result of a **revocation procedure**, refugee status was withdrawn on the basis that there were serious reasons for considering that *D* had committed a **serious non-political crime** outside **GERMANY** and had been guilty of **acts contrary to the purpose and principles of the United Nations**. Upon appeal, the revocation decision was annulled by the Administrative Court of Gelsenkirchen. This decision was upheld upon further appeal to the Higher Administrative Court of North Rhine-Westphalia on similar grounds as in the case of *B*. The BAMF challenged both court decisions before the Federal Administrative Court, which referred the cases to the EU Court of Justice.

The five questions referred to the Court of Justice can be summarised as follows:

- ▶ Is membership of an organisation which is on an EU list of terrorist persons, groups and entities in relation to a person who has actively supported the armed struggle waged by that organisation and perhaps had a prominent position within that organisation a cause of serious non-political crime or acts contrary to the purposes and principles of the United Nations within the meaning of Article 12 (2) (b) or (c) of the Qualification Directive?
- ▶ Is exclusion from refugee status pursuant to Article 12 (2) (b) or (c) of the Qualification Directive conditional upon the person concerned continuing to represent a danger for the host member state?
- ▶ Is it conditional upon a proportionality test being undertaken in relation to the particular case?
- ▶ If a proportionality test applies, must it be taken into consideration that the person is protected against deportation under Article 3 of the European Convention on Human Rights and is exclusion disproportionate only in exceptional cases having particular characteristics?
- ▶ It is compatible with Article 3 of the Qualification Directive for a member state to recognise that a person excluded from refugee status pursuant to Article 12 (2) of the directive has a right of asylum under its constitutional law?

The Court of Justice provided the following answers:

- ▶ The fact that a person has been a member of an organisation included in an EU list of terrorist groups and that this person has actively supported the armed struggle of that organisation **does not automatically constitute a serious reason to exclude** that person from refugee status. This is conditional on an

**assessment on a case-by-case basis** of the specific facts. In order to be able to apply the exclusion grounds in Article 12 (2) (b) and (c) of the Qualification Directive it must be possible to attribute to the person concerned **an individual responsibility for the acts committed** by the organisation in question while that person was a member. In order to do so, the **true role** played by the person concerned in the perpetration of the acts in question, his **position** within the organisation, the extent of the **knowledge** he had or is deemed to have had of its activities, and any **pressure** to which he was exposed or other factors likely to influence his conduct must be considered.

- ▶ **Representing a danger for the host member state is not a factor to be taken into consideration** under Article 12 (2) of the Qualification Directive, but only under its revocation provision (Article 14 (4) (a)) or under the exception to the non-refoulement principle (Article 21 (2)).
- ▶ Exclusion from refugee status under Article 12 (2) (b) or (c) of the Qualification Directive is **not conditional on an assessment of proportionality in relation to the particular case**. If it reaches the conclusion that Article 12 (2) applies, the authority cannot be required to undertake an assessment of proportionality, as this would in fact imply a fresh assessment of the level of seriousness of the acts committed, which it had already undertaken in order to come to the conclusion that Article 12 (2) applies.
- ▶ As long as a clear distinction can be drawn between refugee protection as defined in the Qualification Directive and other national protection statuses based on domestic legislative grounds, the latter national statuses **do not infringe the system established by the directive**.

## V.2 The aftermath of the judgment in EU member states

### V.2.1 Background and general impact

Similarly to the two previous cases, *B and D* touches upon an important, yet **marginal issue** of asylum practice, at least as regards the number of cases involved. The overall impact of the judgment has, therefore, remained **very limited** at the national level. **Not a single relevant case** could be identified in a number of member states, including **BULGARIA, LATVIA, MALTA, POLAND, PORTUGAL, SLOVAKIA** and **SLOVENIA**. Relevant cases are reported to be rare in other member states.

The judgment **did not lead to any legislative change** in any of the member states. Research could reveal **only one guidance document** inspired by the *B and D* judgment, which was published by the **SWEDISH** Migration Board.<sup>123</sup> The paper purports to provide the legal view of the Migration Board on the issue, in light of the decision of the Court of Justice. Meanwhile, it does not declare any change of earlier policy, but simply aims to specify and clarify (for example by identifying relevant soft law and **SWEDISH** jurisprudence on this matter). The only country where the *B and D* judgment had a significant impact on national practices is – not too surprisingly – **GERMANY**, from where the case was referred to the Court of Justice.

### V.2.2 Automatic exclusion for membership of a terrorist organisation

The *B and D* judgment led to a significant change in administrative and judicial policies in **GERMANY** regarding the “automatic” exclusion of members of terrorist organisations from refugee status. Prior to the judgment, the **GERMAN** Federal Office for Migration and Refugees (BAMF) had held that **any type of membership or involvement in the structures of a terrorist organisation should lead to exclusion**. The mere fact of being listed by the UN Security Council Sanctions Committee was considered as indicating that the asylum-seeker in question acted contrary to the principles and purposes of the United Nations. The judicial “approval” of this policy was not uniform though,

123 Swedish Migration Board, *Rättschefens rättsliga ställningstagande angående beviskravet för exklusion och individuellt ansvar*, RCI 02/2011, 12 January 2011

with diverging approaches at different courts. However, the Federal Administrative Court confirmed in 2008 that the exclusion clauses may not only apply with respect to “active terrorists and participants under criminal law”, but also to persons previously acting in support of terrorist activities.<sup>124</sup> As a result of the *B and D* judgment, the Federal Administrative Court expressly and authoritatively ruled in 2011 that being listed with a terrorist organisation or having actively supported the armed struggle of such an organisation **does not automatically constitute a ground for exclusion**.<sup>125</sup> Yet the Federal Administrative Court also pointed out that grounds for exclusion for acts in the sense of Article 1F (c) of the Geneva Convention

[...] may also include persons who provide acts of support in advance of such terrorist activities. In addition, however – to do justice to the function of the ground for exclusion – it will be necessary in each case to examine whether the individual contribution is of sufficient weight to correspond to the grounds for exclusion.

Concerning the approach to this issue in other member states, the *B and D* judgment basically **confirmed previous practices**. For example, **DUTCH** regulation had already clarified in 2000 that<sup>126</sup>

Article 1F may only be invoked if a person was personally involved in war crimes or human rights violations, and this person knew or should have known that through her/his acts or omissions war crimes were committed or human rights were violated.

Relevant guidance from the **UK** Border Agency also rejects the automatic exclusion of members of terrorist organisations, suggesting rather a certain “sliding scale” test:<sup>127</sup>

The approach to be taken, consistent with the Immigration Appeal Tribunal’s view expressed in *Gurung* (October 2002), is that “mere membership” of a proscribed [terrorist] organisation at the time of the commission of acts or crimes proscribed by Article 1F is not enough to bring the person concerned within the 1F exclusion clauses.

On the *Gurung* test, however, where the organisation concerned is one whose aims, methods and activities are predominantly terrorist in character, it may be sufficient for little more than simple membership of and support for such organisations to be taken as acquiescence amounting to complicity in their terrorist acts.

The more active the terrorist group and the more active the participation, the more likely it is that Article 1F (c) will apply. Equally, this could apply to Article 1F (a) cases where membership of a group with a limited brutal purpose would make the subject complicit in its crimes.

Judicial interpretations also tend to be similar. For instance, the **AUSTRIAN** Supreme Administrative Court held in a 2008 judgment that<sup>128</sup>

[...] having participated in armed combat operations or being impeached of a criminal act do not impede the recognition as a refugee *a priori*, as far as no cause for exclusion according to Article 1F of the Geneva Convention is present.

The **FRENCH** National Asylum Court held in the same year that the exclusion clause of Article 1F (c) of the Geneva Convention can only be applied to a member of the Sri Lankan LTTE organisation (included on the EU list of terrorist organisations, whose actions are qualified by the UN Security Council as “acts against the goals and principles of the United Nations”) if she/he “participates directly or indirectly in the decision, preparation and execution of acts of terrorist nature”.<sup>129</sup>

124 Judgment No. 10 C 48.07 of 14 October 2008

125 Judgment No. 10 C 26.10 of 7 July 2011

126 Aliens Circular of 2000, Para. C4/3.11.3.3 – later (but before *B and D*) further guidance was provided on concrete issues of interpretation, as well

127 UK Border Agency, *Exclusion – Articles 1F and 33 (2) of the Refugee Convention, Asylum Policy Instructions*, 1 October 2006 (last amendment: 14 April 2008)

128 Judgment No. 2006/19/0352 of 11 of November 2008 – See similar arguments in judgments No. 92/01/0882 of 10 March 1993, No. 89/01/0264 of 29 November 1989, No. 92/01/0703 of 5 November 1992 and No. 94/20/0761 of 14 of March 1995

129 Judgment No. 611731, M. of 27 June 2008



The UK Supreme Court followed a similar line in a 2010 judgment, with the following conclusion:<sup>130</sup>

Put simply, I would hold an accused disqualified under article 1F if there are serious reasons for considering him voluntarily to have contributed in a significant way to the organisation's ability to pursue its purpose of committing war crimes, aware that his assistance will in fact further that purpose.

A similar approach was reported from all other member states where relevant cases were known from previous years, even if without such explicit guidance (either administrative or judicial). A few **post-*B and D* judgments** further confirm this approach, this time already with reference to the ruling of the Court of Justice. For instance, the IRISH High Court, the BELGIAN Council for Aliens Law Litigation and the District Court of Amsterdam in the NETHERLANDS criticised the failure to conduct an individualised assessment when applying Article 1F, with reference to *B and D*.<sup>131</sup> In a 2011 judgment, the District Court of Sector 4 in Bucharest, ROMANIA, held that even though the asylum-seeker was a member of the PKK, his individual responsibility and involvement in acts falling under the scope of Article 1F had to be examined.<sup>132</sup> Interpreting this issue in more specific terms, the District Court of Haarlem in the NETHERLANDS ruled that it did not follow from the judgment that criminal proceedings would be required for the applicability of Article 1F, while also emphasising that one of the reasons for including exclusion clauses in the Geneva Convention was to prevent those who had committed certain serious crimes from escaping criminal liability.<sup>133</sup>

It can finally be concluded that, in this particular respect, the *B and D* judgment **only affected the practices of GERMANY, which had previously differed from that of other member states.**

### V.2.3 Danger to the host society as a ground for exclusion

With regard to the other key practical aspect of *B and D*, namely the assessment of **a danger to the host society as a ground for exclusion**, the picture is not that clear. The judgment primarily addressed this issue by discussing whether representing a danger to the host society is an additional criterion to be examined upon exclusion. But besides rejecting this idea, it also emphasised that this factor is not to be considered as an exclusion ground at all.<sup>134</sup> This position is in line with the practice of several member states. For instance, the FRENCH Council of State had already clarified in a 1998 judgment that committing a crime in the host country cannot be a ground for exclusion, but it can lead to criminal sanctions and eventually an expulsion according to the provisions of the law implementing Articles 32 and 33 of the Geneva Convention. Legislation in the majority of member states (namely BELGIUM, BULGARIA, the CZECH REPUBLIC, FINLAND, FRANCE, GERMANY, HUNGARY, IRELAND, MALTA, the NETHERLANDS, POLAND, ROMANIA, SLOVENIA, SWEDEN and the UNITED KINGDOM) does not allow for exclusion on the grounds of constituting a threat to national security.<sup>135</sup> Nevertheless, the rest of the member states covered by the present research do foresee such a possibility in their domestic law, as an additional exclusion ground besides those enumerated in Article 1F of the Geneva Convention. Two different legislative methods have been used for this purpose:

130 JS (Sri Lanka), R (on the application of) v Secretary of State for the Home Department (Rev 1) [2010] UKSC 15, 17 March 2010

131 A.B. v. Refugee Appeals Tribunal [2011] IEHC 198, 5 May 2011; Judgment No. 54.335 of 13 January 2011 and Judgment No. AWB 06/24277 of 22 February 2011 (respectively)

132 Judgment No. D.9 of 19 January 2011 – Note that this judgment does not explicitly refer to the *B and D* judgment (rather to UNHCR guidance), but the arguments reflect and were probably motivated by *B and D*

133 Judgment No. AWB 10/6592 of 1 April 2011

134 See Para. 101 of the judgment

135 Which fact, of course, does not mean that the revocation of refugee status (or certain rights related thereto) would not be possible in these jurisdictions, when authorities deem that the refugee constitutes a danger to the host society or national security.

- ▶ Four member states simply include **all exclusion grounds (including threat to national security or the host society) under the same provision and terminology**. In **AUSTRIAN** law this category is called “exclusion” (*Ausschluß*);<sup>136</sup> in **SLOVAKIA** the term used is “denial” (*neudelenie*).<sup>137</sup> **LITHUANIAN** law includes these grounds under the category of “grounds for refusing” (*priežastys dėl kurių nesuteikiamas*) refugee status,<sup>138</sup> while the **LATVIAN** legislator opted for referring to cases when refugee status is “not granted” (*nepiešķir*).<sup>139</sup>
- ▶ Three other member states **kept an apparent distinction** between the exclusion grounds of Article 1F of the Geneva Convention and this additional category. As opposed to the first grounds called “exclusion”, the latter is labelled as “denial” in **ITALY** (*diniogo*)<sup>140</sup> and **SPAIN** (*denegación*),<sup>141</sup> or “rejection” (*recusa*) in **PORTUGAL**.<sup>142</sup>

Even if hardly any information could be collected regarding the use of these additional grounds, it can be concluded that they are **neither in conformity with the Geneva Convention, nor with the Qualification Directive**, especially in light of the interpretation given by the EU Court of Justice in *B and D*. Article 1F of the Geneva Convention sets forth a comprehensive list of exclusion grounds, to which states parties do not have the faculty to add others. Article 12 (2) of the Qualification Directive basically copies these exclusion grounds, again, not allowing for additional categories.<sup>143</sup> The Directive only enables member states to consider this factor

- ▶ in the framework of exclusion from subsidiary protection;<sup>144</sup>
- ▶ or when revoking, ending or refusing to renew refugee status.<sup>145</sup> The latter already presupposes that the asylum-seeker has previously been recognised as refugee and therefore cannot be understood as an exclusion ground (which would be applied within the process of recognition).

The relevant ruling of the Court of Justice in *B and D* (i.e. a danger to the host member state is not a condition for exclusion and should not be considered in the context of exclusion) could have served as a final inspiration to these seven member states to modify their problematic legislation. However, research could not reveal such an impact.

136 Federal Act of 2005 Concerning the Granting of Asylum, Section 6 (1)

137 Act of 20 June 2002 on Asylum and Amendment of Some Acts, Section 13 (2) and (5)

138 Act No. IX-2206 of 29 April 2004 on the Legal Status of Aliens, Section 88

139 Asylum Act of 2009, Section 27 (1)

140 Legislative Decree No. 251 of 19 November 2007 on the Transposing of 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, Section 12

141 Act No. 12/2009 of 30 October 2009 on the Right to Asylum and Subsidiary Protection, Section 9

142 Act No. 27/2008 of 30 June 2008 establishing the conditions and procedures of granting asylum or subsidiary protection, and the status of asylum-seekers, refugees and beneficiaries of subsidiary protection, transposing to domestic legislation the Council Directives 2004/83/EC of 29 April 2004 and 2005/85/EC of 1 December 2005, Section 9 (2)

143 Article 3 of the Qualification Directive only allows for “more favourable” standards, while such a provision cannot be, by any means, considered as a favourable one for the asylum-seekers concerned.

144 Qualification Directive, Article 17 (1) (d)

145 Qualification Directive, Article 14 (4)

## VI. Summary conclusions and recommendations

Research findings gave rise to a number of case-specific conclusions elaborated in the previous chapters. Based on the findings and conclusions of this study, the researcher cannot but ascertain that **the four initial asylum-related judgments by the Court of Justice of the European Union had quite limited impact on the harmonisation of national asylum practices**. In more concrete terms, it can be established that:

- ▶ None of the judgments generated any significant **legislative amendment**.
- ▶ Very few national authorities (namely **SWEDEN**, the **NETHERLANDS** and the **UK**) published **interpretative guidelines**, position papers or any official reaction to these judgments.
- ▶ **Judicial interpretations** of and references to these judgments were relatively more frequent, even though quite often courts referred to them as a confirmation of their previous jurisprudence.
- ▶ **Policy changes as a result of these judgments were rare and modest**, and mainly (even if not exclusively) affected the member state from where the reference for preliminary ruling had been made (with the exception of the *Bolbol* case).
- ▶ Nevertheless, the four cases in question managed to **identify and bring in line with the majority some rather “dissenting interpretations”** on specific issues among the practices of member states (in particular that of **GERMANY**, the **UK** and the **NETHERLANDS** in relation to different aspects). This impact is probably the clearest effect of the judgments that indicate a step towards more advanced harmonisation.

Beyond these primary conclusions, some further findings and side effects could also be identified:

- ▶ **Differences in the national transposition** of the Qualification Directive (e.g. whether “individual” or “indiscriminate” is transposed in Article 15 (c) or whether national legislation uses “exclusion” or “denial”) **do not appear to cause significant divergence** in related practices, as national jurisprudence together with that of the Court of Justice tend to “adjust” these differences in light of the relevant rule in EU law.
- ▶ The judgments had an impact on the **visibility** of and awareness about certain provisions of international and European refugee law (e.g. Article 1D of the Geneva Convention or Article 15 (c) of the Qualification Directive), even though this varied significantly in different member states.
- ▶ The judgments definitely contributed to a **more structured debate and interpretation** of the provisions concerned.

The rather limited impact of these judgments **may not necessarily be a result of reluctance or lack of attention**, but may also be due to a number of other factors:

- ▶ Three out of the four judgments in question touch upon a **rather “marginal” issue** of refugee law and practice (cessation and exclusion), which concern a very limited number of cases. Future references for preliminary ruling which involve more central issues of refugee law (with impact on a larger number of cases) will most probably have more ground-breaking effects.
- ▶ Even though the mandatory translation of all judgments into all official EU languages helps bridge the most important obstacle for successful dissemination, in any non-centralised and/or non-specialised domestic judicial framework it may still be challenging to ensure the **proper access of all judges** to the authoritative guidance in question.

- ▶ There has not been any **centralised EU mechanism for impact monitoring** which could assess how new pieces of legislation in the field of asylum or the judgments of the Court of Justice are “translated” into domestic legislation or practices and which could provide relevant advice.

After all, the question posed in the title of this study, at least for the time being, should be answered in the negative: **the EU Court of Justice is not yet an effective conductor in a disharmonious orchestra of member states.** Using an equally metaphoric comparison, it could be compared to a hairdresser who provides a trim rather than a new hairstyle. However, some positive impacts can already give rise to optimism: if the essential questions are asked by national courts in the future, the jurisprudence of the EU Court of Justice will have the potential to significantly contribute to a protection-oriented harmonisation of European asylum practices.

To this end, the following **short- and mid-term recommendations** are put forward:

- ▶ The European Asylum Support Office (EASO) is recommended to create a **sustainable mechanism for monitoring** the national aftermath of asylum-related judgments by the Court of Justice. This could be integrated into the EASO’s annual reporting scheme, or could be carried out in the form of separate periodic studies. In any case, monitoring should involve contacts with and information from the UNHCR, the judiciary and the civil society in each member state.
- ▶ Member states are encouraged to ensure that **asylum-related jurisprudence** (at least from higher judicial instances) **becomes fully and simply available for research purposes**, preferably through on-line databases. The European Commission and the EASO are recommended to encourage and support member states to this end.
- ▶ The judiciary in EU member states is recommended to **seek guidance from the EU Court of Justice in cases where an especially challenging, strategic or controversial issue of refugee law is at stake.** The UNHCR, the International Association of Refugee Law Judges (IARLJ), the European Council on Refugees and Exiles (ECRE), the European Legal Network on Asylum (ELENA) and the Odysseus Network are all recommended to make efforts in support of such initiatives, both at the national and community level (for example through training, advocacy, preparation of practical guidelines, etc.).
- ▶ Member states are recommended to collect and **publish disaggregated statistics** on subsidiary protection granted on the basis of Article 15 (c) of the Qualification Directive, the application of different grounds for exclusion from refugee status and subsidiary protection, as well as refugee status granted on the basis of Article 1D of the Geneva Convention. Such yet unavailable data would provide valuable information for EU institutions and other stakeholders regarding the divergences between national practices. The European Commission and the EASO are recommended to encourage member states to provide these data.
- ▶ In order to ensure enhanced transparency and to support comparative research in a key area of asylum law in the EU, member states are encouraged to **publish their official position or guidance documents regarding the application of Article 15 (c) of the Qualification Directive** (following the practice of the UK and the NETHERLANDS).
- ▶ The EASO is recommended to convene an **expert meeting for discussing the framework for and preparing a guidance paper on the interpretation of the term “indiscriminate violence”.** The initiative should be carried out in cooperation with the UNHCR, the International Association of Refugee Law Judges (IARLJ) and civil society actors. It should involve experts from various fields, including security and foreign policy, humanitarian law and country information (COI).
- ▶ GERMANY is recommended to **reconsider its rather dissentive policy of “simple arithmetic calculation”** in measuring indiscriminate violence and to harmonise it with the interpretation of other member states. The UNHCR and GERMAN civil society actors are recommended to challenge this practice based on the findings of this study and other relevant research.

- ▶ The **primacy of refugee protection** as compared to complementary forms of protection should be a key concern for all stakeholders in the field. “Substituting policies” which favour subsidiary (or other forms of) protection in cases where the conditions for refugee status may also be fulfilled, as well as jurisprudence blurring the line between the two categories (e.g. the **GERMAN** Federal Administrative Court referring to “not-so-strong” convention grounds when applying the “sliding scale” test)<sup>146</sup> should be subject to scrutiny and should be challenged.
- ▶ The apparently dissentive **DUTCH** practice which limits the applicability of Article 15 (c) to the most extreme and highly exceptional situations and which seems to **refrain from using the “sliding scale”** test for this provision should be subject to more detailed research, with a focus on assessing compliance with the *Elgafaji* judgment.
- ▶ **AUSTRIA, ITALY, LATVIA, LITHUANIA, PORTUGAL, SLOVAKIA** and **SPAIN** are urged to **delete the fact of representing a threat to national security from the grounds for exclusion** from or denial of refugee status in their national asylum legislation, in order to ensure compliance with the Geneva Convention and the Qualification Directive. The European Commission and the EASO are recommended to monitor the implementation of this recommendation.

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146 See Chapter II.2.3

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