

EXAMINING FLIGHT FROM GENERALIZED VIOLENCE IN SITUATIONS OF CONFLICT

An Annotated Bibliography on Article 15(c) of the Qualification Directive

International Association of Refugee Law Judges
Convention Refugee Status and Subsidiary Protection Working Party*
Third Report (Bled, Slovenia, September 2011)

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A INTRODUCTION

The purpose of this annotated bibliography is to compile a list of comparative case law and commentary on article 15(c) of the Qualification Directive. It complements the Working Party Reports prepared by the Human Rights Nexus Working Party (Pene Mathew) and the Exclusion Clause Working Party (Geoff Gilbert) which focus on protection in situations of generalized violence and conflict, and the application of international humanitarian law.

The present document is far from comprehensive. It is hoped that members of the Working Party will contribute additional materials at the meeting in Bled so as to build up a rich database of jurisprudence on article 15(c).

The document is divided into two main parts. The first part lists relevant articles, book chapters, and reports. The second part contains a selection of comparative case law. In most cases, the descriptions of the materials have been drawn directly from article abstracts and judgments.

B ARTICLES AND REPORTS

1. Roger Errera, 'The CJEU and Subsidiary Protection: Reflections on *Elgafaji* – and After' (2011) 23 *International Journal of Refugee Law* 93

This article considers and reflects upon the ruling of the CJEU in *Elgafaji* relating to the scope of subsidiary protection under article 15(c) of the Qualification Directive following a referral of the Dutch Council of State. The latter asked the Court whether article 15(c) offered a supplementary protection in comparison with article 3 ECHR and, if so, what were the criteria for determining that subsidiary protection should be granted. A brief comment on the wording of the questions asked is followed by an analysis of the

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submissions of certain Member States and of the Commission. The *Elgafaji* ruling is then commented on in detail.

This is an important ruling for the interpretation and implementation of article 15(c) by domestic courts. The Court affirmed the autonomy of EU law and held that EU provisions must be given an independent interpretation. It held that subsidiary protection and, in particular, article 15(c) should be given their full effect. It also held that 'indiscriminate violence' may extend to people irrespective of their personal circumstances. It underlined that collective factors play a significant role in the application of article 15(c). As to the burden of proof, the Court affirmed that the existence of a serious and individual threat to the life and person of an applicant to subsidiary protection is not subject to the condition that he adduces evidence that he is specifically targeted by reason of factors particular to his personal circumstances. Such a threat can exceptionally be considered to be established where the degree of indiscriminate violence characterizing the armed conflict reaches such a high level that a civilian returning to his country would face a real risk of subjection to the threat mentioned by article 15(c).

The article also considers the post-*Elgafaji* case law of some Member States, such as Bulgaria, the Czech Republic, France, Germany and the UK.

2. Helene Lambert and Theo Farrell, 'The Changing Character of Armed Conflict and the Implications for Refugee Protection Jurisprudence' (2010) 22 *International Journal of Refugee Law* 237

This article focuses on a key aspect of the EC Qualification Directive, namely, the grounds of eligibility for subsidiary protection. These grounds rest on a test for the risk of 'serious harm' were the applicant to be returned to his or her country of origin. If a genuine risk of harm is found, then the applicant would qualify for protection. Article 15 of the Directive defines 'serious harm' in terms of (a) the death penalty, (b) torture or degrading treatment, and (c) 'serious and individual threat' to a person arising from a situation of armed conflict. This article examines how English and French judicial authorities have applied the third paragraph (that is, Article 15(c) of the Qualification Directive) in recent asylum cases. In such cases, English and French judicial authorities have had to assess (1) the severity of the armed conflict and (2) the individual risk to asylum seekers. Such assessments must be informed by an understanding of the changing character of armed conflict, which has increased the threat to civilians, and by the human security paradigm, which offers a new way of conceptualising the threats to individuals in and from conflict.

3. **Jane McAdam, ‘Individual Risk, Armed Conflict and the Standard of Proof in Complementary Protection Claims: The European Union and Canada Compared’** in James C Simeon (ed), *Critical Issues in International Refugee Law: Strategies for Interpretative Harmony* (Cambridge University Press, Cambridge, 2010)

This paper focuses on the legal impediments to obtaining subsidiary protection in the EU that have manifested themselves since the Qualification Directive entered into force for the EU Member States in October 2006. Its particular focus is article 15(c), which extends protection to those facing ‘a serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict’. This provision has been poorly understood, inconsistently applied across the Member States, and in some jurisdictions is the only subsidiary protection category given full consideration when a Convention claim fails. Its recent examination by the European Court of Justice in *Elgafaji* has highlighted the interpretative difficulties that national courts have had in applying the provision, such as whether the standard of proof in article 15(c) is identical to article 15(b)—requiring the applicant to demonstrate specific individual exposure to the risk of harm—or whether, as the court held, it covers a more general risk of harm that does not require the applicant to show that he or she is specifically targeted by reason of factors particular to his or her personal circumstances. That finding is also important for considering the evidentiary relationship between the subsidiary protection categories and Convention refugee status. This paper examines how article 15(c) has been interpreted in the jurisprudence of a number of EU Member States and demonstrates why it is not presently functioning as a complementary form of protection. The paper concludes by comparing the EU position with Canada.

4. **Jean-Francois Durieux, *Salah Sheekh is a Refugee: New insights into Primary and Subsidiary Forms of Protection* (Refugee Studies Centre Working Paper No 49, October 2008)** <http://www.rsc.ox.ac.uk/publications/working-papers/RSCworkingpaper49.pdf>

This paper explores the limits of ‘subsidiary’ or ‘complementary’ protection, with particular emphasis on how the concept is applied within the European Communities [EC] legal order. Seeking light in obscure places, it argues that recent developments in EC law, as well as the evolving jurisprudence of the European Court of Human Rights, can be construed positively as dispelling confusion between differently motivated claims to international protection. Should ambiguity prevail, however, these developments may well signal the emergence of a regional ‘asylum law’, calling into question the continuing relevance of the universal legal framework enshrined in the 1951 Convention and its 1967 Protocol.

The paper discusses the notion of the ‘war refugee’, examining in particular the notions that persecution within the meaning of the 1951 Convention is neither indiscriminate, nor ‘highly individualised’; and subsidiary protection grounds can usefully address situations on either side of persecution, i.e., where the risk is either very personal or affects populations indiscriminately.

5. Maryellen Fullerton, 'A Tale of Two Decades: War Refugees and Asylum Policy in the European Union' (2010)

http://works.bepress.com/maryellen_fullerton/37

The past twenty years have seen profound developments in the institutional competence of the European Union to address issues of migration and refugee status. The growth of the internal market, the expansion of passport-free travel, and the continuing arrival of individuals fleeing war or persecution led to the realization that a joint European approach to asylum seekers was necessary. Negotiations among the Member States have resulted in a Common European Asylum System. These European developments are largely unknown among refugee scholars, decision makers, and advocates in the United States. An examination of the major components of the Common European Asylum System sheds light on the legal rights of refugees in the European Union and in the United States, and broadens the policy debates concerning the legal protection that should be afforded asylum seekers in the United States.

One of the major innovations of the common EU policy is the creation of an enforceable right of asylum for those who do not qualify as refugees but who can show substantial grounds for believing that they will suffer serious harm if returned to their war-torn country of origin. Known as subsidiary protection, EU law now requires the Member States to provide renewable residence permits to civilians at risk due to indiscriminate violence from armed conflict. In contrast to the United States, where individuals fleeing countries engulfed in armed conflict might, at best, be eligible to apply for the discretionary Temporary Protected Status, in the EU war refugees now have a judicially enforceable right to subsidiary protection. Moreover, in its first interpretation of this right, the European Court of Justice ruled that those seeking subsidiary protection need not produce evidence in every case that they have been singled out or targeted for harm. In overturning the Dutch government's denial of a residence permit to an Iraqi citizen who had fled the violence in his Baghdad neighborhood, the ECJ affirmed the new avenue of protection for civilians fleeing situations of indiscriminate violence.

The arguments of the litigants before the ECJ resonate with arguments familiar to advocates and policy makers in the United States. Although refugees from war zones currently fall outside the scope of the U.S. refugee laws, the broad interpretation of subsidiary protection adopted by the ECJ gives new hope to migrants forced from their homes by the scourge of war.

6. Vanessa Holzer, 'The Relevance of the 1951 Refugee Convention for the Protection of Individuals Forced to Flee Armed Conflicts' in Jana Hertwig and Sylvia Maus (eds), *Global Risks: Constructing World Order through Law, Politics and Economics* (Peter Lang GmbH, Frankfurt am Main, 2010)

This paper examines how international law protects persons compelled to leave their country of origin because of armed conflict. It challenges the prevailing understanding that the Refugee Convention does not protect victims of armed conflict because they are

subjected to general, indiscriminate violence, as opposed to being targeted upon a Convention ground: to the contrary, numerous armed conflicts are at least in part motivated by ethnic or religious concerns. The paper affirms that despite the existence of several international legal instruments for the protection of such persons, the Refugee Convention remains of pivotal importance for their protection. It argues that the refugee definition in article 1A(2) of the Refugee Convention must be interpreted in light of international human rights law and international humanitarian law, when assessing claims for refugee status arising out of armed conflict.

7. Vera Zederman, ‘The French Reading of Subsidiary Protection’ in IARLJ, Convention Refugee Status and Subsidiary Protection Working Party: First Report (November 2006), Part II(A): France

This considers some of the French case law relating to article 15(c).

8. Laurent Dufour, ‘The 1951 Geneva Convention and Subsidiary Protection: Uncertain Boundaries’ in IARLJ, Convention Refugee Status and Subsidiary Protection Working Party: First Report (November 2006), Part II(B): France

This considers some of the French case law relating to article 15(c).

9. UNHCR Statement on Subsidiary Protection under the EC Qualification Directive for People Threatened by Indiscriminate Violence (January 2008)
<http://www.unhcr.org/refworld/docid/479df7472.html>

As a means of clarifying UNHCR’s interpretation of article 15(c) for the *Elgafaji* case, this paper (a) sets out UNHCR’s recommendations for the interpretation of Article 15(c) of the Qualification Directive; (b) provides background information on relevant principles of international and regional refugee and human rights law, the object and purpose of Article 15(c) seen from the perspective of its drafting history; and (c) details Member States’ practice.

10. UNHCR, *Asylum in the European Union: A Study of the Implementation of the Qualification Directive*, (UNHCR, Brussels, 2007)

This report aims to shed some light on the extent to which the Qualification Directive is achieving its aims. It provides a detailed overview of the practice of five Member States (France, Germany, Greece, the Slovak Republic and Sweden) following the 10 October 2006 deadline for implementation of the Qualification Directive. In particular, the report seeks to highlight the degree of consistency (or lack of it) in the approach taken by the selected Member States to specific issues; good practices; and any problems, including in terms of compatibility of State legislation and practice with international standards. Article 15 was a particular focus of the research. The report is an excellent resource for identifying comparative practices.

- 11. UNHCR, *Safe at Last? Law and Practice in Selected EU Member States with respect to Asylum-Seekers Fleeing Indiscriminate Violence* (July 2011)**
<http://www.unhcr.org/4e2d7f029.html>

This report examines the extent to which implementation of the Qualification Directive provides international protection to persons fleeing situations of indiscriminate violence, and whether a protection gap exists. Since three of the most visible and protracted conflicts in recent years have taken place in Afghanistan, Iraq and Somalia, the report focuses on applications for international protection lodged by Afghans, Iraqis and Somalis in six of the 27 EU Member States: Belgium, France, Germany, the Netherlands, Sweden and the UK (which together received 75 per cent of all asylum applications in the EU in 2010). In particular, the report analyses the extent to which these States' interpretation and application of article 15(c) of the Qualification Directive address the protection needs of persons fleeing indiscriminate violence in Afghanistan, Iraq and Somalia.

- 12. VluchtelingenWerk (Netherlands) Project on the Transposition of the Qualification Directive, Article 15(c): *Qualification for subsidiary protection status and the definition of serious harm***
[http://www.qualificationdirective.eu/images/web/Module_2/Module_2_all/Evaluation/Project overviews/Overview of information on Article 15 09.pdf](http://www.qualificationdirective.eu/images/web/Module_2/Module_2_all/Evaluation/Project%20overviews/Overview%20of%20information%20on%20Article%2015%2009.pdf)

This study was compiled prior to the CJEU's ruling in *Elgafaji*. It outlines the practice of 10 Member States in the implementation and interpretation of article 15(c) of the Qualification Directive: Belgium, Bulgaria, Germany, Hungary, Italy, Poland, The Netherlands, Romania, Spain, Sweden.

- 13. International Committee of the Red Cross (ICRC), Opinion Paper, 'How is the Term "Armed Conflict" Defined in International Humanitarian Law?' (March 2008)** [http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/armed-conflict-article-170308/\\$file/Opinion-paper-armed-conflict.pdf](http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/armed-conflict-article-170308/$file/Opinion-paper-armed-conflict.pdf)

It is on this basis that the ICRC takes this opportunity to present the prevailing legal opinion on the definition of 'international armed conflict' and 'non-international armed conflict' under international humanitarian law, the branch of international law which governs armed conflict.

- 14. ECRE and ELENA, *The Impact of the EU Qualification Directive on International Protection* (October 2008) pages 26–29**
www.ecre.org/component/downloads/downloads/131.html

- 15. ECRE, 'Complementary Protection in Europe' (July 2009)**
<http://www.unhcr.org/refworld/pdfid/4a72c9a72.pdf>

This study provides a legislative overview of subsidiary protection in the following EU Member States: Austria, Belgium, Denmark, Finland, France, Germany, Ireland, Sweden, Switzerland, United Kingdom.

16. Remarks by Paul Tiedemann on the relation between Article 15c Qualification Directive and Article 3 ECHR (conference report 10 February 2011)

http://www.rechtspraak.nl/Organisatie/Rechtbanken/Utrecht/OverDeRechtbank/Publicaties-en-toespraken/Documents/Verslag_Symposium_10-2-2011.pdf

17. Amnesty International (German section) and others, ‘Joint Opinion on the Legislation to Implement EU Directives on Residence and Asylum Law’ (August 2007)
www.proasyl.de/fileadmin/proasyl/fm_redakteure/Englisch/Joint_Opinion_Eu_directives.pdf

This report contains a discussion of the application of article 15(c) in the German context.

C CASE LAW

The following provides a selection of case law on article 15(c). Some of the articles and reports above provide useful compilations of case law from other jurisdictions. It is hoped that Working Party members will share jurisprudence from their own countries which can be added into this section.

1 Court of Justice of the European Union

***Elgafaji v Staatssecretaris van Justitie*, Case C-465/07, Judgment of the European Court of Justice (Grand Chamber, 17 February 2009)**

Article 15(c) of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, in conjunction with Article 2(e) thereof, must be interpreted as meaning that:

- the existence of a serious and individual threat to the life or person of an applicant for subsidiary protection is not subject to the condition that that applicant adduce evidence that he is specifically targeted by reason of factors particular to his personal circumstances;
- the existence of such a threat can exceptionally be considered to be established where the degree of indiscriminate violence characterising the armed conflict taking place – assessed by the competent national authorities before which an application for subsidiary protection is made, or by the courts of a Member State to which a decision refusing such an application is referred – reaches such a high level that substantial grounds are shown for

believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to that threat.

Note: See also *Elgafaji v Staatssecretaris van Justitie*, Case C-465/07, Opinion of Advocate General Poiares Maduro (9 September 2008).

2 European Court of Human Rights

***Sufi and Elmi v The United Kingdom* [2011] ECHR 1045 (28 June 2011)**

218. Therefore, following *NA v. the United Kingdom*, the sole question for the Court to consider in an expulsion case is whether, in all the circumstances of the case before it, substantial grounds have been shown for believing that the person concerned, if returned, would face a real risk of being subjected to treatment contrary to Article 3 of the Convention. If the existence of such a risk is established, the applicant's removal would necessarily breach Article 3, regardless of whether the risk emanates from a general situation of violence, a personal characteristic of the applicant, or a combination of the two. However, it is clear that not every situation of general violence will give rise to such a risk. On the contrary, the Court has made it clear that a general situation of violence would only be of sufficient intensity to create such a risk 'in the most extreme cases' where there was a real risk of ill-treatment simply by virtue of an individual being exposed to such violence on return (*ibid.*, § 115).

***NA v United Kingdom* App no 25904/07 (17 July 2008)**

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

***Salah Sheekh v The Netherlands* App no 1948/04 (11 January 2007)**

114. The applicant complained that his expulsion to Somalia would expose him to a real risk of being subjected to treatment in breach of Article 3 of the Convention, having regard to his personal situation of belonging to a minority in the light of the general human rights situation in Somalia.

148. ... it cannot be required of the applicant that he establishes that further special distinguishing features, concerning him personally, exist in order to show that he was, and continues to be, personally at risk. ... It might render the protection offered by that provision illusory if, in addition to the fact that he belongs to the

Ashraf – which the Government have not disputed –, the applicant be required to show the existence of further special distinguishing features.

3 United Kingdom

(a) England and Wales Court of Appeal

***QD & AH (Iraq) v Secretary of State for the Home Department* [2009] EWCA Civ 620 (24 June 2009)**

16. International humanitarian law (IHL) is the name given to the body of law which seeks to protect both combatants and non-combatants from collateral harm in the course of armed conflicts. It thus has a specific area of operation. It also, however, has defined and limited purposes which do not include the grant of refuge to people who flee armed conflict. This should, we respectfully think, have sounded a warning bell to the tribunal which decided *KH*. But the Home Secretary had accepted that Iraq was currently in a state of internal armed conflict within the meaning given to the phrase by IHL and the tribunal went on (§33-39) to reason out why, despite indicators to the contrary in its drafting history, article 15(c) sought to give effect to IHL. The result, they concluded (§51), was that its purpose was to give refuge from “international crimes caused by a serious threat of indiscriminate violence”; in other words “a realistic threat of being victims of war crimes or other serious breaches of IHL”. If this were right, every article 15(c) claim would prompt an inquiry of which the Directive gives no hint and which would depend on an extraneous body of law.
17. We recognise that the drafting history is complex and in places ambiguous in the ways noted by the AIT, not least in the removal of an early reference to Geneva Convention IV without an abandonment of its vocabulary. As they put it:

“several of the terms used in article 15(c) are terms of art within international humanitarian (and international criminal) law: e.g. ‘civilian’, ‘life and [or] person’, ‘indiscriminate’ and, of course, ‘international or non-international [internal] armed conflict’. The only body of law in which all of these terms feature is IHL (together with international criminal law).”
18. None of this, however, is in our view sufficient to introduce an unarticulated gloss of a fundamental kind into a Directive which goes far wider in its purposes than states of armed conflict. We consider that the Directive has to stand on its own legs and to be treated, so far as it does not expressly or manifestly adopt extraneous sources of law, as autonomous. It is not necessary, this being so, to track in *KH* the effects of the AIT’s erroneous premise, but we accept broadly Mr Husain’s submission that it led them to construe “indiscriminate violence” and “life or person” too narrowly, to construe “individual” too broadly, and to set the threshold of risk too high.
35. We therefore accept the proposition, on which the parties before us and the intervener agree, that the phrase “situations of international or internal armed conflict” in article 15(c) has an autonomous meaning broad enough to capture any situation of indiscriminate violence, whether caused by one or more armed

- factions or by a state, which reaches the level described by the ECJ in *Elgafaji*. The Home Secretary in *KH* accepted that there was currently an armed conflict in Iraq, and the AIT proceeded on that acceptance.
36. We would accept UNHCR's submission that, for the purposes of article 15(c), there is no requirement that the armed conflict itself must be exceptional. What is, however, required is an intensity of indiscriminate violence – which will self-evidently not characterise every such situation – great enough to meet the test spelt out by the ECJ.
37. It must follow, as again all counsel agree, that “civilian” in article 15(c) means not simply someone not in uniform – which by itself might include a good many terrorists – but only genuine non-combatants (though UNHCR submitted that former “combatants” should not be excluded).
- See also UNHCR's Submissions on article 15(c), annexed to the judgment

(b) Upper Tribunal, Immigration and Asylum Chamber

HM and Others (Article 15(c)) Iraq CG [2010] UKUT 331

- iv. Following *Elgafaji*, Case C-465/07, BAILII: [\[2009\] EUECJ C-465/07](#) and *QD (Iraq)* [\[2009\] EWCA Civ 620](#), in situations of armed conflict in which civilians are affected by the fighting, the approach to assessment of the level of risk of indiscriminate violence must be an inclusive one, subject only to the need for there to be a sufficient causal nexus between the violence and the conflict.
- v. The degree of indiscriminate violence characterising the current armed conflict taking place in Iraq is not at such a high level that substantial grounds have been shown for believing that any civilian returned there, would, solely on account of his presence there face a real risk of being subject to that threat.
- vi. If the figures relating to indices such as the number of attacks or deaths affecting the civilian population in a region or city rise to unacceptably high levels, then, depending on the population involved, Article 15(c) might well be engaged, at least in respect of the issue of risk in that area, although it is emphasised that any assessment of real risk to the appellant should be one that is both quantitative and qualitative and takes into account a wide range of variables, not just numbers of deaths or attacks.
- vii. If there were certain areas where the violence in Iraq reached levels sufficient to engage Article 15(c) the Tribunal considers it is likely that internal relocation would achieve safety and would not be unduly harsh in all the circumstances.

(c) Asylum and Immigration Tribunal

AM & AM (armed conflict: risk categories) Somalia CG [2008] UKAIT 03444 (27 January 2009)

3. In the context of Article 15(c) the serious and individual threat involved does not have to be a direct effect of the indiscriminate violence; it is sufficient if the latter is an operative cause.

4. The Opinion of the Advocate General in Elgafaji, 9 September 2008 in Case C-465/07 does not afford an adequately reasoned basis for departing from the guidance given on the law in the reported cases of the Tribunal on Article 15(c), namely HH and others (Mogadishu: armed conflict: risk) Somalia CG [2008] UKAIT 00022 and KH (Article 15(c) Qualification Directive) Iraq CG [2008] UKAIT 00023.

5. Before the Tribunal will take seriously a challenge to the historic validity of a Tribunal country guidance case, it would need submissions which seek to adduce all relevant evidence, for or against, the proposed different view. The historic validity of the guidance given in HH is confirmed.

6. However, as regards the continuing validity of the guidance given in HH, the Tribunal considers that there have been significant changes in the situation in central and southern Somalia, such that the country guidance in that case is superseded to the following extent:

(i) There is now an internal armed conflict within the meaning of international humanitarian law (IHL) and Article 15(c) of the Refugee Qualification Directive throughout central and southern Somalia, not just in and around Mogadishu. The armed conflict taking place in Mogadishu currently amounts to indiscriminate violence at such a level of severity as to place the great majority of the population at risk of a consistent pattern of indiscriminate violence. On the present evidence Mogadishu is no longer safe as a place to live in for the great majority of returnees whose home area is Mogadishu;

(ii) Assessment of the extent to which internally displaced persons (IDPs) face greater or lesser hardships, at least outside Mogadishu (where security considerations are particularly grave,) will vary significantly depending on a number of factors;

(iii) For those whose home area is not Mogadishu, they will not in general be able to show a real risk of persecution or serious harm or ill treatment simply on the basis that they are a civilian or even a civilian internally displaced person (IDP) and from such and such a home area, albeit much will depend on the precise state of the background evidence relating to their home area at the date of decision or hearing;

(iv) As regards internal relocation, whether those whose home area is Mogadishu (or any other part of central and southern Somalia) will be able to relocate in safety and without undue hardship will depend on the evidence as to the general circumstances in the relevant parts of central and southern Somalia and the personal circumstances of the applicant. Whether or not it is likely that relocation will mean that they have to live for a substantial period in an IDP camp, will be an important but not necessarily a decisive factor;

(v) As a result of the current conflict between the TFG/Ethiopians and the insurgents, the Sheikhal clan (including the Sheikhal Logobe), by virtue of the hostile attitude taken towards them by Al Shabab, is less able to secure protection for its members than previously, although both as regards their risk of persecution and serious harm and their protection much will depend on the particular circumstances of any individual clan member's case.

HH (Mogadishu: armed conflict: risk) Somalia CG [2008] UKAIT 00022 (28 January 2008)

Note: This case has been superseded by *AM & AM* above, to the extent that (relevantly) there is now an internal armed conflict within the meaning of international humanitarian law (IHL) and Article 15(c) of the Refugee Qualification Directive throughout central and southern Somalia, not just in and around Mogadishu. The armed conflict taking place in Mogadishu currently amounts to indiscriminate violence at such a level of severity as to place the great majority of the population at risk of a consistent pattern of indiscriminate violence. On the present evidence Mogadishu is no longer safe as a place to live in for the great majority of returnees whose home area is Mogadishu.

(1) In deciding whether an international or internal armed conflict exists for the purposes of paragraph 339C of the Immigration Rules and the Qualification Directive (but **not** for any wider purpose outwith the jurisdiction of the Tribunal), the Tribunal will pay particular regard to the definitions to be found in the judgments of international tribunals concerned with international humanitarian law (such as the Tadic jurisdictional judgment). Those definitions are necessarily imprecise and the identification of a relevant armed conflict is predominantly a question of fact.

(3) Applying the definitions drawn from the Tadic jurisdictional judgment, for the purposes of paragraph 339C of the Immigration Rules and the Qualification Directive, on the evidence before us, an internal armed conflict exists in Mogadishu. The zone of conflict is confined to the city and international humanitarian law applies to the area controlled by the combatants, which comprises the city, its immediate environs and the TFG/Ethiopian supply base of Baidoa.

(4) A person is not at real risk of serious harm as defined in paragraph 339C by reason only of his or her presence in that zone or area.

GS (Article 15(c): indiscriminate violence) Afghanistan CG [2009] UKAIT 00044 (19 October 2009)

There is not in Afghanistan such a high level of indiscriminate violence that substantial grounds exist for believing that a civilian would, solely by being present there, face a real risk which threatens the civilian's life or person, such as to entitle that person to the grant of humanitarian protection, pursuant to article

15(c) of the Qualification Directive. GS (Existence of internal armed conflict) Afghanistan CG [2009] UKAIT 00010 is no longer to be treated as extant country guidance.

GS (Existence of internal armed conflict) Afghanistan [2009] UKAIT 00010 (23 February 2009)

The respondent having by letter dated 7 January 2009 conceded that, for the purposes of international humanitarian law there is at present an internal armed conflict in Afghanistan, and that for the purposes of IHL the whole of the territory of Afghanistan is to be treated as being in such a conflict.

Note also:

KH (Article 15c Qualification Directive) Iraq CG [2008] UKAIT 0002 (overturned by *QD & AH (Iraq) v Secretary of State for the Home Department* [2009] EWCA Civ 620 (24 June 2009))

- (1) Key terms found in Article 15(c) of the Qualification Directive are to be given an international humanitarian law (IHL) meaning. Subject to (3) below, the approach of the Tribunal in HH & others (Mogadishu: armed conflict: risk) Somalia CG [2008] UKAIT 00022 to this provision is confirmed.
- (2) Article 15(c) does add to the scope of Article 15(a) and (b), but only in a limited way. It is limited so as to make eligible for subsidiary protection (humanitarian protection) only a subset of civilians: those who can show that as civilians they face on return a real risk of suffering certain types of serious violations of IHL caused by indiscriminate violence.
- (3) Article 15(c) is not intended to cover threats that are by reason of all kinds of violence. It does not cover purely criminal violence or indeed any other type of non-military violence. Nor does it cover violence used by combatants which targets adversaries in a legitimate way.
- (4) Where it is suggested that a person can qualify under Article 15(c) merely by virtue of being a civilian, the principal question that must be examined is whether the evidence as to the situation in his or her home area shows that indiscriminate violence there is of such severity as to pose a threat to life or person generally. If such evidence is lacking, then it will be necessary to identify personal characteristics or circumstances that give rise to a “serious and individual threat” to that individual’s “life or person”.
- (5) Given that the whole territory of Iraq is in a state of internal armed conflict for IHL purposes (that being conceded by the respondent in this case), a national of Iraq can satisfy the requirement within Article 15(c) that he or she faces return to

a situation of armed conflict, but will still have to show that the other requirements of that provision are met.

- (6) Neither civilians in Iraq generally nor civilians even in provinces and cities worst-affected by the armed conflict can show they face a “serious and individual threat” to their “life or person” within the meaning of Article 15(c) merely by virtue of being civilians.

Lukman Hameed Mohamed v. Secretary of State for the Home Department
AA/14710/2006 (unreported, 16 August 2007, cited in UNHCR Statement on Subsidiary Protection under the EC Qualification Directive for People Threatened by Indiscriminate Violence (January 2008))

‘It would be ridiculous to suggest that if there were a real risk of serious harm to members of the civilian population in general by reason of indiscriminate violence that an individual Appellant would have to show a risk to himself over and above that general risk.’

4 Germany

Thank you to Harald Dörig for providing these cases.

Judgment of the German Supreme Administrative Court – BVerwG 10 C 9.08 (14 July 2009)

http://www.bverwg.bund.de/enid/0fcfcaccedaa07993763604758f9c099,0/Decisions_in_Asylum_and_Immigration_Law/BVerwG_ss_C_9_8_m9.html

1. A substantial individual danger to life or limb within the meaning of Section 60 (7) Sentence 2 of the Residence Act that also satisfies the equivalent requirements of Article 15 (c) of Directive 2004/83/EC may also arise from a general danger to a large body of civilians within a situation of armed conflict if the danger is concentrated in the person of the foreigner.
2. If an armed conflict with such a degree of risk does not exist nationwide, as a rule an individual threat will come under consideration only if the conflict extends to the foreigner's region of origin, to which he or she would typically return.

Judgment of the Tenth Division of 27 April 2010 – BVerwG 10 C 4.09

http://www.bverwg.bund.de/enid/0fcfcaccedaa07993763604758f9c099,0/Decisions_in_Asylum_and_Immigration_Law/BVerwG_ss_C_4_9_nh.html

2. An internal armed conflict within the meaning of section 60 (7) sentence 2 of the Residence Act or article 15 (c) of Directive 2004/83/EC does not necessarily presuppose such a high level of organisation and such control by the parties to the conflict over a portion of the territory of a state as is required in order to fulfil the requirements under the Geneva Conventions of 1949 (further evolution of case law in: BVerwG, judgment of 24 June 2008 – BVerwG 10 C 43.07 – BVerwGE 131, 198).
4. In determining the necessary level of indiscriminate violence within the meaning of article 15 (c) of Directive 2004/83/EC in a particular region, account must be taken not just of the acts of violence by the parties to the conflict that violate the rules of international humanitarian law, but also other acts of violence by those parties that do harm to the life or person of civilians non-selectively and irrespective of their personal situation.

Decision of the 10th Division of 24 June 2008 – BVerwG 10 C 43.07

http://www.bverwg.bund.de/enid/0fcfcaccedaa07993763604758f9c099,0/Decisions_in_Asylum_and_Immigration_Law/BVerwG_ss_C_43_7_jo.html

2. The concept of international or internal armed conflict in Section 60 (7) Sentence 2 of the Residence Act and Art. 15 Letter c of Directive 2004/83/EC (known as the 'Qualification Directive') is to be construed taking international humanitarian law into

account (see in particular the four Geneva Conventions on International Humanitarian Law of 12 August 1949 and Additional Protocol II of 8 June 1977).

3. An internal armed conflict within the meaning of Section 60 (7) Sentence 2 of the Residence Act and Art. 15 Letter c of Directive 2004/83/EC need not extend to the entire territory of the country.

5 Czech Republic

Judgment of the Supreme Administrative Court of the Czech Republic of 13 March 2009, No 5 Azs 28/2008, www.nssoud.cz.

Thank you to David Kosar for the following summary.

The SAC *referred* to the following decisions from other EU Member States: Swedish case (MIG No. 2007:9, UM 23-06), French case (*Kulendarajah*), German case (BVerwG 10 C 43.07), Dutch cases (Nos. 200608939/1, 200701108 and 200804650/1) and UK cases (*KH* and *HH*). However, the SAC *discussed* in more detail only the decisions of the German Federal Administrative Court (BVerwG 10 C 43.07) and of the UK Asylum and Immigration Tribunal in *KH* /Article 15(c) Qualification Directive/ Iraq CG [2008] UKIAT 00023

General 'Art. 15(c) test'

- Art. 15(c) QD contains three-step test: (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'. These three questions should be approached in this particular order.

Definition of 'armed conflict'

- Term 'internal armed conflict' includes both the so-called vertical conflicts and the so-called horizontal conflicts.
- An internal armed conflict within the meaning of international humanitarian law exists at any rate if the conflict meets the criteria of Art. 1(1) of Additional Protocol II of 1977. Conversely, it does not exist if the exclusionary conditions of Art. 1(2) of Additional Protocol II of 1977 are present.
- Conflicts falling in between these two boundaries fall within the ambit of Art. 15(c) QD if they satisfy the so-called *Tadić* criteria: *protracted armed violence* and *organization of armed groups* [two following cases provide particularly helpful guidance as to the content of these two criteria: *Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj*, Case No. IT-04-84-T, Trial Chamber, Judgment of 3 April 2008, paras. 49 and 60; and *Prosecutor v. Ljube Bošković and Johan Tarčulovski*, Case No. IT-04-82-T, Trial Chamber, Judgment of 10 July 2008, paras. 177-178 and 199-203].

Definition of ‘civilian’

- As it was not disputed in the present case (No. 5 Azs 28/2008), the SAC held only that in general the term ‘civilian’ includes every person that does not belong to any party of the armed conflict (it cited Art. 50 of Additional Protocol I of 1977 in support of this conclusion).

Definition of ‘serious and individual threat to a life or person by reason of indiscriminate violence’

- The SAC held that the notion of ‘serious and individual threat to a life or person by reason of indiscriminate violence’ contains several requirements but the correct reading of ECJ’s judgment in C-465/07 *Elgafaji* is that these requirements cannot be entirely separated and thus they should be considered together.
- The SAC concluded that ECJ’s judgment in C-465/07 *Elgafaji* in fact stipulates two alternative scenarios when a person faces a ‘serious and individual threat to a life or person by reason of indiscriminate violence’: (1) when there is a so-called ‘total conflict’ in the country of origin, every civilian ‘would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to threat to her life or person by reason of indiscriminate violence’ (C-465/07 *Elgafaji*, para. 43 second indent); and (2) when the armed conflict does not reach the threshold of a so-called “total conflict“, an applicant must show further distinguishing features in order to prove that she faces ‘serious and individual threat to a life or person by reason of indiscriminate violence’ in her country or region (C-465/07 *Elgafaji*, para. 38 in conjunction with paras. 39 and 40)

6 Sweden

Decision of the Swedish Administrative Court of Appeal (February 2007)

Case regarding residence permit, etc. (Swedish Migration Board, 5 July 2007) <http://www.migrationsverket.se/include/lifos/dokument/www/07070582.pdf>

The Board referred to the general situation in Baghdad and that the applicant runs a great risk of being killed on the streets of the city as a consequence of the severe conflicts that prevail there. claims that he should be granted a residence permit as a person otherwise in need of protection. ...

Set against the above background, the Migration Board concludes that the assessment of whether the causal connection contained in the provision on severe conflicts is satisfied should be individual and be aimed at establishing whether the applicant is personally at risk of abuse because of the severe conflicts. There must be at least one special circumstance that demonstrates this. The general situation in the country or city of origin

and the general risk conditions there alone are not sufficient for the causal connection to be deemed to have been established.

7 France

Thank you to Joseph Krulic for this information.

In a decision in May 2009, the French Cour National du Droit d'Asile decided that Somalia is in a situation of 'generalized violence' (see also N° 64479/09022991). The same is legally true, if it considers its jurisprudence, in Iraq and many areas of Afghanistan.

In Afghanistan, from June 2010 to December 2010, there were 48 decisions vis-à-vis 'generalized violence' and subsidiary protection was granted in 19 cases. In January 2011, there were 7 similar decisions (N°09019225, for example). The provinces of Wardak, Ghazni, Nangarhar, Helmand, Logar, Parwan, Kapisa, Baghlan, Sa-E-Pol are considered by the Court as being in a situation of 'generalized violence'.

In Iraq, the situation is more or less similar, but since a case of the State Council (Kona, 15 May 2009) which quashed the Court's decision, the Court considers, in 95% of its cases, that it is a matter of Convention protection and not a subsidiary one as it considers that they are persecuted as Christians, political activists, and not only included in a quagmire of 'generalized violence'.

8 Bulgaria

Decision No 4291 of the Grand Chamber, Supreme Administrative Court of Bulgaria (1 April 2009)

9 The Netherlands

- *ABRvS (Netherlands) decision* (3 April 2008)
- *ABRvS (Netherlands) decision* (20 July 2007)