

Germany - Federal Administrative Court, 27 April 2010, 10 C 4.09

Country of Decision:

Germany

Country of Applicant:

Afghanistan

Date of Decision:

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10 C 4.09

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Court Name:

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Keywords:

Subsidiary Protection

Serious harm

Individual threat

Indiscriminate violence

Internal armed conflict

Revocation of protection status

Relevant Legislative Provisions:Council of Europe Instruments > [EN - Convention for the Protection of Human Rights and Fundamental Freedoms](#) [1] > [Article 3](#) [2]European Union Law > [EN - Qualification Directive, Directive 2004/83/EC of 29 April 2004](#) [3] > [Art 4](#) [4]European Union Law > [EN - Qualification Directive, Directive 2004/83/EC of 29 April 2004](#) [3] > [Art 4](#) [4] > [Art 4.4](#) [5]European Union Law > [EN - Qualification Directive, Directive 2004/83/EC of 29 April 2004](#) [3] > [Art 15](#) [6] > [Art 15 \(b\)](#) [7]European Union Law > [EN - Qualification Directive, Directive 2004/83/EC of 29 April 2004](#) [3] > [Art 15](#) [6] > [Art 15 \(c\)](#) [7]European Union Law > [EN - Returns Directive, Directive 2008/115/EC of 16 December 2008](#) [8] > [Article 3](#)

Headnote:

This case concerns the criteria for determining a serious individual threat and the necessary level of indiscriminate violence in an internal armed conflict. In order for Art 15 (c) of the Qualification Directive to apply, it is necessary to determine the level of indiscriminate violence in the territory of an internal armed conflict. When determining the necessary level of indiscriminate violence, not only acts which contravene international law, but any acts of violence which put life and limb of civilians at risk, have to be taken into account. In the context of Art 4.4 of the Qualification Directive, an internal nexus must exist between the serious harm (or threats thereof) suffered in the past, and the risk of future harm.

Facts:

The applicant is an ethnic Pashtun from Paktia province in Afghanistan. He applied for asylum in Germany in 2001. His application was mainly based on the claim that he had been threatened with forced recruitment by the Taliban.

The Federal Office for the Recognition of Refugees (now: Federal Office for Migration and Refugees) rejected his asylum application but granted temporary leave to remain on the grounds of Section 53 VI of the former Aliens Act (so-called impediment to deportation).

In May 2006 the Federal Office revoked protection from deportation as it considered the risk of forced recruitment obsolete following the end of the Taliban regime. Furthermore, the Federal Office argued that there was no immediate risk of life and limb in the context of the general situation in Afghanistan as the applicant, being a single male adult, could reasonably be expected to make a living in the Kabul area. In the Kabul region it was also possible to have access to medical treatment for the applicant's Post Traumatic Stress Disorder (PTSD) and epileptic seizures.

In September 2007, the Administrative Court of Frankfurt (Main) rejected the applicant's appeal against the revocation of protection from deportation.

On the 11th December 2008 the High Administrative Court of Hesse annulled the Administrative Court's decision insofar as the findings on an impediment to deportation (now: 'prohibition of deportation' under the terminology of the new immigration act) were concerned. According to the High Administrative Court's findings there was an internal armed conflict taking place in Paktia, the applicant's home province. An internal armed conflict did not presuppose a conflict situation in the whole of the country, it was sufficient if its preconditions were met in a part of the country.

Many civilians were put at risk in the internal armed conflict but these risks would be 'densified' in the case of the applicant as he would face a considerable threat to life and limb due to punishment or forced recruitment by the Taliban. The risk he was facing at present was connected to the risk of (past) persecution which made him leave the country. Therefore, the application of Art 4.4 of the Qualification Directive was justified. Finally, the applicant could not be expected to safeguard a minimum subsistence level in other parts of the country.

The German authorities asked for a review of the decision by the Federal Administrative Court insofar as the High Administrative Court's interpretation of Art 15 (c) of the Qualification Directive (or Section 60 VII sentence 2 Residence Act respectively) and its application of Art 4.4 of the

Qualification Directive were concerned.

Decision & Reasoning:

The High Administrative Court's findings on the existence of a substantial individual danger which results from an internal armed conflict did not withstand review.

Section 60 (7) sentence 2 of the Residence Act is equivalent to article 15 (c) of the Qualification Directive and has to be interpreted in terms of the requirements of the Qualification Directive.

i) The High Administrative Court had correctly found that an internal armed conflict takes place in the applicant's home province. It has based its definition of the term 'internal armed conflict' on the meaning of this term in international humanitarian law, particularly the Geneva Conventions of 12 August 1949 including the Additional Protocols (especially Art 1 of the Second Additional Protocol). The Federal Administrative Court supported this approach of the High Administrative Court, even in light of the recent decision by the European Court of Justice (17 February 2009, *Elgafaji*, C-465/07) which has not dealt in detail with this legal question, and although the UK Court of Appeal (24 June 2009, *QD and AH v. Secretary of State for the Home Department*) seems to have a different opinion (see separate summary in this database).

As held in the Federal Administrative Court's decision of 24 June 2008 - 10 C 43.07 - it is not necessary to strictly adhere to the requirements of Art 1 of the Second Additional Protocol. These requirements rather should be drawn upon for guidance, together with the interpretation of this term in international criminal law. As a result, it is possible that an armed conflict falls within the definition of an 'internal armed conflict' even if it does not meet the criteria of Art 1 of the Second Additional Protocol (i.e. 'an armed conflict between armed forces and dissident armed forces or other organised armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations?'). Examples might include a civil war situation or a guerrilla war. However, the conflict must in any case have a certain intensity and consistency. It may suffice that the parties to the conflict carry out sustained and coordinated combat operations with such an intensity and consistency that the civilian population is affected in a significant manner. Considering this, the High Administrative Court had sufficiently established that there is an internal armed conflict taking place in Paktia province.

ii) In contrast, the High Administrative Court's assumption that the applicant would face a serious and individual threat to life and limb by reason of indiscriminate violence did not withstand review. The High Administrative Court had based this assumption on the fact that the applicant had fled the country in 2001 because he had been at risk of forced recruitment and/or punishment by the Taliban and that he would face such risks again upon return. Accordingly, the High Administrative Court had found that the 'facilitated standard of proof' of Section 60 XI of the Residence Act in conjunction with Art 4.4 of the Qualification Directive could be applied. This finding was incompatible with Federal Law.

First of all, the High Administrative Court's findings did not show that the applicant had been threatened with serious harm in the sense of Art 15 (c) of the Qualification Directive before he left Afghanistan. But even if one assumes that the serious harm (or threat thereof) suffered in the past is not necessarily of the kind under Art 15 (c) of the Qualification Directive, the High Administrative Court's findings do not sufficiently support the assumption that another alternative of Art 15 of the Qualification Directive might have been fulfilled. Only Art 15 (b) of the Qualification Directive (torture or inhuman or degrading treatment or punishment) could possibly apply. Indeed, the High Administrative Court had found that the applicant had been at risk of forced recruitment by the

Taliban before he left Afghanistan. However, forced recruitment in a war as such, like the risk of being killed or injured in a war, does not necessarily amount to inhuman or degrading treatment. As the High Administrative Court had not elaborated whether the forced recruitment amounted to inhuman or degrading treatment in the present case, there were no sufficient grounds to assume that the applicant had been at risk of serious harm in the sense of Art 15 of the Qualification Directive. Accordingly, the facts established did not allow for an application of Art 4.4 of the Qualification Directive.

The Federal Administrative Court noted that in the context of Art 4.4 of the Qualification Directive an internal nexus must exist between the serious harm or threats of serious harm suffered in the past, and the risk of a future harm. This is the case both in the context of refugee protection and in the context of subsidiary protection.

iii) In *Elgafaji*, the European Court of Justice (ECJ) had put forward a definition of the term 'indiscriminate violence' under art 15 (c) of the Qualification Directive: According to the ECJ, the degree of indiscriminate violence in an armed conflict had to reach such a high level to justify the assumption that a civilian would face a real risk of a threat as defined in the Qualification Directive, simply by his or her presence in the country or in the region which was affected by the armed conflict. However, this only applied in extraordinary situations in which the degree of risk was so high that there are substantial grounds to assume that a person would be individually exposed to that risk (*Elgafaji*, para 35 to 37).

This reading of Art 15 (c) of the Qualification Directive is in line with the Court's opinion as put forward in its decision of 24 June 2008. It follows that it is necessary in any case to determine the level of indiscriminate violence in the territory in question. For this purpose it is necessary to determine approximately the number of civilians living in the territory in question and the number of acts of indiscriminate violence in the territory. Furthermore, an evaluation has to be made taking into account the number of victims and the severity of the damage suffered (deaths and injuries). Therefore it is possible to apply the criteria which have been developed to determine group persecution.

In the light of these requirements the High Administrative Court's findings on the level of indiscriminate violence or density of danger were deemed insufficient. The High Administrative Court had not even approximately established the number of civilians living in the territory in question and its findings on the dimension of civilian victims were cursory.

Outcome:


The case was referred back to the High Administrative Court. As at June 2011, a new decision of the High Administrative Court had not become known.

Observations/Comments:

An English Translation (commissioned by the Federal Administrative Court, but not officially authorised) is available at:

http://www.bverwg.de/enid/59a33681fe780a1d327dbcf8e988f439,0/Decisions_i... [10]

Attachment(s):

 [10 C 4 09.pdf](#)[11]

National / Other Legislative Provisions:

[Additional Protocol II 1977 \[12\]](#)

[Additional Protocol II 1977 - Art 1 \[13\]](#)

Links:

[1] <http://www.asylumlawdatabase.eu/en/content/en-european-convention-protection-human-rights-and-fundamental-freedoms-echr>

[2] https://www.asylumlawdatabase.eu/node/195#toc_12

[3] <http://www.asylumlawdatabase.eu/en/content/qualification-directive>

[4] <http://www.asylumlawdatabase.eu/en/content/qualification-directive#Art 4 QD>

[5] <http://www.asylumlawdatabase.eu/en/content/qualification-directive#Art%204%20QD>

[6] <http://www.asylumlawdatabase.eu/en/content/qualification-directive#Art 15 QD>

[7] <http://www.asylumlawdatabase.eu/en/content/qualification-directive#Art%2015%20QD>

[8] <https://www.asylumlawdatabase.eu/node/1306>

[9] https://www.asylumlawdatabase.eu/node/1306#toc_52

[10]

http://www.bverwg.de/enid/59a33681fe780a1d327dbcf8e988f439,0/Decisions_in_Asylum_and_Immigration

[11] <https://www.asylumlawdatabase.eu/sites/default/files/aldfiles/10%20C%204%2009.pdf>

[12] <https://www.asylumlawdatabase.eu/en/taxonomy/term/706>

[13] <https://www.asylumlawdatabase.eu/en/taxonomy/term/854>