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## **UK - Court of Appeal, 24 June 2009, QD & AH (Iraq) v Secretary of State for the Home Department with the United Nations High Commissioner for Refugees Intervening [2009] EWCA Civ 620**

**Country of Decision:**

United Kingdom

**Country of Applicant:**

Iraq

**Date of Decision:**

24-06-2009

**Court Name:**

Court of Appeal,

**Keywords:**

Indiscriminate violence

Individual threat

Internal armed conflict

Real risk

Serious harm

Subsidiary Protection

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**Relevant Legislative Provisions:**

Council of Europe Instruments > [EN - Convention for the Protection of Human Rights and Fundamental Freedoms](#) [1] > [Article 2](#) [2]

Council of Europe Instruments > [EN - Convention for the Protection of Human Rights and Fundamental Freedoms](#) [1] > [Article 3](#) [3]

Council of Europe Instruments > ECHR (Sixth Protocol)

Council of Europe Instruments > ECHR (Thirteenth Protocol)

European Union Law > [EN - Qualification Directive, Directive 2004/83/EC of 29 April 2004](#) [4] > [Art 2](#) [5]

European Union Law > [EN - Qualification Directive, Directive 2004/83/EC of 29 April 2004](#) [4] > [Art 3](#) [6]

European Union Law > [EN - Qualification Directive, Directive 2004/83/EC of 29 April 2004](#) [4] > [Art 8](#)

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European Union Law > [EN - Qualification Directive, Directive 2004/83/EC of 29 April 2004](#) [4] > [Art 15](#) [8]

European Union Law > [EN - Qualification Directive, Directive 2004/83/EC of 29 April 2004](#) [4] > [Art 16](#) [9]

European Union Law > [EN - Qualification Directive, Directive 2004/83/EC of 29 April 2004](#) [4] > [Art 17](#) [10]

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**Headnote:**

In this case the Court of Appeal considered the interpretation of Art 15 (c) of the Qualification Directive applying the decision of the CJEU in *Elgafaji* (C-465/07; 17 February, 2009).

**Facts:**

Both male applicants had failed to show that they were refugees but had argued that the levels of violence in their home areas was so serious that they qualified for protection under Art 15 (c). The Tribunal had relied on International Humanitarian Law (IHL) to interpret Art 15(c) and to evaluate the facts of the claims and had dismissed their appeals.

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**Decision & Reasoning:**

The Court began by addressing previous UK Tribunals' reliance on International Humanitarian Law (IHL) to inform the interpretation of Art 15 (c). The Court found that this had been an error; the Directive had to be considered as autonomous. The error of importing IHL had led the Tribunals to construe 'indiscriminate violence' and 'life or person' too narrowly and 'individual' too broadly, and to set the threshold of risk too high.

The problem of real risk remained to be dealt with pragmatically. The apparent contradiction between an 'individual threat' from 'indiscriminate violence' had been addressed in *Elgafaji* from which the Court quoted extensively. There was no additional legal test of exceptionality and the formulation in *Elgafaji* while legally clear left a large range for factual judgements.

On the construction of 'a risk of a threat' *Elgafaji* was less helpful and the Court was disinclined to be prescriptive but did approve a formulation that an applicant for Art 15(c) purposes would have to show that incidents of indiscriminate violence 'were happening on a wide scale and in such a way as to be of sufficient severity to pose a real risk of serious harm' to civilians generally.

'Civilian' should be restricted to genuine non-combatants. UNHCR submitted that former combatants should not be excluded but the point remains unresolved.

Applying the law the Court found that both applicants succeeded in principle and the appeals were remitted to the Tribunal for fresh decisions.

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**Outcome:**

The Appeals were allowed.

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**Subsequent Proceedings :**

The issue was revisited by the Upper Tribunal in *HM and others (Article 15 (c) (Iraq) CG [2010] UKUT 331 (IAC)* and [11][HM \(Iraq\) & Anor v Secretary of State for the Home Department \[2011\] EWCA Civ 1536 \[11\] \(13 December 2011\)](#) (see separate summary on EDAL).

### Observations/Comments:

The judgment appends the submissions of UNHCR. When the successor case *HM & Others (Article 15 (c) ) Iraq CG [2010] UKUT 331 (IAC)* was heard by the Tribunal UNHCR was joined as a party and made submissions. However in [HM \(Iraq\) and RM \(Iraq\) v Secretary of State for the Home Department \[2011\] EWCA Civ 1536 \[11\]](#) the Court of Appeal found an error of law and remitted the appeals to the Tribunal. There has yet to be a definitive application of the law to the situation in Iraq (as of the 6th February 2012).

### Attachment(s):



[Original judgment \[2009\] EWCA Civ 620.pdf](#)[12]

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### 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\\_4](https://www.asylumlawdatabase.eu/node/195#toc_4)
- [3] [https://www.asylumlawdatabase.eu/node/195#toc\\_12](https://www.asylumlawdatabase.eu/node/195#toc_12)
- [4] <http://www.asylumlawdatabase.eu/en/content/qualification-directive>
- [5] <http://www.asylumlawdatabase.eu/en/content/qualification-directive#Art%202%20QD>
- [6] <http://www.asylumlawdatabase.eu/en/content/qualification-directive#Art%203%20QD>
- [7] <http://www.asylumlawdatabase.eu/en/content/qualification-directive#Art 8 QD>
- [8] <http://www.asylumlawdatabase.eu/en/content/qualification-directive#Art 15 QD>
- [9] <http://www.asylumlawdatabase.eu/en/content/qualification-directive#Art%2016%20QD>
- [10] <http://www.asylumlawdatabase.eu/en/content/qualification-directive#Art 17 QD>
- [11] <https://www.asylumlawdatabase.eu/en/case-law/uk-court-appeal-13-december-2011-hm-iraq-and-rm-iraq-v-secretary-state-home-department-2011>
- [12] <https://www.asylumlawdatabase.eu/sites/default/files/aldfiles/Original%20judgment%20%5B2009%5D%20>