

JUDGMENT OF THE COURT (Second Chamber)

26 February 2015 (*)

(Reference for a preliminary ruling — Area of freedom, security and justice — Asylum — Directive 2004/83/EC — Article 9(2)(b), (c), and (e) — Minimum standards for the qualification and status of third-country nationals or stateless persons as refugees — Conditions for obtaining refugee status — Acts of persecution — Criminal penalties for a member of the armed forces of the United States for refusing to serve in Iraq)

In Case C-472/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bayerisches Verwaltungsgericht München (Germany), made by decision of 20 August 2013, received at the Court on 2 September 2013, in the proceedings

Andre Lawrence Shepherd

v

Bundesrepublik Deutschland,

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, K. Lenaerts, Vice-President of the Court, acting as a Judge of the Second Chamber, J.-C. Bonichot (Rapporteur), A. Arabadjiev and J. L. da Cruz Vilaça, Judges,

Advocate General: E. Sharpston,

Registrar: I. Illéssy, Administrator,

having regard to the written procedure and further to the hearing on 25 June 2014,

after considering the observations submitted on behalf of:

- Mr Shepherd, by R. Marx, Rechtsanwalt,
- the German Government, by T. Henze, A. Wiedmann and K. Petersen, acting as Agents,
- the Greek Government, by M. Michelogiannaki, acting as Agent,
- the Netherlands Government, by M. Bulterman and B. Koopman, acting as Agents,
- the United Kingdom Government, by M. Holt, acting as Agent, and S. Fatima, Barrister,
- the European Commission, by M. Condou-Durande and W. Bogensberger, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 11 November 2014,

gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 9(2)(b), (c) and (e) 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 (OJ 2004 L 304, p. 12).
- 2 The request has been made in proceedings between Mr Shepherd, a national of the United States of America, and the Federal Republic of Germany concerning the latter's decision refusing to grant him refugee status.

Legal context

The Geneva Convention relating to the Status of Refugees

- 3 Under the first subparagraph of Article 1(A)(2) of the Convention relating to the Status of Refugees, signed at Geneva on 28 July 1951 (*United Nations Treaty Series*, Vol. 189, p. 150, No 2545 (1954)), which entered into force on 22 April 1954 ('the Geneva Convention'), as supplemented by the Protocol relating to the Status of Refugees, concluded in New York on 31 January 1967, which entered into force on 4 October 1967, the term 'refugee' is to apply to any person who 'owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it'.

Directive 2004/83

- 4 Directive 2004/83 contains the following recitals:

'(1) A common policy on asylum, including a Common European Asylum System, is a constituent part of the European Union's objective of progressively establishing an area of freedom, security and justice open to those who, forced by circumstances, legitimately seek protection in the [European Union].

...

(3) The Geneva Convention ... [constitutes] the cornerstone of the international legal regime for the protection of refugees.

...

(6) The main objective of this Directive is, on the one hand, to ensure that Member States apply common criteria for the identification of persons genuinely in need of international protection, and, on the other hand, to ensure that a minimum level of benefits is available for these persons in all Member States.

...

(16) Minimum standards for the definition and content of refugee status should be laid down to guide the competent national bodies of Member States in the application of the Geneva Convention.

(17) It is necessary to introduce common criteria for recognising applicants for asylum as refugees within the meaning of Article 1 of the Geneva Convention.'

5 In accordance with Article 1 of Directive 2004/83, the purpose of that directive is to lay down minimum standards as regards, first, the requirements to be met by third-country nationals or stateless persons in order to receive international protection and, secondly, the content of the protection granted.

6 According to Article 2(c), for the purposes of that directive, ““refugee” means a third country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country ...’.

7 Article 4 of Directive 2004/83 sets out the conditions for the assessment of the relevant facts and circumstances which the applicant must submit in order to substantiate his application for international protection. Article 4(3) provides:

‘The assessment of an application for international protection is to be carried out on an individual basis and includes taking into account:

- (a) all relevant facts as they relate to the country of origin at the time of taking a decision on the application; including laws and regulations of the country of origin and the manner in which they are applied;
- (b) the relevant statements and documentation presented by the applicant including information on whether the applicant has been or may be subject to persecution ...;
- (c) the individual position and personal circumstances of the applicant, including factors such as background, gender and age, so as to assess whether, on the basis of the applicant’s personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm;

...’

8 Article 9 of that directive, entitled ‘Acts of persecution’, defines those acts, in its first and second paragraphs, as follows:

‘1. Acts of persecution within the meaning of [Article 1(A)] of the Geneva Convention must:

- (a) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms [signed at Rome on 4 November 1950]; or
- (b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a).

2. Acts of persecution as qualified in paragraph 1, can, inter alia, take the form of:

...

- (b) legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner;
- (c) prosecution or punishment, which is disproportionate or discriminatory;

...

- (e) prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling under the exclusion clauses as set out in Article 12(2);

...'

9 In accordance with Article 9(3) of Directive 2004/83, there must be a connection between the reasons for persecution mentioned in Article 10 and the acts of persecution.

10 Article 12 of that directive, entitled 'Exclusion', provides in its second and third paragraphs:

'2. A third country national or a stateless person is excluded from being a refugee where there are serious reasons for considering that:

- (a) he or she has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
- (b) he or she has committed a serious non-political crime outside the country of refuge prior to his or her admission as a refugee; which means the time of issuing a residence permit based on the granting of refugee status; particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes;
- (c) he or she has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations.

3. Paragraph 2 applies to persons who instigate or otherwise participate in the commission of the crimes or acts mentioned therein.'

11 Under Article 13 of Directive 2004/83, a Member State is to grant the applicant refugee status if that person meets, inter alia, the requirements laid down in Articles 9 and 10 of the directive.

German law

12 Under Paragraph 3(1) and (2) of the Law on asylum procedure (Asylverfahrensgesetz) of 27 July 1993 (BGBl 1993 I, p. 1361) as published on 2 September 2008 (BGBl 2008 I, p. 1798; 'the AsylVfG'), to which the national court refers:

'1. A foreigner is a refugee within the meaning of the [Geneva Convention] if, in the country of his nationality or of his former habitual residence as a stateless person, he is exposed to the threats listed in Paragraph 60(1) of the Law on the residence, employment and integration of foreign nationals in the Federal Territory [Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet] of 30 July 2004 (BGBl. 2004 I, p. 1950; 'the Aufenthaltsgesetz').

2. A foreigner is not a refugee under (1) where there are serious reasons for considering that:

- (1) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes,
- (2) he has committed a serious non-political crime outside Federal Territory prior to his admission as a refugee, particularly a cruel action, even if it was committed with an allegedly political objective, or
- (3) he has acted contrary to the purposes and principles of the United Nations.

The first sentence shall apply also to foreigners who have instigated or otherwise participated in the commission of the crimes or acts mentioned therein.'

- 13 Paragraph 60(1) of the Aufenthaltsgesetz, in the version published on 25 February 2008 (BGBl. 2008 I, p. 162):

‘1. Pursuant to the [Geneva Convention] ... a foreigner may not be deported to a State in which his life or freedom is threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. ... Persecution for the purposes of the first sentence may emanate from

- (a) the State,
- (b) parties or organisations controlling the State or substantial parts of the territory of the State, or
- (c) non-State actors, if it can be demonstrated that the actors mentioned in (a) and (b), including international organisations, are unable or unwilling to provide protection against persecution, irrespective of whether or not a power exercising State rule exists in the country,

unless an alternative means of escape is available within the State concerned. Article 4(4) and Articles 7 to 10 of Council Directive 2004/83/EC ... shall additionally be applied in determining whether there is persecution for the purposes of the first sentence. Where the foreigner invokes the prohibition of deportation under this subparagraph, the Bundesamt für Migration und Flüchtlinge [Federal Office for Migration and Refugees] shall establish in an asylum procedure whether the conditions set out in the first sentence apply and the foreigner is to be granted refugee status ... The decision of the Bundesamt für Migration und Flüchtlinge is subject to appeal only in accordance with the provisions of the AsylVfG.’

The dispute in the main proceedings and the questions referred for a preliminary ruling

- 14 In December 2003 Mr Shepherd, a national of the United States of America, enlisted for service in that country’s army, for a period of active service of 15 months. He was trained as a helicopter maintenance mechanic and, in September 2004, was transferred to an air support battalion in Katterbach (Germany). His unit was at that time deployed in Iraq and he was accordingly sent on to Camp Speicher, near Tikrit (Iraq).
- 15 He worked in helicopter maintenance from September 2004 to February 2005 and did not directly participate in either military action or combat operations.
- 16 In February 2005 his unit returned to Germany. He extended the term of his contract.
- 17 On 1 April 2007, he received a travel order to return to Iraq. Before his planned departure from Germany, he left the army on 11 April 2007, believing that he must no longer play any part in a war in Iraq he considered illegal, and in the war crimes that were, in his view, committed there. He stayed with an acquaintance until applying to the competent German authorities for asylum in August 2008. In support of his application, he submitted, in essence, that because of his refusal to perform military service in Iraq, he was at risk of criminal prosecution and that, desertion being a serious offence in the United States, it affected his life by putting him at risk of social ostracism in his country.
- 18 On 31 March 2011, the Bundesamt für Migration und Flüchtlinge rejected the asylum application.
- 19 Mr Shepherd asked the referring court to annul that decision and to order that he be granted refugee status. He relied on Article 3(1) and (4) of the AsylVfG in conjunction with Article 60(1) of the Aufenthaltsgesetz.
- 20 For the referring court, beyond the issue of whether Mr Shepherd will in future face persecution in his country of origin because of his desertion, it is necessary, in particular, to

determine the level of involvement of a member of the armed forces in military operations necessary in order for the penalties which arise from his desertion to constitute 'acts of persecution' within the meaning of Article 9(2)(e) of Directive 2004/83, given that the phrase 'military service which would include crimes or acts falling under the exclusion clauses as set out in Article 12(2)' used in that provision is not clearly defined.

- 21 It was in those circumstances that the Bayerisches Verwaltungsgericht München (Bavarian Administrative Court, Munich) decided to stay the proceedings before it and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is Article 9(2)(e) of Directive 2004/83/EC to be interpreted as meaning that the protection afforded extends only to those persons whose specific military duties include direct participation in combat, that is armed operations, and/or who have the authority to order such operations (first alternative), or can other members of the armed forces also fall within the scope of the protection afforded by that legislation if their duties are confined to logistical, technical support for the unit outwith actual combat and have only an indirect effect on the actual fighting (second alternative)?

- (2) If the answer to Question 1 is that the second alternative applies:

Is Article 9(2)(e) of Directive 2004/83/EC to be interpreted as meaning that military service in a conflict (international or domestic) must predominantly or systematically call for or require the commission of crimes or acts as defined in Article 12(2) of Directive 2004/83/EC (first alternative), or is it sufficient if the applicant for asylum states that, in individual cases, crimes, as defined in Article 12(2)(a) of Directive 2004/83/EC, were committed by the armed forces to which he belongs in the area of operations in which they were deployed, either because individual operational orders have proved to be criminal in that sense, or as a result of the excesses of individuals (second alternative)?

- (3) If the answer to Question 2 is that the second alternative applies:

Is refugee protection granted only if it is significantly likely, beyond reasonable doubt, that infringements of international humanitarian law can be expected to occur in the future also, or is it sufficient if the applicant for asylum sets out facts which indicate that such crimes are (necessarily or probably) occurring in that particular conflict, and the possibility of his becoming involved in them therefore cannot be ruled out?

- (4) Does the intolerance of or prosecution by military service courts of infringements of international humanitarian law preclude refugee protection pursuant to Article 9(2)(e) of Directive 2004/83/EC, or is that aspect immaterial?

Must there even have been a prosecution before the International Criminal Court?

- (5) Does the fact that the deployment of troops and/or the occupation is sanctioned by the international community or is based on a mandate from the United Nations Security Council preclude refugee protection?

- (6) Is it necessary, in order for refugee protection to be granted pursuant to Article 9(2)(e) of Directive 2004/83/EC, that the applicant for asylum could, if he performed his duties, be convicted under the statutes of the International Criminal Court (first alternative), or is refugee protection afforded even before that threshold is reached and the applicant for asylum thus has no criminal prosecution to fear but is nevertheless unable to reconcile the performance of the military service with his conscience (second alternative)?

- (7) If the answer to Question 6 is that the second alternative applies:

Does the fact that the applicant for asylum has not availed himself of the ordinary conscientious objection procedure — even though he would have had the opportunity to do so — preclude refugee protection pursuant to the abovementioned provisions, or

is refugee protection also a possibility in the case of a particular decision based on conscience?

- (8) Does dishonourable discharge from the army, the imposition of a prison sentence and the social ostracism and disadvantages associated therewith constitute an act of persecution within the meaning of Article 9(2)(b) or (c) of Directive 2004/83/EC?

Consideration of the questions referred

Preliminary observations

- 22 It must be noted, first of all, that it is apparent from recitals 3, 16 and 17 in the preamble to Directive 2004/83 that the Geneva Convention constitutes the cornerstone of the international legal regime for the protection of refugees and that the provisions of that directive for determining who qualifies for refugee status and the content thereof were adopted to guide the competent authorities of the Member States in the application of that convention on the basis of common concepts and criteria (judgment in *X and Others*, C-199/12 to C-201/12, EU:C:2013:720, paragraph 39 and the case-law cited).
- 23 Directive 2004/83 must, for that reason, be interpreted in the light of its general scheme and purpose, and in a manner consistent with the Geneva Convention and the other relevant treaties referred to in Article 78(1) TFEU. As is apparent from recital 10 in the preamble thereto, the directive must also be interpreted in a manner consistent with the rights recognised by the Charter of Fundamental Rights of the European Union (judgment in *X and Others*, EU:C:2013:720, paragraph 40).
- 24 Secondly, it must be noted that, under Article 2(c) of Directive 2004/83, the term 'refugee' refers, in particular, to a third-country national who is outside the country of his nationality 'owing to a well-founded fear of being persecuted' for reasons of race, religion, nationality, political opinion or membership of a particular social group and is unable or, 'owing to such fear', unwilling to avail himself of the 'protection' of that country. The national concerned must therefore, on account of circumstances existing in his country of origin, have a well-founded fear of being personally the subject of persecution for at least one of the five reasons listed in that directive and the Geneva Convention (judgment in *Salahadin Abdulla and Others*, C-175/08, C-176/08, C-178/08 and C-179/08, EU:C:2010:105, paragraphs 56 and 57).
- 25 Thirdly, it must be emphasised that Article 9 of Directive 2004/83 sets out the factors which support a finding that acts constitute persecution within the meaning of Article 1(A) of the Geneva Convention. In that regard, Article 9(1)(a) of that directive states that the relevant acts must be sufficiently serious by their nature or repetition to constitute a severe violation of basic human rights, in particular the unconditional rights from which there can be no derogation, in accordance with Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Moreover, Article 9(1)(b) of Directive 2004/83 states that an accumulation of various measures, including violations of human rights, which is sufficiently severe to affect an individual in a manner similar to that referred to in Article 9(1)(a) of that directive, must also be regarded as amounting to persecution. It is clear from those provisions that, for an infringement of fundamental rights to constitute persecution within the meaning of Article 1(A) of the Geneva Convention, it must be sufficiently serious (judgment in *X and Others*, EU:C:2013:720, paragraphs 51 to 53).
- 26 Fourthly, it must be pointed out that, under Article 4(3)(a), (b) and (c) of Directive 2004/83, in the individual assessment of an application for international protection, account must be taken of all the relevant facts as they relate to the country of origin at the time of taking a decision on the application, of the relevant statements and documentation presented by the applicant, and of his individual position and his personal circumstances.
- 27 It is in the light of those considerations that Article 9(2)(e) of Directive 2004/83, to which the national court refers in its first seven questions, and Article 9(2)(b) and (c), referred to in its eighth question, must be interpreted.

- 28 From that point of view, it must also be recalled that, according to Article 9(2) of Directive 2004/83, '[a]cts of persecution as qualified in paragraph 1, can, inter alia, take the form of: ... (b) legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner; (c) prosecution or punishment, which is disproportionate or discriminatory; ... (e) prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling under the exclusion clauses as set out in Article 12(2)'.
- 29 In addition, with respect to Article 12(2) of Directive 2004/83, as the Advocate General pointed out in points 39 to 43 of her Opinion, only the reference to 'war crimes' in Article 12(2)(a) is relevant to the case before the referring court.

Questions 1 to 7

- 30 By these questions, which may appropriately be examined together, the referring court asks, in essence, whether Article 9(2)(e) of Directive 2004/83 must be interpreted as meaning that certain circumstances, relating in particular to the nature of the tasks performed by the soldier concerned, the nature of his refusal to perform military service, the nature of the conflict in question and the nature of the crimes which that conflict is alleged to involve, have a decisive influence in the assessment which must be carried out by the national authorities in order to verify whether a situation such as that at issue in the main proceedings falls within the scope of that provision.
- 31 Before assessing the significance of those circumstances, it must first be pointed out that it is undisputed that, in the case in the main proceedings, the national seeking refugee status faces prosecution and punishment in his country of origin for refusing to perform military service in a conflict. Consequently, the present questions, as can, moreover, be seen from the order for reference, do not concern the reasons for the persecution, dealt with in Article 10 of Directive 2004/83, but only the circumstances that are necessary in order for that prosecution and punishment to constitute 'acts of persecution' as referred to in Article 9(2)(e) of that directive.
- 32 Secondly, it must be noted that the objective of Directive 2004/83, as can be seen, inter alia, from recitals 1 to 6 in the preamble thereto, is to identify persons who, forced by circumstances, genuinely and legitimately need international protection in the European Union. The context of that directive is essentially humanitarian (see, to that effect, judgment in *B and D*, C-57/09 and C-101/09, EU:C:2010:661, paragraph 93).
- 33 In that context, it must be pointed out that Article 9(2)(e) of Directive 2004/83, in that it refers to the refusal to perform military service in a conflict, where performing military service would include war crimes, is in no way restrictive as regards the persons concerned by such service. It must therefore be acknowledged that the EU legislature, in adopting that provision, did not mean to restrict its scope to certain personnel performing such service on the basis, inter alia, of their rank in the military hierarchy, the circumstances in which they were recruited or even the nature of their tasks. As the Advocate General pointed out in point 32 of her Opinion, that provision covers all military personnel, including, therefore, logistical or support staff.
- 34 However, given that the objective of Directive 2004/83, recalled in paragraph 32 of the present judgment, is to identify persons who, forced by circumstances, genuinely and legitimately need international protection in the European Union, being a member of the military is a necessary but not sufficient condition for being eligible for the protection provided for in Article 9(2)(e) of that directive.
- 35 As regards, in the first place, the conditions for the application of Article 9(2)(e) of Directive 2004/83, it must be pointed out, first, that that provision refers to a conflict situation. It follows that, outwith such a conflict situation, any refusal to perform military service, irrespective of the motive, could not fall within the ambit of that provision. The circumstances whose significance the Court is asked to assess in order to define that ambit must therefore relate directly to a particular conflict.

- 36 Secondly, it can be seen from the very wording of Article 9(2)(e) of Directive 2004/83 that it is the military service itself that would involve war crimes. That provision does not refer solely to the situation in which the applicant would be led to commit such crimes personally.
- 37 It follows that the EU legislature intended the general context in which that service is performed to be taken into account objectively. Accordingly, situations in which the applicant would participate only indirectly in the commission of such crimes, because, *inter alia*, he is not a member of the combat troops but rather, for example, serves in a unit providing logistical or technical support, are not, as a matter of principle, excluded. Consequently, the fact that the person concerned, because of the merely indirect nature of that participation, could not be prosecuted under criminal law, in particular before the International Criminal Court, cannot preclude protection arising from Article 9(2)(e) of Directive 2004/83.
- 38 However, although the enjoyment of international protection is not limited to those who could be led to commit acts which constitute war crimes personally, such as combat troops, that protection can be extended only to those other persons whose tasks could, sufficiently directly and reasonably plausibly, lead them to participate in such acts.
- 39 Thirdly, Article 9(2)(e) of Directive 2004/83 is intended to protect the applicant who opposes military service because he does not wish to run the risk of committing, in the future, acts of the nature of those referred to in Article 12(2) of that directive. The person concerned can therefore invoke only the likelihood of such acts being committed. It follows that Article 9(2)(e) of that directive cannot be interpreted as covering exclusively situations in which it is established that the applicant's unit has already committed war crimes. Nor can it be required that the acts of that unit should already have been penalised by the International Criminal Court, even if the latter had jurisdiction do so.
- 40 Fourthly and lastly, while in the assessment of the facts which, under Article 4(3) of Directive 2004/83, it is for the national authorities alone to carry out, acting under the supervision of the courts, in order to determine the situation of the military service concerned, certain events such as, *inter alia*, the past conduct of the applicant's unit or criminal sentences passed on members of that unit may constitute indicia that it is probable the unit will commit further war crimes, such events cannot by themselves automatically establish, at the time of the applicant for refugee status's refusal to serve, that it is likely that such crimes will be committed. Against that background, the assessment which the national authorities must carry out can be based only on a body of evidence which alone is capable of establishing, in view of the circumstances in question, that the situation of that military service makes it credible that such acts will be committed.
- 41 As regards, in the second place, the importance to be attached to the possibility that the State concerned prosecutes war crimes or that the armed intervention was engaged upon on the basis of a mandate of the United Nations Security Council or yet on the basis of a consensus on the part of the international community, it must be noted, first, that an armed intervention engaged upon on the basis of a resolution adopted by that Security Council offers, in principle, every guarantee that no war crimes will be committed and that the same applies, in principle, to an operation which gives rise to an international consensus. Accordingly, although the possibility can never be excluded that acts contrary to the very principles of the Charter of the United Nations will be committed in war operations, the fact that the armed intervention takes place in such a context must be taken into account.
- 42 It must be pointed out, secondly, that, in accordance with Article 4(3)(a) of Directive 2004/83, importance must also be attached to the possibility that the State or States which conduct the operations prosecute war crimes. The existence, in the legal system of those States, of legislation penalising war crimes and of courts which ensure the effective punishment of those who commit such crimes is liable to render implausible the hypothesis that a soldier of one of those States could be led to commit such crimes and, accordingly, may in no case be disregarded.
- 43 It follows that, in those circumstances, it is for the person seeking refugee status under Article 9(2)(e) of Directive 2004/83 to establish with sufficient plausibility that his unit

carries out operations assigned to it, or has carried them out in the past, in such conditions that it is highly likely that acts such as those referred to in that provision will be committed.

- 44 Thirdly, since the acts of persecution invoked by the applicant for refugee status must, in accordance with those provisions of Directive 2004/83, arise from his refusal to perform military service, that refusal must constitute the only means by which that applicant could avoid participating in the alleged war crimes. In that respect, the assessment that has to be carried out by the national authorities must take into account, in accordance with Article 4(3)(c) of Directive 2004/83, the fact, *inter alia*, that, in the present case, the applicant not only enlisted voluntarily in the armed forces at a time when they were already involved in the conflict in Iraq but also, after carrying out one tour of duty in that country, re-enlisted in those forces.
- 45 It follows that the fact, invoked by the referring court in its seventh question, that the applicant for refugee status did not avail himself of a procedure for obtaining conscientious objector status excludes any protection under Article 9(2)(e) of Directive 2004/83, unless that applicant proves that no procedure of that nature would have been available to him in his specific situation.
- 46 Having regard to all of the foregoing, the answer to the first to seventh questions is that Article 9(2)(e) of Directive 2004/83 must be interpreted as meaning that:
- it covers all military personnel, including logistical or support personnel;
 - it concerns the situation in which the military service performed would itself include, in a particular conflict, the commission of war crimes, including situations in which the applicant for refugee status would participate only indirectly in the commission of such crimes if it is reasonably likely that, by the performance of his tasks, he would provide indispensable support to the preparation or execution of those crimes;
 - it does not exclusively concern situations in which it is established that war crimes have already been committed or are such as to fall within the scope of the International Criminal Court's jurisdiction, but also those in which the applicant for refugee status can establish that it is highly likely that such crimes will be committed;
 - the factual assessment which it is for the national authorities alone to carry out, under the supervision of the courts, in order to determine the situation of the military service concerned, must be based on a body of evidence capable of establishing, in view of all the circumstances of the case, particularly those concerning the relevant facts as they relate to the country of origin at the time of taking a decision on the application and to the individual position and personal circumstances of the applicant, that the situation in question makes it credible that the alleged war crimes would be committed;
 - the possibility that military intervention was engaged upon pursuant to a mandate of the United Nations Security Council or on the basis of a consensus on the part of the international community or that the State or States conducting the operations prosecute war crimes are circumstances which have to be taken into account in the assessment that must be carried out by the national authorities; and
 - the refusal to perform military service must constitute the only means by which the applicant for refugee status could avoid participating in the alleged war crimes, and, consequently, if he did not avail himself of a procedure for obtaining conscientious objector status, any protection under Article 9(2)(e) of Directive 2004/83 is excluded, unless that applicant proves that no procedure of that nature would have been available to him in his specific situation.

Question 8

- 47 By its eighth question, the referring court asks, in essence, whether Article 9(2)(b) and (c) of Directive 2004/83 must be interpreted as meaning that the measures incurred by a soldier as a result of his refusal to perform military service, such as the imposition of a prison sentence, dishonourable discharge from the army, and the ostracism and disadvantages associated therewith constitute acts of persecution for the purpose of those provisions.
- 48 In the light of the considerations set out in support of its previous questions, the referring court must be regarded as linking the present question only to the hypothesis that the national authorities responsible for examining the application for refugee status of the applicant in the main proceedings consider that it is not established that the military service he refuses to perform would include the commission of war crimes.
- 49 It is necessary, in those circumstances, to point out, first of all, that the provisions of Article 9(2)(b) and (c) of Directive 2004/83 refer to measures taken by the public authorities whose discriminatory or disproportionate nature must, according to the first paragraph of that article, be sufficiently serious, as recalled in paragraph 25 of the present judgment, in order to be considered an infringement of fundamental rights constituting persecution within the meaning of Article 1(A) of the Geneva Convention.
- 50 As the Advocate General pointed out, in point 80 of her Opinion, in assessing whether the prosecution and penalties that might be incurred by the applicant in the main proceedings in his country of origin, because of his refusal to perform military service, are disproportionate, it is necessary to consider whether such acts go beyond what is necessary for the State concerned in order to exercise its legitimate right to maintain an armed force.
- 51 Even though the assessment of what is necessary in that respect entails taking into account various factors, of, in particular, a political and strategic nature, on which the legitimacy of that right and the conditions for its exercise are based, nothing in the file before the Court suggests that such a right should, in the context of the case before the referring court, be called into question, that its exercise does not justify the imposition of criminal penalties on soldiers who intend to evade their service, or that they should not, in that case, be discharged from the army.
- 52 Although it can be seen from the information provided by the referring court that the applicant in the main proceedings runs the risk of a custodial sentence for desertion of 100 days to 15 months, or even of five years, nothing in the file submitted to the Court suggests that such measures clearly go beyond which is necessary for the State concerned to exercise its legitimate right to maintain an armed force.
- 53 It is, however, for the national authorities to carry out, in that respect, an examination of all the relevant facts concerning the country of origin of the applicant for refugee status, including, as laid down in Article 4(3)(a) of Directive 2004/83, the laws and regulations of that country and the manner in which they are applied.
- 54 Next, assessment of the discriminatory nature of the acts in question would entail ascertaining whether, regard being had to the objectives of legislation arising from the legitimate exercise of the right to maintain an armed force, the situation of soldiers refusing to perform military service may be compared to that of other persons, in order to assess whether the penalties imposed on the former are of a clearly discriminatory nature. Nothing in the file before the Court suggests that such a comparable situation exists in the present case. It is in any event for the national authorities to ascertain whether that is indeed the case.
- 55 Lastly, 'the social ostracism and disadvantages associated therewith' invoked in the referring court's question seem only to be the consequences of the measures, prosecution or punishment referred to in Article 9(2)(b) and (c) of Directive 2004/83 and cannot, therefore, be regarded as acts of persecution for the purpose of those provisions.
- 56 Having regard to the foregoing, the answer to the eighth question is that Article 9(2)(b) and (c) of Directive 2004/83 must be interpreted as meaning that, in circumstances such as

those in the main proceedings, it does not appear that the measures incurred by a soldier because of his refusal to perform military service, such as the imposition of a prison sentence or discharge from the army, may be considered, having regard to the legitimate exercise, by that State, of its right to maintain an armed force, so disproportionate or discriminatory as to amount to acts of persecution for the purpose of those provisions. It is, however, for the national authorities to ascertain whether that is indeed the case.

Costs

- 57 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

1. **Article 9(2)(e) 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 must be interpreted as meaning that:**
 - **it covers all military personnel, including logistical or support personnel;**
 - **it concerns the situation in which the military service performed would itself include, in a particular conflict, the commission of war crimes, including situations in which the applicant for refugee status would participate only indirectly in the commission of such crimes if it is reasonably likely that, by the performance of his tasks, he would provide indispensable support to the preparation or execution of those crimes;**
 - **it does not exclusively concern situations in which it is established that war crimes have already been committed or are such as to fall within the scope of the International Criminal Court's jurisdiction, but also those in which the applicant for refugee status can establish that it is highly likely that such crimes will be committed;**
 - **the factual assessment which it is for the national authorities alone to carry out, under the supervision of the courts, in order to determine the situation of the military service concerned, must be based on a body of evidence capable of establishing, in view of all the circumstances of the case, particularly those concerning the relevant facts as they relate to the country of origin at the time of taking a decision on the application and to the individual position and personal circumstances of the applicant, that the situation in question makes it credible that the alleged war crimes would be committed;**
 - **the possibility that military intervention was engaged upon pursuant to a mandate of the United Nations Security Council or on the basis of a consensus on the part of the international community or that the State or States conducting the operations prosecute war crimes are circumstances which have to be taken into account in the assessment that must be carried out by the national authorities; and**
 - **the refusal to perform military service must constitute the only means by which the applicant for refugee status could avoid participating in the alleged war crimes, and, consequently, if he did not avail himself of**

a procedure for obtaining conscientious objector status, any protection under Article 9(2)(e) of Directive 2004/83 is excluded, unless that applicant proves that no procedure of that nature would have been available to him in his specific situation.

- 2. Article 9(2)(b) and (c) of Directive 2004/83 must be interpreted as meaning that, in circumstances such as those in the main proceedings, it does not appear that the measures incurred by a soldier because of his refusal to perform military service, such as the imposition of a prison sentence or discharge from the army, may be considered, having regard to the legitimate exercise, by that State, of its right to maintain an armed force, so disproportionate or discriminatory as to amount to acts of persecution for the purpose of those provisions. It is, however, for the national authorities to ascertain whether that is indeed the case.**

[Signatures]

* Language of the case: German.