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Our Reference
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When replying please state the date and our reference and only deal with one subject in your letter.

Date 17 March 2009
Re The Judgment of the European Court of Justice of the European Communities in respect of the Qualification Directive

1 Introduction

On the 19th of February last, we held an emergency debate on the judgment of the Court of Justice of the European Communities (hereinafter: "the ECJ") in respect of Article 15(c) of Directive 2004/83/EC of the Council 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 (hereinafter: "the Qualification Directive")[1].

During this debate I promised you that I would send an analysis of the judgment not later than 17 March. The date of 17 March was chosen because the Administrative Jurisdiction Division of the Council of State [*Afdeling Bestuursrechtspraak van de Raad van State*] (hereinafter: "the Division") had scheduled a hearing for the case to which this judgment relates. The promised analysis is set forth below.

The analysis leads me to conclude that the judgment of the ECJ will not have significant implications for asylum practices in the Netherlands, as I anticipate that "exceptional situations", in particular, will mainly occur in a very limited number of situations. No policy changes are required at the present time. Therefore, on the basis of this further analysis, I see no reason to reconsider asylum decisions already given.

2 Framework

Section 29 (1) of the Aliens Act 2000 sets forth the grounds on which an asylum seeker can qualify for a temporary asylum residence permit. This residence permit can be granted to the foreign national:

a. who is a convention refugee;
b. who has shown substantial grounds for believing that if returned to the country of origin, he or she would face a real risk of being exposed to torture or inhuman or degrading treatment or punishment;

[1] Directive 2004/83 of 29 April 2004, OJEC 2004, L 304. The Qualification Directive was transposed into Dutch law with effect from 25 April 2008 under the Aliens Act 2000 [*Vreemdelingenwet 2000*] (Bulletin of Acts and Decrees [*Staatsblad* (*Stb.*).] 2008, 115) and under the Aliens Decree 2000 [*Vreemdelingenbesluit 2000*] (Bulletin of Acts and Decrees 2008, 116) and with effect from 25 May 2008 under the Regulations on Aliens 2000 [*Voorschrift Vreemdelingen 2000*] (Netherlands Government Gazette [*Staatscourant* (*Stcrt.*)] 2008, 97).

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c. who, in the opinion of the Minister of Justice, cannot reasonably be expected to return to the country of origin for compelling reasons of a humanitarian nature which are related to the reasons for his or departure from the country of origin;
d. for whom return to the country of origin would be, in the opinion of the Minister of Justice, unduly harsh on account of the general situation in that country, or
e. who as husband or wife or minor child actually forms part of the family unit of the foreign national, referred to in paragraphs a to d inclusive, who has the same nationality as this foreign national and entered the Netherlands together with this foreign national or followed this foreign national to the Netherlands within three months after the foreign national, referred to in paragraphs a to d inclusive, was granted the temporary residence permit, referred to in Section 28;
f. who as partner or as adult child who is so dependent on the foreign national, referred to in paragraphs a to d inclusive, that for this reason he or she forms part of the family unit of this foreign national, who has the same nationality as this foreign national and entered the Netherlands together with this foreign national or followed this foreign national to the Netherlands within three months after the foreign national, referred to in paragraphs a to d inclusive, was granted the temporary residence permit, referred to in Section 28.

The grounds set forth in paragraphs a and b provide the protection to which the Qualification Directive relates. These provisions are based on the Refugee Convention and Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: "the ECHR"). Therefore, the protection enshrined in these provisions is also referred to as international protection.

The remaining grounds of Section 29(1) of the Aliens Act 2000 are based on national policy and therefore provide national protection. The Qualification Directive does not relate to this national protection.

3 International Protection under the Qualification Directive

The Qualification Directive provides for two forms of international protection:
1. the refugee status;
2. the subsidiary protection status.

The first status corresponds to the protection provided under the Refugee Convention[2]. This has been included in Section 29(1a) of the Aliens Act 2000; see above in paragraph 2, under a.

A person can be eligible for subsidiary protection if he or she does not qualify for the refugee status but in respect of whom substantial grounds have been shown for believing that if returned to the country of origin, he or she would face a real risk of suffering "serious harm". The subsidiary protection status relates to the ground set forth in Section 29(1b) of the Aliens Act 2000.

The term "serious harm" is defined in Article 15 of the Qualification Directive as:

[2] The Geneva Convention of 1951 relating to the Status of Refugees (Dutch Treaty Series [*Tractatenblad* (*Trb.*)] 1954, 88) and the accompanying Protocol of New York of 1967 (Dutch Treaty Series 1967, 76).

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"Serious harm consists of:
a) death penalty or execution; or
b) torture or inhuman or degrading treatment or punishment of an applicant in the county of origin; or
c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict."

The judgment relates to paragraph c of Article 15.

4 Application of Article 15(c) of the Qualification Directive before the Judgment

During the legal proceedings which resulted in this judgment, the Netherlands took the position that Article 15(c) of the Qualification Directive does not provide supplementary or other protection in comparison with Article 3 of the ECHR.

In the assessment of an asylum application, information on the general situation in the country of origin, which is obtained from objective sources such as country reports from the Ministry for Foreign Affairs, is always taken into consideration. It follows from the forgoing that a violation of Article 3 of the ECHR will be more readily considered credible if violations are known to take place on a large scale. This has always been the established decision-making practice.

In response to the "Salah Sheekh" judgment of the European Court of Human Rights (hereinafter called: "the ECtHR") of 11 January 2007[3], the policy on "vulnerable minority groups" was developed as a supplement thereto. This policy implies the following.

Generally speaking, in order to be eligible for a temporary asylum residence permit pursuant to Section 29(1b) of the Aliens Act 2000, the foreign national has to show the existence of special distinguishing features, from which it can be inferred that on return to the country of origin, he or she would face a real risk of being exposed to the acts referred to in this provision. In those cases in which indiscriminate acts of violence or indiscriminate violations of human rights are being committed in the country of origin, these acts of violence or these violations will not constitute as such sufficient grounds to assume a real and individual risk of exposure to the acts described above.

However, a real and individual risk on return – including in a situation of indiscriminate violence or indiscriminate violations of human rights – is also assumed if:
a. the foreign national belongs to a vulnerable minority group in the country of origin; and
b. he or she has shown by means of limited individual indications in themselves that a threatened violation of Article 3 of the ECHR exists in connection with his or her membership of this group.

In order to decide that the foreign national has shown by means of limited indications in themselves that a threatened violation of Article 3 of the ECHR exists, the person concerned does not have to have been personally subjected to such an act. Human rights violations committed in the immediate surroundings of the foreign national against persons who are a member of the vulnerable minority

[3] See also my letter of 22 June 2007, Parliamentary Documents [*Kamerstukken*] II 2006/07, 29 344, no. 64

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group in question, can also constitute sufficient grounds to assume this threatened violation.
It is assumed, in principle, that the human rights violations committed against the foreign national or in his or her immediate surroundings constitute sufficient grounds for deciding that the foreign national on return will - again or yet - face a real risk of being exposed to the acts referred to above.

In view of the position taken that Article 15(c) of the Qualification Directive does not provide supplementary or other protection in comparison with Article 3 of the ECHR, this policy was also aimed at effectuating the application of Article 15(c) of the Qualification Directive.

The question as to whether armed conflict was taking place in a country or region was not in itself of overriding importance for the application of the policy.

5 Content of the Judgment
The judgment was given in answer to questions referred by the Division for a preliminary ruling. The Division first asked the ECJ whether Article 15(c) of the Qualification Directive provides the same protection as Article 3 of the ECHR. In its second question the Division requested additional criteria in event that the ECJ were to find that Article 15(c) of the Qualification Directive does not provide the same protection as Article 3 of the ECHR.

The ECJ holds that in order to be eligible for subsidiary protection the asylum seekers must, in principle, show their individual risk. The ECJ emphasises that the objective finding alone of a risk linked to the general situation in a country is not, as a rule, sufficient to establish that an asylum seeker meets the conditions of Article 15(c) of the Qualification Directive. However, an exceptional situation may arise which would be characterised by such a high degree of risk that substantial grounds would be shown for believing that that person would be subject individually to the risk in question.
The more the applicant is able to show that he is specifically affected by reason of factors particular to his personal circumstances, the lower the level of indiscriminate violence required for him to be eligible for subsidiary protection.

In the individual assessment of an application for subsidiary protection, the following, in particular, can be taken into account: (1) the geographical scope of the situation of indiscriminate violence and the actual destination of the asylum seeker in the event that he or she is returned to the relevant country; and (2) the existence, if any, of a serious indication of real risk. If this indication exists, the level of indiscriminate violence required for eligibility for subsidiary protection may be lower.

The existence of a serious and individual threat to the life or person of the asylum seeker can exceptionally be considered to be established where the degree of indiscriminate violence characterising the armed conflict taking place reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, solely on account of his or her presence on the territory of that country or region, face a real risk of being subject to that threat.
The ECJ indicates in this ruling that it is up to the national authorities to assess the degree of indiscriminate violence and thus to assess whether such an exceptional situation exists.

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The ECJ further refers to the judgment of the ECtHR in respect of N.A. versus the UK of 17 July 2008. In this judgment the ECtHR considers:
"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."[4]

The ECJ considers that its interpretation of Article 15(c) of the Qualification Directive is fully compatible with the ECHR, including this judgment of the ECtHR.

6 Review in relation to Section 29(1b) of the Aliens Act 2000
With reference to the judgment of the ECJ, I envisage the review in relation to Section 29(1b) of the Aliens Act 2000 as follows.

I would firstly note that the review in relation to Section 29(1b) of the Aliens Act 2000 is only carried out once it has been established on the basis of the ground set forth in paragraph a that the foreign national is not a refugee within the meaning of the Geneva Refugee Convention.

Then the question as to whether the foreign national is facing an individual and real risk of treatment as referred to in Article 3 of the ECHR will be examined. This review corresponds to the review of whether the foreign national risks being exposed to an individual and real risk of serious harm within the meaning of Article 15 of the Qualification Directive. This may involve a situation of armed conflict but this is not essential for this review.

If an individual and real risk has not been established, it will be considered whether the foreign national belongs to a vulnerable minority group and can show already by means of limited indications that on his or her return there is a real risk of violation of Article 3 of the ECHR. This policy has been described above in paragraph 4 and does not in itself need to be amended as a result of this judgment.

Finally, in exceptional cases the degree of indiscriminate violence characterising the armed conflict taking place can reach 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 or her presence on the territory of that country or region, face a real risk of being subject to that threat. Therefore, in these cases the foreign national will only have to make plausible his or her identity and that he or she originates from the region in question in order to qualify for subsidiary protection. In these cases the foreign national is not required to belong to a vulnerable minority group.
The geographical scope of the indiscriminate violence will always be taken into account in this review.

[4] NA v United Kingdom, ECtHR 17 July 2008, no. 25904/07. This was later confirmed in the judgment in respect of F.H. v Sweden, ECtHR 20 January 2009, no. 32621/06.

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7 Application to Dutch Policy

7.1 Individual Assessment

In my opinion, the findings of the judgment are for the most part compatible with Dutch asylum policy and are in line with the case law of the ECtHR in Strasbourg.

The starting point in the assessment of asylum applications is that each case is considered individually on its merits. In the event that the general situation (of violence) in a country of origin deteriorates, the individual burden of proof of the individual foreign national will be lower. This has been incorporated as such in the Aliens Act Implementation Guidelines [*Vreemdelingencirculaire*].

7.2 Armed Conflict

It is important to note that, according to the text, Article 15(c) of the Qualification Directive only relates to situations involving international or internal armed conflict. This term has been elaborated in the case law of the Division.
The ECtHR refers in more general terms to situations of violence; "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." This does not necessarily have to correspond to the term "armed conflict".

According to the case law of the Division, there is said to be internal armed conflict if an organised armed group with a responsible command is able to carry out military operations on the territory of a country or a part of this territory against the armed forces of the authorities of that country or another faction. In that case, these military operations must be of a continuous and combined nature in order to be deemed an armed conflict. Disturbances and tensions, such as riots, are not deemed to be such a conflict.

The Ministry for Foreign Affairs has been requested, with a view to the most careful asylum practices possible, to include in the general country reports a review of the question of whether there is armed conflict, as defined by the Division, in (a part of) the relevant country. If such information is not available from the Ministry for Foreign Affairs, I will, if necessary, determine a position on this issue on the basis of the country information known or available to me. Finally, a position on this issue can also be developed in the case law.

At present armed conflicts are deemed to be taking place in:
- Columbia, in the Valle del Cauca district;
- Southern and Central Somalia;
- Sri Lanka, in the northern province; and
- Sudan, Darfur region.

An armed conflict is *not* deemed to be taking place in:
- Armenia;
- Burundi;
- Ivory Coast;
- Kosovo;
- Northern Iraq;
- Nepal;
- Russia, Chechnya in particular;
- Northern Somalia, namely Somaliland, Puntland, Sool and Sanaag;

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- Sudan, except for Darfur.

I soon expect to receive a country report containing a position in respect of armed conflict in a number of countries, namely Afghanistan, Congo (Democratic Republic), Ethiopia, Central and Southern Iraq and Turkey in particular.

7.3 Exceptional Situation

General
The ECJ indicates that in a situation of "armed conflict" an "exceptional situation" can be said to exist where the degree of indiscriminate violence characterising the armed conflict taking place reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, solely on account of his or her presence on the territory of that country or region, face a real risk. However, no clear indicators for such an exceptional situation have been given.

As a result of this judgment, I will, if there is reason to do so, lay down in the policy rules, more specifically than in the past, the extent to which an "exceptional situation" can be said to exist in a particular country or region.

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

This leads me to the conclusion that it is really difficult to imagine a situation such as the abovementioned which would not fall under the scope of the situations for which categorical protection on the basis of national policy has been introduced, as a return to the country of origin in the "exceptional situations" described will be deemed to be unduly harsh on account of the general situation in that country.

This conclusion is also supported, in my opinion, by the three indicators for the introduction of categorical policy in Section 3.106 of the Aliens Decree 2000[5]. The reference of the ECJ to the degree of indiscriminate violence and its geographical scope is comparable to the indicator set forth in paragraph a. There is also a similarity to the indicator set forth in paragraph c, as an "exceptional situation" is so serious that there will be consensus within Europe that return is out the question.

In other words: "exceptional situations" will not, in my opinion, be more widely applied than the categorical protection policy. On the other hand, the introduction

[5] Article 3.106 of the Aliens Decree 2000 reads: "The indicators which will be taken into account in any case in the assessment of whether a situation, as referred to in Section 29 (1d) of the Aliens Act, exists, are:
a. the nature of the violence in the country of origin, in particular the seriousness of the violations of the human rights and the war law, the degree of indiscriminateness, the extent to which the violence occurs and the extent of the geographical scope of the violence;
b. the activities of international organisations in respect of the country of origin if and to the extent that these activities reflect the position taken by the international community in relation to the country of origin, and
c. the policy in other countries of the European Union. "

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of categorical protection will not automatically mean that an "exceptional situation" can be said to exist, as the introduction of a categorical protection policy is a national discretionary power which is vested in me as State Secretary of Justice. This power is not confined to situations in which there is armed conflict.

First review of country information in relation to the term "exceptional situation"
A brief, first analysis of whether it must be assumed at the present time that an "exceptional situation" exists is given below. To that end, I have focussed the analysis in this context on the countries to which a policy of categorical protection applies.

In the current country-based asylum policy, there are three countries to which a categorical protection policy applies:
- Ivory Coast;
- Somalia, unless the foreign national has resided for at least six months in Puntland, Somaliland, Sool, or Sanaag;
- Sudan, for non-Arab population groups from Darfur.

The most recent general country report on the Ivory Coast[6] reveals that there is no armed conflict in this country. Therefore, Article 15(c) of the Qualification Directive does not apply and the question of whether an exceptional situation can be said to exist does not require consideration.

It follows from the recently published country report on Somalia[7] that an armed conflict can be assumed in Central and Southern Somalia. The report also reveals that the safety and security situation in large towns such as Mogadishu is dismal. However, it does not follow from the country report, in my opinion, that the geographical scope of the indiscriminate violence is such that each civilian in that entire region of Central or Southern Somalia faces a real risk on account of his or her presence in the relevant region. This situation seems to chiefly exist in the towns concerned and not outside these towns. This leads me to conclude that in this case an "exceptional situation", as defined by the ECJ, cannot be said to exist. For that reason, the current country-based asylum policy for Somalia does not need to be substantively amended in respect of this point. I will inform the House at an early date as to whether other amendments will have to be made to the country-based asylum policy for Somalia as a result of the recently published country report.

The most recent country report on Sudan[8] shows that there is armed conflict in Darfur. Civilians and in particular, displaced persons are being exposed to violence and assaults by rebel groups and militias allied with the government. Both the rebel factions and the government militias carried out attacks on or committed crimes against the population in camps for displaced persons. The population in the camps for displaced persons is mainly of African origins. According to a source, the Arab population of Darfur is still staying for the most part in its original places of residence and it is indeed living under difficult circumstances, but in relative safety and security. There is no evidence of

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[6] Ministry for Foreign Affairs, General Country Report on the Ivory Coast, January 2009, www.minbuza.nl

[7] Ministry for Foreign Affairs, General Country Report on Somalia, March 2009, www.minbuza.nl

[8] Ministry for Foreign Affairs, General Country Report on Sudan, December 2008, www.minbuza.nl

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targeted attacks being carried out by the parties in conflict against Arab villages or tribes.
It follows from these reports that the situation in Darfur is not such that each citizen faces a real risk of serious harm solely on account of his or her presence. It is the mainly non-Arabic population groups that are facing this risk. This has already been recognised in the current policy. The non-Arab population groups from Darfur are regarded as a vulnerable minority group (see also paragraph 4 of this letter). Therefore, this policy does not need to be amended either.

8 European Dimension
As this judgment involves the interpretation of an article of an EU directive, it is self-evident, in my opinion, that we examine the way in which the other Member States are implementing this article, also in the light of the judgment of the ECJ. My aim is to achieve a harmonised interpretation and application of the Qualification Directive. However, it will take some time to map out the ways in which this article is being applied by the various Member States in order to determine our position on this issue. I imagine that the other Member States are also busy analysing the decision.

During the Justice and Home Affairs Council of 26 and 27 February last, I already requested attention for joint alignment between the Member States in respect of, for example, the terms "armed conflict" and "exceptional situation". The European Commission could also possibly play a part in this process.

9 Conclusion
The forgoing leads me to conclude that the judgment of the ECJ will not have significant implications for asylum practices in the Netherlands. Some points of the judgment, although these points were often already implicitly applied in asylum practices, will be more explicitly laid down in the policy rules of the Aliens Act Implementation Guidelines 2000. This will mainly involve determining in the country-based asylum policy whether "armed conflict" or an "exceptional situation" can be said to exist.

I anticipate that the latter, in particular, will exist in a very limited number of situations. The assessment that an "exceptional situation" exists or that this situation has ended, will always, of course, be submitted to the House.

It also follows from the forgoing that no significant amendments to the asylum policy are required. Therefore, on the basis of this further analysis, I see no reason to reconsider asylum decisions already given.

The State Secretary of Justice,
N. Albayrak