

3. ECJ, 13 SEPTEMBER 2018, *AHMED*, C-369/17, ECLI:EU:C:2018:713

Exclusion from subsidiary protection status must be preceded by a full investigation of all the circumstances of the individual case: one step further in the direction of a single international protection status.

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A. Facts and Ruling

1. *Facts and circumstance of the case*

An Afghan national in Hungary, Mr. Ahmed, obtained refugee status in 2000 on account of the fear of persecution that he faced in his country of origin as his father was a high-ranking officer in the Najibullah regime. In 2014, two judgments imposed on Mr. Ahmed, respectively a custodial sentence of two years and loss of civic rights for four years for attempted murder and a sentence of four years and loss of civic rights for three years for attempted blackmail.

When those criminal proceedings were brought against him, Mr. Ahmed voluntarily requested that the consulate of Afghanistan be fully informed of the outcomes of the proceedings. Inferring from this request of Mr. Ahmed that the risk of persecution had ceased, the Hungarian Immigration and Asylum Office reviewed and withdrew his refugee status in 2014. Mr. Ahmed filed a new application for refugee status and subsidiary protection status in 2015, which the Immigration and Asylum Office rejected. Mr. Ahmed subsequently brought an action against the decision before the Budapest Administrative and Labour Court. The latter upheld the action and ordered the Immigration and Asylum Office to reinstate the procedure. In 2016, the Hungarian Immigration and Asylum Office dismissed Mr. Ahmed's application while noting an obstacle to *refoulement*. Taking into account the abovementioned custodial sentences imposed on Mr. Ahmed, the Office asserted that subsidiary protection could not be granted due to the existence of a ground of exclusion, "the commission of a serious crime", within the meaning of the Hungarian law on the right to asylum transposing the "[Qualification Directive](#)" 2011/95/EU.¹ Article 11(3) of the Hungarian Law transposes Article 17(1)(b) of the Qualification Directive as "a serious crime for which Hungarian law provides for a custodial sentence of five years or more".

Mr. Ahmed contested the decision, arguing that the fact that a person has committed a crime punishable under Hungarian law by five years' imprisonment removes all discretion from the national authority responsible for assessing the ground of exclusion from subsidiary protection status. It is in the context of this dispute that an action against the decision dismissing the application of Mr. Ahmed by the Hungarian Immigration and Asylum Office that the Budapest Administrative and Labour Court

¹ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards of qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (OJ 2011 L 337, p.9).

requested a [preliminary ruling from the ECJ](#) concerning the interpretation of Article 17(1)(b) of the Qualification Directive, formulated as follows:

- Does it follow from the expression “he or she has committed a serious crime” used in Article 17(1)(b) of [Directive 2011/95] that the penalty provided for a specific crime under the law of the particular Member State may constitute the sole criterion to determine whether the person claiming subsidiary protection may be excluded from it?

2. Judgment and reasoning of the Court

Requested to interpret the ground of exclusion from subsidiary protection under Article 17(1)(b) of the Qualification Directive, the Court of Justice first states that the grounds of exclusion from subsidiary protection should be interpreted in light of the rules applicable to exclusion from refugee protection. The latter should be extended, so far as possible, to beneficiaries of subsidiary protection status. According to the ECJ’s own case law, any decision to exclude a person from refugee status must be preceded by a “full investigation into all the circumstances of the individual case and cannot be taken automatically”. Recalling the EU legislature’s intention to establish a uniform status for all beneficiaries of international protection, such a requirement should be transposed to decisions to exclude a person from subsidiary protection.

Therefore, the Court of Justice rules that Article 17(1)(b) of the Qualification Directive “must be interpreted as precluding legislation of a Member State pursuant to which the applicant for subsidiary protection is deemed to have ‘committed a serious crime’ within the meaning of that provision, which may exclude him from that protection, on the basis of the sole criterion of the penalty provided for a specific crime under the law of that Member State”. The competent authority of the Member State concerned should therefore undertake an assessment of the specific facts in order to determine the seriousness of the crime justifying exclusion from subsidiary protection. Moreover, the Court of justice illustrates that Article 17(1)(b) allows a person’s exclusion from subsidiary protection status only where there are “serious reasons” for taking the view that he has committed a serious crime.

B. Discussion

The grounds of exclusion contained in Article 1(F) of the Geneva Convention have been integrated in Articles 12(2) of the Qualification Directive. Article 17(1) on exclusion from subsidiary protection has also been drafted on the lines of exclusion from refugee protection. The rationale behind these exclusion grounds from international protection is to preserve the integrity and the credibility of the protection status provided. Individuals who have perpetrated such acts or crimes are “undeserving” of international protection. Those grounds of exclusion apply differently to refugee protection and subsidiary protection: Article 17(1) on exclusion from subsidiary protection encompasses both non-political and political crimes and it does not envisage a temporal or territorial restriction in respect of the commission of the crimes. Article 17(1) has a broader scope than that of Article 12(2)(b). Despite those differences, the Court of justice explains that the EU legislator drew inspiration from the rules applicable to refugees in order to extend them to beneficiaries of subsidiary protection.

1. Previous ECJ case-law on the grounds of exclusion from refugee status

Until this judgment, the Court of Justice has only addressed exclusion from refugee status and the grounds thereof. In particular, the Court has interpreted the first part of Article 12(1)(a) in its case-law about Palestinian refugees receiving protection or assistance from UNRWA (see [Bolbol](#) and [El Kott](#) judgments). The Court of Justice has also interpreted the second part of Article 12(1)(b) in a line of jurisprudence related to the interaction between terrorist activity and exclusion from refugee protection (see [B and D](#) and [Lounani](#)²). This second body of case law is important for the interpretation of exclusion clauses in light of the Geneva Convention. Indeed, the Court recalls the judgment [B and D](#) (2010) in which it has established that in order to exclude someone from refugee protection, the competent authority of the Member State concerned must undertake an individual assessment of the specific facts of each case. This assessment will determine “whether there are serious reasons for considering that the acts committed by the person in question, who otherwise satisfies the conditions for refugee status, are covered by one of those exclusion clauses”.³ In [B and D](#) the ECJ also stated that “the article [Article 1(f)(c) refugee Convention] should be interpreted restrictively and applied with caution”.

2. Strict interpretation of exclusion clauses

Article 17 of the Qualification Directive constitutes an exception to the general rule on “Granting of subsidiary protection status” stipulated by Article 18 and therefore calls for strict interpretation.

In support of the strict interpretation of exclusion clauses, the Court mentions two documents. First, the report from the European Asylum Support Office (EASO) “[Exclusion: Articles 12 and 17 of the Qualification Directive \(2011/95/EU\)](#)”, a judicial analysis that serves as a tool at the disposal of courts and tribunals dealing with potential cases of exclusion from international protection. The report includes case law of the ECJ, decisions of the European Court of Human Rights as well as relevant decisions of the courts and tribunals of the Member States. Concerning Article 17(1)(b), EASO recommends that the seriousness of the crime envisaged should be assessed in the light of a number of criteria such as “the nature of the act at issue, the consequences of that act, the form of procedure used to prosecute the crime, the nature of the penalty provided and the taking into account of whether most jurisdictions also classify the act at issue as a serious crime”. The second document recalled by the ECJ in support of its interpretation is the UNHCR [Handbook on Procedures and Criteria for determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees](#). Under the section “interpretation of terms”, the UNHCR clarifies that “in evaluating the nature of the crime presumed to have been committed, all the relevant factors [...] must be taken into account”. The latter document should be read together with the [Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees](#) where the UNHCR clarifies: “given the possible serious consequences of exclusion, it is important to apply them with great caution and only after a full

² T. MAHESHE, “[Infractions terroristes et soutien aux activités terroristes : harmonisation par la C.J.U.E. de la notion d’agissements contraires aux buts et aux principes des Nations Unies](#)”, *Newsletter EDEM*, avril 2017.

³ [B and D](#), fn. 4, para. 87.

assessment of the individual circumstances of the case. The exclusion clauses should, therefore, always be interpreted in a restrictive manner”.

3. Towards a uniform status for all beneficiaries of international protection

The Court also recalls that subsidiary protection has been established as a form of protection complementary and additional to refugee protection as enshrined in the Geneva Convention. Referring to recitals 8, 9 and 39 of the Qualification Directive, the Court of Justice states that the EU legislature intended to establish a uniform status of international protection and that the Qualification Directive should be interpreted in the light of the international legal regime for the protection of refugees and consistently with the Geneva Convention. In doing so, the ECJ also refers to its recent judgment *Alo and Osso* (2016).⁴ Therefore, the Court infers that Article 17(1)(b) should be interpreted in the light of Article 12(2) relating to exclusion from refugee status.

4. Application by analogy of the interpretation of the ground of exclusion from refugee status to exclusion from subsidiary protection status

After references to its own case law on refugee status, the Court transposes the requirement of “a full investigation into all the circumstances of the individual case” from decisions of exclusion from refugee status to decisions of exclusion from subsidiary protection. As a result, the Court of Justice found that national Hungarian legislation stands in contrast with European law, where it provides that the length of a crime’s penalty is the sole criterion in deciding its seriousness as a ground of exclusion from international protection.

To conclude, with this ruling of 13 September 2018 the Court of Justice not only reiterated the obligation to carry out a full investigation into all the circumstances of the individual case which might entail the application of a ground of exclusion from subsidiary protection, it has also contributed to further aligning refugee and subsidiary protection in the direction of a single international protection status.

C. Suggested Reading

To read the case: ECJ, judgment of 13 September 2018, C-368, EU:C:2018:713

Case law:

ECJ, 9 November 2010, *B & D*, C-57/09 and C-101/09, EU: C: 2010: 661;

ECJ, 31 January 2017, *Lounani*, C-573/14, EU: C: 2017: 71;

ECJ, 1 March 2016, *Alo and Osso*, C-443/14 and C-444/14, EU:C:2016:127.

⁴ ECJ, 1 March 2016, *Alo and Osso*, C-443/14 and C-444/14, EU:C:2016:127, for a commentary see L. LEBOEUF, “La Cour de justice soumet le plan de répartition des bénéficiaires d’une protection subsidiaire en Allemagne au respect du principe d’égalité”, *Newsletter EDEM*, mai 2016, and J.-Y. CARLIER and L. LEBOEUF, “Choice of residence for refugees and subsidiary protection beneficiaries; variations on the equality principle: *Alo and Osso*”, *Common Market Law Review*, Vol. 54, p. 631-644 (2017).

Doctrine: J.-Y. CARLIER, L. LEBOEUF, « [Choice of residence for refugees and subsidiary protection beneficiaries; variations on the equality principle: Alo and Osso](#) », *Common Market Law Review*, Vol. 54, p. 631-644 (2017);

J.-Y. CARLIER, S. SAROLEA, *Précis de droit des étrangers*, pp. 449-456.

T. MAHESHE, « [Infractions terroristes et soutien aux activités terroristes : harmonisation par la C.J.U.E. de la notion d'agissements contraires aux buts et aux principes des Nations Unies](#) », *Newsletter EDEM*, avril 2017.

L. LEBOEUF, « [La Cour de justice soumet le plan de répartition des bénéficiaires d'une protection subsidiaire en Allemagne au respect du principe d'égalité](#) », *Newsletter EDEM*, mai 2016.

European Asylum Support Office (EASO), January 2016, « [Exclusion: Articles 12 and 17 of the Qualification Directive \(2011/95/EU\)](#) »

UNHCR, September 2003, [Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees](#)

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