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The Week

With or without prejudice to the Geneva Convention? Refugees sur places as a result of subsequent circumstances determined by the applicant (Case C-222/22)

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Introduction

In Case C-222/22 *Bundesamt für Fremdenwesen und Asyl (Conversion religieuse ultérieure)*, the Court of Justice of the European Union ('the Court of Justice' or 'the Court') held that Directive 2011/95/EU (Qualification Directive) precludes a presumption that any subsequent application based on a risk of persecution arising from circumstances which the applicants created by their decision since leaving their country of origin is abusive and therefore prevents the granting of international protection.

The facts

The case originates from proceedings before the Federal Administrative Court of Austria regarding granting refugee status to an Iranian individual who converted to Christianity in Austria. The Federal Office for Immigration and Asylum (BFA) contests this decision, arguing that the applicant created the risk of persecution upon return to Iran by converting to Christianity while in Austria. The BFA underlines that under national law, refugee status cannot be granted in such cases unless the activities in question are authorised in Austria and reflect a pre-existing conviction held by the applicant in their country of origin.

The Administrative Court whether Article 5(3) of the Qualification Directive precludes legislation under which foreign nationals filing subsequent applications are normally denied asylum if their well-founded fear of persecution is based on circumstances they have created by their own decision since leaving their country of origin. The national legislation in question recognises the need for international protection arising *sur place* under two cumulative conditions. Namely, when the risk of persecution originates from activities that are permitted in the Member State, and it is established that those activities constitute the expression and continuation of convictions held by the applicant in the country of origin. The referring court thus asked the Court of Justice whether these two conditions were in line with the Qualification Directive.

The Law: Qualification Directive and Assessments of International Protection *sur place*

In this case, Article 5 of the Qualification Directive provides a common definition of applications based on international protection needs arising *sur place*, that is, after refugees have left their country of origin. Notably, Article 5(2) of the Qualification Directive provides that: 'A well-founded fear of being persecuted or a real risk

of suffering serious harm *may* be based on activities which the applicant has engaged in since he or she left the country of origin, in particular where it is established that the activities relied upon constitute the expression and continuation of convictions or orientations held in the country of origin'.

The same provision in the subsequent paragraph adds a significant exception:

'Without prejudice to the Geneva Convention, Member States *may* determine that an applicant who files a subsequent application shall not normally be granted refugee status if the risk of persecution is based on circumstances which the applicant has created by his or her own decision since leaving the country of origin' (Article 5(3), emphasis added).

The decision

As highlighted by UNHCR in its amicus curiae, in transposing the Qualification Directive into their national legislation, the Austrian legislator merged elements of Article 5(2) and 5(3) of the Qualification Directive by requiring that, to grant asylum, the activities should constitute the continuation of previously held convictions. In addition, it also took a restrictive application of the exception established in Article 5(3) by taking a discretionary measure (Article 5(3) uses 'may') and making it an obligation (Article 3(2) of AsylG 2005 uses 'shall'). According to the Austrian and German Governments intervening in the proceedings, this would have implied the automatic disregard of any subsequent application (para. 36).

In line with the Opinion of the Advocate General (AG) Richard de la Tour, the Court considered that the exception of Article 5(3) to the general rule established in Article 5 (1 and 2) of the Qualification Directive must be interpreted restrictively and applied with caution (para. 29; AG Opinion points 54 and 59). The Court further recalled that Article 4(3) of the Qualification Directive requires the competent national authority to carry out a complete examination of all the circumstances specific to the individual case of the applicant. Hence, any form of automatism would amount to depriving this provision of its *effet utility* (para. 37).

In casu, the competent authority has established the applicant's general credibility and has accepted not only the sincerity of his religious conversion, but also the existence of a well-founded fear of persecution in the event of his return to his country of origin. If confirmed, which is up to the referring court, this finding would exclude any abusive intention or instrumentalisation of the procedure, hence leading to the inapplicability of Article 5(3). Conditioning the recognition of protection needs arising *sur place* to the continuation of convictions already held in the country of origin would result in the deprivation of refugee status on the sole ground that a person converted after the adoption of the final decision on his previous application (AG Opinion, point 72).

Article 5(3) of the Qualification Directive in light of the Geneva Convention?

At the same time, the Court also recognised that where, following an individual assessment, the risk of persecution invoked in support of a subsequent application is based on the applicant's abusive and manipulative intention, Article 5(3) of the Qualification Directive allows Member States to refuse refugee status, within the meaning of

Article 2(e) of the Directive, even if they would otherwise qualify as a refugee under the 1951 Convention relating to the Status of Refugees (Geneva Convention) and Article 2(d) of that Directive (para. 40).

It is worth noting that the exception provided for under Article 5(3) is '[w]ithout prejudice to the Geneva Convention'. This was emphasised by the Austrian and German governments intervening in the proceedings, as they submitted that this phrase in German would generally mean 'regardless' (para. 41). The Court replied that the wording used in one of the linguistic versions of a provision of Union law cannot serve as the sole basis for its interpretation, and other linguistic versions of this provision transpose the same expression as meaning that Member States must take into account the provisions of the Geneva Convention. Beyond these observations, it must also be recalled that under Article 78(1) TFEU, the Union is obliged to interpret its common policy on asylum and immigration in accordance with the Geneva Convention, 'the cornerstone of the international legal regime for the protection of refugees' (recital 4, Qualification Directive).

In this respect, the Geneva Convention includes no requirement that refugees must have left their country of origin on account of a well-founded fear of persecution, nor that their asylum claims *sur place* should be assessed based on their intentions or motivations (UNHRC Handbook, paras 94-96). The Geneva Convention protects those who are at risk of persecution at the time of the assessment, irrespective of whether the risk of persecution originates from the applicants' previously held convictions or conduct. In this respect, what is relevant is the credibility of the applicant. As UNHCR observed, 'once the credibility of the applicant has been established following a rigorous assessment, the recognition of the refugee status depends on the existence of a well-founded fear of persecution, regardless of whether the risk of ill-treatment was created by the applicant's own activities' (UNHCR, para 4.2.10; see also ECtHR, F.G v Sweden, paras 114-115). Yet this credibility assessment is somewhat different from that prescribed by the Qualification Directive and therefore implied by the AG and the Court. It is not so much about the personal credibility of the applicant's good faith (see here), but about the reasonableness of their fear of being persecuted upon return (Goodwin-Gill and McAdam at 82-86).

The Convention itself provides exhaustively listed exclusion clauses to exclude international protection, and it is essential that such clauses be interpreted restrictively. Therefore, there is no basis for excluding applicants at risk of persecution, even in cases where the circumstances were determined by the applicant itself after leaving its country of origin. It would seem reasonable to conclude, in accordance with the UNHCR and consistent jurisprudence (see C-349/20 para 50, C-621/21 para. 60, and C-151/22 para. 49), the Geneva Convention does not require applicants whose well-founded fear of persecution arises *sur place* that their asylum request was submitted in good faith. In fact, the very logic of the Convention starts from the premise that once the requirements of Article 1(A)(2) are satisfied, refugee status should be recognised, with no special substantive or procedural limitation (see Hathaway and Foster, 79-90). It is rather the task of national authorities to assess whether the activities conducted by the applicant would expose them to persecution or serious harm upon return to their country. Hence, the focus should be on the consequences rather than on the triggering cause.

Be that as it may, the Court could probably not offer an interpretation *contra (EU) legem*. It certainly strived to interpret the Qualification Directive in line with the Geneva Convention and the principle of *non-refoulement* but with limited results (para. 44). The Court clarified to what extent national legislation that prevents a subsequent asylum application is compatible with the Qualification Directive. However, it would have also faced the opportunity to clarify once again the scope of EU law and Article 78(1) TFEU, which states that a common policy on asylum, subsidiary protection and temporary protection 'shall be in accordance with the Geneva Convention'.

In the case at hand, it would not be relevant to establish whether the religious conversion occurred out of genuine belief or with abusive intent, as what should be concretely evaluated is the objective risk of facing persecution in one's country of origin, which entitles individuals to protection. Instead, the Court ruled that the Qualification Directive does not allow a presumption that any subsequent application based on circumstances created by the applicant stems from an abusive intention to circumvent the procedure for granting international protection. According to the Court, each subsequent application must be assessed on an individual basis by the Member States' competent authorities in order to avoid the risk of manipulation by bad-faith asylum seekers.

Conclusions

Overall, the Court of Justice has aligned itself with the still-growing number of national courts and authorities that are adding a requirement of good faith to *sur place* claims. However, as explained above, this is not in line with the rationale of the Geneva Convention. In our view, a better approach would have been one based on Article 78 of the TFEU, and thus on the Geneva Convention, which provides that asylum claims, even those stemming from manipulative actions abroad, should be evaluated based on a well-founded fear of persecution and the usual criteria established by the Convention itself.

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