Field:

BVerwGE: No
Professional press: Yes

Asylum law

Sources of law:

Asylum Act (AsylG, *Asylgesetz*)	Section 3c, Section 4 (1) sentence 2 nos. 2 and 3, Section 4 (3), Section 77 (1)
European Convention on Human Rights	Article 3
Directive 2011/95/EU	Articles 6, 15 (b) and (c)
Charter of Fundamental Rights	Articles 4, 19 (2)

Title line:

Subsidiary protection by reason of poor humanitarian situation in country of origin

Keywords:
Subsidiary protection; Somalia; Mogadishu; serious harm; inhuman or degrading treatment; poor humanitarian situation; actor; selective; civil war; collateral damage; protection from deportation; indiscriminate violence; region of origin; armed conflict; individual threat; civilian population; density of danger; risk of death and injury; ratio; overall assessment; quantitative approach; qualitative approach; investigation; reference to Court of Justice of the European Union for preliminary ruling.

Headnotes:

1. Inhuman or degrading treatment by reason of a poor humanitarian situation in a country of origin establishes eligibility for subsidiary protection under Section 4 (1) sentence 2 no. 2 of the Asylum Act (AsylG, *Asylgesetz*) only if such treatment proceeds selectively from an actor within the meaning of Section 4 (3) in conjunction with Section 3c of that Act (see Federal Administrative Court [BVerwG, *Bundesverwaltungsgericht*], decision of 13 February 2019 - 1 B 2.19 - *juris* para. 13)

2. In the absence of individual circumstances that increase danger, indiscriminate violence must attain an especially high level for the civilian population in order for there to be a serious threat to life or to physical integrity within the meaning of Section 4 (1) sentence 2 no. 3 of the Asylum Act. For such a level, findings as to density of danger are required, comprising not only an approximate quantitative determination of the risk of death and injury, but also an overall assessment of how the foreigner is affected individually (see BVerwG, judgments of 27 April 2010 - 10 C 4.09 - Rulings of the Federal Administrative Court [BVerwGE, *Entscheidungen des Bundesverwaltungsgerichts*] 136, 360 para. 33, of 17 November 2011 - 10 C 13.10 - Buchholz 451.902 *Europ. Ausl.- u. Asylrecht* [European Immigration and Asylum Law] no. 58 para. 22-23,

and of 13 February 2014 - 10 C 6.13 - Buchholz 402.25 Section 33 Asylum Procedure Act [AsylVfG, *Asylverfahrensgesetz*] no. 14 para. 24, each concerning the prior version of Section 60 (7) sentence 2 of the Residence Act [AufenthG, *Aufenthaltsgesetz*] former version, which has the same wording; BVerwG, decision 8 March 2018 - 1 B 7.18 - *juris* para. 3).

Judgment of the First Senate of 20 May 2020 - BVerwG 1 C 11.19

I. Wiesbaden Administrative Court (VG, *Verwaltungsgericht*), 14 March 2019
Case no.: VG 7 K 1139/17.WI.A

Federal Administrative Court

(Bundesverwaltungsgericht)

IN THE NAME OF THE PEOPLE

JUDGMENT

BVerwG 1 C 11.19
VG 7 K 1139/17.WI.A

In the administrative matter

Translator's Note: The Federal Administrative Court, or *Bundesverwaltungsgericht*, is the Federal Republic of Germany's supreme administrative court. This unofficial translation is provided for the reader's convenience and has not been officially authorised by the *Bundesverwaltungsgericht*. Page numbers in citations of international texts have been retained from the original and may not match the pagination in the parallel English versions.

When citing this decision, it is recommended to indicate the court, the date of the decision, the case number and the paragraph: Federal Administrative Court, Judgment of 20 May 2020 - BVerwG 1 C 11.19 - para. ...

the First Senate of the Federal Administrative Court,
on 20 May 2020
by Presiding Federal Administrative Court Justice Prof. Dr Berlit and
Federal Administrative Court Justices Fricke, Dr Fleuss, Dr Rudolph
and Böhmann

oral proceedings having been waived, rules as follows:

The claimant's appeal against the judgment of the Wiesbaden Administrative Court (*Verwaltungsgericht*) of 14 March 2019 is denied.

The claimant is to bear the costs of these proceedings.

Reasons:

I

1 The claimant, a Somali national born in Mogadishu in 1998, seeks grant of subsidiary protection.

2 By her own account, the claimant entered the federal territory in 2015, and applied for asylum status at the beginning of 2016. She founded her application primarily on threats from Al-Shabaab. In a decision of 7 February 2017, the Federal Office for Migration and Refugees (*Bundesamt für Migration and Flüchtlinge*, the "Federal Office") refused her applications for asylum, for refugee status, and for subsidiary protection, and found instead that there was a prohibition of deportation pursuant to Sec. 60 (5) of the Residence Act (AufenthG, *Aufenthaltsgesetz*) in conjunction with Article 3 of the European Convention on Human Rights (ECHR).

3 In the court action she brought, which ultimately sought only a grant of subsidiary protection, the Administrative Court (*Verwaltungsgericht*) found against the claimant in a judgment of 14 March 2019. The court based its decision on the ground that upon returning to Somalia, the claimant would not be threatened with inhuman or degrading treatment within the meaning of Section 4 (1) sentence 2 no. 2 of the Asylum Act (AsylG, *Asylgesetz*). Her argument that she would be killed by members of Al-Shabaab upon her return was not found credible. The court also ruled that a grant of subsidiary protection on the basis of the poor humanitarian situation in Somalia was to be ruled out. Although

that situation did establish a basis for inhuman or degrading treatment within the meaning of Article 3 of the European Convention on Human Rights, there was no actor who was selectively inducing or materially exacerbating the poor humanitarian conditions, as provided in Section 4 (3) sentence 1 in conjunction with Section 3c of the Asylum Act and Article 6 of Directive 2011/95/EU. Mere causality between the poor safety situation and the disastrous humanitarian situation did not suffice, the court held. Moreover, it pointed out, the Court of Justice of the European Union (ECJ) has also denied a grant of subsidiary protection so long as an ill foreigner is not "intentionally" denied medical care in his home country. Furthermore, the court below found that recital 35 of Directive 2011/95/EU indicates that risks to which a population of a country is generally exposed do not normally create in themselves an individual threat which would qualify as serious harm. It noted that the Court of Justice of the European Union has recognised an exception to this principle only in the case of Article 15 (c) of Directive 2004/83/EC (threat in a situation of armed conflict). The court recognised that Somalia is indeed characterised by an armed conflict that has gone on for years between Al-Shabaab, on one side, and the troops of the Somali government and its allies, on the other. The poor humanitarian conditions for the civilian population do indeed derive significantly from the poor safety situation or are predominantly attributable to direct or indirect actions by the actors engaged in the conflict. But they are not selectively induced or exacerbated by those actors, and rather must be considered "only" collateral damage. Insofar as the parties to the conflict interfere with humanitarian aid, the court held, those measures are not directed to causing a deterioration in living conditions for the civilian population, but are a means to an end in the struggle for dominance. Even if one were to view these acts as selectively causing a deterioration of the humanitarian situation, it would constitute only part of the reason for the poor living conditions, while the armed conflict is the primary reason. The court found that if the claimant returned to Somalia, she was also not threatened with serious harm by reason of indiscriminate violence pursuant to Section 4 (1) sentence 2 no. 3 of the Asylum Act. The court held that it need not determine whether an armed conflict must be assumed in Mogadishu, because in any event there was no individual threat. It found that in the claimant's case there were no factors that would increase a threat. Nor

was the situation in Mogadishu characterised by such a high level of danger that practically any civilian might be exposed to a serious individual threat simply by being present. The court found that it was not possible to obtain an exact, reliable assessment of the intensity or density of danger on the basis of a quantitative determination of the risk of death and injury by comparing the total number of civilians living in the region against the acts of indiscriminate violence, because there were no reliable figures. Even irrespective of a quantitative assessment, the documented attacks did not attain such a quantity and quality that an assumption of a threat to the entire civilian population must be assumed.

4 In her appeal to this Court, brought by leave of the Administrative Court, the claimant complains of a violation of Section 4 (1) of the Asylum Act and of Article 15 of Directive 2011/95/EU. She argues that inhuman or degrading treatment under these provisions should be decided on the basis of the case-law of the European Court of Human Rights on Article 3 of the European Convention on Human Rights, and does not require selective action by an actor. In light of a proceeding on a referral for a preliminary ruling on Article 15 (c) of Directive 2011/95/EU that is now pending before the Court of Justice of the European Union, she would agree to a stay of proceedings.

5 The defendant defends the challenged judgment.

II

6 The claimant's (leapfrog) appeal, on which, with the parties' consent, this Court is ruling without oral proceedings (Section 101 (2) in conjunction with Section 141 sentence 1 and Section 125 (1) sentence 1 of the Code of Administrative Court Procedure [VwGO, *Verwaltungsgerichtsordnung*]), is admissible but without merit. The Administrative Court did not violate any law subject to review by this Court in holding that the claimant is not entitled to subsidiary protection under Section 4 of the Asylum Act. In particular, if she returns she is not threatened with inhuman or degrading treatment within the meaning of Section 4 (1) no. 2 of the Asylum Act by reason of the poor humanitarian situation in Somalia, because such treatment does not proceed selectively from an

actor within the meaning of Section 3c of the Asylum Act (1.); nor is she threatened with serious harm by reason of indiscriminate violence in a situation of armed conflict pursuant to Section 4 (1) no. 3 of the Asylum Act, because in any event the requisite individual threat is absent (2.). There is no need for further clarification by the Court of Justice of the European Union (3.).

7 The legal assessment of the claimant's petition is governed by the Asylum Act in its present form (currently the version promulgated on 2 September 2008 <Federal Law Gazette [BGBl., *Bundesgesetzblatt*] I p. 1798>, last amended by the Second Act Amending Data Protection Law to Conform to Regulation 2016/679 EU and Transposing Directive 2016/680/EU [*Zweites Gesetz zur Anpassung des Datenschutzrechts an die Verordnung (EU) 2016/679 und zur Umsetzung der Richtlinie (EU) 2016/680*] of 20 November 2019 effective as of 26 November 2019 <BGBl. I p. 1626>). Changes in law that take place after the last oral proceedings or decision by the judge of fact must be taken into account in appeals to this Court if the judge of fact would have to take those changes into account, were that court to decide in place of this Court (BVerwG, judgment of 11 September 2007 - 10 C 8.07 - Rulings of the Federal Administrative Court [BVerwGE, *Entscheidungen des Bundesverwaltungsgerichts*] 129, 251 para. 19). As the present dispute is one in asylum law, in which the judge of fact, pursuant to section 77 (1) of the Asylum Act, must regularly base a decision on the factual and legal situation at the time of the last oral proceedings or decision, if that court were to decide now it would have to base its decision on the current version, unless a derogation is required for reasons of substantive law (established jurisprudence, see BVerwG, judgment of 20 February 2013 - 10 C 23.12 - BVerwGE 146, 67 para. 12). However, the provisions relevant here have not changed since the proceedings before the Administrative Court.

8 According to Section 4 (1) of the Asylum Act - and subject to the reasons for exclusion governed by Section 4 (2) of the Asylum Act, which are not relevant here - a foreigner is eligible for subsidiary protection if he has shown substantial grounds for believing that he would face a real risk of suffering serious harm in his country of origin. Serious harm consists of: (1) imposition of the death penalty or execution, (2) torture or inhuman or degrading treatment or

punishment, or (3) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict. Pursuant to Section 4 (3) of the Asylum Act, Sections 3c through 3e of the Asylum Act apply *mutatis mutandis*, in which case persecution, protection from persecution or the well-founded fear of persecution are to be replaced by the well-founded fear of serious harm, protection against serious harm or the real risk of serious harm; refugee status is to be replaced by subsidiary protection. In this provision, the legislature implemented the requirements of EU law for subsidiary protection under Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the 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 (recast, OJ L 337 p. 9) - known as the Qualification Directive.

9 1. There is no objection on grounds subject to review by this Court to the Administrative Court's holding that if the claimant returns to Somalia, she would not be threatened with serious harm within the meaning of Section 4 (1) sentence 2 no. 2 of the Asylum Act (torture or inhuman or degrading treatment or punishment) by reason of the poor humanitarian situation, because there is no actor within the meaning of Section 4 (3) in conjunction with Section 3c of the Asylum Act from whom inhuman or degrading treatment would selectively proceed.

10 a) Concerning the criteria for inhuman or degrading treatment under the terms of Section 4 (1) sentence 2 no. 2 of the Asylum Act - as also in the case of Section 60 (5) of the Residence Act in conjunction with Article 3 of the European Convention on Human Rights - the case-law of the European Court of Human Rights (ECtHR) on Article 3 of the European Convention on Human Rights is to be consulted, inasmuch as the subject matter they govern is largely identical (BVerwG, judgment of 31 January 2013 - 10 C 15.12 - BVerwGE 146, 12 para. 36). Accordingly, the socio-economic and humanitarian conditions in a country of return do not necessarily have a bearing, and certainly not a decisive bearing, on the question whether the person concerned would face a real

risk of ill-treatment in that country within the meaning of Article 3 of the European Convention on Human Rights (ECtHR, judgments of 28 June 2011 - no. 8319/07 and 11449/07, Sufi and Elmi - para. 278 and 29 January 2013 - no. 60367/10, S.H.H. - para. 74). According to that case-law, the fact that the applicant's circumstances, including his life expectancy, would be significantly reduced if he were to be removed from the Contracting State is not sufficient in itself to give rise to a breach of Article 3, because the Convention for the Protection of Human Rights and Fundamental Freedoms is essentially directed at the protection of civil and political rights. The case-law of the European Court of Human Rights provides otherwise only in very exceptional cases, where humanitarian grounds against the removal are compelling (ECtHR, judgments of 27 May 2008 - no. 26565/05, N. - New Journal of Administrative Law [NVwZ, *Neue Zeitschrift für Verwaltungsrecht*] 2008, 1334 para. 42 and of 28 June 2011 - no. 8319/07 and 11449/07, Sufi and Elmi - para. 278; BVerwG, judgment of 31 January 2013 - 10 C 15.12 - BVerwGE 146, 12 para. 23, 25, and decision of 13 February 2019 - 1 B 2.19 - *juris* para. 6).

11 b) There is no need here for any final decision as to whether, in applying this strict standard of review, the Administrative Court correctly held that the humanitarian situation and general living conditions alone are insufficient to create a level of danger of inhuman treatment high enough to suffice for an exceptional case in which the humanitarian grounds against a removal are compelling (on the ECtHR's assessment of the situation of danger, see judgment of 5 September 2013 - no. 886/11, K.A.B. - para. 91, in which, in contrast to what the court had still held in June 2011, it found that, at any rate in Mogadishu, violence no longer prevails to such an extent that for that reason alone, every returnee is placed at a risk of treatment contrary to Article 3 of the Convention). This is the case because the Administrative Court held that it is not sufficient for an application of Article 15 (b) of Directive 2011/95/EU if a threat of a violation of Article 3 of the Convention arises only in exceptional cases, as established in the ECtHR's interpretation. Rather, a danger of serious harm in the form of torture or inhuman or degrading treatment or punishment that establishes grounds for subsidiary protection, as provided in Section 4 (3) of the Asylum Act, must always proceed from an actor within the meaning of Section 3c of the Asylum Act (BVerwG, judgment of 31 January 2013 - 10 C 15.12 -

BVerwGE 146, 12 para. 29 and decision of 13 February 2019 - 1 B 2.19 - *juris* para. 6).

12 The case-law of the Court of Justice of the European Union has clarified that Article 15 (b) of Directive 2004/83/EC (now: Directive 2011/95/EU), which is worded identically to Section 4 (1) sentence 2 no. 2 of the Asylum Act, should be construed as requiring a direct or indirect action by an actor who is responsible for the inhuman living situation in the sense of an imputability which goes beyond unintended collateral consequences to embrace an act, or even an intent, directed to obtaining the achieved effects. In a case of inadequate medical care, the Court of Justice of the European Union decided in a judgment of 18 December 2014 - C-542/13 [ECLI:EU:C:2014:2452] M'Bodj - (para. 35, 41) that the serious harm referred to in Article 15 (b) of Directive 2004/83/EC (now: Directive 2011/95/EU) cannot simply be the result of general shortcomings in the health system of the country of origin. The court derives this conclusion primarily from Article 6 of Directive 2004/83/EC (now: Directive 2011/95/EU), which sets out a list of those deemed responsible for inflicting serious harm. However, risks to which a population of a country or a section of the population is generally exposed do normally not create in themselves an individual threat which would qualify as serious harm (recital 26 of Directive 2004/83/EC; now: recital 35 of Directive 2011/95/EU). The Qualification Directive is intended to complement rules protecting refugees with subsidiary protection, and to that extent to identify the persons genuinely in need of international protection; its scope does not, however, extend to persons who are allowed to remain in the territories of the Member States for other reasons - such as family or humanitarian reasons (see recitals 5, 6, 9 and 24 of Directive 2004/83/EC; now: recitals 6, 12, 15 and 33 of Directive 2011/95/EU). Consequently, the Court of Justice of the European Union holds that the requirements of Article 15 (b) of Directive 2004/83/EC (now: Directive 2011/95/EU) are not met unless a person suffering from an illness is “intentionally” deprived of health care on his return (ECJ, judgment of 18 December 2014 - C-542/13, M‘Bodj - para. 41). Reinforcing this position, Advocate General B. also argues that serious harm within the meaning of Article 15 (b) of Directive 2004/83/EC (now: Directive 2011/95/EU) must proceed from the direct or in-

direct actions of the public authorities. The risk of inhuman or degrading treatment must arise from factors that are, directly or indirectly, but always intentionally, attributable to the public authorities of that country, either because the threats to the person concerned are being made or tolerated by the authorities in the country of which that person is a national, or because those threats are made by independent groups against which the authorities of that country are unable to provide effective protection to their citizens (Opinion of Advocate General B. of 24 October 2017 - C-353/16, M.P. - para. 30 et seqq.). Consistently with that position, the Court of Justice of the European Union states in its judgment of 24 April 2018 - C-353/16 [ECLI:EU:C:2018:276], M.P. - (para. 51) that the risk of deterioration in the health of a third country national who is suffering from a serious illness, as a result of there being no appropriate treatment in his country of origin, is not sufficient, unless that third country national is "intentionally" deprived of health care, to warrant that person being granted subsidiary protection. According to this case-law, the act or omission of the actor must be deliberate and selective ("intentional"). Similarly to the jurisprudence of the Federal Administrative Court (BVerwG, *Bundesverwaltungsgericht*) on determining an act of persecution in connection with refugee status under Section 3 (1) of the Asylum Act or Asylum Procedure Act (AsylVfG, *Asylverfahrensgesetz*) (BVerwG, judgment of 19 January 2009 - 10 C 52.07 - BVerwGE 133, 55 para. 24), there is therefore a need for a selective act or omission by an actor that induces or significantly exacerbates the poor humanitarian situation (BVerwG, decision of 13 February 2019 - 1 B 2.19 - *juris* para. 13; see also Broscheit/Gormik, Journal of Immigration Law and Immigration Policy [ZAR, *Zeitschrift für Ausländerrecht und Ausländerpolitik*] 2018, 302 <305-306, 307>). This applies taking account of the objectives of the Directive that have been emphasised by the Court of Justice of the European Union in general, and the express reference to Article 6 of Directive 2004/83/EC (now: Directive 2011/95/EU), not only when the threatened harm is attributable to general shortcomings of the health system in the country of origin, but for all types of cases of an inhuman living situation in a country of origin that are covered by Article 15 (b) of Directive 2011/95/EC.

13 This interpretation is consistent with Article 3 of the European Convention on Human Rights and the provisions in Article 4 and Article 19 (2) of the Charter

on Fundamental Rights, which are to be interpreted in its light. If a threatened violation of Article 3 of the European Convention on Human Rights, as interpreted by the European Court of Human Rights, is threatened in highly exceptional cases in the country of origin, that would oppose deportation to that country. But this does not mean that the third country national should therefore also be granted leave to reside in a Member State by way of subsidiary protection (ECJ, judgment of 18 December 2014 - C-542/13, M'Bodj - para. 40). The possibility that international protection may be unavailable does not constitute a final decision as to whether a return to the country of origin - including with reference to Article 3 of the European Convention on Human Rights - is legally permissible under either EU law (see also Mannheim Higher Regional Court (VGH, *Verwaltungsgerichtshof*), judgment of 3 November 2017 - A 11 S 1704/17 - *juris* para. 80) or national law (see Section 60 (5) and (7) sentence 1 of the Residence Act).

14 c) In application of these principles, the Administrative Court found that there were no persuasive grounds to assume serious harm within the meaning of Section 4 (1) sentence 2, no. 2 of the Asylum Act solely by reason of the poor humanitarian situation in Somalia, because this situation does not proceed selectively from an actor. In so finding, in terms of fact it acknowledged that Somalia is characterised by an armed conflict that has gone on for years between Al-Shabaab, on one side, and the troops of the Somali government and its allies, on the other. However, the court concluded that the resulting deterioration in the living conditions of the Somali civilian population is "only" collateral damage of the intense civil war. It held that measures taken by Al-Shabaab and the authorities that affected the humanitarian situation were not intended to cause a deterioration in the living conditions of the civilian population, but rather were a means to an end in the struggle for dominance. Even if one were to view these acts as a selective exacerbation of the humanitarian situation, that influence would be relatively minor, because the armed conflict is the primary reason for the poor living conditions, and the selective exacerbation is only part of the reason.

15 There is no cause for objection on grounds subject to review by this Court to either the Administrative Court's assessment of circumstances in Somalia, as the

judge of fact, or its associated alternative legal conclusion that what is at most a subordinate selective exacerbation of the humanitarian situation by an actor within the meaning of Section 3c of the Asylum Act cannot in itself suffice for a grant of subsidiary protection under Section 4 (1) sentence 2 no. 2 of the Asylum Act. Poor humanitarian conditions in a country are typically attributable to a multiplicity of factors. If a grant of subsidiary protection under Section 4 (1) sentence 2 no. 2 of the Asylum Act requires the presence of an actor responsible for the inhuman living situation, that situation must in any event be significantly, and not just to a small extent, attributable to the intentional, selective actions of an actor.

16 2. Nor does the claimant meet the requirements of Section 4 (1) sentence 2 no. 3 of the Asylum Act. This clause provides that serious harm also consists of a serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict. Under this third case group - which implements the requirements of Article 15 (c) of Directive 2011/95/EU - subsidiary protection covers situations of threat to the fundamental right to life and physical integrity that arise in armed conflicts, and that in themselves are not to be qualified as persecution under the fundamental conception of the Geneva Refugee Convention.

17 a) In forming its prognosis of whether the claimant would be exposed to a serious individual threat to life or limb by reason of indiscriminate violence upon her return to Somalia, the Administrative Court correctly focused on the factual conditions in Mogadishu. The point of reference for the prognosis of risk required under Section 4 (1) sentence 2 no. 3 of the Asylum Act is the actual destination in the event of a return. As a rule this is the foreigner's region of origin, to which that person will typically return (BVerwG, judgment of 14 July 2009 - 10 C 9.08 - BVerwGE 134, 188 para. 17, with reference to ECJ, judgment of 17 February 2009 - C-465/07 [ECLI:EU:C:2009:94], Elgafaji - NVwZ 2009, 705 para. 40). As the claimant lived in Mogadishu prior to leaving the country, the assumption that she will return there is justified.

18 b) The Administrative Court furthermore correctly held that a serious individual threat to life and limb as provided in Section 4 (1) sentence 2 no. 3 of the Asylum Act can also proceed from a general risk to a plurality of persons in an

armed conflict - as the Administrative Court presumed in the claimant's favour - if that risk becomes concentrated in the foreigner's person.

19 According to the case-law of the Court of Justice of the European Union, the requirement for a serious individual threat by reason of indiscriminate violence refers to harm to civilians irrespective of their identity, 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 presence on the territory of that country or region, face a real risk of being subject to a serious threat (ECJ, judgment of 17 February 2009 - C-465/07, Elgafaji - para. 35). However - in light of the 26th recital of Directive 2004/83/EC (now: 35th recital of Directive 2011/95/EU), which notes that risks to which a population of a country or a section of the population is generally exposed do "normally" not create in themselves an individual threat "which would qualify as serious harm"; further, in light of the subsidiary nature of the harm in question; and finally, in light of the system established under Article 15 of Directive 2004/83/EC (now: Directive 2011/95/EU), in which the harms defined under letters a and b presuppose a clear degree of individualisation - this possibility is reserved for an extraordinary situation 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 (ECJ, judgment of 17 February 2009 - C-465/07, Elgafaji - para. 36 et seqq.). The Court of Justice of the European Union specifies this principle further as meaning that 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 (ECJ, judgment of 17 February 2009 - C-465/07, Elgafaji - para. 39). Consequently if, by reason of the armed conflict prevailing in Somalia, a general threat arises in the Mogadishu region for a large number of civilians, in order for the claimant to be entitled to subsidiary protection that threat must become so concentrated in her person that it constitutes a serious individual threat to her within the meaning of Section 4 (1) sentence 2 no. 3 of the Asylum Act.

20 Where there is a high level of indiscriminate violence for the civilian population, such an individualisation may result from factors particular to the person of the individual concerned that increase the risk. These include first and foremost personal factors that cause the applicant to appear more severely affected by the general, indiscriminate violence, for example because that person is compelled by profession - e.g., as a physician or journalist - to remain in the vicinity of the source of danger. However, one must also take into account personal factors by reason of which the applicant, as a civilian, is additionally exposed to the threat of selective acts of violence - for example by reason of that person's religious or ethnic affiliation - to the extent that a grant of refugee status does not already come under consideration for that reason in itself (BVerwG, judgment of 27 April 2010 - 10 C 4.09 - BVerwGE 136, 360 para. 33). The Administrative Court has found no such individual factors that increase danger for the claimant, and that finding is binding upon this Court.

21 By exception, an individualisation of the general danger may also arise in cases in which there are no individual factors that increase danger - as here - but there is an extraordinary situation that is characterised by such a high level of danger that practically any civilian would be exposed to a serious individual threat merely because of their presence in the area concerned (BVerwG, judgment of 14 July 2009 - 10 C 9.08 - BVerwGE 134, 188 para. 15 with reference to ECJ, judgment of 17 February 2009 - C-465/07, Elgafaji). If there are no factors that increase risk, an especially high level of indiscriminate violence is required (BVerwG, judgment of 27 April 2010 - 10 C 4.09 - BVerwGE 136, 360 para. 33). To determine the intensity or density of danger necessary for this purpose, according to this Court's jurisprudence - based on the principles it has developed for determining group persecution in the field of refugee law (on this see BVerwG, judgment of 18 July 2006 - 1 C 15.05 - BVerwGE 126, 243 para. 20 et seqq.) - what is required first is an approximate quantitative determination of the risk of death and injury, and on that basis, an overall assessment of the foreigner's individual exposure (see BVerwG, judgments of 27 April 2010 - 10 C 4.09 - BVerwGE 136, 360 para. 33, of 17 November 2011 - 10 C 13.10 - Buchholz 451.902 European Immigration and Asylum Law [*Europ. Ausl.- u Asylrecht*] no. 58 para. 22-23 and of 13 February 2014 - 10 C 6.13 -

Buchholz 402.25 Section 33 Asylum Procedure Act no. 14 para. 24, each regarding the forerunner provision of Section 60 (7) sentence 2 of the Residence Act, former version, which had the same wording; BVerwG, decision of 8 March 2018 - 1 B 7.18 - *juris* para. 3). However, this "quantitative" approach in this Court's jurisprudence ultimately differs at most in degree from the contrary position that is sometimes argued, namely that a purely qualitative approach is required (cf., e.g., Dietz, NVwZ-Extra 24/2014), for it does not aim to establish a "danger value" to be applied to all conflict situations - still less, one endorsed by a supreme court - in the sense of a mathematical-statistical minimum threshold that is to be applied mandatorily; rather, by way of the requirement of a final overall assessment, it leaves adequate room for qualitative appraisals; even the contrary position, with its purely qualitative approach, ultimately cannot manage without having recourse to the actual persecution events (cf. Berlit, ZAR 2017, 110).

22 However, we may leave aside here the question whether, to this extent, further clarification must be awaited from the Court of Justice of the European Union in light of the jurisprudence in other European states and the related reference submitted by the Mannheim Higher Regional Court, seeking a preliminary ruling on the criteria of EU law by which the existence of a serious individual threat must be assessed (Mannheim Higher Regional Court, reference of 29 November 2019 - A 11 S 2374/19 et al. - *juris* with further sources from other Member States' jurisprudence). This is because in an overall assessment, the Administrative Court concluded that irrespective of any quantitative consideration of ratios, the scope of the general threat in Mogadishu does not present the requisite density of danger. There were no quantitative findings concerning the risk of death and injury based on a comparison of the total number of civilians living in the region concerned against the acts of indiscriminate violence, but the court explained that that is a consequence of the fact that such findings concerning the situation in Somalia were unlikely to be reliably possible. The court found that the total number of persons who have been the victims of indiscriminate violence could not be estimated even with approximate reliability, because no trustworthy figures were available. There is no need to decide in the present proceedings whether the Administrative Court thus met its judicial

duty of clarification under Section 86 (1) sentence 1 of the Code of Administrative Court Procedure (VwGO, *Verwaltungsgerichtsordnung*), and whether no further clarification was possible that the court below could reasonably be expected to pursue, because a leapfrog appeal to this Court serves only to clarify fundamental questions of law, and cannot be founded on procedural objections (Section 134 (4) Code of Administrative Court Procedure), nor were any such objections raised here. If, on the basis of the findings by the judge of fact, which are fundamentally binding on this Court, one holds that the risk of death and injury cannot be reliably determined, even approximately, in quantitative terms under the duty to clarify the facts incumbent on the Federal Office and the courts, there can be no objection to the further holding of the Administrative Court - which is then founded not least of all on qualitative considerations - that on returning to the Mogadishu region the claimant would not be exposed to a serious individual risk to life and limb from indiscriminate violence.

23 According to the findings of the Administrative Court, the security situation in Mogadishu does remain volatile. But the greatest danger to the civilian population in the region does not proceed from armed conflicts between the parties to the civil war, but from attacks by the Islamist militia Al-Shabaab. These are often directed against military and political targets, even though Al-Shabaab's attacks sometimes also deliberately target the civilian population in order to cause chaos and undermine trust in the government's stability. In its capacity as the judge of fact, the Administrative Court arrived at the assessment that the documented attacks, which were described in detail, had not thus far reached such a quantity and quality as to support the assumption that the entire civilian population in Mogadishu is in danger. In so finding, it took into account that at present Mogadishu is not among the regions of Somalia that are particularly affected by the conflict, and reports at least mention improvements in the security situation, even though that situation must still be categorised as poor. On the basis of these findings by the judge of fact, which are binding on this Court, there is no cause to object on grounds subject to review by this Court to the conclusion, reached by way of an overall assessment, that not every civilian in the Mogadishu region is exposed to a serious individual threat solely on the basis of their presence there.

24 3. This Court can decide with no need for further prior clarification from the Court of Justice of the European Union.

25 a) The requirements for granting subsidiary protection under Section 4 (1) sentence 2 no. 2 of the Asylum Act on the basis of inhuman or degrading treatment attributable to poor living conditions in the country of origin proceed from the aforementioned case-law of the Court of Justice of the European Union, and the present case offers no reason for further clarification by that court. Insofar as the jurisprudence of the Austrian Supreme Administrative Court (VwGH, *Verwaltungsgerichtshof*) holds that the threat of inhuman or degrading treatment within the meaning of Article 3 of the European Convention on Human Rights is sufficient for granting subsidiary protection, with no need for causation by an actor within the meaning of Article 6 of Directive 2011/95/EU, the Supreme Administrative Court itself points out that this is solely the consequence of a more favourable provision under Austrian national law - which is contrary to EU law (Austrian VwGH, ruling of 21 May 2019 - Ro 2019/19/0006 - Newsletter of Human Rights [NLMR, *Newsletter Menschenrechte*] 2019, 353). But this jurisprudence is not transferable to the German legal situation, because with the reference in Section 4 (3) sentence 1 of the Asylum Act to Section 3c of the Asylum Act, the German legislature has implemented the application of Article 6 of Directive 2011/95/EU for subsidiary protection (as well) in conformity with EU law, and in Section 60 (5) and (7) of the Residence Act it has taken precautions that extend even above and beyond the subsidiary protection under EU law against exposing people to a real danger of inhuman or degrading treatment within the meaning of Article 3 of the European Convention on Human Rights.

26 b) At any event, it does not follow from the jurisprudence of this Court whether a quantitative minimum threshold is needed for a grant of subsidiary protection under Section 4 (1) sentence 2 no. 3 of the Asylum Act on grounds of a serious individual threat by reason of indiscriminate violence when determining the risk of death and injury (on this point see Mannheim Higher Administrative Court, reference for a preliminary ruling of 29 November 2019 - A 11 S 2374/19 et al. - *juris* with further sources from the jurisprudence of other Member States), and it is not material to a decision in the instant case, if only

because irrespective of that consideration, the Administrative Court denied the existence of a sufficient density of danger on the basis of a comprehensive overall assessment. This too, for its part, does not raise any questions as to standards of EU law that are in doubt.

27 4. The disposition as to costs proceeds from Section 154 (2) of the Code of Administrative Court Procedure.

28 5. No court costs are imposed, in accordance with Section 83b of the Asylum Act. The value at issue proceeds from Section 30 of the Act on Attorney Compensation (RVG, *Rechtsanwaltsvergütungsgesetz*). There are no grounds for a derogation under Section 30 (2) of that Act.

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