

Harald Doerig: A Comment on the Abdullah Decision of the CJEU from the Perspective of the Referring Court

IARLJ Conference in Lisbon, September 2010

I like to add some remarks to the excellent analysis of my distinguished colleague Roger Errera concerning the Abdullah Decision of the CJEU dating from 2 March 2010. I have a close connection to the case because it was my court who has made the reference to the CJEU in this case and who has to deal with the answers now in order to proceed in the final decision on the case.

Let me begin to tell you some statistical figures of the year 2009. In that year 8115 persons were granted refugee status in Germany, but in the same time refugee status was withdrawn in 3828 cases because of the change of circumstances (2290 of these cases concern citizens of Iraq). So cessation of refugee status plays an important role in Germany.

Now I draw my attention to the judgement of the CJEU.

I. The CJEU Answers to our Questions

First Question: When does a refugee's well-founded fear of persecution no longer exist and he also has no other reason to fear persecution

Answer:

- 1) The reasons why he was persecuted have ceased to exist, f.ex. Saddam Hussein and his regime has gone away
- 2) There is not any longer an absence of state protection against persecution. That means his home country now is able and willing to protect the refugee against acts of persecution against his person. Therefore it is necessary that the home country operates an effective legal system for the detection, prosecution and punishment of acts constituting persecution and that the national concerned will have access to such protection
- 3) In this context the competent authorities may (not must) take into account, inter alia, the laws and regulations of the country of origin and the manner in which they are applied, and the extent to which basic human rights are guaranteed in that country.

But it is not necessary - as UNHCR has demanded - that there is a functioning system of law and justice in the home country and an adequate infrastructure to enable residents to exercise their rights. The right to a basic livelihood is as well not necessary for the cessation of refugee status. The CJEU did not even mention refraining from cessation when the living conditions in the appellant's home country are poor. I slightly differ from Roger Errera in this point. For me it seems to be clear, that the CJEU has answered this question in the negative, because when answering the question what are the reasons to refrain from cessation the Court refers to the absence of persecution and an effective system of state protection against

persecution, but to nothing more. So he answered Question 2 c (as well as Question 2 a) in the context of question 1.

4) The change of circumstances must be significant and non-temporary. The factors which formed the basis of the refugee's fear of persecution have to be permanently eradicated.

Again the CJEU Judgement has given a clear answer to this question. It is well situated in the middle between the position of the German/British governments on one side and of UNHCR on the other. We need a significant and non-temporary change of conditions, but we don't need a functioning system of law and justice and the guarantee of living conditions that ensure the minimum basis for a livelihood.

Second Question: Does the cessation of refugee status also require that the refugee should not be threatened with serious harm, within the meaning of Article 15 of the Directive?

Answer:

No. The Directive governs two distinct systems of protection, the first concerns refugee status and the second concerns, subsidiary protection. The cessation of refugee status cannot be made conditional on a finding that a person does not qualify for subsidiary protection.

Third Question: If the circumstances for granting the refugee status have ceased to exist, what standard of probability has to be applied for new and different circumstances founding persecution?

Answer:

1) The standard of probability used to assess the risk stemming from new and other circumstances is the same as that applied when refugee status was granted. It is no lower standard.

2) There is a relaxation of the burden of proof for the refugee in Art. 4 para 4 QD to demonstrate his continuing fear of persecution, if he had suffered from former persecution in the past. The Court of Justice decides that this relaxation in the burden of proof only applies if the refugee relies on circumstances other than those he was recognised as being a refugee.

I give you an example: The Iraqi applicant was recognized as refugee solely because he had left his home country and applied for asylum in another state. Under Saddam Hussein this alone constituted persecution. A new reason is his fear of persecution for religious grounds by islamic extremists in Iraq.

The relaxation of the standard of proof in Art. 4 para 4 QD however is granted only if the new fear has a connection with an already existing fear in the past. That means: If the refugee had already claimed to be persecuted for religious grounds by islamic extremists in the past, but recognized only because of his asylum application as such, the new persecution and an already existing former fear of persecution are sufficiently connected with each other. The CJEU looks on the grounds of

persecution in so far. That means, the rule of Art. 4 (4) QD applies if a new persecution for religious grounds corresponds with a former persecution for religious grounds. No sufficient connection is the fact that the refugee was tortured in the past and fears torture in the present, if the grounds for the torture are different. F.ex. he was tortured in the past because he was in a Kurdish opposition group and fears torture now for religious grounds. There must be a connection between the reasons for persecution in the sense of Art. 10 QD, not in the acts of persecution in the sense of Art. 9 QD.

II. The Consequences of the CJEU Decision

If a cessation order has to be examined by the courts, they have to pay attention to the following points:

- 1) Have the reasons for persecution, that lead to the recognition of the refugee in the past, ceased to exist.
- 2) Is there a state protection against this kind of persecution now
- 3) Are the factors which formed the basis of the refugee's fear of persecution in the past permanently eradicated now.
- 4) If the refugee claims the fear to be persecuted for other reasons than he had been recognized: Are they based on the same reason in the sense of Art. 10 QD (f. ex. religion) as the reasons he had been recognized it has to be examined if the reasons for resecution have really ceased to exist (assessment by Art. 11 para 2 QD).

Are they not based on the same reason as he had been recognized he can, however, get a relaxation in the burden of proof according to Art. 4 para 4 QD: This is the case if he had been recognized for other grounds than he fears persecution now, but reasons of the same nature had already existed in the past and the refugee proves that this really was the case. Those reasons can have existed in the past in two ways:

- a) They have already existed at the time of his first application but they were not decisive for the refugee authorities or the applicant did not mention them.
- b) They have occurred after he had left his country of origin.

It is the task of the national courts to examine all that. It is a hard task to find out the conditions for Art. 4 para 4 QD, because you have to examine if there was a persecution in the past. On the other side it is a task which refugee judges are already familiar with. And it helps the refugee to get a fair judgement.