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**A. S. Ispolinov**

**THE EUROPEAN COURT  
OF JUSTICE CASE  
OF ELGAFAJI:  
THE INTERACTION  
BETWEEN EU LAW  
AND INTERNATIONAL  
HUMANITARIAN LAW**



*This article focuses on the increasing influence of international court rulings on the development of new concepts within international law, in particular, the concept of subsidiary protection to persons who fall outside the scope of the 1951 Refugee Convention. The author also considers the issues related to the concept of indirect effect in EU law, as well as the interaction between the EU and international law.*

**Key words:** *international law, international humanitarian law, EU law, refugees, supplementary protection, indirect effect, EU common policy.*

Over the last 10—15 years, we have witnessed the emergence and rapid development of an international law phenomenon that was later dubbed *judicial activism*. It is understood as a process of active and dynamic interpretation of the norms of international law by courts of all levels — both international courts (European Court of Human Rights (ECHR), Court of Justice of the European Union, WTO Appellate Body), and the most renowned and authoritative national courts — as well as the increasing influence of their decisions on the development of international law in general. As to the EU Court of Justice, its decisions and established practices resonate far beyond the European Union.

Over the recent years, the EU Court of Justice has made several landmark decisions following its earlier adopted policy towards strengthening and emphasising the autonomy of the EU legal procedure both from national and international law. It is sufficient to remember its ruling on the Kadi case, when the Court stated that the norms of the primary law of the EU as well as the basic principle of EU law override any other international law norms [1].

Another example is a recent decision (of February 17, 2009) in the El-gafaji case [2], which is of interest for Russian researchers from several perspectives.

Firstly, this decision interprets the provisions of the European Council Directive 2004/83/EC of 29 April 2004 (hereafter referred to as the Directive), which was widely discussed by specialists in international humanitarian law. It sets uniform minimal standards for the qualification and grant of refugee status or subsidiary protection to third country nationals or stateless persons [3].

The Directive itself should be discussed and analysed individually and in full detail. However, in this work, it will be sufficient to mention that the Directive has become the first international document that develops and clarifies the provisions of the 1951 Convention relating to the status of refugees. The Directive was drawn up in view of the ample experience, including

court practice, of different states. The announced objective of this document was the development of a Common European policy of granting asylum through setting uniform minimum standards for all EU member states. An important innovation was that, for the first time, an international legal document featured the structure of subsidiary protection. It was understood as legal protection granted to persons, to whom the 1951 Convention did not extend. Although, at the national level there had been an established practice of granting protection to persons of this category (called de-facto refugees or humanitarian refugees), whereas at the international level this issue had not been tackled and no document had defined the term *subsidiary protection*. This gap was filled with the Directive, which described a special group of people, whom the refugee status did not extend to, but who required special legal regulation, and established a set of rights granted in the framework of such subsidiary protection defining at the same time the criteria for acquiring such status<sup>1</sup>. Not surprisingly, the adoption of the Directive was an important landmark in international humanitarian law, which, for the first time, embodied the non-refoulement principle — which had rooted in the practices of a number of states — at the international level. According to this principle, a person (even if the 1951 Convention does not formally apply to them), must not be deported from a country in case the return to the country of origin poses a threat to their life or health.

The decision of the EU court of justice was one of the first to clarify a number of key issues pertaining to the practical application of the provisions of the Directive. The decision of the EU Court of Justice in the *Elgafaji* case made it possible to speak of the emergence of special court practice pertaining to the issues of granting subsidiary protection, which is of interest from the perspective of both international humanitarian law and the development of a common EU legal space.

Secondly, the above mentioned decision of the EU Court of Justice — when considering the relation between the Directive and the national law of member states — applies the indirect effect doctrine (harmonious interpretation) hardly studied in the works of Russian scholars.

Thirdly, in that case, the Court deemed it possible to comment on the relation between the provisions of the Directive and, hence, the EU law in general, and the existing international law, including the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms. Emphasising its visions of the EU law as an autonomous phenomenon, the Court —with all due respect and tact — formulates its attitude towards the 1950 European Convention and the decisions of the European Court of Human Rights. It is a very topical issue for Russian scholars in view of the recent conflict of the positions of the ECHR and the Constitutional Court of the Russian Federation on the *Markin* case [5] and the ensuing heated discussion among Russian researchers [6].

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<sup>1</sup> It is worth noting that the set of rights granted in the framework of subsidiary protection is narrower than that granted to those enjoying the refugee status; other differences are a shorter minimum period of the validity of residence permit, the right reserved by the state to limit social benefits, limitations regarding employment, etc. (see.: [4]).

The circumstances of the Elgafaji case can be summarised as follows: on December 13, 2006, Mr and Mrs Elgafaji applied for a temporary residence permit in the Netherlands claiming that, in the case of deportation, they will be exposed to a real danger in their country of origin (Iraq). They presented facts substantiating their claims of danger. Mr Elgafaji, a Shiite Muslim, had worked for more than two years at a British company providing security services for transportation between the airport and the Green Zone in Baghdad. It was the reason why the Elgafajis once found a note at their doorstep threatening “death to collaborators”. Taking into account the fact that Mrs Elgafaji was a Sunnite Muslim, the spouses claimed that they would be exposed to a real danger in case of their return to Iraq.

However, the Ministry for Integration and Immigration of the Netherlands denied them asylum, referring to, *inter alia*, the corresponding provisions of national legislation that require the proofs of real threat to applicants to be convincing.

The applicants brought the case to the Dutch court, which took their side. The Court of Appeal examined the case and established that the government of the Netherlands, at the moment when the facts of the case took place, had not implemented the EC Directive 2004/83, and brought the case in the framework of preliminary rulings to the EU Court of Justice for the clarification of application of EU law norms in this case.

There was a conflict of provisions of three legal acts.

1. Article 3 of the European Convention on Human Rights (EConHR) stipulates that “No one shall be subjected to torture or to inhuman or degrading treatment or punishment”, on the basis of which the European Council standards for granting asylum were developed; the reasons for such action are a real individual threat to life, threat of capital punishment or a threat of being subjected to torture.

2. The legislation of the Netherlands working at the moment when the facts of the case took place and duplicating the standards of granting asylum developed in the framework of the Council of Europe.

3. The above mentioned Directive, which first mentions as a code of fundamental rights and freedoms the 2000 Charter of Fundamental Rights (it came into force simultaneously with the Lisbon Treaty) rather than the ECHR and stipulates that member states apply uniform criteria for identifying those requiring international protection. As to the criteria of granting subsidiary protection, the Directive states that they should be derived from international agreements on the protection of human rights and the practices existing in the EU member state (paragraph 6 and 25 and the preamble of the Directive).

Regarding the criteria required for identifying those in need of subsidiary protection, the Directive introduced in Article 15 (c) — alongside those presented in the 1951 Convention of Article 3 of the ECHR — another, absolutely new for international humanitarian law, criterion: “serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict”.

Thus, Dutch migration authorities and, later, national courts, faced the need to apply either the current legislation of the Netherlands based on the

norms of the ECHR, or the provisions of the Directive, which had not been implemented into the national law of that country yet.

The EU Court of Justice, whose decision established the procedures of application of the Directive's norms in response to the request of the Dutch court, did not deny itself the pleasure of emphasising the following:

a) The fundamental right set forth in Article 3 of the ECHR forms a part of general principles of the EU law and the established practice of the ECHR should be taken into account when interpreting the scope of this right within the EU legal procedure. However, Article 15 (c) of the Directive contains provisions dissimilar to those of Article 3 of the ECHR and whose interpretation must be conducted independently, but in view of the norms of the ECHR (paragraph 28 of the court decision).

b) Local authorities, when considering an application for subsidiary protection, or courts, when examining appeals against the decision to refuse to grant such protection, should assess and apply the provisions of Article 15 (c) to the applicant in view of the fact that, in contrast to Article 3 of the ECHR, covers risks of a more general nature (paragraph 33 of the court decision).

c) In exceptional cases (akin to the one under consideration), the threat to life can be considered in the framework of an armed conflict rather than specific acts of violence. In this case, violence should be of indiscriminate nature, i.e. extend to all people, regardless of their personal circumstances (paragraph 34 of the court decision).

d) Here, the term *individual threat* can be interpreted as a threat to civilians, regardless of the status and position — if indiscriminate violence in the course of the conflict reached such a high level (which should be assessed by competent national authorities, including courts) that there are sufficient reasons to assume that, having returned to the country of origin, the civilian will be exposed to a serious threat described in Article 15 (c) of the Directive (paragraph 35 of the court decision).

e) The fact that the Directive had not been implemented into the Dutch legislation does not exempt the national court from the obligation to apply the national legislation in view of the objectives and provisions of the Directive (the Court referred to the practice established since the *Marleasing* case [7], reiterating its commitment to the indirect effect doctrine [8]). In accordance to this doctrine, in case the Directive had not been implemented in due time and its provisions did not have direct effect, the national court must apply the national legislation interpreting it in view of the objective and provisions of the Directive, including the refusal to apply provisions of the national legislation inconsistent with it [9].

Summing up this overview of the key elements of the decision of the EU Court of Justice in the *Elgafaji* case, one can arrive at the following conclusions.

Firstly, as a result of the practice of the EU Court of Justice, we are witnessing the emergence of a new institution in international humanitarian law and EU law, i.e. that of subsidiary protection. The decision of the Court in the *Elgafaji* case clarifies the practical application of the criteria set forth in the Directive in granting applicants, who are not covered by the formal refu-

gee status according to the 1951 Convention, subsidiary protection according to international law.

Secondly, in the opinion of the EU Court of Justice, the corresponding provisions of the EU law, although based on the norms of the ECHR and other international agreements on human rights, are a distinct improvement over the latter. At the same time the EU Court of Justice has propensity to rely on the provisions of the 2000 Charter of Fundamental Rights, emphasising its role of the catalogue of human rights in the EU, which, although being based on the ECHR, surpasses the latter.

Thirdly, the provisions of the EU law regulating the procedure of granting subsidiary protection and, first of all, Article 15 (c) of the Directive, being internal regulations of the EU, whose content is not similar to the ECHR and other international agreements on human rights, should be interpreted independently; the practice of the ECHR concerning granting asylum should be not more than taken into account. According to the unanimous opinion of researchers specialising in the EU law, the introduction by the Lisbon Treaty (Article 267) of the provision on immediate examination by the Court of Justice of questions put by national courts regarding preliminary rulings in cases of prisoners, states that the number of cases pertaining to granting asylum and subsidiary protection brought to the EU Court of Justice will be increasing [10].

Fourthly, it is worth mentioning that the Directive 2004/83/EC introducing the new for international humanitarian law institution of subsidiary protection did not receive a warm welcome from the EU member states that did not implement it in the due period (until October 10, 2006). The practice of the EU Court of Justice, including the ruling on Elgafaji case, shows that the EU authorities are very determined in taking all possible measures for the successful implementation of a common European policy on granting asylum. So, the EU Commission referred eight member states to the Court of Justice pertaining to the violation of their obligations under the EU law, namely, the non-implementation of the given Directive in due time. The EU Court of Justice already made rulings on the first four cases [11]. The guidelines for national courts regarding the interpretation of national law in view of the objective and provisions of the Directive given in the Court's ruling of the Elgafaji case opens a second front in the battle with the member states eluding active participation in the implementation of the EU common policy on granting asylum.

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