



Press and Information

Court of Justice of the European Union

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Advocate General's Opinion in Case C-472/13
Andre Lawrence Shepherd v Bundesrepublik Deutschland

According to Advocate General Sharpston, non-combat military personnel may claim asylum if they consider themselves to be at risk of prosecution or punishment for refusal to perform military service where so doing might involve commission of war crimes

When assessing such applications national authorities should not apply rules or procedures based upon international criminal law

Under the EU directive on minimum standards for the qualification of refugees¹, a third country national who has a well-founded fear of being persecuted in his home country for reasons of race, religion, nationality, political opinion or membership of a particular social group may request refugee status within the EU.

Mr Shepherd, a US citizen, enlisted for service in the US armed forces in 2003. He was trained as a maintenance mechanic for Apache helicopters and in 2004 was deployed to Iraq where he carried out maintenance (particularly) on helicopters. In February 2005 he returned with his unit to its base in Germany. He then began to have doubts about the legitimacy of the war in Iraq and to investigate his concerns. By the time he received the order to redeploy to Iraq in 2007 he had reached the view that the war was contrary to international law. In his view these military operations involved the systematic, indiscriminate and disproportionate use of weapons without regard to the civil population. As a result particularly of the increasing deployment of Apache helicopters, more and more civilians were being harmed and international humanitarian law violated. He believed that the helicopters could not have been used if he and other maintenance mechanics had not made them combat-ready.

Mr Shepherd did not want to risk participating in war crimes in the context of his unit's deployment in Iraq. He did not consider the possibility of making a request to the US authorities not to be deployed on grounds of conscientious objection because he does not completely reject the use of war and force. He had, indeed, re-enlisted at the end of his initial period of service. He believed that an application to refuse to perform military service would not have protected him from further deployment in Iraq. He therefore decided to leave the US army before commencing a second tour of duty there; and deserted on 11 April 2007. As his refusal to perform military service in Iraq puts him at risk of prosecution for desertion by the US military authorities, in August 2008 Mr Shepherd applied for asylum in Germany.

In March 2011 the Bundesamt für Migration und Flüchtlinge (Federal Office for Migration and Refugees) ('the Bundesamt') refused Mr Shepherd's request for asylum on the grounds that (i) there is no fundamental right to conscientious objection; (ii) Mr Shepherd could have left military service legally; and (iii) the Qualification Directive does not apply to a person in his position.

Mr Shepherd then challenged that decision before the Bayerisches Verwaltungsgericht München (Bavarian Administrative Court, Munich, Germany). He considers that the Bundesamt wrongly focused on the concept of the *act* of persecution, neglecting the concept of the *reasons* for

¹ Directive 2004/83/EC of 29 April on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ 2004 L 304, p.12) ('the Qualification Directive').

persecution. The Bundesamt erred in applying principles of international criminal law in its assessment of his claim for asylum. It therefore erroneously concluded that a person refusing to perform military service may be granted refugee status only if he can prove 'beyond reasonable doubt' that, had he remained in the armed forces, he would have rendered himself guilty of the commission of an offence under international criminal law. Against that background the Bayerisches Verwaltungsgericht München has asked a number of questions seeking guidance on the meaning of Article 9(2)(e) of the Qualification Directive. That provision states that prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include committing war crimes, is an act of persecution for the purposes of the Qualification Directive. The principal question is whether Article 9(2)(e) applies to a person in Mr Shepherd's position and if so how his case should be assessed.

In her Opinion today, Advocate General Eleanor Sharpston addresses those questions. She takes the view that the words "... where *performing military service would include* [committing war crimes]" in Article 9(2)(e) of the Qualification Directive should be interpreted as meaning that all military personnel, including logistical support staff such as a helicopter maintenance mechanic, are covered by that article. There is nothing in the wording of the Qualification Directive limiting those words solely to combat personnel. That view is consistent with the Qualification Directive's overarching aim of identifying those persons who are forced by circumstances to seek protection in the European Union and are genuinely in need of it.

The Advocate General considers that the assessment of whether such a person "would" be led to participate in the commission of war crimes difficult because it requires the national authorities to consider acts and the consequences of actions that have not yet taken place.

Such an assessment is fundamentally different from the *ex post* inquiry that is conducted in criminal proceedings. Here, the national authorities must consider whether there is a direct link between the acts of the person concerned and the reasonable likelihood that war crimes might be committed, such that the person concerned could be led to participate in the commission of war crimes because his actions comprise a necessary element of those crimes.

Regarding the question as to whether Mr Shepherd qualifies as a refugee within the meaning of the Qualification Directive, there must be a connection between the reasons listed in that Directive and the acts of persecution defined in Article 9. In assessing whether Mr Shepherd is a member of a particular social group the national authorities should have regard to whether he holds a conviction of sufficient cogency, seriousness, cohesion and importance regarding the conflict in question. Those authorities would then have to consider whether, on the basis of the material available to them, it is reasonable to suppose that, in the US, persons in Mr Shepherd's specific position are regarded differently and are subject to particular treatment by society in general.

As to whether the conflict in question must predominantly or systematically involve the commission of acts such as war crimes or whether it is sufficient for an applicant to show that in individual cases, such acts were committed by the armed forces to which he belongs, Advocate General Sharpston states that neither alternative is determinative of whether or not Article 9(2)(e) of the Qualification Directive applies. What matters is the likelihood that the applicant risks committing war crimes. It is not necessary to establish beyond reasonable doubt that violations of international criminal law can be expected to occur. The Advocate General emphasises that the Statute of the International Criminal Court is not relevant in such an assessment.

Advocate General Sharpston expresses the view that the existence of national or international machinery to prosecute war crimes may in principle be a deterrent to their commission. However, it is a sad but inescapable fact that, even though such machinery may exist, war crimes *are* sometimes committed in the heat of conflict. Thus, if Article 9(2)(e) of the Qualification Directive is to have any value as a means of enabling those at risk of finding themselves forced to participate in committing war crimes to find a safe haven, it must operate independently of whether national or international machinery to prosecute and punish war crimes exists and is used.

As regards whether Article 9(2)(e) of the Qualification Directive can be invoked even where military action is sanctioned by the international community or a UN Security Council mandate, the Advocate General considers that the existence of such a mandate does not obviate the need for, or affect the outcome of, the assessment conducted under the Qualification Directive. Nor does it *per se* exclude the possibility that war crimes have been or might be committed.

By the last of its questions concerning the interpretation of Article 9(2)(e) of the Qualification Directive, the German court asks whether, before he can rely on that provision, an applicant must avail himself of the ordinary conscientious objector procedure provided in his national system. Whether such a procedure exists is a matter for the national authorities to assess according to the facts and circumstances of the case in question. In the Advocate General's view, there is no good reason why a person in Mr Shepherd's position should qualify for refugee status on a ground of persecution which he would have been able to avoid without compromising his beliefs if he had lodged an application for conscientious objection under any relevant national rules. Conversely, if as serving personnel he would have been precluded from seeking conscientious objection status on the basis of his objection to redeployment in Iraq, the fact that he did not lodge a request for such status cannot have any bearing on his application for refugee status.

Finally, the Bayerisches Verwaltungsgericht München sought guidance on whether a dishonourable discharge following a prison sentence and the social ostracism and disadvantages associated with such punishment constitute acts of persecution within the meaning of the Directive. In approaching that question the Advocate General took into account that entitlement to refugee status only arises where an act of persecution is connected with a reason for persecution. In that respect all parties making observations to the Court (including Mr Shepherd) accept that States may impose penalties on military personnel who refuse to perform further military service where their desertion is *not* based on valid reasons of conscience and provided that any penalties and the associated procedures comply with international standards. Accordingly, that question is relevant only if the national authorities conclude that Mr Shepherd did *not* plausibly believe that he risked committing war crimes if he redeployed to Iraq. Court martial proceedings and/or a dishonourable discharge clearly fall within the Directive. However, an applicant has to show that such measures are in themselves discriminatory or are applied in a discriminatory manner. As Mr Shepherd relies on being persecuted because of his membership of a particular social group in his claim, in making that assessment it is necessary to consider whether there are social groups in the US that are comparable to that to which Mr Shepherd claims to belong, whether his group is more likely than the comparable group to face discrimination and whether any apparent difference in treatment could be justified. In the absence of any evidence on the case-file indicating that discrimination of that kind is relevant here, it is for the national authorities to make the necessary detailed assessment of the facts and circumstances to determine the true position.

It is likewise impossible to say in the abstract whether a possible prosecution is disproportionate or discriminatory, or whether Mr Shepherd's likely punishment, if he is convicted of desertion, would be disproportionate, triggering application of the Directive. In general terms, in assessing whether prosecution or punishment for desertion is disproportionate it is necessary to consider whether such acts go beyond what is necessary for the State concerned to exercise its legitimate right to maintain an armed force. Ultimately, such matters are again for the national authorities to assess in the light of the circumstances of the case.

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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The [full text](#) of the Opinion is published on the CURIA website on the day of delivery.

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