Cessation of refugee status and actors of protection: CJEU, judgment of 20 January 2021, OA

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Featured Judgment

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CJEU, judgment of 20 January 2021, *OA*[2]

Cessation of refugee status and actors of protection

In her analysis of the OA judgment, concerning the revocation of international protection status with the possible concomitant return of a refugee to their country of origin, Samantha Velluti examines the case by drawing on a comparison with previous rulings of the CJEU as well as the English and German courts. The importance of the judgment lies in shedding light on the meaning of 'protection' and 'actor of protection' in the country of origin. Even after Brexit, the judgment will continue to have effects in the United Kingdom and be followed accordingly.

1. Facts and dispute in the main proceedings

OA is a Somali national, who originally resided in Mogadishu, Somalia. He is a member of the minority Reer Hamar clan. In the course of the 1990s, OA and his first wife were the victims on a number of occasions of serious harm and violence at the hands of the Hawiye militia in Mogadishu. In 2001 they fled Somalia and travelled to Kenya. In the same year, OA's first wife entered the UK and obtained refugee status; OA travelled to the UK in 2003 and obtained refugee status there as a dependent of his first wife.

His refugee status was revoked in 2016 because of a change of circumstances in Somalia and he was declared ineligible for humanitarian protection under the UK's Immigration Rules. The Secretary of State for the Home Department (SSHD) decided that to return OA to his country of origin would not be in breach of the obligations of the UK under

1 I would like to thank Dr William McCready, Sussex Law School, and the anonymous reviewers of the *Asiel- & Migrantenrecht* for their insightful comments on an earlier draft of this case note.

2 Case C-255/19 *Secretary of State for the Home Department v OA*, ECLI:EU:C:2021:36.

Article 3 of the European Convention on Human Rights (ECHR).
In particular, according to the SSHD there had been a non-temporary change of circumstances in the refugee's country of origin as persecution of minority clans by majority clans is no longer a real risk in the Mogadishu region and there is effective state protection.[3] The SSHD decision to revoke OA's refugee status was partly based on the availability of support from OA's relatives and fellow clan members. In this regard, the SSHD referred to a previous judgment of the Upper Tribunal (UT) according to which:

> 'although the relevant protection must be state protection, the assessment of the effectiveness of that protection requires consideration of protective functions in a wide sense to include those carried out by families and clans'.[4]

Significantly, in assessing the refugee's situation if returned to Mogadishu, the UT found that OA could be financially supported by close relatives living in that city, from his sister who was resident in Dubai and by fellow clan members in the UK.[5]
The refugee challenged those findings and argued that 'he still has a well-founded fear of persecution in Mogadishu and that the state authorities in Somalia are not capable of protecting him from serious harm'.[6] He based his claim on the 2014 assessment made by the United Nations High Commissioner for Refugees, according to which 'the security situation in Mogadishu still gives rise to serious concerns and that the minority clans remain at a particular disadvantage'.[7] Further, he maintained that the 'Country Guidance' case that was used by the SSHD was the 'result of a misunderstanding of state protection, since it was based in part on the availability of protection from family or other clan members, who are private, and not state actors'.[8] In this respect, the UNHCR *Guidelines on Cessation* provide that protection must be effective and available and it must be afforded through 'a functioning government and basic administrative structures, as evidenced for instance through a functioning system of law and justice, as well as the existence of adequate infrastructure to enable residents to exercise their rights, including their right to a basic livelihood.'[9]

In addition, as rightly pointed out by the UNHCR, changes must prove durable and implementable and should be given time to consolidate before any decision on cessation is made.[10] A minimum period of 12 to 18 months – always depending on the circumstances – should normally pass before a decision on ceased circumstances can be considered reliable.[11]

Questions of the Upper Tribunal

(1) Is 'protection of the country of nationality' within the meaning of Article 11(1)(e) and Article 2(e) of [Directive 2004/83] to be understood as State protection?
(2) In deciding the issue of whether there is a well-founded fear of being persecuted within the meaning of Article 2(e) of [Directive 2004/83] and the issue of whether there is protection available against such persecution, pursuant to Article 7 of [Directive 2004/83], is the 'protection test' or 'protection inquiry' to be applied to both issues and, if so, is it governed by the same criteria in each case?
(3) Leaving to one side the applicability of protection by non-state actors under Article 7(l)(b) [of Directive 2004/83], and assuming the answer to question (1) above is yes, is the effectiveness or availability of protection to be assessed solely by reference to the protective acts/functions of State actors or can regard be had to the protective acts/functions performed by private (civil society) actors such as families and/or clans?
(4) Are (as is assumed in questions (2) and (3)) the criteria governing the 'protection inquiry' that has to be conducted when considering cessation in the context of Article 11(l)(e) [of Directive 2004/83] the same as those to be applied in the Article 7 context?'

2. Decision of the Court of Justice

This case concerns the interpretation of the concept of 'protection' of 'country of nationality' (Articles 2(c), 7(1)(a) and (b) and 11(1)(e) of the Qualification Directive).[12]
The CJEU concluded that Article 11(1)(e) of the Qualification Directive – commonly known as the 'ceased circumstances' clause-[13] must be interpreted as meaning that the requirements to be met by the 'protection' to which that provision refers in respect of the cessation of refugee status must be the same as those which arise, in relation to the granting of that status, from Article 2(c) of that Directive, read together with Article 7(1) and (2) thereof.[14] In other words, the Court found that 'the notion of 'protection' in the cessation

3 UKUT *SSHD* v *OA* (RP/00137/2019), para. 41.
4 *Ibidem*, para. 49; see *MOJ & Ors (Return to Mogadishu) Somalia CG v. Secretary of State for the Home Department*, [2014] UKUT 00442 (IAC), United Kingdom: Upper Tribunal (Immigration and Asylum Chamber), 3 October 2014, see also ECtHR, *RH v Sweden* (Application No. 4601/14), 10 September 2015, para. 73.
5 UKUT, above no. 2, para. 29.
6 CJEU, Case C-255/19 *Secretary of State for the Home Department v OA joined parties: United Nations High Commissioner for Refugees (UNHCR)* ECLI:EU:C:2021:36, para. 26.
7 *Idem*; see also UN High Commissioner for Refugees (UNHCR), *UNHCR Position on Returns to Southern and Central Somalia*, 17 June 2014, available at: https://bit.ly/3hce48z [accessed 1 April 2021].
8 CJEU, above no. 5, para. 26.
9 UNHCR, *Guidelines on International Protection No. 3: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the 'Ceased Circumstances' Clauses)*, 10 February 2003, HCR/GIP/03/03, available at: https://bit.ly/3dDURKB [accessed 1 April 2021], para. 15, p. 5, see also para. 16, p. 5.
10 UNHCR, 'Discussion Note on the Application of the 'ceased circumstances' Cessation Clause in the 1951 Convention; (EC/ SCP/1992/CRP.1), para. 12.
11 Idem.
12 Council Directive 2004/83/EC of 29 April 2004 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, and corrigendum, OJ 2005 L 204, p. 24); Article 11(1)(e) of the Qualification Directive is based on Article 1(C)(5) of the 1951 *Convention relating to the Status of Refugees*, see UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations Treaty Series No. 2545, vol. 189, p. 137.
13 UN High Commissioner for Refugees (UNHCR), *UNHCR public statement in relation to Salahadin Abdulla and Others v. Bundesrepublik Deutschland pending before the Court of Justice of the European Union*, August 2008, C-175/08; C-176/08; C-178/08 & C-179/08, available at: https://bit.ly/3xh0PZC, p. 1 [accessed 6 April 2021].
14 Ibidem, para. 64.

assessment must be the same as that for recognition of status (*i.e.* the 'mirror image')'.[15]

CJEU: 'any social and financial support provided by private actors, such as the family or the clan of a third country national concerned, falls short of what is required under those provisions to constitute protection'

The Court then considered whether social and financial support provided by private actors, such as the family or clan of the third country national, meets the requirements of protection as per Article 11(1)(e) and 7(2) of the Qualification Directive. Protection in the meaning of these Articles refers to a country's ability to prevent the persecution or suffering of serious harm, among others, 'by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm,' and the applicant's access to such protection.'[16] Mere financial and social support are inherently incapable of protecting an individual against these acts but rather can merely help ensure their reintegration.[17]
Relatedly, the Court examined whether the social and financial support provided by a clan or family can exclude a fear of persecution, regardless of the definition of protection in Article 11(1)(e) of the Qualification Directive. If the protection requirements of Article 7(2) are met it can be inferred that there is no fear of persecution.[18] The Court concluded that:

> 'any social and financial support provided by private actors, such as the family or the clan of a third country national concerned, falls short of what is required under those provisions to constitute protection and is, therefore, of no relevance either to the assessment of the effectiveness or availability of the protection provided by the State within the meaning of Article 7(1)(a) of that directive, or to the determination, under Article 11(1)(e) of that Directive, read together with Article 2(c) thereof, of whether there continues to be a well-founded fear of persecution.'[19]

3. After *Abdulla*

The *OA* decision is a further development of the CJEU's reasoning in *Abdulla*,[20] a case concerning five Iraqi nationals who applied for asylum in Germany and for various reasons submitted that they feared persecution in Iraq by the regime of Saddam Hussein's Baath party. They were granted refugee status in 2001 and 2002. Subsequently, their refugee status was revoked on the basis that there had been a change of circumstances in Iraq and, in particular, that Saddam Hussein's regime had been overthrown. Consequently, the German authorities considered that the applicants were now safe from the persecution suffered under the previous regime and that they were not under any significantly likely threat of further persecution on any other grounds. Following a series of challenges in domestic courts the case came before the German Federal Administrative Court on points of law.[21] In turn, the German Court stayed the proceedings and made a request for a preliminary ruling to the CJEU with the questions focusing mainly on cessation.[22]

While the appellants and the Commission maintained that the conditions to obtain refugee status and those for cessation differed,[23] Germany, Italy, Cyprus and the UK were in favour of the symmetrical perspective, i.e. of a correlation between the revocation of refugee status and the end of a well-founded fear of persecution. Even though the UNHCR was not a formal intervener, it nevertheless issued a statement aiming at influencing the proceedings.[24] The UNHCR interpreted Article 1C(5) of the 1951 Refugee Convention (on which Article 11 of the Qualification Directive is based) restrictively and emphasised that the absence of a present risk of persecution is necessary, but insufficient.[25] Moreover, as indicated by Article 11(2) of the Qualification Directive, 'the change of circumstances is of such a significant and non-temporary nature that the refugee's fear of persecution can no longer be regarded as well-founded,' which according to the UNHCR is meant to ensure durable solutions for refugees.[26]
Significantly, Advocate General Mazák stressed the need to interpret Article 11 of the Qualification Directive in a

15 Maria O'Sullivan, 'Legal note on the cessation of international protection and review of protection statuses in Europe', European Council on Refugees and Exiles (ECRE) Legal Note 07, 2021, available at: https://bit.ly/3hrbSc1 [accessed 1 April 2021] p. 11.
16 CJEU, above no. 5, paras. 43-44; see also Opinion of Advocate General Hogan in *Case C255/19 Secretary of State for the Home Department v OA (Request for a preliminary ruling from the Upper Tribunal (Immigration and Asylum Chamber) (United Kingdom))*, ECLI:EU:C:2020:342, para. 58.
17 CJEU, above no. 5, paras. 45-46.
18 CJEU, above no. 5, paras. 58-60.
19 CJEU, above no. 5, para. 63.
20 CJEU, Joined Cases C-175/08. C-176/08. C-178/08 and C-179/08 *Salahadin Abdulla, Hasan, Adem and Rashi, Jama v Bundesrepublik Deutschland*, ECLI:EU:C:2010:105.
21 Bundesverwaltungsgericht (Federal Administrative Court, Germany), 10 C 33.07, 7 February 2008, paragraph 23, ('BVerwG 33.07'), available at (2009) 21(3) *International Journal of Refugee Law*, 549.
22 The request of the German Federal Administrative Court
'1. Is Article 11(1)(e) of [the] Directive ... to be interpreted as meaning that – apart from the second clause of Article 1(C)(5) of the [Geneva] Convention – refugee status ceases to exist if the refugee's well-founded fear of persecution within the terms of Article 2(c) of that directive, on the basis of which refugee status was granted, no longer exists and he also has no other reason to fear persecution within the terms of Article 2(c) of [that directive]?
2. If Question 1 is to be answered in the negative: does the cessation of refugee status under Article 11(1)(e) of [the] Directive also require that, in the country of the refugee's nationality,
(a) an actor of protection within the meaning of Article 7(1) of [the Directive] be present, and is it sufficient in that regard if protection can be assured only with the help of multinational troops,
(b) the refugee should not be threatened with serious harm, within the meaning of Article 15 of [the Directive], which leads to the granting of subsidiary protection under Article 18 of that directive, and/or
(c) the security situation be stable and the general living conditions ensure a minimum standard of living?
3. In a situation in which the previous circumstances, on the basis of which the person concerned was granted refugee status, have ceased to exist, are new, different circumstances founding persecution to be:
(a) measured against the standard of probability applied for recognising refugee status, or is another standard to be applied in favour of the person concerned, and/or
(b) assessed having regard to the relaxation of the burden of proof under Article 4(4) of [the] Directive ...?'
23 CJEU, above no. 18, para. 32.
24 UNHCR, above no. 11; this statement reiterated the position in its guidelines on cessation, see above no. 8.
25 Cathryn Costello, *The Human Rights of Migrants and Refugees in European Law* (Oxford: OUP, 2016), p. 207.
26 *Idem.*

cautious manner, fully respecting human dignity.[27] Hence, with regard to the requirement of protection imposed under Articles 11(1)(e) and 7(2) this must not exist in the abstract but in concrete, tangible and objective terms.[28] Linked to this, Advocate General Mazák held that it is 'questionable whether the country in question will have the organisational structure and means to provide protection under Article 7 if it cannot ensure a minimum standard of living for its citizens'.[29]

4. Filling 'gaps' in the law

The CJEU addressed the central question on the relationship between cessation and recognition of status interpreting cessation in Article 11(1)(e) of the Qualification Directive as the 'mirror image' of the recognition of refugee status.[30] The reasoning of the CJEU was that Article 11(1)(e) of the Qualification Directive like Article 1C(5) of the 1951 Refugee Convention, provides that a person ceases to be classified as a refugee when 'he no longer qualifies for refugee status'.[31]

The *Abdulla* judgment had a major impact on Germany's asylum procedures.[32] The Federal Administrative Court significantly changed its practice pre-*Abdulla*. While it basically upheld its main focus on the cessation of the original grounds of persecution it also developed more severe requirements for the application of the 'ceased circumstances' clause.

With regard to actors of protection, the CJEU did not fully examine Article 7 of the Qualification Directive but held that Article 7(1) does not preclude 'the protection from being guaranteed by international organisations, including protection ensured through the presence of a multinational force in the territory of the third country.'[33]

The OA decision is of great salience because it filled a legal gap in relation to actors of protection.

In this respect, the *OA* decision is of great salience because it filled a legal gap in relation to actors of protection.[34] Specifically, the finding of the Advocate General that non-state actors can only supply protection deemed to be equivalent to that of state protection where those non-state actors control all or a substantial part of a state and have also sought to reproduce key state functions by providing or supporting a functioning legal and policing system based on the rule of law, is particularly significant.[35]

The issue of non-state actors' suitability to provide adequate protection is also related to the other moot question of the applicability of the Internal Protection Alternative (IPA) or Internal Relocation Principle (IRP) to cessation cases. The UNHCR's position is that the IPA/IRP should not be used in principle in cessation decisions as

> 'refugee status can only come to an end if the basis for persecution is removed without the precondition that the refugee has to return to specific safe parts of the country in order to be free from persecution. Also, not being able to move or to establish oneself freely in the country of origin would indicate that the changes have not been fundamental.'[36]

However, this approach is disputed by some academics[37] and there is divergence of opinion amongst national courts, which in certain circumstances seem to consider the IPA/IRP as a possible trigger for cessation of refugee status.[38] Given the lack of security in large parts of Somalia, it comes as no surprise that the IPA/IRP was not considered in the *OA* case.

The above jurisprudential approach emphasising an assessment of the refugee's individual situation vis-à-vis his well-founded fear of persecution together with actors of protection of the country of origin, is in line with changes in EU asylum law.[39] Article 24 of the 2011 Recast Qualification Directive[40] provides that Member States shall issue three-year residence permits to refugees and one year residence permits to holders of subsidiary protection, renewable in both instances. The Directive also allows Member States to review cases upon expiry of those permits and to revoke a person's international protection status and residence if circumstances in the country of origin have changed.[41] There is also a proposal before the European Parliament to amend the Recast Qualification Directive to impose an obligation on Member States to carry out systematic and regular 'status reviews' to examine whether there have been significant changes in the situation of the relevant country of origin.[42]

27 Opinion of Advocate General Mazák in Joined Cases C-175/08. C-176/08. C-178/08 and C-179/08 *Salahadin Abdulla, Hasan, Adem and Rashi, Jama v Bundesrepublik Deutschland*, ECLI:EU:C:2009:551, para. 45.
28 Ibidem, para. 53.
29 Ibidem, para. 63.
30 For the UK context, see also: *Secretary of State for the Home Department v MA (Somalia)* [2018] EWCA Civ 994 (Arden J) ('MA Somalia 2018').
31 *Ibidem,* para. 65.
32 For further analysis, see Gábor Gyulai, 'The Luxemburg Court: Conductor for a Disharmonious Orchestra? Mapping the national impact of the four initial asylum-related judgments of the EU Court of Justice', Hungarian Helsinki Committee, 2012, pp. 29-32, available at: https://bit.ly/3xf3fYH [accessed 2 April 2021].
33 *Ibidem*, paras. 75 and 101.
34 Younous Arbaoui, 'The OA case: Game Changer? Private 'actors of protection' in European Asylum Law', *Refugee Law Initiative* Blog, 27 November 2020, available at: https://bit.ly/2UidzAT [accessed on 2 April 2021]. Arbaoui's analysis preceded the judgment of the CJEU and focused, among others, on the Opinion of AG Hogan. That said, his conclusions turned out to be correct, particularly in relation to the position of the CJEU.
35 Opinion of Advocate General Hogan, above no. 14, paras 78-79; CJEU, above no. 5, paras. 63-64.
36 UNHCR, above no. 8, para. 17.
37 Yi Chao, *A Legitimate Norm Gets Misunderstood: Finding a Plausible Place for the Internal Relocation Principle in International Refugee and Human Rights Law*, Doctoral Thesis, Faculty of Law, McGill University, Montreal (ProQuest Dissertations Publishing, 2020); for detailed analysis, see Jonah Eaton, 'The Internal Protection Alternative Under European Union Law: Examining the Recast Qualification Directive' (2012) 24 *International Journal of Refugee Law* 4: 765–792, https://doi-org.ezproxy.sussex.ac.uk/10.1093/ijrl/ees051.
38 O'Sullivan, above no. 13, pp. 17-18.
39 Ibidem, p. 2.
40 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), [2011] OJ L 337/9.
41 Article 11(1)(e) and Article 14 of Directive 2011/95/EU; *e.g.* Article 14(2) where it provides that: 'the Member State which has granted refugee status shall, on an *individual basis*, demonstrate that the person concerned has ceased to be or has never been a refugee in accordance with paragraph 1 of this Article.'
42 Proposal for a regulation of the European Parliament and of the Council 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

5. Consequences after Brexit

It remains to be seen what consequences the *OA* judgment will have for the UK since it is no longer a Member State of the EU.[43] This is an important point as an extensive part of the *MOJ & Ors (Return to Mogadishu) Somalia* country guidance case 'is predicated on the availability of protection by clan members from persecution',[44] which both the Advocate General and the CJEU found to be unacceptable from the perspective of protection from persecution.

As the request for a preliminary reference by the UT was lodged on 26 March 2019, namely, before the end of the transition period, on 31 December 2020,[45] the CJEU had jurisdiction to deliver a preliminary ruling with binding force on and in the UK, in accordance with Articles 86(2) and 89 of the Withdrawal Agreement.[46]

While the European Union (Withdrawal) Act 2018 provides that UK courts and tribunals are not bound by any principles laid down or any decisions made by the European Court, *i.e.* the CJEU, after the implementation period (IP) completion day,[47] it also says that they may have regard to anything done on or after IP completion day by the European Court, another EU entity or the EU so far as relevant to any matter before the court or tribunal.[48]

Moreover, the Qualification Directive and EU-derived domestic law such as the Refugee of Persons in Need of International Protection (Qualification) Regulations 2006, which implements the Qualification Directive in the UK, have become retained EU law on IP completion day.[49]

The Qualification Directive and the UK regulations implementing it outline the criteria for determining asylum claims. As they are based on international treaties such as the 1951 Refugee Convention and the ECHR which will remain unchanged by Brexit, the underlying law is unlikely to change substantially even if they are repealed after Brexit.[50] Additionally, a combined reading of section 2 (on EU-derived domestic legislation) and section 4 (any rights, powers, liabilities, obligations, restrictions, remedies and procedures etc. under section 2(1) of the European Communities Act 1972) of the 2018 Act[51] seems to confirm that they continue to have effect in domestic law and thus will continue to be enforced and followed accordingly. ◀

granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third country nationals who are long-term residents, COM(2016) 466 final - 2016/0223 (COD), Explanatory Memorandum, reviews are foreseen for Articles 14 and 20, see Articles 15 and 21.

43 The UK left the EU at midnight (CET) on 31 January 2020.

44 Bilaal Shabbir, 'Luxembourg set to undermine Home Office position on clan protection in Somalia', 12 May 2020, p. 2, available at: https://bit.ly/2UnYJsE [accessed 9 March 2021].

45 Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (the 'Withdrawal Agreement'), OJ 2020, L 29, p. 1., Article 126.

46 Idem.

47 European Union (Withdrawal) Act 2018 (c. 16), s6(1).

48 Ibidem, s6(2).

49 Iain Halliday, 'Briefing: the status of EU immigration and asylum law after Brexit' 3 February 2020, available at: https://bit.ly/3h9unmv [accessed 2 April 2021].

50 Idem; see also Shabbir, above no. 42. Moreover, the UK's Immigration Rules provide that: 'All asylum applications will be determined by the Secretary of State in accordance with the Refugee Convention', see *Immigration Rules (last amended May 2021)*, HC 395, (as amended), 23 May 1994, para. 328.

51 Section 2(1) provides that: 'EU-derived domestic legislation, as it has effect in domestic law immediately before exit day, continues to have effect in domestic law on and after exit day'; Section 4(1) and (2) provides that:
'(1) Any rights, powers, liabilities, obligations, restrictions, remedies and procedures which, immediately before exit day (a) are recognised and available in domestic law by virtue of section 2(1) of the European Communities Act 1972, and (b) are enforced, allowed and followed accordingly, continue on and after exit day to be recognised and available in domestic law (and to be enforced, allowed and followed accordingly).
(2) Subsection (1) does not apply to any rights, powers, liabilities, obligations, restrictions, remedies or procedures so far as they (a) form part of domestic law by virtue of section 3, or (b) arise under an EU directive (including as applied by the EEA agreement) and are not of a kind recognised by the European Court or any court or tribunal in the United Kingdom in a case decided before exit day (whether or not as an essential part of the decision in the case).'

En in Nederland...

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Op weg naar volledige interpretatie van artikel 7 van de Kwalificatierichtlijn[1]

In zijn bespreking van het arrest OA laat Younous Arbaoui zien dat privéactoren geen rol moeten spelen in de beoordeling van de doeltreffendheid en beschikbaarheid van bescherming in het land van herkomst. Het arrest maakt echter niet duidelijk of een effectief rechtsstelsel altijd vereist is en of overheidscampagnes en NGO's, zoals Nederlandse rechters geregeld aannemen, dat stelsel kunnen vervangen.

1 Dit commentaar is grotendeels gebaseerd op Y. Arbaoui (novembre 2020)' 'The OA case: Game Changer? Private 'actors of protection' in European Asylum Law', RLI Blog on refugee Law and Forced Migration; Y. Arbaoui (février 2021)' 'L'affaire OA: un autre pas vers une interprétation complète de la notion de la "protection" dans la directive qualification', Cahiers de l'EDEM. Ik dank de aanwezigen tijdens de cursus 'Internationaal vreemdelingenrecht mensenrechten, verdieping' (Studiecentrum Rechtspleging (SSR), juni 2021, waar ik deze bijdrage heb gepresenteerd) voor op- en aanmerkingen.

Tijdens de hoorzitting[2] voor het Hof van Justitie van de EU in het kader van de *OA*-zaak,[3] hebben betrokken partijen de nadruk gelegd op de vraag of eventuele financiële en sociale steun door privéactoren, in het bijzonder de familie en de clan van de asielzoeker, voldoet aan de beschermingsvereisten die voortvloeien uit artikel 7 van de Kwalificatierichtlijn.[4] In het *OA*-arrest beantwoordt het Hof deze vraag ontkennend. Het vindt dat de financiële en sociale steun van privéactoren irrelevant is voor de beoordeling van de doeltreffendheid en beschikbaarheid van bescherming in het land van herkomst.[5]

Daarnaast is het Hof van oordeel dat dergelijke steun niet relevant is voor de vaststelling van het voortbestaan van een gegronde vrees voor vervolging in de context van de beëindiging van de vluchtelingstatus.[6] Gezien de symmetrietussen de toekenning en de beëindiging van de vluchtelingenstatus,[7] en nu de beschermingsvraag en de beoordeling van de vrees voor vervolging intrinsiek met elkaar verbonden zijn,[8] is de financiële en sociale steun van privéactoren evenmin relevant voor de beoordeling van het bestaan van de vrees voor vervolging in het kader van de toekenning van de vluchtelingstatus.

Nu, net als in het Verenigde Koninkrijk,[9] de steun van privéactoren een belangrijke rol speelt in de Nederlandse asielpraktijk,[10] bijvoorbeeld in zaken van vrouwen die om asiel vragen wegens gedwongen huwelijk[11] of vrouwenbesnijdenis,[12] zal het *OA*-arrest moeten leiden tot wijzigingen in beleid[13] en in de praktijk.[14]

Artikel 7 Kwalificatierichtlijn

1. Bescherming tegen vervolging of ernstige schade kan alleen worden geboden door: a) de staat; of b) partijen of organisaties, met inbegrip van internationale organisaties, die de staat of een aanzienlijk deel van zijn grondgebied beheersen, mits zij bereid en in staat zijn bescherming te bieden overeenkomstig lid 2.
2. Bescherming tegen vervolging of ernstige schade moet doeltreffend en van niet-tijdelijke aard zijn. In het algemeen wordt dergelijke bescherming geboden wanneer de actoren als bedoeld in lid 1, onder a) en b), redelijke maatregelen tot voorkoming van vervolging of het lijden van ernstige schade treffen, onder andere door de instelling van een doeltreffend juridisch systeem voor de opsporing, gerechtelijke vervolging en bestraffing van handelingen die vervolging of ernstige schade vormen, en wanneer de verzoeker toegang tot een dergelijke bescherming heeft.'[15]

1. Anders dan het EHRM

Het *OA*-arrest heeft uitsluitend betrekking op de vluchtelingstatus en niet op de subsidiairebeschermingsstatus.[16] Aangezien artikel 7 van de richtlijn van toepassing is op beide gevallen, kan echter gesteld worden dat privéactoren ook geen rol moeten spelen in de context van subsidiaire bescherming.[17] In het bijzonder betekent dit dat het *OA*-arrest van toepassing is op gevallen waarin het gaat om ernstige schade in de zin van onmenselijke behandeling in het land van herkomst.[18]

Dit standpunt vindt steun in de uitspraak van het Europese Hof voor de Rechten van de Mens in *H.L.R.* waarin artikel 3 (verbod van onmenselijke behandeling) van het Verdrag tot bescherming van de rechten van de mens en de fundamentele vrijheden (EVRM) centraal stond. Het EHRM heeft in deze zaak geoordeeld dat in gevallen van onmenselijke behandeling door niet-overheidsactoren, aannemelijk moet worden gemaakt dat het risico reëel is en dat de autoriteiten in het land van herkomst geen bescherming bieden.[19] In de EHRM-jurisprudentie over vrouwen die om bescherming vragen, bijvoorbeeld vanwege gedwongen huwelijken en/of vrouwenbesnijdenis, is echter elke factor die het risico op onmenselijke behandeling minder reëel maakt, wel relevant. Het EHRM ziet niet alleen de staat maar ook privéactoren, zoals familieleden en ngo's, als relevante factoren.[20]

2 E. Stoppioni (mars 2020), 'L'audience de la CJUE dans l'affaire C-255/19 O.A.: statut de réfugié et rôle du soutien de la famille ou du clan', *Compte rendu d'audiences de plaidoiries du Blog droit européen*.
3 Hof van Justitie van de EU 20 januari 2021, *Secretary of State for the Home Department tegen OA*, C255/19, ECLI:EU:C:2021:36.
4 Richtlijn 2011/95/EU van het Europees Parlement en de Raad van 13 december 2011 inzake normen voor de erkenning van onderdanen van derde landen of staatlozen als personen die internationale bescherming genieten, voor een uniforme status voor vluchtelingen of voor personen die in aanmerking komen voor subsidiaire bescherming, en voor de inhoud van de verleende bescherming (herschikking).
5 *OA*, punten 48 en 63.
6 *OA*, punt 63.
7 *OA*, punten 37-39.
8 *OA*, punt 56.
9 *OA*, punten 25 en 26.
10 H. Battjes (2016): 'Wanneer is bescherming effectief? De Afdelingsjurisprudentie over bescherming in het licht van het Unierecht', *JNV 3*(24). Zie ook de uitspraak van Rechtbank Den Haag van 23 februari 2018 (zaaknummer: NL17.8385, beschikbaar op vluchtweb) waarin de staatssecretaris betoogt dat verzoekers' stam bescherming kan bieden. De rechtbank benadrukt dat het 'niet blijkt dat de bescherming van de tribale geschilbeslechting gelijkgesteld dient te worden met de bescherming van de autoriteiten' (r.o. 6.3). Het hoger beroep van de staatssecretaris werd kennelijk ongegrond verklaard en verkort afgedaan (ABRvS 26 februari 2019, zaaknummer: 201802473/1, beschikbaar op vluchtweb).
11 Y. Arbaoui (2020), 'Gedwongen huwelijk in het Nederlandse asielrecht', *A&MR* 2020-8, p. 376-384, p. 383; Y. Arbaoui (2019), *Deux Poids, Deux Mesures: A critical frame analysis of the Dutch debate on family related asylum claims*. Dissertatie, VU, p. 130-142;
12 Martin Vegter, 'Moeders wil is geen wet. Gebrekkige bescherming van Guineese meisjes als moeder tegen besnijdenis is', *A&MR* 2016-3, p. 115-122.
13 Bijvoorbeeld het asielbeleid ten aanzien van Somalië dat behelst dat bij de beoordeling van het bestaan van een binnenlands beschermingsalternatief, de aanwezigheid van familieleden meegewogen dient te worden (WBV 2019/14, par. 24.5.2.).
14 Zie ook Sadhia Rafi, 'Kroniek toelatingsgronden asiel', *A&MR* 2021-3, pp. 157-166, p. 158. Hoewel het *OA*-arrest een intrekkingszaak betreft, gaan alle prejudiciële vragen over het concept 'bescherming', zoals bedoeld in artikel 2, 7 en 11 van de Kwalificatierichtlijn. Of dit arrest ook gevolgen zou hebben voor de Nederlandse intrekkingspraktijk, hangt af van de vraag of de steun van privéactoren ook een rol speelt bij de behandeling van de beschermingsvraag in het kader van de beëindiging van de vluchtelingstatus. Naar mijn weten is dit niet het geval. Op vluchtweb zijn er geen uitspraken waarin wordt verwezen naar privé-actoren in de context van intrekkingen. Voor een bespreking van de intrekkingspraktijk, zie A.C. Counet, 'Intrekkingen en herbeoordelingen van asielvergunningen. Verleningsgrond vervallen', *A&MR* 2020-10, p. 505-510.
15 Deze richtlijnbepaling is geïmplementeerd onder artikel 3.37c Voorschrift Vreemdelingen.
16 *OA*, punt 51.
17 Rechtbank Den Haag (zittingsplaats Den Bosch 21 juli 2015, ECLI:NL:RBDHA:2015:8479) verklaarde het *Abdullah*-arrest (HvJ EU 2 maart 2010, *Salahadin Abdulla e.a.*, C175/08, C176/08, C178/08 en C179/08, EU:C:2010:105), dat net als het *OA*-arrest de intrekking van de vluchtelingstatus betreft, van toepassing op subsidiaire bescherming.
18 Artikel 15 sub b) Kwalificatierichtlijn.
19 EHRM 29 april 1997, klachtnummer 24573/94 (*H.L.R. t. Frankrijk)* par. 40.
20 EHRM 28 juni 2012 (Application no. 14499/09), *AA tegen Zweden*, ECLI:CE:ECHR:2012:0628JUD001449909, Rechtspraak Vreemdelingenrecht 2012 nr.6 m.nt. Y. Arbaoui; EHRM 17 mei 2011, Application no. 43408/08, *Izevbekhai en anderen tegen Ierland*, ECLI:CE:ECHR:2011:0517DEC004340808; EHRM 8 maart 2007 Application no. 23944/05, *Collins en Akaziebie v. Zweden*, ECLI:CE:ECHR:2007:0308DEC002394405; EHRM 30 augustus 2011 Application no. 4539/11, *Ameh en anderen v. het Verenigd Koninkrijk*; EHRM 10 april 2012 Application no. 35745/11, *R.W. et al. V. Zweden*. Zie ook: H. Battjes (2012), 'De

Deze EHRM-jurisprudentie is duidelijk niet in harmonie met het *OA*-arrest. Hoewel het EHRM niet gebonden is aan de jurisprudentie van het Hof, is het interessant of het EHRM zijn jurisprudentie zal aanpassen naar aanleiding van het *OA*-arrest.[21] De lidstaten zijn wel gebonden aan zowel het EVRM als de Kwalificatierichtlijn. Daarom kan gesteld worden dat lidstaten die vasthouden aan de Straatsburgse benadering, op grond waarvan privéactoren bescherming kunnen bieden, in strijd handelen met artikel 7 Kri. [22]

Gesteld kan worden dat lidstaten die vasthouden aan de Straatsburgse benadering, op grond waarvan privéactoren bescherming zouden kunnen bieden, in strijd handelen met artikel 7 Kri.

2. Inhoud bescherming

Een belangrijke kwestie die het *OA*-arrest openlaat, zijn de maatregelen die de autoriteiten in het land van herkomst moeten nemen om de aanwezigheid van bescherming aan te nemen.[23] Onder verwijzing naar het *Abdullah*-arrest[24] merkt het Hof op dat de vereiste bescherming doelt op het vermogen van de autoriteiten om daden van vervolging te voorkomen of te bestraffen. Het Hof voegt hieraan toe dat artikel 7, lid 2 ziet:

> 'op maatregelen tot voorkoming van daden van vervolging en op het bestaan van een doeltreffend juridisch systeem voor de opsporing, gerechtelijke vervolging en bestraffing van dergelijke daden'.[25]

Hoewel dit suggereert dat het bestaan van een effectief juridisch systeem vereist is om bescherming aan te nemen, maakt het Hof dit echter niet expliciet. Vervolgens oordeelt het Hof, weer onder verwijzing naar *Abdullah*,[26] dat vastgesteld dient te worden dat de actoren van bescherming:

> 'redelijke maatregelen hebben getroffen om vervolging te voorkomen, met name dat zij beschikken over een doeltreffend juridisch systeem voor de opsporing, gerechtelijke vervolging en bestraffing van handelingen die vervolging vormen'.[27]

Hierbij dient, volgens het Hof, rekening te worden gehouden met hoe de overheidsinstanties in het land van herkomst functioneren en hoe de wettelijke bepalingen worden toegepast.[28] Ook suggereert dit dat het vereiste van doeltreffend juridisch systeem een zelfstandig en minimum criterium is, maar het Hof zegt het niet uitdrukkelijk. Het is daarom nog niet duidelijk of redelijke maatregelen kunnen worden genomen met andere middelen dan de implementatie van een effectief rechtsstelsel en, zo ja, wat deze andere middelen kunnen zijn.

Dit is een cruciale vraag nu artikel 7, lid 2 van de richtlijn bepaalt dat bescherming wordt geboden wanneer de beschermingsactoren 'redelijke maatregelen' treffen 'onder andere' door de instelling van een doeltreffend juridisch systeem. Er kan dus worden gesteld dat deze bepaling een zekere beoordelingsmarge bevat, aangezien de woordcombinaties 'redelijke maatregelen' en 'onder andere' suggereren dat redelijke maatregelen ook genomen kunnen worden in andere vormen en met andere middelen dan de implementatie van een effectief juridisch systeem. Volgens vaste jurisprudentie van de Afdeling bestuursrechtspraak van de Raad van State is het vereiste van een effectief rechtssysteem inderdaad geen autonoom criterium en kunnen andere elementen een rol spelen.[29] Tegen deze uitleg werd aangevoerd dat de woorden 'onder andere' duiden op een cumulatieve en niet op een alternatieve voorwaarde,[30] en dat artikel 7, lid 2 van de richtlijn een standaardminimum bevat, namelijk dat van een effectief rechtssysteem.[31]

Het is nog steeds niet duidelijk of redelijke maatregelen kunnen worden genomen met andere middelen dan de implementatie van een effectief rechtssysteem.

In de Nederlandse jurisprudentie zijn voorbeelden te vinden van maatregelen, anders dan een effectief rechtssysteem, die worden gezien als voldoende om bescherming aan te nemen. In zaken van vrouwen die op de vlucht zijn voor een gedwongen huwelijk, verwijzen Nederlandse rechters naar de inspanningen van de overheid om de situatie van vrouwen te verbeteren, zoals bewustmaking, empowerment van vrouwen en wetsontwerpen die gedwongen huwelijken in de landen van herkomst strafbaar stellen. Deze drie

ontwikkeling van het begrip bescherming in het asielrecht'. *Migration Law Series* (10); Battjes (2016); J. Wessels (2019), 'The boundaries of universality: Migrant women and domestic violence before the Strasbourg Court', *Netherlands Quarterly of Human Rights 37*(4), 336-358; T.P. Spijkerboer, 'Asylum decision-making, gender and sexuality', in P. de Bruycker & E. Tsourdi, *Research Handbook on EU Migration and Asylum Law*, Edward Elgar 2021 (nog te publiceren).

21 Deze EHRM-jurisprudentie is evenmin in harmonie met de jurisprudentie van de VN Comité tegen Foltering (CAT); zie: *I.A.M. t. Denemarken,* Comm 3/2016 (CRC 25 januari 2018); *F.B. t. Nederland*, 15 december 2015, ve15002235.

22 Zie ook T.P. Spijkerboer, 'Asylum decision-making, gender and sexuality', in P. de Bruycker & E. Tsourdi, *Research Handbook on EU Migration and Asylum Law*, Edward Elgar 2021 (nog te publiceren).

23 UNHCR is van mening dat de bewoordingen van artikel 7 lid 2 niet duidelijk maken wat onder 'redelijke maatregelen' dient te worden verstaan: 'Article 7 (2) also does not provide a clear meaning of "reasonable steps". While the proposal includes a reference to "effective and durable" protection, the proposed text does not clarify that the "reasonable steps" must be those which can actually ensure "effective and durable" protection. Based on the present recast formulation, it is possible to consider that an actor has provided sufficient protection if reasonable steps have been taken, although the protection is neither effective nor durable.' UNHCR (2010), Comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted (COM(2009)551, 21 October 2009), p. 5, zie https://bit.ly/3AjjKVI.

24 HvJ 2 maart 2010, *Salahadin Abdulla e.a.*, C175/08, C176/08, C178/08 en C179/08, EU:C:2010:105, punten 59, 67 en 68.

25 *OA*, punt 44.

26 *Abdulla*, punten 70 en 74.

27 *OA*, punt 38.

28 *Abdullah*, punt 71.

29 ABRvS 5 augustus 2008, zaaknummer 200708107/1, *JV* 2008/341 m.nt. Battjes en *NAV* 2008/35 m.nt. den Heijer. Tot nu toe is dit de enige uitspraak waarin de Afdeling artikel 7 van de richtlijn expliciet bespreekt. Deze uitspraak is bevestigd in ABRvS 29 mei 2012, ECLI:NL:RVS:2012:BW7273; ABRvS 1 juli 2016, ECLI:NL:RVS:2016:1913; ABRvS 1 februari 2017, nr. 201509506/1/V1; ABRvS 19 mei 2017, ECLI:NL:RVS:2017:1330; ABRvS 27 februari 2012, 201110164/1/V2, *JV* 2012/236, ve12000583, m.nt. Y. Arbaoui; ABRvS 6 augustus 2013, ECLI:NL:RVS:2013:708.

30 *NAV* 2008/35 m.nt. den Heijer.

31 Battjes (2016).

elementen werden door rechters, naast de aanwezigheid van ngo's die tijdelijke opvang voor vrouwen bieden, regelmatig beschouwd als voldoende om te concluderen dat er effectieve bescherming beschikbaar was.[32] Ook in zaken van vrouwen die vrouwenbesnijdenis hebben ontvlucht, werd verwezen naar de initiatieven van de autoriteiten en enkele ngo's in het land van herkomst.[33]

Het is echter discutabel of zulke overheidsinspanningen naast de aanwezigheid van ngo's 'redelijke maatregelen' zijn in de zin van artikel 7, lid 2 van de richtlijn. Veel regeringen in de landen van herkomst tolereren gendergerelateerd geweld niet openlijk en proberen dit probleem aan te pakken, bijvoorbeeld door campagnes te organiseren, relevante wetgeving aan te nemen en ngo's te steunen. Deze overheidsinspanningen getuigen vaak van de ontoereikendheid van bestaande staatsbescherming en dus van het ontbreken van een effectief rechtssysteem. Aangezien ngo's er meestal zijn om de hiaten in het overheidsbeleid op te vullen, getuigt de aanwezigheid ervan eerder van tekortkomingen in bestaande staatsbescherming. Dergelijke inspanningen tonen aan dat de overheid bescherming probeert te bieden, maar niet dat effectieve bescherming daadwerkelijk beschikbaar is.[34]

Daarom kan in toekomstige (gendergerelateerde) zaken de volgende prejudiciële vraag aan het Hof worden gesteld:

> 'Kan anders dan middels een doeltreffend justitieel systeem invulling worden gegeven aan de waarborgen ter voorkoming van vervolging als bedoeld in artikel 7 lid 2? Indien het antwoord op deze vraag bevestigend is, wat dient de andere invulling in te houden?'[35]

De beantwoording van deze vraag zal een belangrijke volgende stap zijn op weg naar een volledige interpretatie van artikel 7 van de Kwalificatierichtlijn. ◄

32 Arbaoui (2019), p. 130-142; Y. Arbaoui (2020), 'Gedwongen huwelijk in het Nederlandse asielrecht' *A&MR* 2019-8, p. 376-384, p. 382-383.
33 Martin Vegter, 'Moeders wil is geen wet. Gebrekkige bescherming van Guineese meisjes als moeder tegen besnijdenis is', A&*MR* 2016-3, p. 115-122, p. 5.
34 Battjes (2016); Y. Arbaoui (2020), 'Gedwongen huwelijk in het Nederlandse asielrecht', *A&MR* 2020-8, p. 376-384, p. 384; Janssen 2004, p. 613.
35 Battjes (2016).